

Tennessee Judicial Nominating Commission
Application for Nomination to Judicial Office

Rev. 26 November 2012

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INTRODUCTION

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

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website <http://www.tncourts.gov>). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) **and** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit fourteen (14) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Presiding Judge, Division IX, Circuit Court of Tennessee For the Thirtieth Judicial District at Memphis, Shelby County, Tennessee

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

1975; BPR No. 008600

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

Tennessee; BPR No. 008600

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).

From 1975-78 I was Of Counsel for the Law Offices of James F. Schaeffer. From 1978-84 I had a solo practice, sharing office space with three other attorneys. Since September 1, 1984 to present I have been Presiding Judge of Division IX of the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis, Shelby County, Tennessee.

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.

Not Applicable

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

From 1975-84 I had a general practice. Approximately 80% civil (emphasis in personal injury, family law, real estate and collections.) I appeared in Federal Courts 5 to 10 times; Tennessee Courts of record approximately 150-200 times; Tennessee lower courts approximately 150-200 times; courts in other states fewer than five times. Approximately 20% criminal.

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

Two reported cases: (Case No. 1) *State v. Davis*, 637 S.W.2d 471 (Tenn. Cr.App 1982) Hardeman Circuit Court. I tried this criminal case involving two juveniles who were accused of second-degree burglary. A non-lawyer Juvenile Court Judge blended a transfer hearing with a hearing on the merits of the delinquency petition. The case was subsequently transferred to Circuit Court where the juveniles were tried as adults. The Trial Judge directed a verdict of guilt against the two juveniles and submitted the case to the jury to determine punishment. On appeal, the Court of Criminal Appeals held that the Trial Judge erred in directing a verdict of guilt and that jeopardy had attached in the Juvenile Court when the non-lawyer judge found that the

juveniles were delinquent as a part of the blended transfer/adjudicatory hearing.

The case is significant because of the holding that a judge cannot direct a verdict of guilt in a criminal case when the defendant has entered a plea of not guilty, and because of the holding that jeopardy attaches in a Juvenile Court case when the Juvenile Court Judge begins a hearing on a delinquency petition.

(Case No. 2) ***Baxter v. Vandenhoevel***, 686 S.W.2d 908 (Tenn.App 1984). I represented the plaintiff who was injured in two separate motor vehicle accidents occurring only three weeks apart. I filed two separate lawsuits against the drivers of both vehicles, but dismissed the case involving the first accident on the first day of jury trial regarding the second accident. The jury returned a verdict of \$5,000.00 on proof that the plaintiff's medical bills were \$10,000.00 and that she sustained a 10% permanent disability as a result of the second crash.

The case is significant because of the holding that the general rule that undisputed medical proof may not be ignored by the jury does not apply when the medical opinion is based upon purely subjective findings.

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

I was first elected as Judge of newly created Division IX of the Circuit Court of Tennessee For the Thirtieth Judicial District at Memphis, Shelby County, Tennessee in August, 1984, and served from September 1, 1984 to August 31, 1990. I was re-elected without opposition in August 1990, 1998 and 2006. My duties as Circuit Court Judge include hearing all matters that come before the Circuit Court, both jury (about 50 % of the caseload) and non-jury (about 50% of the caseload). I hear all types of civil cases, including personal injury (car wrecks, product liability, malpractice, minor's settlements, et al), contract disputes, business disputes, stockholders' derivatives actions, workers compensation, land condemnation cases, family law cases (divorce, custody, child support, orders of protection, termination of parental rights, adoptions, et al), appeals from the General Sessions Court, Juvenile Court and administrative agencies, habeas corpus petitions, petitions for Writs of Mandamus, et al. I also have conducted approximately 50 judicial settlement conferences for cases pending in other courts. One such case was a personal injury case that had been previously tried before a jury for seven weeks that resulted in a hung jury and a mistrial. I mediated the case over a two-day period of time and the case settled, which saved a second 7 week trial.

As a trial judge I have been involved in fifty-three (53) cases that are published in the Southwestern Reporter. The most noteworthy of those cases are the following:

- 1) ***Doe v. Catholic Bishop for Diocese of Memphis***, 306 S.W.3d 712, (Ct. App.2008). A

former Catholic church congregant brought a tort action against a local Catholic diocese, alleging that the diocese was directly liable for the negligent hiring, supervision, and retention of a priest who allegedly, sexually abused the congregant while he was a minor. The diocese moved for summary judgment on the ground that the statute of limitations had expired. The trial court denied the motion.

The significance of the case is that as an issue of first impression, the congregant's causes of action were not tolled by the discovery rule, the doctrine of equitable estoppel, or the doctrine of fraudulent concealment.

- 2) ***In re Adoption of A.M.H.***, 215 S.W.3d 793, (Tenn.2007). This was a termination of parental rights/adoption case. The foster parents of a child sought termination of the biological parents' parental right to the child and sought to adopt the child.

The significance of the case is that the Supreme Court held that the statute of repose did not require the biological parents' appeal of an order affirming termination of their parental rights; evidence was insufficient to establish that the biological parents willfully abandoned the child; and that the biological parents did not voluntarily transfer custody and guardianship of the child to the foster parents with knowledge of the consequences of their actions.

- 3) ***Brown v. Crown Equipment Corp.***, 181 S.W.3d 268, (Tenn.2005). This was a personal injury product liability case where the plaintiffs alleged injuries from a defective forklift.

The significance of the case is that the Supreme Court held that the factors set out in *McDaniel v. CSX Railway* were not exclusive, that the trial judge is not required to consider all of the *McDaniel* factors in every case, and that the trial judge can consider other factors as well.

- 4) ***Hodges v. S.C. Toof & Company***, 833 S.W.2d 896 (Tenn. 1992). This was a wrongful discharge suit against an employer for terminating the employee because of jury service. The jury returned compensatory and punitive damages for the employee and the employer appealed. The issues were (1) whether the statutory remedies for wrongful discharge were exclusive or whether the employee could also recover common law damages, and (2) the defendant asked the Court to re-exam the manner in which punitive damages are awarded in Tennessee.

The case is significant because the Supreme Court changed the law in Tennessee on punitive damages. The Court held that a court may award punitive damages only if it finds that a defendant has acted either intentionally, fraudulently, maliciously, or recklessly; and the Court set forth the procedure, including bifurcated trial, to provide specific criteria to guide the jury in deciding whether to award punitive damages and, if so, in what amount. The Court also held that a plaintiff is not limited to the statutory remedies in a wrongful discharge case, but may also recover common law damages for retaliatory discharge based on jury service.

- 5) ***Kilpatrick v. Bryant, M.D.***, 868 S.W. 2d 594 (Tenn. 1993). A patient sued a physician for medical malpractice for the patient's loss of chance of survival as a result of a negligent diagnosis. Summary judgment was granted to the defendant physician on this issue. The

issues were (1) whether a cause of action for “loss of chance” is cognizable in Tennessee, and (2) whether the plaintiffs failed, as a matter of law, to establish the existence of causation, i.e., that the purported medical malpractice actually caused the harm complained of.

The significance of the case is that for the first time in Tennessee, the Supreme Court held that there can be no liability in a medical malpractice case for negligent diagnosis or treatment that decreases a patient’s chances of avoiding death or other adverse medical condition where the death or adverse medical condition would probably have occurred anyway.

- 6) ***Johnson v. LeBonheur Children’s Medical Center***, 74 S.W.3d 338 (Tenn. 2002).

A mother brought a negligence action against a private hospital alleging that the hospital was vicariously liable for negligence of state-employed physician residents who allegedly caused the mother’s child to suffer permanent neurological damage resulting from cardiac arrest during surgery. The issue was whether the vicarious liability of a private hospital may be based upon the acts or omissions of a state-employed physician resident.

The significance of the case is that for the first time in Tennessee, the Supreme Court held that a hospital can be held vicariously liable, under the doctrine of *respondeat superior*, solely for acts of a state-employed physician resident, if that resident was found to be an agent or servant of the hospital.

- 7) ***Trau-Med of America, Inc. v. Allstate Insurance Company***, 71 S.W.3d 691 (Tenn. 2002). A medical center filed a complaint against an insurance company and several of its employees alleging, inter alia, that the defendants tortiously interfered with its business relationship and conspired to destroy the company’s business reputation. The issue was whether the trial court should have granted the defendant’s motion to dismiss for failure to state a claim.

The significance of the case is that the Supreme Court (1) held that an insurer can be held vicariously liable for the acts of its attorneys, and (2) for the first time in Tennessee, expressly adopted the tort of intentional interference with a business relationship.

- 8) ***Lane v. W.J. Curry & Sons***, 92 S.W.3d 355 (Tenn. 2002). The plaintiff claimed that encroaching branches and roots from the defendant’s trees constituted a nuisance for which plaintiff was entitled to damages. Defendant claimed that self-help was the only remedy available therefore plaintiff could not recover. The issue was whether a landowner can bring a nuisance action against an adjoining landowner when tree branches and roots from the adjoining landowner’s property encroach upon and damage the neighboring landowner’s property.

The significance of the case is that for the first time in Tennessee, the Supreme Court held that self-help is not the sole remedy of an adjoining landowner and that a nuisance action may be brought when tree branches and roots from the adjacent property encroach upon and damage the neighboring landowner’s property.

- 9) ***Hill v. City of Germantown***, 31 S.W. 3d 234 (Tenn. 2000). The widowers of a motorist and her passenger who were killed in an accident during a high-speed police chase of a

traffic violator brought a wrongful death suit against the city and its police officers. The issue was whether *Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d 593 (Tenn. 1999), applied retroactively to this case to permit loss of consortium damages to be awarded to the plaintiffs.

The significance of the case is the Supreme Court's holding (1) that *Jordan* did apply retroactively, and that loss of consortium damages were recoverable under the wrongful death statute, and (2) that plaintiffs had already received the maximum allowable award under the Governmental Tort Liability Act and loss of consortium damages could not increase the total amount of the award.

- 10) ***Taylor v. Beard***, 104 S.W.3d 507 (Tenn. 2003). The minor children of a parent who was injured in a motor vehicle accident brought loss of parental consortium claims against a motorist and his employer arising from personal injuries the parent sustained in the accident. The issue was whether Tennessee should adopt a cause of action allowing a child to recover for loss of parental consortium due to an injury to the child's parent.

The significance of the case is the Supreme Court's holding that it declined to create a common law cause of action for loss of parental consortium in personal injury cases.

- 11) ***Maxwell v. Davco Corporation of Tennessee***, 776 S.W.2d 528 (Tenn.App. 1989). A commercial tenant's employee brought suit against the landlord for personal injuries sustained on leased property. The issue was whether the Trial Court should have granted the landlord's summary judgment motion on the ground (1) that the landlord was not liable for defects arising on the premises after the date of the initial lease, and (2) that plaintiff was guilty of assumption of the risk and/or contributory negligence.

The significance of the case is the holding that the landlord and tenant's coextensive knowledge of the dangerous condition would negate any liability on the landlord's part.

- 12) ***Ball v. Overton Square, Inc.***, 731 S.W.2d 536 (Tenn. App. 1987). Former employees filed suit alleging breach of express and implied employment contracts seeking recovery under a "shadow stock" plan and alleging trespass and conversion of automobiles. The issues were (1) whether there was an implied contract of employment, (2) whether the punitive damages awarded by the jury was excessive, (3) whether the employees' counsel could read the employer's president's discovery deposition even though the president was present and testifying at trial, where he was called by the employees' counsel as if for cross-examination, and (4) whether the employees were entitled to have their performance shares ("shadow stock") valued under the alternative formula which would have applied if 75% of the employer's stock had been acquired by a buyer.

The significance of the Appellate Court's holding was (1) that there was an implied contract of employment, (2) punitive damages were excessive and the reduction was proper, (3) employer's president's deposition could be read, even though the president was present and testified at trial, and (4) employees were not entitled to have their performance shares valued under the alternative formula that would have applied if 75% of the employer's stock had been acquired by a buyer.

I have also served as a Special Judge on the Tennessee Supreme Court Special Workers

Compensation Panel and as a Special Judge for the Court of Appeals Western Section. Two of the opinions that are reported in the Southwestern Reporter: *Angela K. Hill v. Royal Insurance Co. and CKR Industries, Inc.*, 937 S.W.2d 873 (Tenn.1996), and *Judith Diane Greer v. Edwin Daniel Greer*, 2002 WL 1751225, (Ct.App 2002). Those opinions are attached as Attachment 2 and 3.

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

Not Applicable

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

As a judge I have served on the faculty for the following:

Tennessee Judicial Academy, a one-week academy where I taught courses on *How to Conduct a Jury Trial; How to Prepare Jury and Give Instructions; and How to Prepare for and Reduce the Stresses of Being a Judge*. Nashville, TN, 1998 – present.

National Judicial Academy for 3-day course on *Judicial Training on the Americans With Disabilities Act*. Reno, Nevada, 1993.

Leadership Institute for Judicial Education (LIJE), a 3-day conference on adult learning styles and life balance taught to judges and judicial educators from across the United States. Memphis, TN, 1997 – 2007

National Judicial Institute on Domestic Violence for one week on *Enhancing Judicial Skills in Domestic Violence*. Nashville, TN, 2008.

I have testified before the Tennessee General Assembly on the following subjects:

Comparative Fault, Questions Raised by *McIntyre vs. Balentine*, Testimony before the Tennessee General Assembly, House Judiciary Sub-Committee. November 1993.

The New Parenting Plan Legislation - How it is Working. Testimony before the Tennessee General Assembly, House Children and Family Committee. February 2001.

I also served on the Tennessee Judicial Council Committee on the Weighted Caseload Formula study in 2001 - 2004, and on the Tennessee Judicial Conference Weighted Caseload Formula Advisory Committee in 1998, 2007 and 2013.

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

In 1996 I applied for the Tennessee Supreme Court. The date of the Commission meeting was approximately November, 1996. My name was not submitted to the Governor.

In 2005 I applied for the Tennessee Supreme Court. The date of the Commission meeting was approximately July, 2005. My name was not submitted to the Governor.

EDUCATION

14. List each college, law school, and other graduate school which you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

University of Tennessee Martin, Fall and Winter Quarters, 1966-67. I left to return home to Memphis after my mother died to assist my father with a business while he was hospitalized.

University of Memphis (formerly Memphis State University), 1967-71 Bachelor of Business Administration degree, Major in Economics and Finance.

University of Memphis, School of Law, 1971-74, Juris Doctor degree.

As a judge I have also had the following courses:

National Judicial College - Attended and completed course requirements for:

- 1987 - General Jurisdiction (3 weeks)
- 1992 - Advanced Evidence (1 week)
- 1993 - How to Read Financial Statements (3 days)
- 1997 - Faculty Development Workshop (1 week)

Tennessee Judicial Conference

- 1991 - Faculty Development Workshop (3 days)
- 1998 - Judicial Settlement Conference/Mediation Training (1 week)
- 2008 - Judicial Settlement Conference/Mediation Training (1 week)

Leadership Institute for Judicial Education (LIJE)

- 1997 - Leadership Training
- 2002 - Advanced Leadership Training
- 2007 - Courts as Learning Organizations - A Workgroup Conference (1 week)

National Judicial Institute on Domestic Violence
Enhancing Judicial Skills in Domestic Violence – 2001 (3 days)

National Symposium on the Future of Judicial Branch Education -1999 (3 days)

Project Passport - National Conference to Develop Uniform Domestic Abuse Order of
Protection Forms - 2000 (3 days)

PERSONAL INFORMATION

15. State your age and date of birth.

65; March 12, 1948

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

65 years

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

65 years

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

Shelby

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.

None

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

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

No

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.

(1) February, 1983, in the Tipton County Circuit Court at Covington, docket number unavailable. I was the defendant in a divorce case. The case was settled amicably.

(2) Approximately 1983 in the Shelby County General Sessions Court, docket number unavailable. I was the plaintiff and sued a former client for collection of attorney's fee.

(3) Approximately 1990, in the Shelby County General Sessions Court, docket number unavailable. I was the plaintiff and sued a tenant for collection of unpaid rent and

property damage.

- (4) Approximately 1993, in the Shelby County General Sessions Court, docket number unavailable. I was the plaintiff and sued a tenant for collection of unpaid rent and property damage.
- (5) July, 1992, in the United States District Court for the Western District of Tennessee, a lawsuit was filed against me styled *Nerren v. Childers, et al*, Docket No. 92-2536-H BRO. I was one of three defendants in a complaint filed by an attorney/litigant in a contested divorce and child custody case that I presided over. I ordered the litigant to return the parties' two minor children to the State of Tennessee. She refused to obey the court order and, after a contempt hearing, I found the litigant in civil contempt of court and ordered her to be held in jail until she complied with the court's order, which she did shortly thereafter. The litigant then filed a complaint against me, her husband's attorney and another attorney, alleging that I had entered into a conspiracy with those two attorneys to deprive her of her constitutional and civil rights. The case against me was dismissed by the Court on a motion to dismiss in October, 1992.
- (6) In October, 2010, my daughter filed a lawsuit in the Circuit Court of Tennessee for the Thirtieth Judicial District under docket no. CT-005089-10 styled *Lisa Dickerson, et vir., v. Yamaka Harris*. The lawsuit is for personal injuries she sustained when a motor vehicle struck her while she was a pedestrian walking in a cross-walk. My daughter died in September, 2012, and I was substituted as the plaintiff in the case, as Administrator of her estate. The case is still pending.

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

Tennessee Domestic Violence State Coordinating Council 1998 - 2012
Vice-chair, 1998 -1999, 2004 - 2005
Chair, 1999 - 2004, 2005 – 2007

Memphis Rotary Club 1998 – 2009
Paul Harris Fellow – 2007

Midtown Memphis Rotary Club
Charter Member 2010 - present

University of Memphis
Law School National Council - Past President 1983
School of Law Alumni Association
Board of Directors 2000 - 2002, 2005 – present
Secretary-Treasurer 2010-2011

President-elect 2011-2012
President 2012 - 2013

Committee on Building Public Trust and Confidence in the Courts
1999 - 2001

Shelby County Domestic Violence Council
Chair, 1999-2000
Executive Committee, 1996 - 2002
Chair, Court Coordinating Committee, 1996-1999

SCALES Project (Supreme Court Advancing Legal Education for
Students)
Chair 1999 (750 Shelby County high school students)
Chair 1998 (750 Memphis City high school students)

Shelby County Government Victims Assistance Center
Cycle Stops Advisory Committee Member

The Exchange Club Family Center of the Mid-South, Inc.
Board of Directors, 1997- 2000

Court Appointed Special Advocate (CASA) Advisory Committee
1998-1999

Community Legal Center
Board of Directors (previously served)

University of Memphis Society - Board of Directors (previously served)

State Technical Institute at Memphis
Legal Assistant Technology Advisory Committee Member
(previously served)

Memphis Junior Chamber of Commerce
Board of Directors (previously served)

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

- a. If so, list such organizations and describe the basis of the membership limitation.
- b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No

ACHIEVEMENTS

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

Tennessee Judicial Conference

Executive Committee, 1991 - 2000, 2005 - 2006

Vice-President, 1996 – 1997

President-elect, 1998 - 1999

President, 1999 - 2000

Committees:

Tennessee Pattern Jury Instruction - Civil Committee

Member 1984 - Present

Chair 1991 - 1999, 2000 - Present.

Committee on Compensation and Retirement, 1993 - present

Treasurer 1993 - present

Committee on Relations With Court Clerks

Court Technology Committee

Domestic Relations Committee

Judicial Redistricting Committee

Legislative Committee (previously served)

Long Range Planning Committee (previously served)

Tennessee Judicial Academy

Weighted Caseload Committee 1998 - present

Tennessee Trial Judges Association, 1984 - present

President, 1991 - 1995

American Bar Association, 1993 - present

Commission on Lawyers Assistance Programs (CoLAP)

Commissioner 2000 - 2003, 2006 – 2007

Chair 2007 – 2011
Advisory Commission to CoLAP 2003 – 2006, 2011- present

Law School Assistance Committee Chair 2002 - 2004
Conditional Admission Subcommittee Chair
2002 – 2007

Judicial Assistance Committee Chair 2005 – 2008
Policy Committee Chair 2011 – present

Judicial Division
Children and Family Law Committee 2005 – 2007

American Bar Foundation – Fellow (inducted 2011)
The American Bar Foundation is an honorary organization of lawyers, judges, and legal scholars whose public and private careers have demonstrated outstanding dedication to the welfare of their communities and to the highest principles of the legal profession.

Tennessee Lawyers Assistance Program Commission
Commissioner 1999 – 2009
Chair, Judicial Assistance Group 2010 - present

Leo Bearman, Sr., American Inn of Court 1995 - present
Founding Member, Master of the Bench, 1995
Executive Committee, 1997-1998, 2001- present
Membership Committee Chair, 1997-1999
Program Committee Co-Chair, 2001-2002
Legal Counsel, 2002-2003
President, 2004-2006

American Judges Association, 1993 - 1997

American Judicature Society, 1984 - present

Tennessee Bar Association, 1993 – present

Tennessee Bar Foundation - Fellow (inducted 2001)

Memphis Lawyers Helping Lawyers, Inc.
Member, 1987 - 2004
Chair, 1990 - 1994
Vice-president, 1994 - 2004

Memphis Bar Association 1984 – present
Board of Directors, 1980 - 1982, 1993 - 1995

21st Annual Bench/Bar Conference, Chair, March 1997
Judiciary Practice and Procedure Committee, past Chair
Law Week Committee, past Chair
Lawyer Referral Service Committee, past Chair

Memphis Bar Foundation – Fellow (inducted 1994)
Board of Directors, 1998 - 2002

Tennessee Judicial Information System Joint Advisory Committee
on Civil Reporting Systems, 1987

Tennessee Judicial Council
Weighted Caseload Committee, 2001 - 2004

Tennessee Trial Lawyers Association, 1975 - 1984
Board of Governors 1980-82

Memphis Trial Lawyers Association, 1975 - 1984
President, 1983

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

Awarded the first *Excellence in Legal Community Leadership Award* by the Hazelden Foundation. October, 2012.

Awarded the *Justice Frank F. Drowota III Outstanding Judicial Service Award*, “in recognition of Outstanding and Dedicated Service to the Bench and the Bar,” by the Tennessee Bar Association. June, 2012.

Awarded the *Charles A. Rond Memorial Award, Outstanding Judge of the Year* for 2006, by the Memphis Bar Association Young Lawyers Division.

Selected the *Outstanding Jurist for 2004-2005* by the Memphis Bar Association Divorce and Family Law Section. June, 2005

Awarded the *Distinguished Alumni Achievement Award* for 2002 by the University of Memphis. March, 2002.

Awarded *The Judge Wheatcraft Award* by the Tennessee Coalition Against Domestic and Sexual Violence. October, 2001.

Awarded the *Charles A. Rond Memorial Award, Outstanding Judge of the Year* for

1999, by the Memphis Bar Association Young Lawyers Division.

Awarded the *Pro Bono Volunteer of the Year Award* for 1997 from the Memphis Area Legal Services Corporation and the Memphis Bar Association.

Awarded Law Enforcement Oscar, *Judge of the Year* for 1990, by the Shelby County [TN] Deputy Sheriff's Association.

Awarded the *Charles A. Rond Memorial Award*, *Outstanding Judge of the Year* for 1986, by the Memphis Bar Association.

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

Would You Be My Friend? Ethical Considerations for Attorneys and Judges Using Social Media Sites, *Tennessee Family Law Letter*, Vol. 27, No. 8, June 2013.

TENNESSEE PATTERN JURY INSTRUCTIONS - CIVIL, *Tennessee Practice*, West Publishing Co., Third ed. 1997; Fourth ed. 2004; Fifth ed. 2005; Sixth ed. 2006, Seventh ed. 2007; Eighth ed. 2008; Ninth ed., 2009; Tenth ed., 2010; Eleventh ed., 2011; and Twelfth ed., 2012. Chaired the committee that revised and re-wrote Tennessee pattern jury instructions.

Stressed Out? Depressed? Drink too Much? Lawyer Assistance Programs Can Help, American Bar Association, *Pass It On*, Vol. No. 18, Issue No. 1, Fall, 2008.

Helping Our Fellow Judges: An Update on the CoLAP Judicial Assistance Initiative, American Bar Association, *The Judges Journal*, Vol. 47 No. 42, Spring, 2008.

Got Stress? Using CoLAP and Its New Judicial Assistance Project, American Bar Association, *The Judges Journal*, Vol. 45 No. 4, Fall, 2006.

Looking for Your Passion, *Memphis Lawyer Magazine*, Nov/Dec 2004.

Don't Let Budget Constraints Erode a Court That Works, *The Commercial Appeal*, (Memphis) October 12, 2003.

Rebuilding Public Trust In The Judicial System, *The Daily News*, (Memphis) December 23, 1999.

Jury Service Can be Fun? *The Daily News*, (Memphis) April 23, 1998.

New Domestic Violence Court Helping Victims. *Juridicus* (Newsletter of the Tennessee Administrative Office of the Courts), April - May 1998

Dispositive Motions: Are You Following The Rules?, *The Memphis Bar Association Magazine*, Spring 1994.

TENNESSEE PATTERN JURY INSTRUCTIONS - CIVIL, Second edition *Tennessee Practice*, West Publishing Co., 1988. Member of the committee that revised and re-wrote Tennessee pattern jury instructions.

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.

Do's and Don'ts From the Bench: Habits to Break and Habits to Keep, Memphis Bar Association Litigation Section Seminar, Memphis, TN, December, 2012

Stress In The Legal Profession, Tennessee Attorneys Memo Law Conference for Tennessee Practitioners, Nashville, TN, December, 2012.

You Be the Judge: Negotiating Child Support Issues, Memphis Bar Association ADR & Family Law Section, Memphis, TN, July, 2012.

Headlines or Lifelines, Kansas Joint Judicial - Kansas Bar Association Conference, Overland Park, Kansas, June, 2012

Mistakes Domestic Attorneys Make, Tennessee Association For Justice (TAJ) Annual Convention, Memphis, TN, June, 2012.

Docketing Motion Days - A Type of Case Management Approach, Tennessee Judicial Conference, Memphis, TN, June, 2012

Service for the Judiciary: TLAP, Tennessee Clerks of Court Conference, Memphis, TN, June, 2012.

SCALES Project (Supreme Court Advancing Legal Education for Students), faculty member teaching delegates of American Legion Boys State about the cases to be presented for argument to the Tennessee Supreme Court. Cookeville, TN, May, 2012.

Mediating Child Support Issues: You Be the Judge, Memphis Bar Association ADR & Family Law Section, Memphis, TN, April, 2012.

What Not to Wear in Court, Professionalism Program for Law Students, Cecil C. Humphreys School of Law, Memphis, TN, February, 2012

Child Support Guideline Guidelines, 2d Annual New Orleans Seminar, Tennessee Association for Justice, New Orleans, LA, February, 2012

Headlines or Lifelines, 2012 Winter Regional Conference, Texas Center for the Judiciary, San Antonio, TX, January, 2012

Stress In the Legal Profession, Tennessee Attorney's Memo (TAM) 2-Day Law Conference, Franklin, TN. November, 2011.

Crafting Jury Instructions, Tennessee Attorney's Memo (TAM) 2-Day Law Conference, Franklin, TN. November, 2011.

Protecting the Vulnerable: Demystifying Probate, Memphis Bar Association/University of Memphis Law Alumni Chapter, Memphis, TN. October, 2011.

Mental Health Records in Family Law Cases, Family Law Section, Memphis Bar Association,

Memphis, TN. October, 2011.

Ethical Considerations, Shelby County Child Support Services 2d Annual Child Support CLE Training, Memphis, TN. August, 2011.

The Impact of Budget Reductions on State and Local Drug Control And Criminal Justice Programs - Time For a New Paradigm?, Panel discussion, American Bar Association Annual Meeting, Toronto, Ontario, Canada. August, 2011.

Headlines or Lifelines? Best Practices in Court Administration: Protecting the Public While Addressing the Problem of Judges in Distress, Conference of Chief Justices and Conference of State Court Administrators, Atlanta, GA. July, 2011.

Difficult Child Support Calculations And When To Impute Income, Tennessee Association for Justice Annual Meeting, Chattanooga, TN. June, 2011.

Judging While Impaired: Judges Helping Judges, The Louisiana Judicial College & Louisiana State Bar Association Joint Summer School, Sandestin, FL. June, 2011.

SCALES Project (Supreme Court Advancing Legal Education for Students), faculty member teaching delegates of American Legion Boys State about the cases to be presented for argument to the Tennessee Supreme Court. Cookeville, TN, May, 2011.

Difficult Child Support Calculations And When To Impute Income, 2011 Tennessee Association for Justice, Domestic Law Forum, Memphis, TN. March, 2011.

Parental Relocation, 2011 Tennessee Association for Justice, Domestic Law Forum, Memphis, TN. March, 2011.

Jury Selection and Pre-trial Procedures, John Dice Seminar sponsored by Memphis Bar Association. Memphis, TN. December, 2010.

Stress & Stress Management, John Dice Seminar sponsored by Memphis Bar Association. Memphis, TN. December, 2010.

SCALES Project (Supreme Court Advancing Legal Education for Students), faculty member teaching delegates of American Legion Boys State about the cases to be presented for argument to the Tennessee Supreme Court. Cookeville, TN, May, 2010.

Shelby County Local Rules of Circuit Court Update, Memphis Bar Association 33rd Annual BenchBar Conference. Sandestin, FL. May 2010.

Rehabilitation, Including Conditional Admission, As a Licensing Tool, National Conference of Bar Examiners, Austin, TX. April, 2010.

The Practical & Ethical Effects of the Changes to the Local Rules of Practice. Memphis Bar Association Litigation Section. Memphis, TN. March, 2010.

Jury Instructions. John Dice Seminar sponsored by Memphis Bar Association. Memphis, TN. December, 2009.

Resources and Services. Transitional Legal Education Seminar, sponsored by Memphis Bar Association and Tennessee Bar Association. Memphis, TN. November, 2009

CoLAP - What Is It and What Does It Do?, Alabama State Bar, Alabama Lawyers Assistance Program Conference. Montgomery, AL. November, 2009.

Lincoln on Professionalism, Memphis Bar Association Annual Professionalism Seminar. Memphis, TN. October, 2009.

The Volunteer's Role in Building a Better LAP: National Best Practices, Missouri Lawyers Assistance Program, 14th Annual Lawyers Assistance Conference. St. Louis, MO. October, 2009.

The Do's and Don't's of Oral Argument, Panel presentation, Tennessee Defense

Lawyers Association. Memphis, TN. September, 2009.

Jury Trials and Jury Instructions, Tennessee Judicial Academy. Murfreesboro, TN. August 2009.

SCALES Project (Supreme Court Advancing Legal Education for Students), faculty member teaching delegates of American Legion Boys State about the cases to be presented for argument to the Tennessee Supreme Court. Cookeville, TN, May, 2009.

Family Law: Domestic Violence, Memphis Bar Association 31st Annual BenchBar Conference. Sandestin, FL. May 2009.

Legal Ethics in the Movies, Memphis Bar Association Young Lawyers Division Annual Ethics Seminar, Memphis, TN, December 2008

Handling Domestic Abuse Cases, Tennessee Judicial Conference, Burns, TN. October 2008.

Jury Selection: Batson Challenges, Tennessee Attorneys Memo Law Conference for Tennessee Practitioners. Memphis, TN. October 2008.

Tennessee Lawyers Assistance Program, Tennessee Attorneys Memo Law Conference For Tennessee Practitioners. Memphis, TN. October 2008

Handling Domestic Abuse Cases, General Sessions Judges Conference. Memphis, TN, September 2008.

Psychology of Jury Selection, Memphis Bar Association Litigation Section. Memphis, TN, August 2008.

Professionalism, Courtesy and Civility, We Have Met the Enemy and They Is Us, Tennessee Judicial Conference/Tennessee Bar Association/Tennessee Association For Justice Bench Bar Committee. Gatlinburg, TN. June, 2008.

SCALES Project (Supreme Court Advancing Legal Education for Students), faculty member teaching delegates of American Legion Boys State about the cases to be presented for argument to the Tennessee Supreme Court. Cookeville, TN, May, 2008.

Effective Communication Between the Bench and Bar, Memphis Bar Association 31st Annual BenchBar Conference. Sandestin, FL. May, 2008.

QPR - Ask a Question, Save A Life, Greater Memphis Paralegal Alliance. Memphis, TN. February 2008.

Mental Health and Legal Fitness to Practice: Is There A Principled Process? Association of Professional Responsibility Lawyers. Los Angeles, CA. February 2008.

Jury Selection - An Art or Science?, Annual John Dice Seminar, Memphis Bar Association. Memphis, TN. January 2008.

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.

1980 - Candidate for State House of Representatives, District 83 (elective)

1982 – Candidate for Judge of Division V of the Circuit Court of Tennessee for the Thirtieth District at Memphis. (elective)

1984 – Candidate for Judge of Division IX of the Circuit Court of Tennessee for the Thirtieth District at Memphis. (elective)

1990 - Candidate for Judge of Division IX of the Circuit Court of Tennessee for the Thirtieth District at Memphis. (elective)

1998 - Candidate for Judge of Division IX of the Circuit Court of Tennessee for the Thirtieth District at Memphis. (elective)

2006 - Candidate for Judge of Division IX of the Circuit Court of Tennessee for the Thirtieth District at Memphis. (elective)

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

No

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

Attachment 1: Tennessee Practice, Volume 8, *Tennessee Pattern Jury Instructions Civil*, 12th ed., September 2012

Attachment 2: *Judith Diane Greer v. Edwin Daniel Greer*, Court of Appeals Opinion

Attachment 3: *Angela K. Hill v. Royal Insurance Company and CKR Industries, Inc.*, Supreme Court Special Workers' Compensation Panel Opinion.

Attachment 4: Would You Be My Friend? Ethical Considerations for Attorneys and Judges Using Social Media Sites, *Tennessee Family Law Letter*, Vol. 27, No. 8, June 2013

Attachment 5: Looking for Your Passion, *Memphis Lawyer Magazine*, Vol. 21, Issue 6, November/December, 2004.

ESSAYS/PERSONAL STATEMENTS

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

I have spent the majority of my professional life as a jurist. Throughout the last twenty-nine years on the trial bench, I have honed my ability to listen, to reason and to write clear and concise opinions. I have also demonstrated the ability to work with people and to achieve consensus. I do not believe in making changes just for the sake of change, but I have always been willing to consider making changes that are beneficial to the court system and as a Court of

Appeals judge I would continue to be open and responsive to constructive changes to improve the system. I have sought and obtained leadership positions within the judiciary and believe that as an Appellate Judge I can help to build consensus among the members of the Court, to keep the Tennessee Court system one of the best in the nation.

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

In law school I was the student representative to the Board of Directors of the Memphis Area Legal Service (MALS). As an attorney I chaired the Lawyer Referral Service Committee and served as a panel member. I regularly took cases and handled them on a pro bono basis. As a judge I worked with MALS to develop a plan to give priority on the Court docket to divorce cases where the parties were represented by an attorney taking cases on the MALS *pro bono* Panel. I was awarded the **Pro Bono Volunteer of the Year Award** from MALS and the Memphis Bar Association for that work. I also served on the Board of the Community Legal Center which provided legal services to the working poor.

I also served on the Shelby County Domestic Violence Council from 1995 to 2002, and served as Chair in 1999-2000 to reduce the incidence of domestic violence throughout the state. I was instrumental in helping to create a pilot project Domestic Violence Court in Shelby County, to make it easier for domestic violence victims to access the courts. I served on the Tennessee Domestic Violence State Coordinating Council from 1998 to 2012, and served as Chair or co-Chair from 1998 to 2007. I was awarded **The Judge Wheatcraft Award** by the Tennessee Coalition Against Domestic and Sexual Violence, “for providing outstanding service within the judicial system, and improving access to justice for victims of domestic and sexual violence.”

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)*

The Court of Appeals has 12 judges, four sit in each grand division. The Western Section sits primarily in Jackson, but also hears cases quarterly in Nashville. The Court hears appeals of all civil cases, including family law cases, except for workers compensation cases. I have a broad range of experience as an appellate court special judge, a trial judge, a mediator, and a practicing attorney. Given my broad range of experience I am confident that I could review the record for all types of cases as an appellate judge. Through my work on the bench and on various committees throughout my legal career and as Chair of many of those committees, I have demonstrated my ability to work with others, to lead, and to achieve consensus.

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

I have served in leadership positions on the Shelby County Domestic Violence Council and the Tennessee Domestic Violence State Coordinating Council (DVSCC). As DVSCC Chair I lead a Tennessee delegation that attended an eight-state conference in Kentucky in 1999, sponsored by the National Violence Against Women Office (VAWO), for the purpose of creating uniform Order of Protection forms to be used in all 8 states. The purpose was to make it easier for law enforcement officers to recognize and enforce the Orders across state borders. The eight state delegations in attendance were very divergent, as were the laws of each state. However, after much discussion, we were able to reach a consensus on a uniform Order. Each state pledged to work to get the uniform orders adopted statewide. Through the work of the DVSCC, the General Assembly enacted legislation for use of the uniform order statewide, and Tennessee became the first of the eight states to do so.

I have served on the Exchange Club Family Center Board of Directors, the Court Appointed Special Advocate (CASA) Advisory Committee, the Community Legal Center Board of Directors, the Memphis Lawyers Helping Lawyers Board of Directors and the American Bar Association Commission on Lawyer Assistance Programs (CoLAP). I have also served on various committees for the Downtown Memphis Rotary Club and the Midtown Memphis Rotary Club. I have also been active in the University of Memphis Alumni Association as a Board member and officer.

I have also spoken to many schools and civic groups about the court system in an effort to improve public confidence in the system. One of the classes I have taught is a course in the Memphis and Shelby County schools entitled “*Making Marriage Work and Avoiding Divorce*”. I intend to continue similar activities to those above to improve the community and the legal system.

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

I have experience in sitting as a special judge for the Supreme Court Workers Compensation Panel and on the Court of Appeals. I have participated in hearing approximately fifty (50) appellate cases and have written approximately twenty (20) appellate opinions. As a trial judge I have conducted in excess of 500 jury trials and decided in excess of 1500 non-jury trials with approximately 250 of those being contested divorce cases. I have also conducted more than 50 judicial settlement conferences (mediations). As a member of the Tennessee Judicial Conference Pattern Jury Instruction Committee since 1984, I have drafted new and modified existing jury instructions for use by judges and attorneys throughout Tennessee. I have chaired that committee since 1991.

I have previously discussed my activities as a member of the Shelby County Domestic Violence Council in creating a pilot project Domestic Violence Court in Shelby County to improve access to the courts for victims of domestic violence. As vice-chair of the Tennessee Domestic Violence State Coordinating Council I participated in the drafting of, and the public

hearings on, the Rules for Certification of Batterer Intervention Programs which have the force of law.

As a Commissioner on the ABA Commission on Lawyer Assistance Programs (CoLAP) I chaired the Law School Assistance Committee. That committee developed programs and policies to assist law students who are affected by alcohol, drug or mental health issues. A part of the committee's work was to draft a Model Rule on Conditional Admission to Practice Law to encourage law students to seek early treatment for those issues and by doing so allowing them to be conditionally admitted to law practice with safeguards in place to protect the public. I shepherded the Model Rule to passage in the 550-member ABA House of Delegates and it is now an American Bar Association policy, used to encourage states throughout the country to adopt such a rule.

I have worked very hard during my career as a jurist to improve the judicial system in areas where I found it lacking. I have concentrated a great deal of my efforts in the areas of domestic violence and lawyers assistance programs to improve the plight of victims of domestic violence (including children) and lawyers, judges and law students who have been adversely affected by stress, depression, substance abuse or other causes. I have also worked diligently to improve public confidence and trust in the judicial system. In addition to my demonstrated leadership abilities, my "talents" include hard work, dedication, persistence, vision and the ability "to think outside the box."

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)*

I will uphold the law even if I disagree with the substance of the law. There have been occasions when I disagreed with the substance of the law, but upheld the law. As an example, I have heard numerous cases involving the termination of parental rights of young children. The law requires that the parental rights to children be terminated if the evidence shows that the child's parents have willfully not supported or visited the child or children within four (4) months of the filing of the petition to terminate parental rights. If the evidence shows that the parents have not done so, then the law requires that the parental rights to the child or children be terminated, even though I believed that in some cases the four month time period was too short.

REFERENCES

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

A. Joe M. Duncan, Esquire, 130 Court Avenue, Memphis, Tennessee 38103; 901-524-5110
B. Leo Bearman, Jr., Esquire, First Tennessee Building, 165 Madison Avenue, Memphis, Tennessee 38103;
C. Dorothy J. Pounders, Esquire, 1770 Kirby Parkway, Suite 105, Memphis, Tennessee 38138; 901-752-1630
D. Jim Rout, Bank Tennessee, 100 W. Mulberry St., Collierville, Tennessee 38017; 901-854-7854
E. Joseph A. Clayton [REDACTED] Collierville, Tennessee, 38017; [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 - Western Section of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

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

Dated: June 17, 2013.


Signature

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



TENNESSEE JUDICIAL NOMINATING COMMISSION
511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER

NASHVILLE, TN 37219


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

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which 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 Tennessee Judicial Nominating Commission to request and receive any such information and distribute it to the membership of the Judicial Nominating Commission and to the office of the Governor.

ROBERT LAWSON CHILDERS

Type or Printed Name



Signature

6-17-13

Date

008600

BPR #

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

TENNESSEE PRACTICE

Volume 8

TENNESSEE PATTERN JURY INSTRUCTIONS CIVIL [T.P.I.—CIVIL]

TWELFTH EDITION

September 2012

Prepared and Edited by
THE COMMITTEE ON PATTERN JURY
INSTRUCTIONS (CIVIL)
OF THE
TENNESSEE JUDICIAL CONFERENCE

REPORTER
Aaron J. Conklin, Esq.

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THE COMMITTEE ON PATTERN JURY INSTRUCTIONS (CIVIL) OF THE TENNESSEE JUDICIAL CONFERENCE

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PREFACE

THE USE OF T.P.I.—CIVIL

This book is a working tool for use by trial counsel in preparing requests and by the trial judge in preparing a charge. For those of us who still believe in the worthiness of the jury trial as a means of attaining justice, every stage of the trial has its special importance, all leading to the ultimate jury decision - the verdict.

Jury instructions are of overriding importance to the trial judge. The trial judge is responsible for communicating to ordinary citizens, unexposed to the ivy-covered towers of legal education, a respect for law as an instrument to attain justice. The trial judge must give the jury, in a very short time, perhaps a new way of thinking about justice as the application of the same rules to all in similar circumstances. The trial judge must aid the jury in establishing its concept of right and wrong under the guidance of the law. The finest legal scholar might fail as a trial judge unless that person can communicate something of the philosophy of the law to the jury in a way lay jurors can understand.

These instructions are not official and no prior approval of any instruction has been sought from the Supreme Court or the intermediate Appellate Court. They are as subject to objection and reversal as instructions have always been. The instructions do not presume to replace the individual judgment of the trial judge and they are offered merely as a guide, not a straitjacket, and as a slave, not a master. It may be necessary to modify the instructions from time to time, depending on the facts of the case.

The committee has followed four basic guidelines in its work:

- (1) The instruction must be an accurate statement of the law.
- (2) It must be as brief and concise as practicable without sacrificing meaning.
- (3) It should be understandable to the average juror.

- (4) It must not be slanted toward either party and free of argument.

The committee suggests that counsel requesting modification of any pattern instruction (or an instruction not in this work) should follow these same guidelines.

Many instructions are followed by use notes which give warning or assistance about the actual use of the instructions. Many are also followed by comments. The comments are designed to assist the judge and counsel in any necessary modification of an existing instruction.

REQUESTING T.P.I.—CIVIL INSTRUCTIONS

The committee suggests that adoption of local rules concerning the use of pattern jury instructions would be helpful to the courts and attorneys. The local rule might require that the requested instruction be reduced to writing in its entirety with a reference to *T.P.I.—CIVIL*, _____ edition, or it might simply require a reference to *T.P.I.—CIVIL*, _____ edition. It is important to put the edition number because a new edition on T.P.I.—Civil is now being published each year. If the request is for a modification of an instruction, the request could identify the instruction to be modified by number, such as *T.P.I.—CIVIL*, _____ edition, No. _____ modified, with only the modification reduced to writing.

A suggested form for instruction requests could be as follows:

(Style of case)

(Case docket number)

Jury instructions requested by Plaintiff.

1. T.P.I. - CIVIL No. _____, _____ edition
2. T.P.I. - CIVIL No. _____, _____ edition, Modified
3. T.P.I. - CIVIL No. _____, _____ edition

(Signed) Attorney for Plaintiff

THE FUTURE

The final product of the committee is a living, dynamic work subject to constant improvement and modification as neces-

sitated by changes in the case law and statutory law. The numbering system was designed for the addition of new instructions at a proper and orderly place. The primary purpose of the comments is to assist in the adaption of an existing instruction to a new case.

Both Bench and Bar are urged to make suggestions for additions, deletions and other improvements to future committees of the Tennessee Judicial Conference.

FOREWORD

Work on pattern jury instructions originally began in 1970 when Chancellor John D. Templeton, then president of the Tennessee Judicial Conference, appointed a committee to prepare civil and criminal instructions and to investigate the possibility of the Conference publishing them. Chancellor Templeton observed in the August 1970 issue of *Tennessee Judge* that "by pattern jury instructions many other states have achieved uniformity, certainty, clarity, brevity, and many other desirable qualities."

Chancellor Templeton appointed Judge T. Edward Cole as chair of the committee. The following year Chancellor Templeton became the chair. Sometime later the committee began to function as two committees, one for civil instructions chaired by Chancellor Templeton and one for criminal instructions. The criminal instructions are published separately. The first edition of the *Tennessee Pattern Jury Instructions—Civil* was published in 1978. Sometime thereafter, Judge James M. Swiggart became the chair. In the early 1980's Judge William W. O'Hearn became the chair and remained so until his retirement in 1990. In 1988 the committee published the second edition of the civil pattern jury instructions. In 1990 Judge J.S. Daniel became the chair. Judge Robert L. Childers became the chair in 1991 and served until 1999. Judge Thomas White Brothers was chair in 1999-2000. The current chair, Judge Robert L. Childers, became the chair again in 2000.

The civil instructions are the product of the committee and have no official status, although some of the instructions have been cited with approval by the appellate courts. Beginning in 2004 the committee decided to have its work published as a new edition each year, rather than publish supplements.

The committee has striven to make this edition as free of error as possible and it hopes that this edition represents an improvement, as well as a replacement, of the previous edition. The committee has made every effort to use clear and concise language in the instructions so as to be understandable to the average juror, since the juror is the person who must make ultimate use of them. The committee has also tried to make

the instructions as gender neutral as possible. Every attempt has been made to follow new decisions as precisely as possible, consistent with the previously stated goals.

Where Tennessee decisions are unavailable or are unclear, the committee has substituted its collective understanding of what the law in Tennessee would be, were those clear decisions available. In all other instances authority for the particular instruction is clearly stated. The committee is under no illusion that it has produced the definitive work on the subject. Continuing changes in the law will require continuing revision of the instructions.

During its work on the Third edition the committee decided it would be advisable to consult with both the plaintiff's and defense bar to ensure that the instructions would be as substantively correct as possible. As a result Mr. John A. Day, Esquire, and Mr. James M. Doran, Jr., Esquire, both experienced trial attorneys, were invited to join the committee as consultants. Both Mr. Day and Mr. Doran have continued to serve the committee and have made invaluable contributions to the committee's work. The committee is grateful to both of them for their contributions.

In 2009 the committee enlisted the services of a linguist to assist the committee with its efforts to make the instructions more comprehensible to the average juror. The committee is grateful to Dr. Bethany K. Dumas, Ph.D., J.D., University of Tennessee, for her willingness to assist us in this regard.

The current reporter for the committee, Aaron J. Conklin, Esquire has been of invaluable assistance in keeping the minutes of the committee meetings, reporting the working and final drafts of each instruction, checking citations and editing the Use Notes and Comments.

Judge Robert L. Childers
Chair

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION PANEL
AT NASHVILLE

ANGELA K. HILL,

Plaintiff/Appellee,

v.

ROYAL INSURANCE COMPANY
and CKR INDUSTRIES, INC.,

Defendants/Appellants.

FRANKLIN CHANCERY

No. 01SO1-9505-CH-00071
No. Below 13,718

HON. JEFFREY F. STEWART
CHANCELLOR

For the Appellant:

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For the Appellee:

Clinton H. Swafford
SWAFFORD, PETERS & PRIEST
100 First Avenue, SW
Winchester, Tennessee 37398

MEMORANDUM OPINION

Members of the Panel:

Justice Frank Drowota, III
Senior Judge John K. Byers
Special Judge Robert L. Childers

AFFIRMED.

CHILDERS, Special Judge

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with TENN. CODE ANN. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. Our review is *de novo* on the record accompanied by a presumption that the findings of fact of the trial court are correct unless the evidence preponderates otherwise. TENN. CODE ANN. § 50-6-225(e)(2).

The trial court awarded Plaintiff Hill \$16,212.00 permanent partial disability benefits, representing eighty (80) weeks at the benefit rate of \$202.65 per week, or twenty percent (20%) permanent partial disability to the body as a whole; and future medical expenses pursuant to the Tennessee Workers' Compensation Act. The trial court also allowed an attorneys fee of twenty percent (20%) of the award, in the amount \$3,242.40, to be paid in lump sum.

The appellant contends that the trial court erred in:

1. Finding that a vocational disability based upon a permanent medical restriction, with medical testimony of no medical impairment rating in accordance with A.M.A. Guidelines for Evaluation of Permanent Impairment, constitutes a compensable permanent partial disability under the Workers' Compensation Act.
2. Awarding permanent partial disability benefits to the Plaintiff that were excessive and against the weight of the evidence.

We affirm the judgment of the trial court.

Ms. Hill filed the complaint in the Chancery Court for Franklin County, Tennessee, against her employer, Defendant CKR Industries, seeking to recover unpaid benefits under the Tennessee Workers' Compensation Act for work-related injuries. Ms. Hill alleged that she suffered injuries as a result of exposure to chemicals in use at the CKR Plant. This case was consolidated with three (3) additional cases for trial due to significant similarities in the cases.

At CKR, Ms. Hill worked as a Mucote sprayer. Mucote is a sealant, used to prevent rubber weather stripping from drying out, and contains two solvents, toluene and methyl ethyl ketone. Ms. Hill began suffering from nose bleeds, difficulty in breathing, upset stomachs, and dizzy spells while at work. She complained to the

human resources supervisor and safety and environmental coordinator about her symptoms and was moved to another position. When she was later returned to the spraying job, she was offered a larger mask and a respirator. Ms. Hill testified that she was told that she would get used to the chemicals, but she did not.

Ms. Hill was treated by Dr. Stensby who concluded that her problems were caused by exposure to Mucote. Dr. Stensby testified that this exposure caused an acute bronchial spasm which in his opinion was not of a permanent nature and would be relieved if she was no longer exposed to Mucote. Dr. Stensby found that Ms. Hill had no physical impairment and therefore gave her no impairment rating pursuant to the A.M.A. Guidelines.

Mr. Edwards, a vocational consultant with over twenty years experience, testified on Ms. Hill's behalf at trial. He testified that the chemicals causing Ms. Hill's problems, or chemicals similar to those, are found in twenty-five percent (25%) of the work places. He opined that in his experience an individual with a respiratory insult should not work in an industrial environment that has respiratory irritants.

The trial court held that although no medical impairment rating was given pursuant to the A.M.A. Guidelines, because the doctor's findings indicated that Ms. Hill has a residual impairment resulting from her injuries that is permanent in nature, she carried her burden of proof establishing both medical causation and a permanent impairment. The permanent impairment being the restriction that Ms. Hill should no longer be exposed to Mucote or its components.

The provisions of TENN. CODE ANN. § 50-6-241 do not apply in this case because the Plaintiff's injuries occurred in May of 1992. TENN. CODE ANN. § 50-6-241 expressly states that it applies only to those injuries occurring after August 1, 1992.

PERMANENCY

The Appellant contends that because the medical expert testimony presented at trial showed that Ms. Hill did not sustain any permanent physical or medical impairment under the A.M.A. Guidelines or otherwise, she was not entitled to recover permanent partial disability benefits. However, it is undisputed that Ms. Hill was instructed by her

physician not to return to work at CKR because of the potential for exposure to certain chemicals which caused her illness. It is further undisputed that CKR terminated the employment of Ms. Hill based on the medical advice that she not return to work in the work environment at CKR.

Permanency must be established in worker's compensation cases. *Johnson v. Midwesco, Inc.*, 806 S.W.2d 804, 806 (Tenn. 1990) (citing *Blaylock v. Williams*, 483 S.W.2d 578 (Tenn. 1972); *Floyd v. Tennessee Dickel Distilling Co.*, 463 S.W.2d 684 (Tenn. 1971). Appellant argues that Ms. Hill failed to establish the permanency of her condition through the medical proof regarding the restriction on her work environment. We disagree.

Appellee argues that the facts of this case are analogous to those in *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452 (Tenn. 1988), and should be construed in the same manner. In *Corcoran*, the plaintiff was working as an automobile mechanic when in the course of his employment he suffered a hernia. *Id.* at 454. The plaintiff underwent surgery to repair the hernia and returned to work a couple of weeks later with permanent restrictions on lifting and straining. *Id.* A vocational expert testified on behalf of the plaintiff as to the decreased chance for the plaintiff to compete for many jobs. *Id.* at 455. The doctor who testified on behalf of the plaintiff agreed that the chance of reoccurrence was significant enough that plaintiff should not do any lifting or straining, but declined or was unable to attribute a disability impairment rating to the plaintiff. The trial court granted the defendants' motion to dismiss, due to the doctor's failure to attribute an anatomical disability rating to the plaintiff. On appeal, this Court refused to permit denial of compensation because a doctor to whom the plaintiff was taken by the defendants declined or refused to attribute an anatomical disability rating to the plaintiff. This Court, while recognizing that "an anatomical disability rating based on one of the two statutory references is preferable and ordinarily, if not uniformly, part of the proof offered by either or both parties," held that "the ultimate issue is not the extent of anatomical disability but that of vocational disability, the percentage of which does not definitely depend on the medical proof regarding a percentage of anatomical disability."

Corcoran, 746 S.W.2d at 457. "We do not think that, when medical evidence established permanency, the failure of a medical expert to attribute a percentage of anatomical disability can justify a denial of compensation if other evidence demonstrates that an award of benefits is appropriate." *Id.*

In this case, the weight of the evidence demonstrated that Ms. Hill was in fact entitled to an award of benefits. She was exposed to chemicals during her employment at CKR, suffered physical reactions due to that exposure, and was terminated due to her inability to tolerate the work environment at CKR.

Taken as a whole, the medical proof shows that the residual impairment from Ms. Hill's injury is permanent. Therefore we find that the trial court did not err in finding that a vocational disability existed based upon the testimony of the medical experts that a permanent medical restriction existed, even though no medical impairment rating was given by any of the medical experts. We find that this constitutes a permanent partial disability under the Workers' Compensation Act.

DISABILITY AWARD

The Appellants argue that the amount of permanent partial disability awarded to the Ms. Hill was excessive and against the weight of the evidence. Ms. Hill is thirty-four (34) years old and has a tenth grade education. Her work experience included cleaning motel rooms and offices, inspecting clothing, and planting and potting trees at a commercial nursery. She testified during the trial that she was going to have to give up her job as a cafeteria worker she obtained subsequent to her termination at CKR because of her adverse reaction to bleach used in the cafeteria. The vocational expert testified that he evaluated Ms. Hill to assess her industrial disability. He opined that she should not be exposed to any industrial environment where additional respiratory insult could occur, and that she is restricted to a "clean office environment" for the rest of her working life. He further opined that Ms. Hill's industrial wage earning loss ranges from forty percent (40%) to seventy-five percent (75%).

Once causation and permanency have been established by expert medical

testimony, the trial judge may consider many pertinent factors, including age, job skills, education, training, duration of disability, anatomical disabilities established by medical experts, and job opportunities available to a worker with those anatomical disabilities, to determine the extent of the worker's industrial disability. *Worthington v. Modine Manufacturing Co.*, 798 S.W. 2d 232, 234 (Tenn. 1990). Even where an expert testifies as to vocational disability, the trial judge is not required to accept without reservation the expert's opinion, but is charged with making an independent evaluation based on the factors above. *Miles v. Liberty Mutual Insurance Co.*, 798 S.W. 2d 665, 666 (Tenn. 1990). The trial court considered the Plaintiff's age, her education, her work history and testimony concerning her ability to work, and how her skills and limitations would affect her reemployment in the local job market.

We also find that the weight of the evidence supports the amount of the permanent partial disability awarded to Ms. Hill. The judgment of the trial court is affirmed. Costs are assessed to the Appellants. We remand the case to the trial court for the entry of any order necessary to carry out this judgment.


Robert L. Childers, Special Judge

CONCUR:

Frank F. Drowota, III, Justice

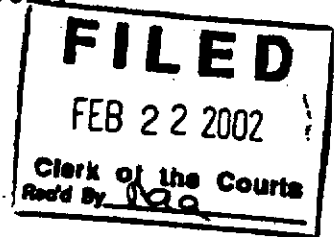
John K. Byers, Senior Judge

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
JUNE 21, 2001 Session

JUDITH DIANE GREER v. EDWIN DANIEL GREER

Direct Appeal from the Chancery Court of Benton County No. 9819;
The Honorable Ron E. Harmon, Chancellor

No. W2000-02881-COA-R3-CV



This appeal arises out of a divorce action filed by the parties in Benton County, Tennessee. Edwin Daniel Greer ("Husband") appeals the trial court's decision awarding the parties' marital residence to Judith Diane Greer ("Wife"), ordering Husband to pay rehabilitative alimony for four years, and awarding attorney's fees to Wife. We reverse the trial court's decision awarding the marital residence and the adjoining 9.4 acres to Wife and remand for further action by the trial court. We affirm the trial court's decision awarding Wife rehabilitative alimony and an attorney's fee of \$3,000.00. We remand the case to the trial court for the amount and duration of rehabilitative alimony.

**Tenn. R. App. R. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed in Part,
Reversed in Part and Remanded**

ROBERT L. CHILDERS, SP. J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

L.L. Harrell, Jr., Trenton, TN, for Appellant

W. Brown Hawley, II, Paris, TN, for Appellee

OPINION

Facts and Procedural History

Wife filed a Complaint for divorce on May 21, 1999. Husband filed an Answer and Counter-complaint on June 14, 1999. Temporary child support and visitation was ordered on June 15, 1999. Wife filed an Answer to the Counter-complaint on September 14, 1999. The Final Decree of Divorce was entered on October 18, 2000.

The parties were married on May 5, 1984. They have three children born of the marriage, ages twelve, nine, and five. At the time of divorce, Husband was forty-one years of age, and Wife was thirty-five. Wife owned no property before the marriage except for her clothing.

Husband owned a mobile home, cattle, real estate, farm equipment, two motor vehicles and guns before the marriage. Shortly after the marriage, a house was built on 9.4 acres of land that was owned by Husband's father, Eulas Greer. In 1989, Eulas Greer deeded Husband this land in exchange for a 10 acre tract of land that Husband owned before the marriage. The deed to the 9.4 acres on which the marital residence was built made no mention of Wife having an interest in the real estate. The house was built with funds from Husband's savings prior to the marriage, the sale of Husband's cattle that he owned with his father before the marriage and with money given to him by his father. There was never a mortgage on this property. During the marriage, Husband purchased a 110 acre parcel of real estate (Bain farm) with his business partner. The business partner later transferred his one-half interest in the Bain farm to Husband and his father. There were also two other parcels of real estate that Husband and his father purchased during the marriage: one 18 acre parcel and one 8.3 acre parcel. The Chancellor found that these two parcels had little or no equity. There was also a promissory note owed to Husband for \$35,000.00, and farm, equipment, motor vehicles, household goods, furniture, appliances, guns, jewelry and personal belongings, all of which the Chancellor found to be marital property.

The Chancellor awarded Wife the marital residence and the 9.4 acre tract. He also awarded Wife a 1991 Ford Escort automobile, certain items of household goods, furniture, appliances, jewelry and personal belongings, but did not place a value on any of these items. The Chancellor ordered Husband to pay Wife rehabilitative alimony of \$400.00 per month for forty-eight (48) months, the sum of \$1,250.00 for Wife's one-half equity interest in a tractor, and a \$3,000.00 attorney's fee. Husband was also ordered to pay child support of \$150.00 per week, which was not appealed.

The Chancellor awarded Husband the Bain farm and the \$35,000.00 promissory note receivable. He also awarded Husband the guns, several motor vehicles, several pieces of farm equipment, and certain items of household goods, furniture, appliances and personal property, but did not place a value on any of these items. The Chancellor also divested Wife of any interest she had in the 18 acre and the 8.3 acre parcels of land.

Husband has appealed the Chancellor's decision awarding the marital residence and the 9.4 acres, \$400.00 per month rehabilitative alimony for forty-eight (48) months, and the \$3,000.00 attorney's fee to Wife.

Issues

The issues presented for our review are:

1. Did the trial court err in classifying the marital residence and the surrounding 9.4 acres as marital property and awarding it to Wife?
2. Did the trial court err in awarding the Wife \$400.00 per month in alimony for forty-eight (48) months?
3. Did the trial court err in ordering Husband to pay Wife a \$3,000.00 attorney's fee?

Standard of Review

A review of findings of fact by a trial court is *de novo* upon the record of the trial court, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. R. App. R. 13 (d). *Brooks v Brooks*, 992 S.W. 2d 403,404 (Tenn. 1999). Review of questions of law is *de novo*, without a presumption of correctness. See *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W. 3d 625,628 (Tenn. 1999). Review of the trial court's conclusions based on undisputed facts are also *de novo*, without a presumption of correctness. *NCNB Nat'l Bank v Thrailkill*, 856 Sw 2d.150,153 (Tenn Ct. App. 1993).

Law and Analysis

1. **Did the trial court err in classifying the marital residence and the surrounding 9.4 acres as marital property and awarding it to Wife?**

Because Tennessee is a "dual property" jurisdiction, trial courts must first classify the parties' property as either separate or marital before equitably dividing the marital estate. *Batson v. Batson*, 769 S.W.2d 849, 856 (Tenn. App.1988). Proper classification of a couple's property is essential. *Id.* at 856.

Separate property is defined in TENN. CODE ANN. § 36-4-121(b)(2) as:

- (A) All real and personal property owned by a spouse before marriage;
- (B) Property acquired in exchange for property acquired before the marriage;
- (C) Income from and appreciation of property owned by a spouse before marriage except when characterized as marital property under subdivision (b)(1); and
- (D) Property acquired by a spouse at any time by gift, bequest, devise or descent.

Marital property is defined in TENN. CODE ANN. Section 36-4-121(b)(1) as:

All real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing of a complaint for divorce, except in the case of fraudulent conveyance in anticipation of filing, and including any property to which a right was acquired up to the date of the final divorce hearing, and valued as of a date as near as reasonably possible to the final divorce hearing date.

"Marital property" includes income from, and any increase in value during the marriage, of property determined to be separate property in accordance with subdivision (b)(2) if each party substantially contributed to its preservation

and appreciation and the value of vested pension, retirement or other fringe benefit rights accrued during the period of the marriage.

(D) As used in this subsection, "substantial contribution" may include, but not be limited to, the direct or indirect contribution of a spouse as homemaker, wage earner, parent or family financial manager, together with such other factors as the court having jurisdiction thereof may determine.

The trial court made the following remarks concerning the marital residence and the 9.4 acres:

The Court finds the house and nine acres or at least the nine acres where the parties' marital residence is located was owned by the husband's father. Prior to the marriage, the husband owned a separate parcel or tract of land of approximately 10 acres which he traded for the land where the house exists. The Court finds the value at the time of the trade to be \$2,000.00 according to the affidavit on the deed signed by Mr. Eulis(sic) R. Greer as reflected in Exhibit 22. The stipulation as to value of \$84,000.00 being the value of the improved property will be reduced by the \$2,000.00 of premarital property of the husband. The balance would be one-half each.

Although the Chancellor did not specifically find that the marital residence and the surrounding 9.4 acres was marital property, that finding is implicit in his ruling since he awarded the marital residence and the 9.4 acres tract to Wife.

A trial court is afforded wide discretion when equitably dividing marital property between divorcing parties, and its distribution will be given "great weight" on appeal. *Ford v. Ford*, 952 S.W.2d 824, 825-826 (Tenn. Ct. App. 1996). However, before it can be subject to the court's powers of equitable division, property must first qualify as marital property. *Cutsinger v. Cutsinger*, 917 S. W. 2d 238, 241 (Tenn. Ct. App. 1995).

In this case the construction of the marital residence began a few weeks after the parties married, on land owned by Husband's father. In 1989 Husband exchanged with his father a 10 acre tract of land he owned before the marriage, for the 9.4 acre tract owned by his father, on which the marital residence was located. This exchange of property during the marriage remained the separate property of Husband. TENN. CODE ANN. § 36-4-121(b)(2)(B). At no time during the marriage did Wife have title to the real estate. There was evidence in the trial court that Husband used his savings and proceeds from the sale of cattle owned before the marriage, a total of \$32,000.00, in the construction of the marital residence. However, Husband and his father also testified that the father had given Husband money to build the house. While the father testified that he had given Husband several checks, he also testified that Husband had

written checks from the Greer and Greer account for construction of the house. Greer and Greer was a partnership between Husband and his father that began operating prior to the marriage. The father also testified that he had used his tools and "paid some hands that worked on the building." The total amount of money given by Husband's father was never established. It appears from the record that Wife does not dispute that the money from Husband's father was a gift from the father to Husband alone. Property acquired by a spouse at any time by gift is deemed to be separate property. TENN. CODE ANN. § 36-4-121(b)(2)(D). Since Husband used his separate property, his savings, proceeds from the sale of cattle owned before the marriage, and gifts from his father, for the construction of the marital residence, the residence and the 9.4 acre tract remained his separate property.

Although this property remained Husband's separate property the Chancellor could have awarded Wife an equitable interest in the property upon a proper showing by Wife that there was an increase in the value of the marital residence and the 9.4 acres, by proving the amount of the increase in the value of the property during the marriage, and that she had made a substantial contribution to the increase in value. TENN. CODE ANN. § 36-4-121 (b)(1)(B). If a nonowner spouse can show that she made a substantial contribution to the preservation and appreciation of a piece of separate property, the trial court may grant the nonowner spouse an equitable share of the increase in value of that property. *Id.* at 241.

We agree that, based on the evidence offered at trial, the Chancellor could have found that Wife made a substantial contribution to the preservation and appreciation of the marital residence. However, in order to prove such an appreciation or increase in the value of separate property, a nonowner spouse must present evidence that proves the value of the separate asset prior to the marriage. *Id.* "One who claims an interest in the increase in value of the separate property of his spouse has the burden of showing the amount of such increase." *Bryson v. Bryson*, App. No. 88-94-II, 1988 WL 87685 at * * *3 (Tenn. Ct. App. Aug. 26, 1988). If there is no proof of the value of a separate asset, the trial court has no legitimate basis to determine that an asset has appreciated. *Id.* Thus, a trial court cannot make an equitable distribution of the alleged appreciated value of that particular asset. *Id.* Although the marital residence was constructed shortly after the parties' marriage, it was built with Husband's separate property. In order to establish the value of the marital residence it was necessary for Wife to prove either the fair market value of the residence at the time it was constructed or the total amount of money used to construct the marital residence. Wife failed to prove either.

Although the Chancellor found that the fair market value of the 9.4 acres at the time of the exchange in 1989 was \$2,000.00, there was no evidence offered at trial to establish the fair market value of the marital residence at the time of its construction, nor was there sufficient evidence to prove the total amount of the funds used to construct the marital residence. We find that the evidence preponderates against the trial court's classification of the marital residence and the 9.4 acre tract as marital property. The trial court erred in awarding the 9.4 acres and the marital residence to Wife as marital property. We find this property to be Husband's separate property.

As to the remaining assets, the Chancellor made the following distribution:

The husband will receive all other real property, including the Bain farm, the 18 acres and any interest [Wife] might have in the eight point three acres. Wife will receive the furnishings in the house listed on Exhibit Eight as marital. The husband will receive the items in the house that are items either owned by him prior to the marriage or that are listed as his separate property.

. . . The husband will receive his firearms that are located in the house; the wife will receive the '91 Ford Escort; the husband will receive the remaining vehicles. The Court finds that [Husband] has an interest in these vehicles, at least half, the undisputed proof is that the vehicles came through Greer and Greer which he claims and which his father claims to be a -- or at the time this was done, to have been a joint equal partnership.

. . . The tractor and the remaining farm equipment will go to the husband. The only allowance made for the wife is on the tractor; she will receive [\$1.250] for her interest in the tractor. . . The Court finds that there is a marital interest in the tractor aforementioned; the GMC pickup which is awarded to the husband and the Chevrolet pickup, the two-ton International, the tractor and various -- the bailer, cutter, parts washer, hay rake and feed grinder. . . The Court finds the wood-mower -- and I -- if that's the bushhog that Mr. Greer, Sr. spoke of -- I'm assuming it is: he said it was. I don't think a bushhog and a woods mower are the same piece of equipment, but -- all those items the wife has a marital (sic) interest in will be divested out of her and vested in the husband.

With the exception of the Bain farm property and the tractor, the trial court placed no values on the items determined to be marital property. The parties do not dispute that the Bain farm property is marital property, nor do they dispute that Husband's father owns a one-fourth undivided interest in this property. However, the Chancellor did not recognize the father's one-fourth interest in his ruling establishing the value of the marital interest in the Bain farm property. The Chancellor stated that "[t]he Bain farm, the Court finds to be marital property, \$82,700.00 by stipulated value. It'll be \$41,350.00 each, virtually the same as the house and nine acres."

Having reviewed this record, we find that the trial court erred in its classification of the marital residence and the 9.4 acres as marital property. We also find that the trial court failed to place a value on all of the marital property. As a result we find it necessary to remand this action to the trial court for a determination of the values of the marital assets and an equitable of them according to the factors enumerated in TENN. CODE ANN. § 36-4-121 (c)(1-11).

2. **Did the trial court err in awarding Wife \$400.00 per month in alimony for forty-eight (48) months?**

Trial judges have broad discretion to determine whether spousal support is needed and, if so, its nature, amount, and duration. *Kinard v. Kinard*, 986 S.W.2d 220,234 (Tenn. Ct. App. 1998). Appellate courts are generally disinclined to second-guess a trial judge's spousal support decision unless it is not supported by the evidence or is contrary to the public policies reflected in the applicable statutes. *Id.*

Wife was thirty-five years old at the time of trial. She had a high school education, and had worked outside of the home for one to three years after the parties married. After that she helped with the farm until she started caring for Husband's grandmother for which she was paid up to \$315.00 per week. At the time of trial she had been caring for an elderly woman, earning \$7.00 per hour, working five to seven hours per day on Monday, Wednesday and Friday and every other weekend. Wife is also in good health. Her affidavit showed that her monthly expenses totaled \$1,238.83. This amount did not include any rent or house payment. Husband had been employed throughout the marriage as a welder, and the Chancellor found that Husband had an earning capacity of \$10.00 per hour. The parties were married for 16 years.

When deciding whether rehabilitation is possible, and, in general, determining the proper form and amount of alimony, courts must consider the "relevant factors" set forth in TENN. CODE ANN. § 36-5-101(d)(1)(A) through (L), but "the real need of the spouse seeking the support is the single most important factor. In addition to the need of the disadvantaged spouse, the courts most often consider the ability of the obligor spouse to provide support." *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn. 1995).

After considering the factors enumerated in TENN. CODE ANN. § 36-5-101 (d)(1)(A-L), the Chancellor properly awarded Wife rehabilitative alimony. However, we will remand the issue on the amount and duration of the rehabilitative alimony to the trial court, in light of our finding that the marital residence and the 9.4 acre tract is Husband's separate property, to give the trial court the opportunity to review the amount and duration of the rehabilitative alimony based on the new equitable division of marital assets.

3. **Did the trial court err in ordering Husband to pay Wife a \$3,000.00 attorney fee?**

The record reveals that Wife incurred attorney's fees and expenses in the amount of \$3,268.37. The Chancellor awarded her an attorney's fee of \$3,000.00. Attorney fee awards are treated as alimony. *Gilliam v. Gilliam*, 776 S.W.2d 81, 86 (Tenn. Ct. App. 1988). In determining whether to award attorney's fees, the trial court should consider the relevant factors in TENN. CODE ANN. § 36-5-101(d)(1). *Houghland v. Houghland*, 844 S.W.2d 619, 623 (Tenn. Ct. App. 1992). Where the wife demonstrates that she is financially unable to afford counsel, and where the husband has the ability to pay, the trial court may properly order the

husband to pay the wife's attorney's fees. *Harwell v. Harwell*, 612 S.W.2d 182, 185 (Tenn. Ct. App. 1988). These awards are within the sound discretion of the court, and unless the evidence preponderates against the award, it will not be disturbed on appeal. *Lyon v. Lyon*, 765 S.W.2d 759, 762-63 (Tenn. Ct. App. 1988). We find the award of attorney's fees to be proper and affirm the trial court.

Conclusion

The judgment of the trial court awarding the marital residence and 9.4 acres to Wife is reversed. The trial court's judgment awarding rehabilitative alimony and attorney's fees to Wife is affirmed. The cause is remanded to the trial court for a determination of the values of all marital assets, an equitable distribution of the marital assets, and to determine the amount and duration of rehabilitative alimony consistent with this opinion. Costs of this appeal are taxed equally to the Appellant, Edwin Daniel Greer, and his surety, and Appellee, Judith Dianne Greer, for which execution may issue if necessary.



ROBERT L. CHILDERS, SPECIAL JUDGE

TENNESSEE

FAMILY LAW LETTER

A MONTHLY DIGEST OF TENNESSEE FAMILY LAW DEVELOPMENTS

W. WALTON GARRETT • EDITOR

Vol. 27, No. 8
June 2013

Highlights

- There are two cases in this issue where the children did not want to visit with the noncustodial parent. In *Maupin v. Maupin*, 27 TFLL 8-13, the appellate opinion by Judge Susano observed that the father had the ability to influence the children regarding their relationship with the mother, affirmed the father's designation as the primary residential parent, and remanded. On remand the chancellor was to modify the permanent parenting plan to require professional counseling and therapy with the goal of attaining a healthy family relationship. In *Beyer v. Beyer*, 27 TFLL 8-30, Judge Childers included in the parenting plan a provision that best interest of the children required an attempt to resolve the situation by combining intensive individual therapy for the father with therapeutic family visitation between the father and two of his daughters. The stated purpose was to help the father learn how to use more effective methods of handling anger and to develop an understanding of the children's emotional needs. The father will have an opportunity to practice new skills in a supportive environment by combining individual counseling with therapeutic visitation.
- The 2013 Pocket Supplement, April 2013, for Tennessee Practice, Volumes 19 and 19A, Tennessee Divorce, Alimony and Child Custody with Forms has been mailed. For assistance call 1-800-328-4880.
- In the case of *State ex rel. Phillips v. Phillips* the Court of Appeals has found an exception to the Doctrine of Sovereign Immunity where the father's wages were garnished to recover child support arrearages when there were no arrearages. Most of the funds recovered had been paid to the mother. The chancellor ordered the State to reimburse the father. The Court of Appeals affirmed. 27 TFLL 8-16

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Would You Be My Friend? Ethical Considerations for Attorneys and Judges Using Social Media Sites¹

By Judge Robert L. Childers

The growing popularity of social networking websites such as Facebook and Twitter has helped to connect people all over the world. While the use of these sites has greatly contributed to the free flow of information and ideas, it has also created several ethical dilemmas for certain professionals such as attorneys. Of course, it should go without saying that lawyers, as any other professionals, should be careful about what they post on these sites. One need not be reminded that the Rules of Professional Conduct apply everywhere, even the Internet. Accordingly, an attorney is just as subject to discipline for what the attorney posts on Facebook as for what the attorney does or says anywhere else.

Aside from this obvious caveat, however, are a few more esoteric concerns. For example, does an attorney have an affirmative duty to investigate social media websites for jury selection or case preparation? Some recent authority suggests so. Comment 8 to Rule 1.1 of the Model Rules of Professional Conduct now states that: “[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including *the benefits and risks associated with relevant technology*”² Some case law has touched on the issue as well. In *Johnson v. McCullough*, the Missouri Supreme Court suggested that attorneys have a duty to conduct online investigations as part of their jury selection process.³ Similarly, in *Griffin v. Maryland*, a Maryland appellate court hinted that attorneys should now use social media when investigating their cases.⁴ Even though Tennessee law has not addressed this issue yet, it seems that the law is moving toward requiring attorneys to explore the avenues of social media in their practice.

Therefore, as an attorney, it is a good idea to become familiar with social networking sites and to start utilizing social media when needed.

Another ethical concern for attorneys is the proper use of social media when gathering information about a party or a witness. Specifically, is it ethical for an attorney or an agent of the attorney to attempt to “friend” someone on Facebook for the purpose of gaining access to that person’s private information? If the attorney knows the person is represented by counsel then the friend request would most certainly violate Rule 4.2 of the Tennessee Rules of Professional Conduct.⁵ However, sending a friend request to an unrepresented party may also violate Rule 8.4 when a lawyer sends the request for the purpose of gathering information. Rule 8.4 states in pertinent part that a lawyer shall not “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation”⁶ One study found that forty-one percent of Facebook users blindly accept friend requests from people they do not know.⁷ Accordingly, it certainly seems logical that many individuals would accept a lawyer’s or his assistant’s friend request completely unaware of the lawyer’s true purpose. Such conduct on the lawyer’s part arguably involves dishonesty and misrepresentation. In fact, a few ethics committees have found that it does. For example, in 2009 a lawyer approached the Philadelphia Bar Association Professional Guidance Committee explaining that the lawyer believed a witness’s Facebook and Myspace accounts contained relevant information to impeach the witness’s deposition testimony.⁸ The lawyer had previously attempted to visit both the witness’s Facebook and Myspace pages. In doing so, though, the lawyer discovered that access to those pages could only be obtained with the witness’s permission—i.e. the witness accepting a friend request from the lawyer.⁹ The lawyer proposed to ask a third person who the witness would not recognize to send the witness a friend request.¹⁰ If such friend request was accepted, the lawyer intended to gather relevant information to impeach the witness.¹¹ The Philadelphia Bar Association found that this conduct would violate Rule 8.4 of the Pennsylvania Rules of Professional Conduct.¹² The Association reasoned that the conduct was deceptive in that it “omit[ted] a highly material fact, namely that the third party who ask[ed] to be allowed access to the witness’s page [was] doing so only because he or she [was] intent on obtaining information . . . to impeach the testimony of the witness.”¹³ Two bar associations in New York have reached similar conclusions.¹⁴ It is important to note that Tennessee’s Rule 8.4 is identical to Pennsylvania’s Rule 8.4. Therefore, the Tennessee Bar Ethics Committee or the Board of Professional Responsibility may come to a similar conclusion.

A third ethical issue concerns the preservation of evidence. For example, can a lawyer tell his or her client to delete the client’s Myspace or Facebook account or instruct the client to remove damaging content from the account? According to Rule 3.4 of the Tennessee Rules of Professional Conduct, the answer is no. Rule 3.4 states that “A lawyer shall not . . . unlawfully obstruct another party’s

access to evidence or unlawfully destroy or conceal a document or other material having potential evidentiary value.¹⁵ That rule also states that “[a] lawyer shall not counsel or assist another person to do any such act”¹⁶ An attorney instructing a client to erase content on social media accounts could arguably qualify as the destruction of evidence. In a recent Virginia case, an attorney instructed his paralegal to tell a client to “clean up” his Facebook account by deleting certain pictures the other side had requested in a discovery request.¹⁷ The client deleted his Facebook account and answered the discovery request by stating: “I do not have a Facebook page”¹⁸ While the court did not explicitly mention Rule 3.4, it did assess \$542,000 in sanctions against the attorney and \$180,000 in sanctions against the client.¹⁹

With all this in mind, it is important that attorneys use social media conscientiously. While some aspects of responsible social networking amount to little more than common sense—i.e. “be careful what you post on Facebook and Twitter”—other aspects can be a little trickier. With the continuing prominence of social media in the world, though, it seems unlikely that lawyers will be able to avoid these networking sites and still adequately represent their clients. As a result, it is important that lawyers not only use common sense while on these sites, but also that lawyers stay updated on the Rules of Professional Conduct as well as cases and opinions addressing these issues.

Lawyers are not the only legal professionals who should exercise caution when using social media. Judges should also exercise caution and common sense when using social media. In 2012 the Tennessee Judicial Ethics Committee issued an opinion as to whether judges may utilize social media, such as Facebook, Twitter, LinkedIn, and MySpace and, if so, the extent to which they may participate.²⁰

The Judicial Ethics Committee found that while the Code of Judicial Conduct allows judges to participate in social media, such interaction “must be undertaken cautiously.”²¹ The Committee found that judges may ethically participate in social media, but must do so with caution and with the expectation that their use of media likely will be scrutinized for various reasons by others.²² The Committee further cautioned that judges must be constantly aware of ethical implications as they participate in social media and must decide whether disclosure must be made, and whether the benefit and utility of participating in social media justify the attendant risks.²³

Judicial ethics committees from several states have addressed the question, with the majority concluding that

judges may utilize social networking sites, but must do so with caution. For example, the Maryland Judicial Ethics Committee concluded that the mere fact of a “social connection” does not create a conflict, and it is the nature of that social interaction that should govern the analysis, not the medium in which it takes place.²⁴

In summary both lawyers and judges should use common sense and caution in deciding whether, when, and how to use social media sites, because failure to do so may result in unwanted, and perhaps expensive, consequences.

1 Judge, Division IX, Circuit Court for the Thirtieth Judicial District at Memphis. The author also acknowledges the assistance of Andrew R. Francisco, Judicial Law Clerk.

2 Model Rules of Prof'l Conduct R. 1.1 cmt. 8 (2012) (emphasis added).

3 *Johnson v. McCullough*, 306 S.W.3d 551, 558-59 (2010).

4 *Griffin v. Maryland*, 995 A.2d 791, 801 (Md. Ct. Spec. App. 2010), *rev'd*, 19 A.3d 415. (Md. 2011).

5 See Tenn. Rules of Prof'l Conduct R. 4.2 (2011) (“In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”)

6 Tenn. Rules of Prof'l Conduct R. 8.4(c) (2011).

7 *Sophos Facebook ID Probe Shows 41% of Users Happy to Reveal All to Potential Identity Thieves*, Sophos (Aug. 14, 2007), <http://www.sophos.com/en-us/press-office/press-releases/2007/08/facebook.aspx>.

8 Phila. Bar Ass'n Prof'l Guidance Comm., Formal Op. 2009-02 at *1 (2009).

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.* at 2*.

13 *Id.*

14 See N.Y. St. Bar Ass'n Comm. Prof'l Ethics, Formal Op. 843 (2010); The Ass'n of the Bar of the City of New York. Comm. on Prof'l and Judicial Ethics, Formal Op. 2010-2 (2010).

15 Tenn. Rules of Prof'l Conduct R. 3.4(A).

16 *Id.*

17 *Allied Concrete Co. v. Lester*, No. 120074, 2013 WL 119666, at *2 (Va. 2013).

18 *Id.*

19 *Id.* at *3.

20 Judicial Ethics Committee Opinion 12-01, 10/23/12.

21 *Id.*

22 *Id.*

23 *Id.*

24 Maryland Judicial Ethics Opinion, 2012-07.

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LOOKING FOR YOUR PASSION

BY JUDGE ROBERT CHILDERS

Unlike Abe Lincoln, I was not born in a log cabin. I was born in an asbestos-shingled house in Capleville, Tennessee, in what was then rural, southeastern Shelby County about 1.5 miles from the Mississippi state line. I grew up on a farm milking cows, slopping hogs and gathering eggs from the hen house. I started playing baseball in the 4th grade. I ate, slept and breathed baseball until I graduated from high school. However, when I failed to make the varsity baseball team, I decided that professional baseball might not be in my future after all and started considering other career options.

I can't say precisely what made me decide that I wanted to become a lawyer. There were no lawyers in my family, in fact, no one in my family was even remotely connected to the legal profession. I was the first in my family to attend college, let alone graduate from college.

After graduating from high school, I worked in the St. Louis area to earn enough money to begin college. In order to attend college and law school, I worked a series of part-time jobs. I began college at the University of Tennessee at Martin, but came back to Memphis after two quarters when my mother died. I finished college at Memphis State University and then went to law school there. After graduating from law school, I practiced in a small law firm for three years. I then shared space with three other lawyers for six years.

In 1982 I decided to run for judge. I had sat as a special judge in the General Sessions courts on many occasions and had enjoyed it, and other lawyers told me they thought that I had the qualities to be a good judge. Unfortunately, I waited too long to decide whether to run for General Sessions Court or for Circuit Court. By the time I decided to run against an incumbent judge in Circuit Court, most lawyers had already committed to the incumbent. I came in a close second in a four-person race. Since I had done so well against an incumbent judge, notwithstanding my late entry into the race, I decided in 1984 to run for the newly created division in Circuit Court. I had five opponents and I was fortunate to be elected.

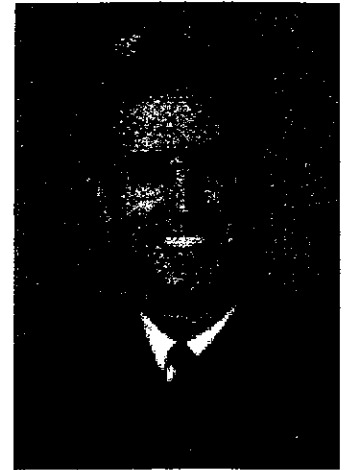
I look back on those days and it sometimes seems as if I went through them in a fog and that I was being guided by some unseen force. As I get older I become more convinced that everything happens for a reason, that there are no coincidences. Although I have had obstacles to overcome in my life, I consider myself to have been extremely lucky. But I find that the harder I work, the more luck I have. I have been very blessed in my personal and professional life.

I have worked very hard, but I have also received a tremendous amount of support and assistance from many others who believed in me. I am a firm believer in the passage from St. Luke that "to whom much is given, much is expected."

The profession of law, much like politics, is all about dealing with people. I have always enjoyed interacting with and helping people. I believe that serving the public is the hallmark of the legal profession. Both in my personal and professional life, I have tried to give back just a small portion of the blessings and good fortune that I have received.

The longer I live, the more I realize how fragile and fleeting life is. There are no guarantees about how long any of us will live. That realization has made me more intent on living every moment to its fullest. It has made me focus on the things that are really important in my life: family, friends and helping others. The ironic thing about helping others is that it makes life more meaningful to me. In the words of Sir Winston Churchill, we make a living by what we get, we make a life by what we give.

I encourage everyone to find a way to be of service to others. Find a cause that you are passionate about and willing to put hard work into. I am convinced that any of us can do anything that we put our minds to, if we are willing to work hard to achieve the goal. I predict that if you do this, you will find life more fulfilling, and you will help to make this world a better place. ♦



Judge Robert Childers was elected Judge, Division 9 in 1984 and reelected in 1990 and 1998. He graduated from The University of Memphis with a B.B.A. in 1971 and earned his J.D. from The University of Memphis Cecil C. Humphreys School of Law in 1974. He holds the following professional affiliations: Chair of the Domestic Violence State Coordinating Council; Memphis Lawyers' Help Lawyers', Inc.; Chair of the Civil Pattern Jury Instruction Committee for the Tennessee Judicial Conference since 1991; Tennessee Lawyers' Assistance Program (TLAP); American Bar Association's Commission on Lawyer Assistance Programs (CoLAP); and Memphis Bar Association. Judge Childers is Past President of the Tennessee Judicial Conference; Former President of the Tennessee Trial Judges' Association; and former Special Judge of the Tennessee Supreme Court Workers' Compensation Panel. He received the MBA's Chancellor Charles A. Rond Memorial Award for Outstanding Judge of the Year in 1986 and 1999, and Judge of the Year by the Shelby County Sheriff's Association in 1990.