Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev.14 September 2011

Name: W. Scott Rosenberg

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(including county)

Nashville, Davidson County, Tennessee

Office Phone: (615) 862-8038 Facsimile: (615) 880-3640

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[redacted] Davidson County, [redacted]

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INTRODUCTION

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

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am presently employed by the Juvenile Court of Davidson County, Tennessee as a Magistrate.

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

I was licensed to practice in Tennessee in 1990. My BRP number is 14468.

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.

Not applicable.

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).

October 1990 to July 1993 – I was employed by the District Attorney's Office of Davidson County, Tennessee.

July 1993 to December 1997 – I was employed by the law firm of Joyce, Meredith, Flitcroft & Normand as an attorney.

December 1997 to September 1998 – I was self employed as an attorney and associated with the firm of Robert L. Jackson and Associates.

June 1998 to October 1998 – In addition to my private practice, I was appointed Special Assistant District Attorney by General Victor S. Johnson, III.

September 1998 to Present – I am employed by the Davidson County Juvenile Court as a Magistrate.

My only other occupation has been a mashgiach (kosher supervision) for OK Kosher Certification and Nashville Kashrut Commission. I have been involved in kosher supervision for 3 years.

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.

From October 1990 to December 1997 I was employed by the District Attorney's Office and then the law firm of Joyce, Meredith, Flitcroft & Normand. All of my practice during this time was as a Title IV-D contract attorney. My practice during these years consisted primarily in the Circuit and Juvenile Courts of Davidson County. I also practiced in the Bankruptcy Court representing the state in child support claims.

From January 1998 until September 1998 I was in private practice. My practice consisted of primarily family law and juvenile law matters. I also handled appellate and intellectual property matters.

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

Not applicable.

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.

From September 1998 until present I have been a Magistrate with the Davidson County Juvenile Court. My experience has been primarily in the area of paternity cases which have included issues of custody, child support, visitation, UCCJEA and other related matters. I have also heard all other types of cases in juvenile court including termination of parental rights, transfer hearing (transferring juveniles to adult court on delinquency charges), dependency and neglect charges and delinquency charges.

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.

Not applicable.

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 July 2007 I submitted an application for the vacancy on the Court of Appeals, middle division. My name was not submitted to the Governor as a nominee.

EDUCATION

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

University of Florida – January, 1981 to May, 1982. Music Major. No degree. I left to transfer to Belmont College.

Belmont University – August, 1982 to December, 1982. Music Business Major. No degree. I left to transfer to Middle Tennessee State University.

Middle Tennessee State University – January, 1983 to May, 1986. Recording Industry Management Major. B.S. Degree.

Nashville School of Law – September, 1986 to June, 1990. J.D. Degree.

PERSONAL INFORMATION

15. State your age and date of birth.

I am 49 years old. My date of birth is October 5, 1962.

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

I have lived continuously in Tennessee since I began attending Belmont College in August 1982.

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

I have lived in Davidson County continuously since December 1995.

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

I am registered to vote in Davidson County.

19. Describe your military Service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not applicable.

20. Have you ever pled guilty or been convicted or 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.

No.

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.

None.

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.

I have been a member of the Nashville Bar Association and Tennessee Bar Association at various times over the past ten years, however, I do not have the specific dates.

I was a member of the Tennessee Bar Association Family Law Code Commission for approximately seven years from approximately 2002 until 2008. We were responsible for recommending legislation to the Executive Council.

I have also been involved with the following committees and professional organizations.

2009 – 2010 Tennessee Bar Association Family Law Section Executive Council. We made recommendations on family law issues to the TBA board.

1994 Member of the committee appointed by the Department of Human Services, Child

	Support, to develop the legal forms for the Tennessee Child Support Enforcement System (TCSES).
1997	Member of the committee appointed by the Department of Human Services, Child Support, to develop additional legal forms for the Tennessee Child Support Enforcement System (TCSES).
1997	Nashville Bar Association - Domestic Relations Committee. Vice Chair. My primary responsibility was to organize the Committee's annual CLE presentation.
1998	Nashville Bar Association - Domestic Relations Committee. Chair.
2000-2002	National Child Support Enforcement Association (NCSEA) Member of the Judicial Subcommittee. We were responsible for reaching out to members of the Judiciary across the country.
2001-2003	Eastern Regional Interstate Child Support Enforcement Association (ERICSA) – Board of Directors.
2005	Tennessee Department of Human Services Child Support Guideline Advisory Committee. We developed the present child support guidelines.
2006	Tennessee Department of Human Services Child Support Enforcement Committee. We drafted and recommended legislative initiatives to assist in the enforcement of child support.
2009-Present	Federal Office of Child Support Enforcement - National Judicial Child Support Task Force. The Task Force consists of several committees all directed at addressing child support issues on a nationwide basis. My primary function has been in the development of a website designed to assist trial court judges with child support matters. The site is found at http://www.acf.hhs.gov/programs/cse/courts.html

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

None

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

Nashville Bar Journal, June 1999, *Uniform Interstate Family Support Act: New Opportunities in Support Enforcement.*

NCSEA Child Support Quarterly, Fall 2007 Edition, *Access and Visitation, Getting Real: A Judge Talks about How Visitation and Child Support Orders Should Fit Together*.

During 2010 and 2011 I also published a quarterly report entitled The Rosenberg Report. The report reviewed all Tennessee Appellate and Supreme Court cases involving family law issues.

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.

2011 District Attorneys' Conference – *Civil / Criminal Contempt after Turner v. Rogers*

ERICSA Annual Conference – *A Death in the Family; What is the impact on Child Support* and *Hard To Enforce Child Support Cases*

2010 NCSEA Annual Policy Forum – *Creative Court Collaborations*

Tennessee Association for Justice Domestic Law Forum – *Child Support; How to Count Days, Calculate Income and other Problem Issues*

WICSEC Annual Conference – *A Death in the Family; What is the impact on Child Support*

TBA – *Domestic Case Law Update*

2009 AOC – New Judge's Training – *Child Support Issues*

District Attorneys' Conference – *Child Support Issues*

2008 ERICSA Annual Conference – *Access and Visitation*

2007 WICSEC Annual Conference – *Problem Solving Courts*

NCSEA Tele-Talk – *4th Annual Ethics for Attorneys*

NBA Family Law Institute – *Criminal Contempt*

NCSEA Tele-Talk – *Ethics for Child Support Professionals*

Tennessee Child Support Enforcement Conference – *Mock Trial: Solving the Case of the Elusive Obligor*

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.

In 1998 I ran for the position of Juvenile Court Judge in Davidson County. I was subsequently appointed as a Referee by Judge Betty Adams Green in September of 1998.

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.

I have attached two examples of opinions I rendered in cases that were appealed to the Court of Appeals. Both examples are completely my own personal efforts. In chronological order they are:

Mardis v. Mardis, 2005 WL 1467871 (Tenn. Ct. App.)

Sinor v Barr, 2006 WL 304699 (Tenn. Ct. App.)

ESSAYS/PERSONAL STATEMENTS

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

I am seeking the position of Circuit Court judge because I have the experience to transition into this position and be a well respected member of the Circuit bench and I have a proven commitment to serving the public and would be honored to continue in my career by serving on the Circuit Court.

During the past 13 years I have learned that being a judge requires more than just a thorough knowledge of the law. It also requires understanding the role of a judge in the community, the ability to preside in a dignified manner over the court in which they serve, listen patiently to litigants and attorneys, then make well reasoned decisions in a manner that articulates to the

parties that their position was heard and considered. I believe that I have a proven record demonstrating my commitment to these principles.

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 my realm of the judicial system I deal primarily with non-married parents. On a daily basis I deal with the rights of the respective parents. I have been a strong advocate of balancing the rights of both parents. To that extent I pioneered programs and procedures in the Juvenile Court of Davidson County to ensure that the rights of the non custodial parents take equal precedent with the establishment of obligations. I have initiated procedures, including the creation of pro se forms, to make it simpler for non custodial parents to obtain visitation. I co-developed with the Exchange Club a co-parenting class for non-married parents called *Partners in Parenting*. I am also worked closely with the Department of Human Services and the Administrative Office of the Court on a pilot program called *Tennessee Parenting Project* which assists parents in obtaining visitation rights.

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

I am seeking appointment to the Circuit Court of Davidson County, Third Circuit Court. There are 14 Circuit Court Judges and 4 Chancellors. Of the Circuit Court Judges 6 hear criminal cases and one hears domestic matters exclusively. Until recently there were two judges hearing domestic matters exclusively. Because of the caseloads this division has worked well for the courts and the citizens of Davidson County. This division of cases makes sense because it facilitates simpler docketing and the judges assigned those cases can concentrate their focus on those areas of the law. If selected I am able to offer my extensive experience in family law matters to assume the caseload formerly handled by Judge Solomon. However, should the court need me to hear other matters I am capable of hearing any type of cases assigned to me.

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)***

If appointed to the Circuit Court of Davidson County I plan to continue with the same level of community involvement and hope to increase it. I am currently very involved in the Jewish community. I presently serve as president of my synagogue and sit on the board of the Gordon Jewish Community Center. I have previously been president of B'nai B'rith, a Jewish service organization and was previously on the board of Jewish Family Services. I also try to serve the public by various speaking engagements and volunteer work. I must also balance my community involvement with my commitment to my family. In that respect, we try to find

community involvement that involves the entire family such as our annual participation in the Keith Searcy Memorial Thanksgiving Dinner.

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 been married for 25 years and have three children. My commitment to my family and community are based on strong internal convictions and how I view our roles as humans to improve the world. Judaism teaches that every person has an obligation of Tikun Olam (repairing or improving the world). This conviction is evidenced by my many years of public service and dedication to improving the legal system to improve the lives of families and children. This belief also means that I do and will continue to take seriously every case I hear as if my decision will impact the entire world.

My approach to my responsibility as a judge is based on my religious beliefs. The trial judge is the front line of the judicial system for many people. Therefore, the way in which a judge acts towards litigants in large measure determines the public's respect for the judicial system. In Judaism there is a teaching (referring to judges) that says "*when parties to a suit are standing before you they should be in your eyes as guilty, but when they have departed they should be in your eyes as innocent*". This means that at the outset of a hearing the judge should let each party know that their claims are being taken seriously. At the conclusion of the hearing the judge must let the parties know that they have been heard and the judge has taken into consideration their side of the case.

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)***

Since I have not practiced in over 13 years I can only give an example from my position as a Magistrate. In the case of Sinor v. Barr (cited in question 34) I strongly disagreed with the ruling of the Court of Appeals. At trial I had taken a position that was supported by a decision from the Florida Supreme Court interpreting the burden of proof in criminal contempt proceedings. As of that point there had been no Tennessee precedent on this specific issue. I believed the Appellate decision to be an unnecessarily narrow interpretation of the burden of proof in a criminal contempt case. Despite my disagreement I have respected the decision.

The resulting decision made it much more difficult to enforce child support obligations using criminal contempt proceedings. As a result of this decision the Department of Human Services convened the 2006 Enhanced Child Support Enforcement Committee. One of the products of the committee was to recommend legislation to address this issue. I was assigned to this task and as a result drafted the legislation currently found at T.C.A. 36-5-101(a)(8) and 35-5-101(d).

I believe that my approach to this disagreement was appropriate under Canon 4 of the Code of Judicial Ethics. Further, the appropriate manner to address the issue was through the legislature as the legislature is responsible for enacting the law. The function of the judiciary is to interpret and apply the law.

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. Stuart Wilson-Patton, Senior Counsel, Attorney General's Office, 2nd Floor, CHB, 425 5th Ave. North, Nashville, TN 37202. (615) 532-2567 Stuart.Wilson-Patton@ag.tn.gov

B. Jean Crowe, Attorney, Legal Aid Society, 300 Deaderick St., Nashville, TN 37201. (615) 244-6610 jcrowe@las.org

C. Barbara Broersma, Assistant General Counsel, Department of Human Services, 400 Deaderick Street, 15th Floor Nashville, TN 37243 (615) 313-4700 barbara.broersma@tn.gov

D. Judge Larry Holtz, Judicial/Court & Military Liaison, Office of Child Support Enforcement, 370 L'Enfant Promenade, SW, Washington, DC 20447 (202) 401-5376 lholtz@acf.hhs.gov

E. Gregory D. Smith, Attorney, Stites and Harbison, 401 Commerce Street, Suite 800 Nashville, TN 37219 (615) 782-2266 gregory.smith@stites.com

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 Third Circuit Court of Davidson County, 20th Judicial District of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

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

Dated: ___October 26_____, 2011___.

_____

Signature

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

TENNESSEE JUDICIAL NOMINATING COMMISSION

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

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY

WAIVER OF CONFIDENTIALITY

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

W. Scott Rosenberg
Type or Printed Name

_____
Signature

October 26, 2011
Date

14468
BPR #

IN THE JUVENILE COURT FOR DAVIDSON COUNTY, TENNESSEE

DEBRA MARDIS
Petitioner

VS.

FILE NO: 2019-56300 / 56299
DOCKET NO: 22-56936 / 56937
TCSES NO: 715384

DAVID MARDIS
Respondent

ORDER

This cause came on to be heard on the 19th day of March, 2002 before the Honorable W. Scott Rosenberg, on a further hearing on Respondent's Motion to Modify and Review of the Parenting Plan.

Based upon a review of the Parenting Plan submitted by the parties, the Respondent has the child 3 days per week and the Petitioner has the child 4 days per week. This schedule is constant through the year. Based on the testimony of the parties the Respondent makes about $24,000.00 per year. Based on the Parenting Plan presented it appears that strict application of the child support guidelines would be unjust and inappropriate in this matter. The Court finds that it is appropriate to deviate from the Tennessee child support guidelines in this matter for the reasons set forth at Rule 12-2-4-.04 (1) (b) of the Rules of the Tennessee Department of Human Services Child Support Division. As set forth below the Court explains the specific approach used in this case to determine the appropriate child support obligations of both parents.

One of the major goals of the child support guidelines is to ensure that when parents live separately, the economic impact on the child is minimal [Rule 1240-2-4-.02 (2) (e)]. This is accomplished by determining a formula that appropriately allocates the financial responsibilities for raising the child between both parents. In most cases, when there is "average visitation" as defined by the guidelines of approximately 80 days per

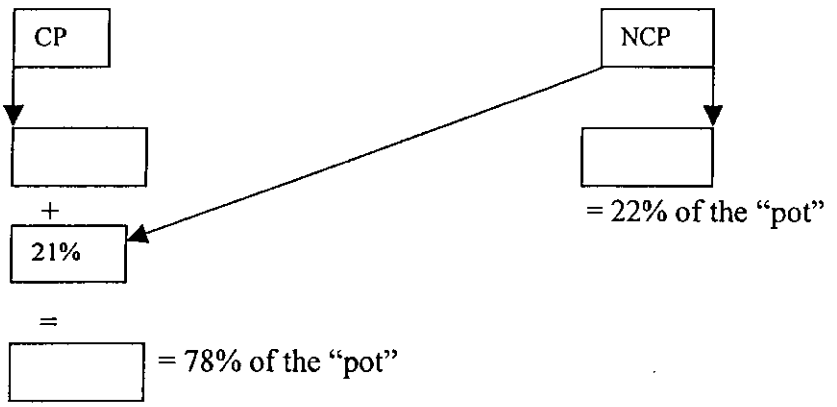
year the non-custodial parent pays child support in an amount equal to 21% of their income. In cases where the visitation or parenting time is more or less than this average the guidelines provide that the Court is to make a case by case determination as to the appropriate amount of child support [See Rule 1240-2-4-.02 (6) and 1240-2-4-.04 (1) (b)].

The guidelines provide that the income of the obligee should not be considered in the calculation of or as a reason for deviation from the guidelines in determining the support award amount. The guidelines then go on to say that the formula presumes that the obligee will be expending at least an equal percentage of net income as that of the obligor for the support of the child for whom child support is sought [See Rule1240-2-4-.03 (2)]. Once the Court deviates from the guidelines based on parenting time, the formula does not work as it is written.

This Court is now faced with the task of maintaining the guideline goal that each parent contribute an equal percent of their income to the support of this child and determining an appropriate amount of child support so that the economic impact on the child is minimized. In order to accomplish these goals and objectives the Court has developed an approach which the Court believes to be fair and equitable. Further the formula proposed, if used consistently would further promote the goal of making child support awards more equitable by ensuring more consistent treatment of persons in similar circumstances [Rule 1240-2-4-.02 (2) (6)].

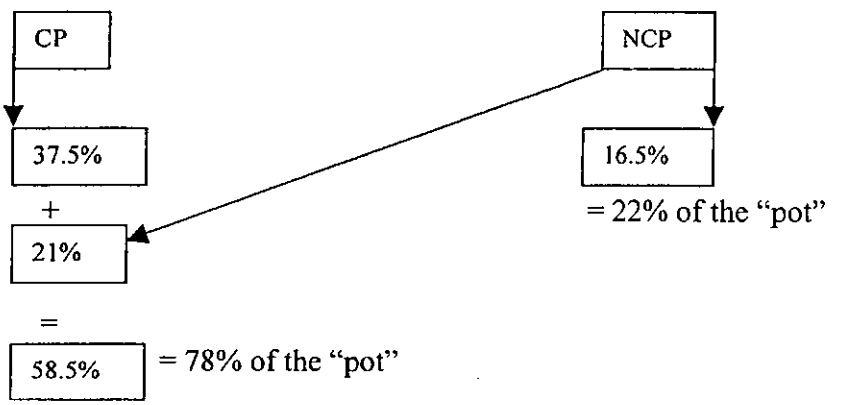
Upon just a cursory review of the guidelines it is apparent that the guideline figure of 21% is not a parent's actual rate of support. The 21% is only the amount the non-custodial parent pays to the custodial parent in order to achieve equity based on the standard allocation of parenting time of 78% for the custodial parent and 22% for the non-custodial parent. The non-custodial parent must still provide support at the same level while the child is with them, further the 21% must factor in that the custodial parent is contributing 21% of their income to the non-custodial parent while the child is in the non-custodial parents care. This approach to the guidelines would ensure that each parent is contributing an equal percentage of their income to support the child. The question is how can the Court determine the parent's actual rate of child support. The guidelines

give us certain insights: the non-custodial parent pays 21% to the custodial parent when the custodial parent has the child 78% of the time and the non-custodial parent has the child 22% of the time. Below is a diagram showing this.



The key is to determine how much each parent contributes then to collectively allocate it between them on a 78% and 22% basis according to the time they have the child. The Court has determined that the actual rate of support is 37.5% of net income for 1 child. If each earns the same amount and contributes 37.5% of individual net income there is a combined total of 75%. If the custodial parent receives 78% of the 75% or 58.5% the formula appears as follows.

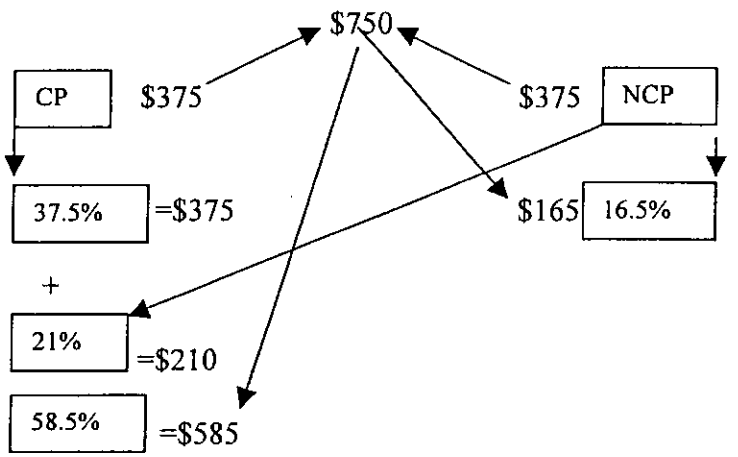
Below is a diagram of this approach:



As is shown, though the custodial parent does not pay any monies directly to the non-custodial parent, the custodial parent and non-custodial parent actually pay an equal

percentage of income. The amount the custodial parent should pay to the non-custodial parent for the time the non-custodial parent has the child is calculated in to the amount the non-custodial parent retains to expended during the non-custodial parent's possessory time in essence lowering the percentage the non-custodial parent pays to the custodial parent.

To see this in action, below is a diagram of a typical case where both parents have net income of $1,000 per month.



CP receives 78% of the $750 NCP receives 22% of $750

As can be seen in the typical guideline case with parenting time as anticipated by the guidelines, the non-custodial parent pays 21% of their income to the custodial parent. The non-custodial parent retains 16.5% of their income to provide support when the child is with them. The custodial parent retains 37.5% of their income to provide support for the child. The cumulative support obligation of both parents is $750. The custodial parent retains 78% of the "pot" while the non-custodial parent retains 22% of the "pot.

As the percentages of parenting time change, each party's percentage of the pot can be determined accordingly. By way of example, as in the Casteel cases the non-custodial parent had an additional 50 days per year. The percentage of time is calculated as # of days / 365 days.

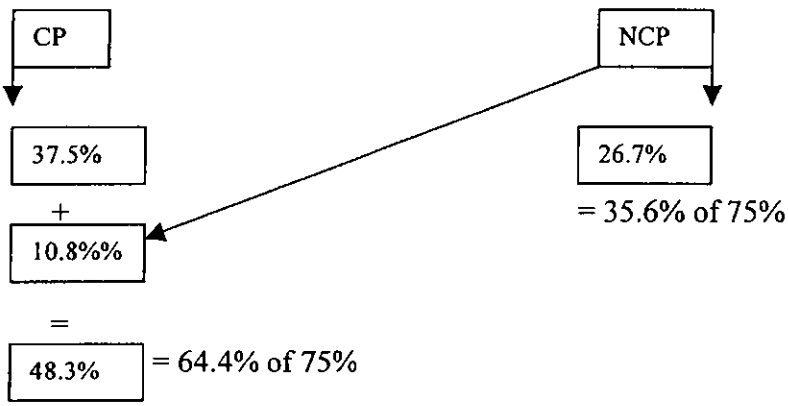
In that case the percentage is as follows:

130 / 365 = .356 or 35.60% for the non-custodial parent, and

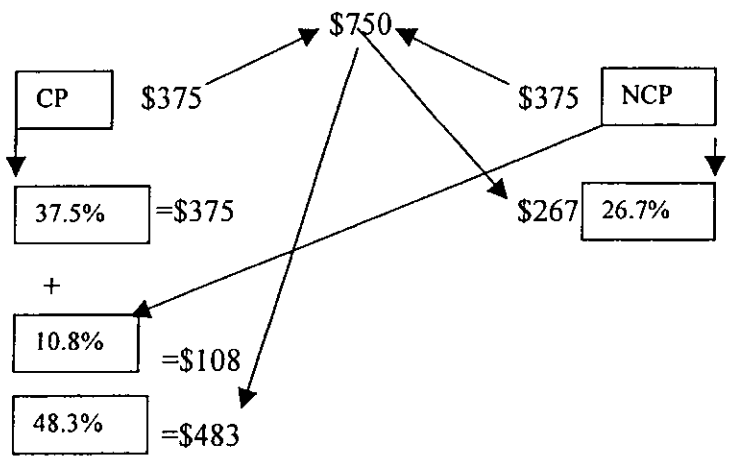
235 / 365 = .644 or 64.40% for the custodial parent.

Applying this division of parentage time, the custodial parent's percentage of the pot is $483 ($750 x .644) and the non-custodial parent's percentage of the pot is $267 ($750 x .356)

In order to determine the support obligation, subtract $267 from $375. The non-custodial parent pays the custodial parent $108 instead of the guideline amount of $210. The custodial parent then has $483 (her $375 + $108 from the non-custodial parent).



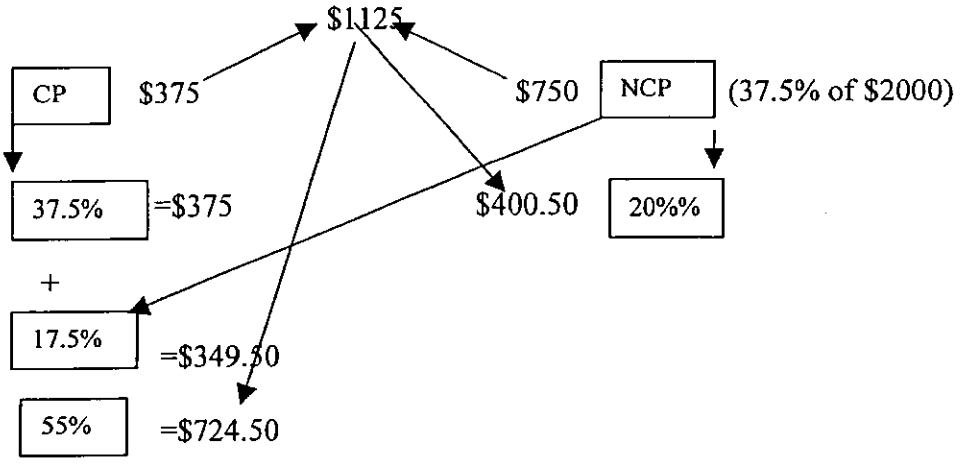
or



CP receives 64.4% of the $750 NCP receives 35.6% of $750

As income changes, this formula would also change. Already, it should be apparent that if time and income were equal and each party paid one half of all expenses

there would be no support changing hands. As we work towards a formula for more (or less) than "standard visitation" then income of both parents becomes more of a factor. If time is equal and income is not equal, then the issue becomes ensuring that each parent has the same amount of money to expend on the child during their possessory parenting time. By way of example, in the same time allocation as Casteel, if the non-custodial parent's income were double the custodial parent's income, then the allocation of the "pot" would be as follows:

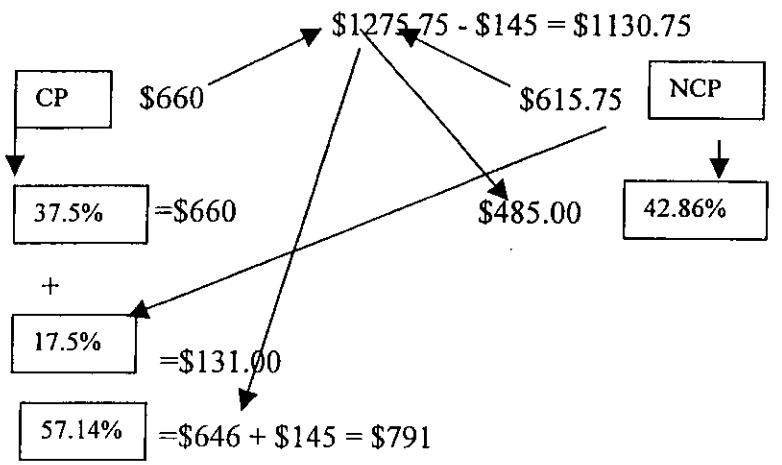


CP receives 64.4% of the $1125 NCP receives 35.6% of $1125

Note that the percentage of income from the non-custodial parent to the custodial parent changes from 10.8% when there is equal income to 17.5% when the non-custodial parent's income is double the custodial parent's. The percentage of the pot does not change. Both still pay the same percent of their net income into the pot, however, because of the differences in income, in order to effectuate the proper allocation of the pot, the non-custodial parent pays a different percentage of his income to the custodial parent. This variation occurs because the custodial parent still keeps her 37.5 % "in her pocket" while the formula actually allocates a portion of her 37.5% to the non-custodial parent.

In this case at issue the Court has determined that the Petitioner has the child 208 days per year and the Respondent 156 days per year. This equates to a percentage of .5714 for the Petitioner and .4286 for the Respondent. The Petitioner's "actual" child

support obligation is $660.00 per month. This is based on average gross monthly income of $2,166.00 per month (net income on the guideline chart of $1,760.00 per month). The Respondent's actual child support obligation is $615.75 per month based on average gross monthly income of $2,000.00 (net income on the guideline chart of $1,642.00 per month). The combined total is $1,275.75 of joint income to allocate for this child. The Petitioner testified that she buys the clothes and spends $600.00 per year and buys his school supplies and other regular school expenses not including lunches. This amount appears to be around $180.00 per year. Additionally the Petitioner maintains automobile insurance for the child at a cost of $80.00 per month. Of the $1,275.75 it appears that $145.00 per month should be allocated to the Petitioner for these expenses. The remainder of $1,130.75 should then be allocated between the parents to pay for expenses while the child is in each parent's control. The remainder of the "pot" is allocated between the Petitioner and Respondent 57.14% and 42.86% respectively. The Petitioner would receive $646.00 and plus $145.00 for a total of $791.00. The Respondent would receive $485.00. Since the Petitioner already has her $660.00 the Respondent should pay approximately $131.00 in child support in order to achieve equity as anticipated by the guidelines in this case the child support calculation is diagramed below.



CP receives 57.14% of the $1130.75 plus $145 NCP receives 42.86% of $1130.75

Each party shall be responsible for all fixed expenses including housing, utilities and food. Each party shall be responsible for school lunch when the child leaves from their home for school.

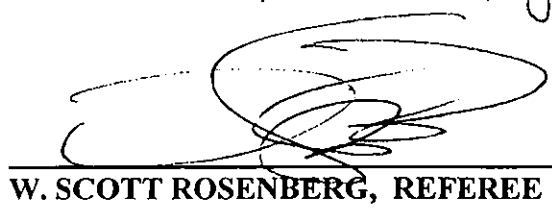
The Respondent also raised the issue of voluntary emancipation of the parties older daughter. The Petitioner testified the child left her residence in late July of 2001. The child quit school in February 2001. The child turned 18 on October 27, 2001. According to the testimony it is apparent that the Mother was no longer exercising control over the child as of late July 2001 and therefore voluntarily emancipated at that time. However, the Court declined the Respondent's request to modify child support effective that date. Pursuant to the prior child support order the Respondent paid $546.00 per month for 2 children. Upon emancipation the Respondent paid $546.00 per month for 1 child. The Court finds that it was the duty of the Respondent to seek modification. Pursuant to T.C.A. 36-5-101 (a) (5) the Court may not modify a child support order prior to the date of the filing of an action to modify. While the Court recognizes that the duty to support terminates upon emancipation. In cases such as this, where the parties have multiple children, upon termination of the child support obligation by emancipation the amount of child support set applies as the presumptive amount for the remaining child until an action to modify is filed. This approach is taken because upon emancipation it is not appropriate to just take a "step down" from 32% to 21% of the non-custodial parent's current child support obligation. Rather, upon emancipation the Court must make a reassessment of the current child support obligation for one child based on the non-custodial parent's current income. Because the Respondent did not file a Petition to Modify this Court had no way to make that reassessment. Without the Court having this ability the Court finds it would be inappropriate to now try to make any retroactive reassessment.

It is therefore, **ORDERED, ADJUDGED, AND DECREED** that: The Respondent shall pay child support of $130.00 per month in increments of $30.00 per week in the manner and method previously ordered by this Court.

All other provisions of the Orders previously entered in this matter not affected by this Order shall remain as previously ordered.

This order may be appealed to the Juvenile Court Judge by filing a request for rehearing with the Juvenile Court Clerk. This order must be obeyed until the Judge rules otherwise. ANY FAILURE TO COMPLY WITH THIS REFEREE'S ORDER IS PUNISHABLE BY CONTEMPT, FOR WHICH THE PENALTIES MAY INCLUDE A FINE AND/OR IMPRISONMENT.

ENTERED this 1st **day of** April, **2002.**



W. SCOTT ROSENBERG, REFEREE

CERTIFICATE OF SERVICE

I certify that a true and exact copy of this Order has been served upon the parties below in the manner set forth.

( ) Personal Service in Court (x) Mailing a copy to the address listed with the Court

David E. Mardis
1517 Enclove Circle
Nashville, TN 37211

Debra L. Mardis
182 Plum Nelly Circle
Nashville, TN 37211

Maximus Child Support Services Service by Mail and Faxing a copy to 726-2061
Attn: Pam Finch

This the 1st day of April, 2002.

Clerk

IN THE JUVENILE COURT OF DAVIDSON COUNTY, TENNESSEE

CHARLENE SINOR	]	File No. 46-91-89
Petitioner	]	
	]	
v.	]	Petition No. PT-22848
	]	
TIMOTHY BARR	]	
Respondent	]	TCSES No. 207726

SUPPLEMENTAL FINDINGS AND ORDER ON CONTEMPT

This cause came on to be heard on the 30th day of August, 2004 upon the petition for criminal contempt for failure to pay child support filed by the petitioner and State of Tennessee. In this cause the court has found the respondent guilty of 6 counts of contempt as outlined below. This case presented an interesting issue of proof as outlined in the court's ruling.

This case has a rather lengthy history with this Court. Paternity was established on May 3, 1989. At a subsequent hearing on May 18, 1989 child support was set at $60.00 per week with retroactive support determined to be $5,366.03. Both of these orders were the result of default hearings. On October 18, 1989 an ex parte order of attachment was issued by the court pursuant to a petition for attachment and contempt filed on October 17, 1989. That attachment was never served and the file laid dormant until another petition for contempt was filed on February 21, 2001. That second contempt petition was ultimately heard by the court on August 1, 2001 and the respondent was found guilty of 13 violations of the orders of the court and sentenced to 10 days for each of those violations for a total sentence of 130 days. The court delayed imposing that sentenced based on the respondent's compliance with the prospective orders of the court. Ultimately at a second compliance hearing on December 11, 2001

the respondent was found to be in compliance and the court deemed the 130 day sentence served.

The events subsequent to that December 11, 2001 hearing are the subject of these proceedings. On June 15, 2004 the State of Tennessee filed a third contempt petition against the respondent. In this petition the petitioner and State alleged that the respondent was "able bodied" and "capable of pursuing gainful employment". They reference the December 11, 2001 order, which is part of the court's file, that required the respondent to make child support payments of $260 per month in increments of $60 per week and payments of $108.33 per month in increments of $25 per week toward the child support arrearage. They also allege that the respondent did not make the payments as ordered as evidenced by the "Exhibit A" attached to their petition. The service copy of the petition did not actually contain the "Exhibit A". The respondent filed a motion to dismiss because of the technical deficiency of the petition. However, the petition filed with the court contained the exhibit and prior to the hearing, specifically on August 27, 2004, the State of Tennessee provided the Exhibit A to the respondent (which the respondent's counsel acknowledged). The court denied the respondent's motion because the deficiency was with the service copy and the respondent was provided with the exhibit prior to the hearing and the respondent indicated he was prepared to go forward with the trial (as opposed to a continuance in order to respond to the "Exhibit A").

In this case the State of Tennessee chose to proceed with criminal contempt (they make alternative allegations of civil and criminal contempt in their petition). The elements of proof the court must find in order for the petitioner to sustain a petition for contempt are; 1) did the respondent have knowledge of the order; 2) did the respondent

fail to make the payments as ordered and 3) was the respondent's failure to make the payments willful. Each element must be proven "beyond a reasonable doubt". The question hinges on two parts, what is "reasonable doubt" and what is "willfulness".

The first element has to do with reasonable doubt as to knowledge of the court order. So, for example, a respondent who is present for the hearing and actually hears the court's ruling can be presumed to understand the order. In such a case the petitioning party does not have to prove that element by extrinsic evidence. So, for example, it is not necessary to prove that the person understands English, that the person can actually hear, that the person understood and comprehended the words or that the person has the ability to read. For one who is present in court the mere proof of their presence in court when the court issued its order is sufficient to make a prima facie case, beyond a reasonable doubt as to this element. In a case where the order is established by default and support is set on the presumption set forth pursuant to the guidelines, the petitioner must put forth some proof of knowledge of the order. The fact that the order is mailed to the address at which the respondent is served (as evidenced by the certificate of service on the order) is generally enough to establish this fact beyond a reasonable doubt. It is not necessary to prove by extrinsic evidence that the respondent actually received the order. These are examples where the record establishes the fact of knowledge of the order. The prima facie case is made out generally by the record, not extrinsic evidence. If the respondent intends to claim that they did not have actual knowledge of the contents of the order because, for example, the respondent is unable to read and did not understand the order or that the respondent did not reside at the address to which the order was mailed, the

respondent must affirmatively assert that defense. This is not an improper shifting of the burden of proof.

The second element has to do with whether the payments were made. Because of the innovations with centralized collection and prohibitions against direct payments this element is typically proven by the introduction of the official state payment records.

The third element pertains to whether the respondent willfully failed to make the payments. In the context of a child support criminal contempt case the issue is whether the respondent had the ability to pay when the payments were missed. Ability to pay can be a subjective test. So, for example, when a person is unemployed and fails to make the payments the question becomes whether that person was able to work. If the court only looks to actual employment in its determination then "willfulness" becomes completely subjective. One who wants to avoid the court order would merely choose not to work and therefore the failure to pay would not be willful. Rather, the court looks at the issue of willfulness not from a subjective but more objective viewpoint. Willfulness has to do with what one is able to do, not the actual choice the person makes. Willfulness has to do with one's ability to work, not whether or not one actually works.

The element of willfulness also has degrees. One who is able to work and says he has not been able to find any work for 6 months may have a different level of willfulness from one who actually works, has income and still does not comply with the order. Even more so, one who works and evidence is presented that the person specifically said that they would not comply with the order has even a further degree of willfulness.

The willfulness test with regard to ability to earn focuses solely on whether one is or is not able to comply with the order. Reasonable doubt with regard to willfulness has to do with whether the person had the objective inherent ability to comply with the order. Once that fact is established the "degree" of willfulness must be determined by the court and factored into the disposition of the contempt. This principle was recently reiterated by the Tennessee Court of Appeals in the case of *State v. Wood*, 91 S.W.3d 769 (Tenn. App. 2002) wherein they cited the United States Supreme Court decision in *United States v. United Mine Workers of America*, 300 U.S. 258 at 303 (1947). The court pointed out the factors set out by the United States Supreme Court that should be considered in reviewing a contempt sentence and quoted the opinion as follows:

> [T]he trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, he seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest , and the importance of deterring such acts in the future."

In this case the proof was uncontroverted with regard to the first element. The respondent was present in court during the prior proceedings in 2001 when he was found guilty of contempt for failing to pay child support. He complied with the terms of the order during the probationary period and his sentence was deemed served. He clearly knew of the order and his responsibilities imposed by that order. The second element was also uncontroverted. The pay records submitted during this hearing, Exhibit 1, clearly laid out what payments were made since the December 11, 2001 hearing. Those records clearly indicate that the respondent did not make any payments during October

2003, November 2003, December 2003, January 2004, February 2004 and March 2004. This present petition was dated as of March 24, 2004. The records also showed no payments until August 19, 2004; however, because the petition only alleged contempt through March 24, 2004 the court did not consider any other missed payments after that date with regard to the contempt allegations. The third element is controverted.

The proof presented at trial was very sparse. The essence of the hearing primarily pertained to the pay records. During the hearing the only witness called was Charlene Sinor, the petitioner and custodial parent. The only physical evidence presented was the pay records. The petitioner testified that she had no additional information regarding the respondent's ability to work or actual work he has performed since the 2001 contempt hearing. During her testimony she referred back to exhibits entered at the August 1, 2001 hearing. Specifically she referred to Exhibits 1 and 2 indicating that the respondent was self employed in the home painting business. That evidence was the basis for the findings of contempt at the prior hearing. The petitioner testified that she contacted the respondent in May or June of 2003 seeking help in raising their child. She was having difficulties with the child and requested that the respondent take the child for a period of time. She said that the respondent refused her request. She testified that she never contacted the respondent when payments stopped in September of 2003 and had not contact with him through the filing of the petition. From September of 2003 until March 2004 there was no specific evidence that the respondent could or could not make these payments. There was no proof presented for this period. The respondent chose not to testify in this proceeding as he invoked his 5th amendment privilege. Counsel for the respondent argues that the petitioner has the burden of putting on *specific proof* that the

respondent had the ability to work and pay during the 6 months during which no payments were made. Counsel for the State of Tennessee argues that the court can rely on its prior findings of the respondent's ability to pay and that no specific proof for this period of time is required. For the reasons further elaborated the court agrees with the counsel for the State of Tennessee.

A case of criminal contempt differs from other criminal proceedings. This distinction has been noted in numerous Tennessee opinions. While the rights of the respondent are the same and the burden of proof is the same in a criminal proceeding as they are in a criminal contempt proceeding there are many distinctions. For example, respondents in criminal contempt proceedings are not afforded the right to a jury trial. In a criminal proceeding a complaint is filed against an individual alleging violation of a criminal statute. The action rests solely on the allegations in the complaint. The action is not related to any other court proceedings. A contempt proceeding is sui generis and is considered incidental to the case out of which it arises and often stems from an underlying proceeding as noted by the Tennessee Supreme Court in the recent decision of *John Doe. v. Board of Professional Responsibility of the Supreme Court of Tennessee*, 104 S.W.3d 465 (Tenn. 2003). A criminal proceeding starts with nothing and the case has to be established fact by fact. A criminal contempt proceeding starts with a court history involving findings and orders that have not been challenged. Therefore, the starting point is different. It would be a ridiculous proposition to suggest that the court turn a blind eye to its prior findings in assessing the issue of contempt. So, for example, as mentioned before, the mere reference to the prior order is generally sufficient to prove knowledge of the order. The petitioning party does not have to reestablish service of

process, presence of the respondent, or receipt of the prior court order by extrinsic evidence. As noted before, there is, if you will, a "presumption" that one who is present in court who is given or mailed a copy of an order, has knowledge of the contents of the order. That "presumption" then shifts the burden to the respondent to put on proof that he or she did not have knowledge of the order. Once sufficient proof is taken that would create a reasonable doubt that the respondent had knowledge of the order the petition is defeated.

Likewise, the court can rely on the prior findings of ability to earn. In the prior contempt proceedings, on August 1, 2001, the court reiterated the findings from 1989, that the respondent was able to pay support of $260 per month. This amount of support translates on the guidelines to around $8.40 per hour. The evidence of payments during his 130 day probationary period further supports this finding. Additionally, after that case concluded the respondent continued making payments in line with those prior findings. It was not until September 2003 that the payments ceased abruptly and completely with no payments being made during the following 6 months. This finding remains unchallenged to this day. The respondent has never filed a petition to modify his support. No evidence was presented at trial indicating that the respondent was unable to make the payments. The petitioner had no specific evidence as to any employment or income as the respondent has traditionally been self employed as a house painter. The respondent chose not to testify in this proceeding as he invoked his 5th amendment privilege. Therefore, the prior findings remain unchallenged and uncontroverted.

Counsel for the respondent claims that this is an improper shifting of the burden of proof. The court is not persuaded by this argument. The issue of proving income and

ability to earn has long presented problems in child support cases. In the matter of *Kirchner v. Pritchett*, 1995 WL 714279 (Tenn. Ct. App.) the Tennessee Court of Appeals recognized this unique problem. They noted that the Tennessee courts have consistently held that parties seeking relief have the ultimate burden of proof and that this burden never shifts. However, they noted professor Wigmore's analysis that the most important consideration to be kept in mind is that the burden of producing evidence should be place on the party who presumably has primary control over or knowledge of the evidence. In applying this analysis the court ruled that:

> "The risk of failure or inability to produce evidence of the noncustodial parent's income and expenses should not fall on the custodial parent. This information is within the noncustodial parent's control. Thus, if the noncustodial parent has failed or refused to produce evidence of his or her income prior to the hearing, the burden of producing satisfactory evidence of income and expenses should be placed on the noncustodial parent—the party most able to provide it."

Applying this same logic to a contempt proceeding for failure to pay child support, the court finds that, because the burden of providing proof of income is on the non-custodial parent, the court can rely on its prior findings *until the non-custodial parent produces evidence to contradict the prior findings.* This is not an improper shifting of the burden of proof or an interference with the presumption of innocence.

While the court can find no specific Tennessee authority on point, the court references the case of *Bowen v. Bowen*, 471 So.2d 1274 (Fla. 1985). This case involved similar issues of proof. In this case the Florida Supreme Court found that;

> "[I]n such a proceeding, the movant must prove, beyond a reasonable doubt, that the defendant willfully violated the court order. The movant, however, has the benefit of a presumption that the defendant has had the ability to pay the ordered support or alimony by reason of the prior judicial determination. This presumption, of course, places the burden on the defendant to come forward with evidence to show that, due to circumstances beyond his control, he had no ability to pay. We reject the argument that his presumption improperly infringes upon a criminal contempt defendant's Fifth Amendment privilege.... This type of required response has been approved in other criminal matters...(statutory inference that a person proved to be in possession of recently stolen property knew or should have known that the property was stolen)."

Harmonizing these two cases, the court is of the opinion that because the respondent in this matter uniquely possess the ability to prove his income the court can rely on the prior finding of ability to earn and carry that finding forward into a contempt proceeding until rebutted by the respondent.

This situation must also be viewed from another perspective. It is a generally accepted principle that one who does not work does not eat. The court must have reasonable doubt as to the respondent's ability to earn. The court can use common sense to determine that someone cannot go for six (6) months without an ability to earn and continue to survive without some way to obtain food and shelter. The court records reflect that the respondent was served at the same address with this contempt petition as he lived at the last time he was in court in 2001. The State had no evidence as to who owns this residence, but the court can, with a little common sense, deduct that the respondent has the same roof over his head now as he did in 2001. The residence must

be either paid for (denoting equity) or payments are being made (denoting income from some source to make the payments) or the residence is being provided to the respondent at no cost to him by some unidentified third party (denoting that none of his income or resources were utilized in providing the shelter). In this case the court would have to believe that for 6 months the respondent had no resources or ability to earn and that he only survived by the good graces of some unidentified person.

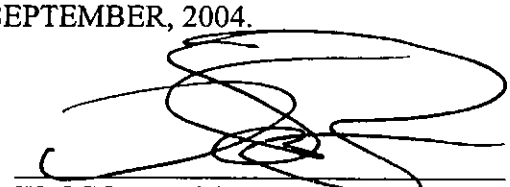
Counsel for the respondent argues that the court must start with a clean slate and that the petitioner must prove that the respondent specifically was able to pay during the period of non payment. This position is not tenable because it would require, in essence, an inference that the respondent could not work. Again, applying simple logic, the respondent had to eat and have shelter. Those items cost money. Those monies are either earned, in the possession of or provided to the respondent. If provided it is because the respondent chose not to work or cannot work. If the respondent chose not to work he still had the ability, therefore, the only option left is that he could not work. Absent specific evidence the court must start somewhere; either he worked, had the ability and chose not to work or could not work.

The flaw in the respondent's argument is that the presumption of innocence afforded criminal defendants does not mean that the court cannot use prior findings and the court record as a starting point for the hearing. A presumption of innocence does not mean, in the context of a child support contempt proceeding, a presumption of an inability to work. That is the essence of the respondent's argument. Rather, the presumption of innocence in a child support contempt proceeding is a presumption that the respondent complied with the order until proven otherwise.

For the forgoing reasons the court finds the respondent guilty of 6 specific violations of the orders of this court as previously outlined. In accordance with the guidance provided by the United States Supreme Court in United States v. United Mine Workers of America, supra as noted by our Court of Appeals in State v. Wood, supra, the court sentences the respondent to 10 days for each violation to be run consecutively. However, the court suspends the sentence upon the respondent's compliance with the terms of the order as the court finds this to be the least sever measure necessary to achieve the purpose for which the sentence is imposed.

IT IS ACCORDINGLY ORDERED.

ENTERED THIS 14th DAY OF SEPTEMBER, 2004.



W. SCOTT ROSENBERG, REFEREE

CERTIFICATE OF SERVICE

I certify that a true and exact copy of this Order has been served upon the parties below in the manner set forth.

( ) Personal Service in Court (x) Mailing a copy to the address listed with the Court

Mike Urquhart
20 Academy Place
Nashville, TN 37210

Timothy Barr
1441 Central Pike
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Pleasantview, TN 37146

Lisa Cowan
222 Second Ave. North Ste. 600
Nashville, TN 37201

Kyle Marquardt
222 Second Ave. North Ste. 600
Nashville, TN 37201

This the 14 day of September, 2004.

Paula Morgan

Paula Morgan, Deputy Clerk