

**The Governor's Council for Judicial Appointments**

**State of Tennessee**

***Application for Nomination to Judicial Office***

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Crockett County

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**INTRODUCTION**

The State of Tennessee Executive Order No. 54 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website [www.tncourts.gov](http://www.tncourts.gov)). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to [ceesha.lofton@tncourts.gov](mailto:ceesha.lofton@tncourts.gov).

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

**PROFESSIONAL BACKGROUND AND WORK EXPERIENCE**

1. State your present employment.

Attorney/Owner with The Davis Firm, Alamo, TN

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 law in Tennessee in 2007. My bar number is 026265

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.

I am licensed in Tennessee since 2007 and my license is currently active.

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

No.

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

Upon completion of the Tennessee Bar Exam, I worked for The Perry Firm, a law firm in Brentwood, Tennessee. My work at The Perry Firm consisted primarily of the following:

- Insurance Defense: Litigated Insurance Defense Cases for State Farm.
- Employment Law: Litigated employment law cases for clients.
- Personal Injury: Litigated Personal Injury Cases for Clients.
- Family Law: Litigated Divorces, Adoptions, and Juvenile Issues.
- Wills and Estates: Prepared wills and estate plan for high net worth clients. Probated Estates.
- Business Law: Prepared detailed business plans, documents, litigated contract cases, prepared Limited Liability, Corporation, and Partnership documents.

In 2009, I was asked by Stephen Fincher to move home and work on Stephen Fincher's Campaign for the United States Congress. My work there consisted primarily of the following:

- Drafted policy papers for the campaign winning support from various advocacy groups.
- Developed and executed opposition research on opponents in the Primary and the General Election; worked closely with State Senators and State Representatives to obtain research on General Election opponent;
- Developed and executed campaign message, prepped candidate, wrote speeches, debate prep.
- Managed aggressive fundraising activities.
- Hired and managed interns

In 2010, I worked as a Legislative Assistant for Congressman Stephen Fincher in Washington D.C. My work primarily consisted of the following:

- Provided legislative advice on numerous issues including Taxation, Healthcare, Financial Services, Swaps, Futures, Derivatives, Judicial, Regulatory Issues, Agriculture, Transportation, Social Security, Medicare, and Budget.
- Prep Member on legislative proposals for floor votes and bill co-sponsorships.
- Produced, managed and executed legislative concepts and proposals.
- Developed, drafted, and executed strategies to implement the Congressman's policy and political goals by building and developing diversified partnerships and coalitions with other Members, select Committees, third party groups, and industry leaders.
  - H.R. 3606, the *Jumpstart Our Business Startups (JOBS) Act* collaborated with industry and Leadership staff to accelerate passage of legislation, which passed the House and Senate and was signed into law on April 5, 2012.
  - H.R. 1341, the *Financial Competitive Act of 2013*: collaborated with Industry and Leadership to accelerate passage of legislation, to study the differences between the United States and other jurisdictions in implementing the derivatives credit valuation adjustment capital requirement
  - H.R. 1287, *Sound Science Act of 2013*: moved legislation through Committee and Leadership staff to include this legislation as part of the Farm Bill that passed the House
  - H.R. 4392, the *Energize Emerging Opportunities Act*: moved legislation through Committee and Leadership staff to include this legislation as part of H.R. 4413, the Commodity and Futures Trading Commission Reauthorization Act that passed the House
  - H.AMDT.953 to H.R.4413: moved legislation through the Committee and Leadership staff to pass this Amendment as part of H.R. 4413, the *Commodity and Futures Trading Commission Reauthorization Act* that passed the House
  - H.R. 4789: To amend the Internal Revenue Code of 1986 to make the deduction for State and Local general sales taxes permanent.
  - H.R. 4764: *Verify it Act*: Amends the Internal Revenue Code to prohibit a federal agency from notifying the Secretary of the Treasury of any past-due

legally enforceable debt until such agency: (1) notifies by certified mail the person owing such debt that the agency proposes to notify the Secretary of the debt and gives such person at least 60 days to present evidence that such debt is not past due or legally enforceable, (2) considers such evidence and determines that an amount of such debt is past-due and legally enforceable, and (3) satisfies any other conditions the Secretary may prescribe to ensure that the debt is valid and that the agency has made reasonable efforts to collect such debt.

- H.R. 4728: *Certify it Act*: Directs the Comptroller General (GAO) to study the impact of the Patient Protection and Affordable Care Act (PPACA) on small businesses and the Office of the Actuary, Centers for Medicare & Medicaid Services, to study the Act's impact on small group health insurance costs. Declares that, if GAO or the Office of the Actuary reports to Congress that PPACA has caused either net employment loss amongst small businesses or small group health insurance costs to rise, certain PPACA assessments that may be imposed on employers for failing to offer their full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage shall not apply for a specified one-year period.

Declares further that, if GAO or the Office fails to submit such a report in accordance with specified timelines, such assessments shall not apply during the following calendar year.

- H.R. 4392: *Energize Emerging Opportunities Act*: Directs the Commodity Futures Trading Commission (CFTC) to amend regulations regarding criteria qualifying certain registered commodity pool operators for exemption from requirements for specified risk disclosures, performance disclosures, periodic reporting, annual reporting, and recordkeeping. Alters one criterion for qualification for such exemptions currently granted to: (1) registered commodity pool operators who sell participations in a pool solely to qualified eligible persons in an offering which qualifies for exemption from the registration requirements of the Securities Act, and (2) certain banks registered as commodity pool operators in connection with a pool that is a collective trust fund whose securities are exempt from registration under the Securities Act.

Repeals the current additional criterion for such banks that the securities must be offered or sold, without marketing to the public, solely to qualified eligible persons. Replaces such criterion with one stating simply that the securities must be sold solely to qualified eligible persons. (Thus, eliminates the requirement that such securities be offered or sold without marketing to the public, and so allows such marketing.)

Repeals the current prerequisite for exemption of interests in a commodity pool from registration under the Securities Act of 1933 that such interests be offered and sold without marketing to the public in the United States. Requires such interests, instead, simply to be offered and sold pursuant to specified requirements for exempted transactions. (Thus, also eliminates the requirement that such interests be offered and sold without marketing to the public in the United States, and so allows such marketing)

- H.R.3623 *Improving Access to Capital for Emerging Growth Companies Act*:

Amends the Securities Act of 1933 (Act) to reduce from 21 to 15 the number of days before a "road show" that an emerging growth company (EGC), before its initial public offering (IPO) date, may publicly file a draft registration statement for confidential nonpublic review by Securities and Exchange Commission (SEC) staff.

(A financial "road show" is an offer [other than a statutory prospectus or a portion of one] that contains a presentation regarding an offering by one or more members of the issuer's management and includes discussion of one or more of the issuer, such management, and the securities being offered.

Typically, a road show is a series of meetings across different cities, often before an IPO, in which top executives from a company have the opportunity to talk with current or potential investors.)

Prescribes a grace period during which an issuer that was an EGC at the time it filed a confidential registration statement for confidential SEC review, but is no longer one, shall continue to be treated as one.

Authorizes an EGC, within one year of its IPO, to submit confidentially to the SEC a draft registration statement for any securities to be issued subsequent to its IPO (follow-on offerings) for confidential nonpublic review by SEC staff before publicly filing a registration statement, if the initial confidential submission, including amendments, is publicly filed with the SEC within two days before it issues those follow-on offerings.

Amends the Jumpstart Our Business Startups Act to direct the SEC to revise its general instructions on Form S-1 to prescribe conditions under which a registration statement that is filed by an issuer (or submitted for confidential review) before its IPO may omit financial disclosure information for historical periods otherwise required

- H.R.3409: *National Wildlife Refuge Expansion Limitation Act of 2013*: Amends the National Wildlife Refuge System Administration Act of 1966 to prohibit the Secretary of the Interior from expanding any national wildlife refuge, except as expressly authorized by a law enacted after January 3, 2013.
- H.R. 3126: *Healthcare Fairness Act of 2013*: Amends the Patient Protection and Affordable Care Act to prohibit the expenditure of federal funds to pay any portion of the premium for a health plan purchased by a Member of Congress pursuant to the Act.
- H.R. 3074: *IRS Abuse Protection Act of 2013*: Amends the Internal Revenue Code to require the Secretary of the Treasury to provide written notice to a taxpayer any time such taxpayer's account, tax return, or return information is accessed by the Department of the Treasury. Requires such notice to include: (1) who accessed such information, (2) the purpose for which such information was accessed, (3) how much information was accessed, (4) a copy of all information accessed, and (5) a notice of taxpayer rights. Prohibits the Secretary from providing access to or disclosing taxpayer information to a state entity conducting an investigation until such entity agrees to notify the Secretary, within one year after the investigation is closed, of the identity of who accessed such information, what was accessed, and why and how such information was accessed.

- H.R. 3021: *IRS Employee Responsibility Act of 2013*: Makes an officer or employee of the Internal Revenue Service (IRS) personally responsible for payment of any awards or costs of litigation arising from official actions taken by such officer or employee that a court finds were in violation of law, vexatious, frivolous, or in bad faith unless such court finds special circumstances that would make an award unjust. Requires the Inspector General for Tax Administration of the Department of the Treasury to notify a taxpayer of an investigation by the Inspector General of any unauthorized use of a taxpayer's account, tax return, or tax information and provide full access to any report with respect to such investigation.
- H.R. 2156: *Claims Licensing Advancement for Interstate Matters Act or CLAIM Act*: Urges the National Association of Insurance Commissioners (NAIC) to: (1) adopt a model independent claims adjuster licensing Act meeting specified criteria, and (2) adopt and administer a multi-state examination for an independent claims adjuster seeking to adjust claims in a jurisdiction other than his or her home state.  
 Authorizes the NAIC to prescribe examinee eligibility requirements, and requires any multi-state examination to require adjusters to demonstrate essential competence with cross-jurisdictional legal and regulatory concepts. Declares that nothing in this Act shall be construed to: (1) require a state to adopt licensing requirements for independent claims adjusters if it does not have such requirements; (2) limit the right of a state to establish licensing fees or enforce its laws regarding the adjusting of insurance claims, provided that such a fee is uniform regardless of the licensee's state of residence; or (3) affect the jurisdiction and authority of a state insurance regulator to prescribe and enforce its insurance laws, rules, and regulations governing independent claims adjuster activity in its jurisdiction.  
 Sets forth criteria for state compliance with this Act, including reciprocity. Authorizes an independent claims adjuster meeting the requirements of this Act to ascertain, determine, negotiate, or settle a claim in a state that is not in compliance with this Act, but only if the adjuster: (1) holds a valid license in his or her home state, and (2) has passed any multi-state examination established and administered by the NAIC.  
 Prohibits a state from imposing additional requirements upon such an adjuster. Authorizes an independent claims adjuster meeting the licensure and examination requirements of this Act to adjust claims for losses related to any presidentially-designated major disaster, regardless of the licensure requirements of the state where the disaster is located.
- H.R. 1779: *Preserving Access to Manufactured Housing Act of 2013*: Amends the Dodd-Frank Wall Street Reform and Consumer Protection Act to revise the exclusion from the meaning of "mortgage originator" of any employee of a retailer of manufactured homes who does not for compensation or gain take residential mortgage loan applications, for compensation or gain offer or negotiate terms of a residential mortgage loan, or advise a consumer on loan terms (including rates, fees, and other costs).  
 Excludes from the meaning of "mortgage originator," instead, any retailer of

manufactured or modular homes or its employees unless the retailer or its employees receive compensation or gain for engaging in certain activities in excess of any compensation or gain received in a comparable cash transaction. Amends the Truth in Lending Act to revise the definition of "high cost mortgage.

- H.R. 1221: *Basel III Capital Impact Study Act*: Directs the federal banking agencies (the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation [FDIC]), prior to issuing any final rule amending the agencies' general risk-based capital requirements for determining risk-weighted assets and minimum regulatory capital ratios as proposed in certain June 2012 notices of proposed rule making, to study and report regarding the impact of the approaches on the minimum regulatory capital requirements of insured depository institutions and insured depository institution holding companies.

Requires the banking agencies to separately identify provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) that affect capital quality, capital levels, asset quality, and the risk management activities of insured depository institutions and insured depository holding companies and take into consideration the impact of such provisions. Specifies Dodd-Frank provisions to be included.

Permits the banking agencies to solicit participation in the study from insured depository institutions and insured depository institution holding companies on a voluntary basis.

Amends the International Lending Supervision Act of 1983 to revise capital adequacy requirements by directing the banking agencies to seek to ensure that any differences in rules implementing the capital standards do not: (1) give competitive advantages to any class or group of institutions unless otherwise required by federal law, or (2) undermine Dodd-Frank requirements for enhanced supervision and prudential standards.

- H.R. 3213: *Small Company Job Growth and Regulatory Relief Act of 2011* - Amends the Sarbanes-Oxley Act of 2002 to revise the small issuer exemption from the requirement that each registered public accounting firm that prepares or issues the audit report for a securities issuer attest to, and report on, the issuer's management assessment of the effectiveness of its internal control structure and procedures for financial reporting. Specifies that this requirement shall not apply to an issuer that has a total public float for the relevant reporting period of less than \$350 million.

Prohibits this Act from being construed to relieve or exempt an issuer from the internal control reporting and assessment requirements of the Sarbanes-Oxley Act of 2002, or from its requirement that officers of the issuer certify certain annual and quarterly reports.

- Established and executed strategies to implement Congressman's regulatory oversight goals of agencies
  - Developed strategy, built a diversified coalition and defeated the Environmental Protection Agencies (EPA) proposed SPCC rules for farms, Particulate Matter part per billion rules for rural areas, and Crop Insurance payment rules



- regarding flooding created by manmade activities.
- Developed and executed strategy, which directly led to the IRS settling in several constituents' claims.
- Developed and implemented strategy which led to the USDA releasing several hundred thousand dollars in disaster relief funds directly to family farms.
- Developed external messaging and prepped Member and staff to swiftly respond to constituents.
- Managed and developed tactical messaging strategies including: drafting op-ed articles, mass e-newsletters, speeches, and Power Point presentations.

In 2015, I moved to Nashville, TN, where I worked at the Cole Law Group in Brentwood, TN for three months before deciding to move to West Tennessee and open my own firm. While at the Cole Law Group, my work consisted of personal injury, employment law, and family law.

In 2015, I moved home to Alamo, TN and opened The Davis Firm. My work here has primarily consisted of the following:

- Produced and executed comprehensive tax planning for family farms.
- Produced and executed comprehensive tax and business planning for multiple rental properties.
- Personal Injury: Litigated Personal Injury Cases for Clients.
- Family Law: Litigated Divorces, Adoptions, and Juvenile Issues.
- Wills and Estates: Prepared wills and estate plan for high net worth clients. Probated Estates.
- Business Law: Prepared detailed business plans, documents, litigated contract cases, prepared Limited Liability, Corporation, and Partnership documents.
- Property Law: Represented clients in Easement cases, argued before the State of Tennessee Court of Appeals on an Easement case, closed numerous homes and loans, and drafted numerous deeds.

In 2018, I ran David Livingston's successful Campaign for Haywood County Mayor. My work here primarily consisted of the following:

- Advised candidate on election law and ensured the campaign was in compliance with all rules, regulations, and laws.
- Managed entire campaign operation: Budget, Public Relations, Media, Political Operations, Social Networking, Volunteer Operations, Donor Cultivation, Speech Writing, Scheduling, Coalition Building, and Get Out the Vote.
- Developed and implemented campaign strategy: Drafting all Campaign Letters, Campaign Slogan, Campaign Signs, and Speeches.
- Debate Prep and Strategy.
- Secured Victory in a seat not held by Republicans in 148 years in a minority-majority county with 39.34% of the vote.

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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.
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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.

<p>My current practice consists primarily of tax issues (25%), estate planning and administration (35%), business and transactional law (20%), family law (5%), personal injury (5%), property law (5%), Charitable Organizations (3%), and Social Security disability claims (2%). My cases involving tax issues, include but are not limited to, working with businesses to develop strategies limit tax exposure and maximize profit margins. Another part of my tax practice involves representing individuals or businesses who are being audited or have been assessed penalties and fines by the Internal Revenue Service. Also, I represent charitable organizations in obtaining their 501 (c) 3 status and educate nonprofits on how to file the correct forms each year with the Internal Revenue Service. My estate planning cases involve creating Revocable and Irrevocable Trusts, Asset Protection Trusts, Miller Trusts, Tennessee Community Property Trusts, Wills, gift-giving planning, life estates, Power of Attorneys for Finance and Healthcare, and Living Wills. I work with clients and their accountant and financial advisors to develop and implement a strategy that maximizes my client's goals and preserves their assets for future generations. My business and transactional cases involve corporate and limited liability (llc) company formation documents, real estate transactions, working under the North American Free Trade Agreement rules to secure Non-immigrant status for Canadians working for a large West Tennessee company, drafting contracts, defending or acting as the Plaintiff in contract dispute cases, lease negotiations, and asset purchases. My family law cases include representing clients in divorces and divorce related issues, adoptions and custody issues. My personal injury cases involve representing clients who have been injured in automobile accidents, slip and fall cases, and defending businesses and individuals who are defendants in lawsuits. My property law cases involve representing clients in easement dispute issues, landlord tenant issues, and preparing deeds. My Social Security disability cases involve representing clients who are filing for Social Security disability from the initial stage of filing the application through all appeals, including appearing in front of the administrative law judge.</p>
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8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory

matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

I dedicate the largest amount of time to creating estate plans for clients. My estate planning practice encompasses many areas of the law, including but not limited to, the rules and regulations for Tennessee's Estate Recovery Program under Medicaid, Community Property Trusts, creating Medicaid Asset Protection Trusts, Life Insurance Trusts, Revocable Trusts, Irrevocable Trusts, Miller Trusts, gift planning, Family LLC's, as well as all other tools available to avoid probate, such as life estates. I have also represented clients in Will Contests in the Chancery Court for Crockett County, Tennessee and I have probated Wills in Chancery Courts in Middle and West Tennessee.

As part of my tax practice, I advise businesses on strategies to minimize their tax liabilities and increase profits. As such, I work with clients to start a business, create all business formation documents and advise on the positive and negatives of different business structures. I advise existing businesses on strategies to limit their tax exposure. I have created organizing documents for S-Corps, LLC's, Family LLC's, and Partnerships.

I represent a trucking company that operates in multiple jurisdictions. As such, I spend a large amount of time on regulatory compliance issues, tax issues in multiple states, contract and asset purchase agreements, and licensure issues for the trucking industry. As part of my regulatory compliance practice, I stay up to date on new rules and regulations promulgated by the Federal Motor Carrier Safety Administration.

I work with a large corporation in West Tennessee that has employees from Canada. As such, I have represented my client to the U.S. Customs and Border Control to ensure that the non-immigrant status provisions of the North American Free Trade Agreement (NAFTA) are complied with.

My charitable organizations practice consists of filing organizing documents with the State of Tennessee, developing and implementing by-laws, holding the first meeting of the board of directors, drafting mission statements, organizing and filing applications and related documents with the IRS, organizing and filing documents with the Tennessee Attorney General's Office, advising on grants and fundraising opportunities, and providing continued legal assistance as needed.

I have represented non-profit organizations in cases involving excess benefit penalties against the IRS.

As part of my tax practice, I spend a large amount of time researching the Internal Revenue Code, Treasury Rules and Regulations, Tax Court Opinions, and Legislative History.

Another area of my practice is family farms. I work with family farms to develop strategies to

minimize personal liabilities. I advise family farms on how they should organize their business to maximize amounts received under the Farm Service Administration. I have represented farming operations in Haywood County Chancery Court.

As part of my business practice, I have represented clients in contract dispute cases, property damage cases, and Tennessee Consumer Protection Act cases in courts across Middle and West Tennessee.

I have appeared and represented clients in The Tennessee Court of Appeals Western Division representing a client in a property dispute. I have appeared in numerous General Sessions, Chancery, and Circuit Courts in Middle and West Tennessee in a variety of property cases.

I have appeared and represented clients for Social Security disability claims in front of the Administrative Law Judge.

A large area of my practice in Williamson County, Tennessee was representing State Farm Mutual Insurance Company in insurance defense cases. As the attorney for the defendant, I have taken several depositions of Plaintiffs, medical doctors, and witnesses. Also, I appeared in numerous courts with motions across Middle Tennessee, participated in jury and bench trials, and represented clients in numerous mediations.

I have represented clients in contested and uncontested divorces, taken depositions in contested divorces, appeared in numerous courts across Middle Tennessee on motions, and represented clients in several mediations.

Further, I have represented clients in terminating parental rights, child custody issues, and adoptions in Chancery Courts in Middle and West Tennessee.

I was appointed Guardian Ad Litem for several cases in Williamson County, TN where I would appear in court as necessary. I have, as Guardian Ad Litem, opposed granting a Conservatorship and appeared in Williamson County Chancery Court to present my evidence.

I have represented clients in several General Sessions and Circuit Court bench trials in Williamson County and West Tennessee in tenant removal actions.

I have represented clients in home loan closings and refinances.

I have represented several clients in DUI cases in Middle and West Tennessee Courts.

My work in Washington D.C. consisted of the following:

- drafting legislation;
- drafting speeches;
- drafting policy papers;
- drafting weekly emails to constituents;
- drafting the Congressman's response to questions from the media;
- drafting the Congressman's response to constituent mail;
- organized Advisory Boards;
- provided the Congressman with bill summaries and vote recommendations for all committee and floor votes;
- represented the Congressman in meetings in Tennessee and Washington D.C.; and,
- drafted and organized other Member offices to support delaying, modifying, or

preventing regulatory rules from going into effect including the Spilled Milk rule, the SPCC rule for farms, and rules dealing with particulate matter.

Further, I represented constituents' interests to multiple government agencies. Including but not limited to the following:

- represented several constituents against the IRS to settle tax claims;
- worked with several family farms to secure disaster relief from the USDA, including over \$400,000.00 for a farm in Tipton County;
- worked with several constituents to settle claims brought by the EPA relating to the Superfund;
- secured H-2B visas for seasonal workers;
- advocated for and secured the support from the U.S. Trade Representative for Vietnam to pressure the Vietnam textile industry to pay US cotton brokers under the terms of the original contracts;
- worked with U.S. Customs and Immigration to secure entry of trucks containing perishable goods;
- represented constituents to the Social Security Administration to secure disability awards;
- represented constituents to the FDA to secure permission for life saving drugs;
- worked with the US Department of State to secure adoptions for families in West Tennessee;
- worked with state and local elected officials to achieve economic development funds and grants;
- worked with individuals and organizations to secure grants; and,
- worked with economist Art Laffer to secure support from State Representatives, State Senators, and Governor Bill Haslam to phase out Tennessee's Estate Tax.

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

I have represented clients in one case in which a petition for writ of certiorari was filed with the United States Supreme Court. The petition was denied.

I was the main client contact, provided research, and provided drafting assistance for the brief to the U.S. District Court, the 6<sup>th</sup> Circuit Court of Appeals, and the United States Supreme Court for the following cases:

- *Becky Matheny, Individually and as Surviving Spouse of Ronald Matheny, Deceased, Plaintiff v. Tennessee Valley Authority v. Johnna Lawrence, Thomas Lawrence* 523 F. Supp. 2d 697 (M.D. Tenn. 2007) (wrongful death lawsuit arising out of a tugboat accident in the Cumberland River and a *Limitation of Liability Act* case against TVA);

and,

- *Becky Matheny v. TVA*, 557 F. 3d 311 (6th Cir. 2009) (appeal from wrongful death lawsuit arising out of a tugboat accident in the Cumberland River and a *Limitation of Liability Act* case against TVA).

My responsibilities included researching Federal Maritime Law cases, researching the *Limitation of Liability Act*, the rules and regulations for safe tugboat operation in public waters, the safety rules and regulations for tugboat Captains and employees, and researching Supreme Court cases relevant to boating accidents, limitations of liability for governmental entities, and damage awards.

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.

Not applicable.

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

From 2007 to 2009 I was appointed by the Chancery Court of Williamson County to serve as Guardian Ad Litem on numerous cases involving conservatorship petitions. These petitions consisted mostly of adults who were suffering from dementia or Alzheimer's. As part of my duties as the GAL, I would interview the petitioners, family members, medical doctors, home health personal if applicable, inspect the living conditions of the conservatee, and interview the proposed conservatee. Following the interviews and investigation, I would make my recommendations to the Chancery Court. The recommendations included the following: should there or should there not be a conservatorship granted, if a conservatorship is warranted--who the conservator should be, and appear at any hearing regarding the conservatee.

In 2015, I was appointed a Guardian Ad Litem by the Juvenile Court of Crockett County Tennessee in child custody case involving the Department of Child Services. I investigated the claims brought before the Court, met with and interviewed the minor children and the adults granted temporary legal and physical custody, inspected the home the minor children were living in, and made my recommendations to the Court.

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

In 2001, I worked for two Tennessee House of Representative members. I also worked for

Governor Phil Bredesen on his successful campaign for Governor in 2002.

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

Not applicable.

**EDUCATION**

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

Middle Tennessee State University- 1998-2004 Degree: B.S. Major: Political Science Minors: Computer Information Systems, Insurance, and Sociology.

Served as a Senator in the Student Government.

A Member of numerous honor societies reflecting my GPA and Dean's list.

Board Member of Up 'til Dawn-a charity event that raises money for St. Jude.

Was selected to work at the Tennessee State Capitol as an intern for Representative Johnny Shaw and former Representative John Hood.

University of Memphis School of Law- 2004-2007 Degree: Juris Doctor.

Cala Award for Cyber Law.

University of Alabama School of Law-2013-2015 Degree: Master of Laws Taxation.

**PERSONAL INFORMATION**

15. State your age and date of birth.

I am 38 years old and my birthday is [REDACTED] 1980.

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

I have lived continuously in the State of Tennessee with the exception of the 4 and half years I lived in Washington D.C. I returned to Tennessee in 2015.

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

3 years

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

Crockett County

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

Not applicable.

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No.

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

No.

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

None.



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 that you have held in such organizations.

Neighbors Offering Assistance and Hope (NOAH) of Crockett County—A 501 (c) 3 nonprofit that raises money for families in Crockett County who are experiencing an illness or some other hardship.

The Heritage Foundation—Washington D.C. based think tank that develops and works to implement policies creating more freedom and less government.

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

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

I was a member of the Sigma Nu Fraternity in college, which limited its membership to men.

**ACHIEVEMENTS**

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

Tennessee Bar Association 2019  
Crockett County Chamber of Commerce 2019

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

None.

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

None.

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

None.

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

None.

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

No.

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

Please see the attached. The brief was done in conjunction with another attorney. The trust is my work.

**ESSAYS/PERSONAL STATEMENTS**

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

Since first reading Francis Bacon's *The Advancement of Learning* as a young high school student, I knew my life would be dedicated to the service of others. I believe, just as Francis Bacon did, that, "it is reserved only for God and the angels to be lookers on."

It is our duty to help when, where, and how we can. As an attorney, it is my job to solve problems. As judge, my ability to make a positive impact on the greatest number of lives increases considerably.

I have traveled from a cotton field in the only county without a stop light in Tennessee, to the halls of Congress, and back home to positively impact my community.

A good life is a life lived in service to others. This position allows me to serve my community, contribute to my state, and make a difference in the lives of many people.

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

I provide pro bono services or substantially reduce my fee for charitable organizations and churches. I provided, at a substantially reduced fee, tax advice for charitable organizations, including Neighbors Offering Assistance and Hope (NOAH) for Crockett County and the JesusCristo es la Respuesta Pentecostal Church. I have represented clients pro bono in the past.

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 judgeship I am applying for is the intermediate appellate court for the Western Division of Tennessee. The Court is located in Jackson, Tennessee. The court is comprised of four (4)

judges. The Court handles civil-or non-criminal appeals from Circuit and Chancery Courts in West Tennessee. My selection would make possible for the Court of Appeals to continue efficient and effective review of trial court decisions.

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)*

Like most people, I have had close friends or family members who have lost their battle to cancer. Because of this, I have dedicated time and finances in support of organizations in search of a cure. In high school I was involved with Relay For Life. In college, I was on the board of Up 'til Dawn. My wife and I give to St. Jude. I, recently, donated attorney time to organize and form a 501 (c) (3) for an organization that raises funds for cancer research and support.

Currently, I am involved with Neighbors Offering Assistance and Hope (NOAH) of Crockett County. This organization raises funds for people in Crockett County who are experiencing hardships. The hardship could be related to cancer or some other disease, lose of a job, death in a family, or some other emergency. Also, I work with the organization to make sure they are compliant with federal tax laws.

If I am selected as judge, I would like to continue supporting NOAH in whatever capacity the Judicial Code of Conduct allows.

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

The foundation of who I am today can be found in the building blocks of my past. On that foundation, my family laid the blocks of hard work, perseverance, and faith.

I learned the value of hard work by going to the fields and watching my grandfather farm my family's land. I remember riding on a Massey Ferguson tractor, sitting with my Mom on a four-row planter, and working the garden with my grandmother. My grandfather would often say "if there is work that needs doing, we get it done." Whenever I am ready to quit, I remember those words and keep going until the job is finished.

My parents taught me perseverance. When I was twenty (20) years old I was diagnosed with a severe case of Ulcerative Colitis. There were times the pain was so great I couldn't stand. However, I refused to allow my condition to define my future. I never missed class, never missed work at my minimum wage job, and fought through the pain to graduate.

While in my first semester of law school, I was informed my colon would need to be removed. Although I struggled to maintain focus, my faith sustained me. Thankfully, a new drug saved my colon.

Life taught me “not for ourselves alone are we born.” My greatest strengths are compassion and openness to assisting others, analyzing and solving problems, and having a positive impact. My purpose is to be useful in service to community, state, and country.

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)

Daniel Webster, the great orator of the U.S. Senate, stated the following: “No man can suffer too much, and no man can fall too soon, if he suffer or if he fall in defense of the liberties and Constitution of his country.”

Judges take an oath to “support and defend the Constitution of the United States and the Constitution of the State of Tennessee,” to “administer justice without respect of persons,” and to faithfully and impartially discharge,” his or her duties as a judge.

I believe, just as Daniel Webster did, that personal consequences are of little importance when faced with the duty to uphold our founding principles. One principle, our founders were wise to introduce, is the separation of powers doctrine. The judiciary is responsible for applying the law as it is written, regardless of whether or not its application produces a “fair” result.

As an attorney, I have represented clients to the best of my ability. I have pursued a favorable outcome in their cause, regardless of my personal beliefs in a rule or statute.

If selected, I will faithfully discharge my duty and uphold the law as written by the legislature. Our system of governance demands nothing less.

### REFERENCES

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

A. Jon Perry, Attorney: Homeland Title Tennessee, 1896 General George Patton Dr., Brentwood, TN 37067; [REDACTED]

B. Charlotte Kelley, Burlison Gin, P.O. Box 146, Burlison, TN 38015; [REDACTED]

[REDACTED]

C. Dave Dahl, Owner: The Wise Foundation, 207 N. Church Ave., Dyersburg, TN 38024; [REDACTED]

D. Jennifer Marks, Attorney: Walsh and Watts, 4324 Wedgwood Rd., S Fort Worth, TX 76133;

E. Randy Camp, Attorney: Randy C. Camp Attorney, 29 N. Bells St., Alamo, TN 38001; [REDACTED]

**AFFIRMATION CONCERNING APPLICATION**

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Appeals of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

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

Dated: 2-12, 2019.

  
\_\_\_\_\_  
Signature

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



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


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

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

**WAIVER OF CONFIDENTIALITY**

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

Christopher N. Davis  
Type or Print Name

  
Signature

February 12, 2019  
Date

026265  
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.
<u>Tennessee Department of Commerce and Insurance</u>
<u>Life and Health and Property and Casualty891812</u>



# Writing Samples

FILED  
MAR 03 2017  
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Rec'd By *[Signature]*

IN THE COURT OF APPEALS OF TENNESSEE  
WESTERN DIVISION AT JACKSON

BILLY BUTLER and STEPHEN LEATH, )  
 )  
Plaintiffs/Appellees )  
 )  
VS. )  
 )  
MALVIN C. PITTS, JR., MARCIA )  
L. PITTS, and MALVIN C. PITTS, III., )  
 )  
Defendants/Appellants. )  
 )

Docket No. W2016-0674-COA-R3-CV  
Appeal from Haywood County Chancery  
Court Docket No. 2014-CH-46

**BRIEF OF APPELLANTS**

For Appellants:

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BPR 26265

**ORAL ARGUMENT REQUESTED**

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
STATEMENT OF THE ISSUES.....	4
STATEMENT OF THE CASE.....	5
ARGUMENT.....	37
CONCLUSION.....	54
CERTIFICATE OF SERVICE.....	55

**TABLE OF AUTHORITIES**

**CASES:**

<i>ABN AMRO Mortg. Group, Inc. v. S. Sec. Fed. Credit Union</i> ..... 372 S.W.3d 121, 127 (Tenn. Ct. App. 2011)	44
<i>Baliles v. Cities Serv. Co.</i> , 578 S.W.2d 621, 1979 Tenn. LEXIS 416..... (Tenn. 1979)	47
<i>Barber v. Westmoreland</i> , 601 S.W.2d 712, 714 (Tenn. Ct. App. 1980).....	45
<i>Brown v. Brown</i> , 45 Tenn. App. 78, 95-96, 320 S.W.2d 721, 728 (1958).....	46
<i>City of Memphis v. Wait</i> , 102 Tenn. 274, 277, 52 S.W. 161, 162 (Tenn. 1899)...	46
<i>Collins v. Smithson</i> , 585 S.W.2d 598,603 (Tenn. 1979).....	44, 45
<i>Colonial Pipeline Co. v. Morgan</i> , 263 S.W.3d 827, 836 (Tenn. 2008).....	38
<i>Estate of Burchfiel v. First United Methodist Church</i> , 933 S.W.2d 481, 482 ... (Tenn. Ct. App. 1996)	45,46
<i>Estate of Walton v. Young</i> , 950 S.W.2d 956, 959 (Tenn. 1997).....	37
<i>Fowler v. Wilbanks</i> , 48 S.W.3d 738, 740 (Tenn. Ct. App. 2000).....	37
<i>Ganzevoort v. Russell</i> , 949 S.W.2d 293,296 (Tenn. 1997).....	38
<i>Graham v. Caples</i> , 325 S.W.3d 578, 581 (Tenn. 2010).....	38
<i>Grindstaff v. State</i> , 297 S.W.3d 208, 219 n.12 (Tenn. 2009).....	50
<i>Holder v. Serodino</i> , 2015 Tenn. App. LEXIS 745, 2015 WL 5458377..... (Tenn. Ct. App., Sept. 16, 2015).	44
<i>Hutchison v. Board</i> , 194 Tenn. 223, 227-28, 250 S.W.2d 82, 84 (1952).....	45
<i>Mitchell v. Chance</i> , 149 S.W.3d at 46 (Tenn. Ct. App. April 2004)...	44, 45
<i>Nw. Tenn. Motorsports Park, LLC v. Tenn. Asphalt Co.</i> , 410 S.W.3d 810, 816... (Tenn. Ct. App. 2011)	37
<i>Perrin v. Gaylord Entm't Co.</i> , 120 S.W.3d 823, 826 (Tenn. 2003).....	38

<i>Quarles v. Arthur</i> , 33 Tenn. App. 291, 295, 231 S.W.2d 589, 590 (1950).....	45
<i>Randolph v. Randolph</i> , 937 S.W.2d 815,819 (Tenn. 1996).....	37
<i>Rawlings v. John Hancock Mut. Life Ins. Co.</i> , 78 S.W.3d 291, 296..... (Tenn. Ct. App. 2001)	37
<i>Rodgers v. Burnett</i> , 108 Tenn. 173, 184, 65 S.W. 408, 411 (1901).....	46
<i>Saddler v. Saddler</i> , 59 S.W.3d 96, 101 (Tenn. Ct. App. 2000).....	37
<i>Shore v. Maple Lane Farms, LLC</i> , 411 S.W.3d 405,414 (Tenn. 2013).....	37
<i>State v. Franklin</i> , 308 S.W.3d 799, 809 (Tenn. 2010).....	50
<i>State v. Hatcher</i> , 310 S.W.3d 788, 808 (Tenn. 2010).....	50
<i>State v. Lewis</i> , 235 S.W.3d 136,141 (Tenn. 2007).....	50
<i>Stickley v. Carmichael</i> , 850 S.W.2d 127, 132 (Tenn. 1992).....	45
<i>USA Cartage Leasing, LLC v. Baer</i> , 202 Md. App. 138, 32 A.3d 88, 110..... (Md. Ct. Spec. App. 2011)	44
<i>Weatherhead v. Sewell</i> , 28 Tenn. (9 Humph.) 272, 295 (1848).....	46
<i>Wells v. Tenn. Bd. of Regents</i> , 9 S.W.3d 779, 783 (Tenn. 1999).....	38
<i>Wright v. Harrison</i> , 137 Tenn. 157, 192. S.W. 716, 1916..... Tenn. LEXIS 63 (1916)	47
 <b>RULES:</b>	
Tenn. R. App. P. 13 (d).....	37

## INTRODUCTION

MAY IT PLEASE THE COURT:

This record represents an appeal as of right by the defendants and your appellants herein, Malvin C. Pitts, Jr. and wife, Marcia L. Pitts as well as their son, Malvin C. Pitts, III from the judgment rendered against them on the 21<sup>st</sup> day of June, 2016 and which was filed and entered of record in the trial court on July 12, 2016 by the Honorable George R. Ellis, Chancellor for Haywood County, Tennessee (Vol. 1, pp. 5-6). Notice of Appeal was timely filed on August 8, 2016 (Vol. 1 pp. 9-10).

This is a matter which originated in the Chancery Court of Haywood County, Tennessee by the filing of a Complaint against the defendants. The said plaintiffs were represented by Mr. Pat H Mann, Jr., Attorney at Law of the Haywood County Bar. The defendants, Malvin C. Pitts, Jr., Marcia L. Pitts, and Malvin C. Pitts, III throughout the Chancery proceedings and up unto this appeal, have been represented by Mr. James S. Haywood, Jr., Attorney at Law, from Brownsville, Tennessee. Notice of Appearance was filed on July 22, 2016 by Mr. Christopher N. Davis as co-counsel in the representation of the defendants and Appellants herein (Vol. 1, pp 7-8). On November 1<sup>st</sup>, 2016 Mr. Joshua B. Shearon filed as co-counsel for representation of the Appellees herein along with Mr. Mann (Vol. 1, pp. 11-12).

References to the record will be indicated by volume and page number. The entire record in this cause consists of four (4) volumes. The first volume is the Technical Record containing the pleadings, minute entries, motions and orders of the Chancery Court. The

Technical Record will be referred to as "T.R." and then indicate the volume and page number(s).

The second volume, Volume 2, is a Transcript of the Proceedings from a hearing held on June 21, 2016. Volume Three (3) is a Transcript of Proceedings from the hearing held also on June 21, 2016. Volume Four (4) is the record containing the Exhibits to the case. This volume will be referred to by volume number and exhibit number. Volumes Two (2) thru Three (3) containing the transcripts of the hearings will be herein referred to as the "Vol. 2 or 3" of the Record along with the pages numbers.

**STATEMENT OF THE ISSUES**

**1. WHETHER OR NOT THE “YELLOW LINE” DRAWN UPON A TAX MAP FILED AS BEING THE DESCRIPTION FOR THE EASEMENT, IS A VALID AND PROPER DESCRIPTION ACCORDING TO THE LAW.**

**2. WHETHER OR NOT THE CHANCELLOR SHOULD HAVE TAKEN UP THE ISSUE PRESENTED BY BOTH PARTIES AS TO WHERE THE ALLEGED EASEMENT WAS LOCATED.**

**3. WHETHER OR NOT THE DAMAGES ASSESSED BY THE CHANCELLOR AGAINST THE APPELLANTS WERE APPROPRIATE.**



### STATEMENT OF THE CASE

This is a case which originated in the Chancery Court of Haywood County, Tennessee by the initial filing of a Complaint on behalf of the Plaintiffs (Appellees), Billy Butler and Stephen Leath, on July 8, 2014. The Complaint alleged that plaintiffs Butler and Leath purchased a thirty-foot easement for ingress and egress from William James and Ewell James. The Complaint further stated that the defendants (Appellants), Malvin Carvin Pitts, Jr., Marcia Lee Pitts, and Malvin Carvin Pitts, III. later purchased the property, removed a culvert, planted crops on the area claimed as their easement, and their Complaint sought damages from the defendants (Appellants). There was also a third party complaint which was filed against various members of the James family who sold the property to the Pitts family prior to the complaint being filed. An Order Granting Summary Judgment against third-party plaintiffs (Pitts) was filed and entered by the trial court on May 28, 2015. The granting of the summary judgment was appealed by the Appellants in this cause and this Honorable Court, i.e. Court of Appeals, filed its decision on February 12, 2016 affirming the summary judgment and dismissal of the third-party defendants. This matter is docketed as Docket No. W2015-01124-COA-R3-CV – Filed February 12, 2016.

This part of the case came on to be heard on June 21, 2016 in the Haywood County Chancery Court in Brownsville before the Honorable George R. Ellis, Chancellor. In first addressing the Court, Mr. Pat H. Mann, Jr., counsel for the appellees, attempted to introduce proof which he asserted showed exactly where the easement in question is located. In response,

the Court contended that the issue of the location of the easement was never prayed for in the original Complaint which was taken to the Court of Appeals on June 18, 2015 in case number W2015-01124-COA-R3-CV, and that the Court of Appeals made it clear that there was an easement by their opinion filed February 12, 2016. ("T.R." Vol. 2, page 7). The Court then asserted that general damages were the only issue left to determine at this hearing, including crop damages and the inability to duck hunt or plant crop in 2015. ("T.R." Vol. 2, page 8-9). Mr. Pat H. Mann, Jr. continued to attempt to introduce deeds and documents to establish exactly where this easement was, asserting that the Court of Appeals did determine that the easement was "good" but not where it was. ("T.R." Vol. 2, page 10). Again, in response, the Court asked where either party prayed for the location of the easement to be determined in the original complaint. ("T.R." Vol. 2, page 10). Mr. Pat H. Mann, Jr. stated it was in his complaint "as recorded in deed book so-and-so, page so-and-so in the register's office." ("T.R." Vol. 2, page 10). In response, the Court stated that the complaint stated "you conveyed an ingress and egress over this roadway by instrument from Williams James and Ewell James recorded in deed book 263, page 384 and it would appear there's some kind of description that the Court of Appeals says that's it." (Vol. 2, page 10). Mr. Pat H. Mann, Jr. attempted again stating it would just be three (3) or four (4) documents to enter into the record. ("T.R." Vol. 2, page 10). The Court then asked "what would be the point?" ("T.R." Vol. 2, page 10). Mr. Pat H. Mann, Jr. stated then some of them are Google Maps that show the easement road and where it is located. ("T.R." Vol 2, page 11) The Court then asserted that the Court of Appeals "bought" what was stated in the original complaint, apparently recorded in deed book 263, page 384, and that part was done and to move to damages. ("T.R". Vol 2, page 11) When asked again by Counsel for the

Appellees if the Court did not want Counsel to introduce the deed document, the Court stated “The Court of Appeals instructed me -- it looks like they bought into this easement that’s in deed book 263, page 384. So, it looks like that’s the easement, so I’m thinking damages is all we’ll be taking up this morning.” (“T.R.” Vol. 2, page 11-12)

In turn, Counsel for the Appellants, Mr. James S. Haywood, Jr., agreed with the Court that the Court of Appeals said there was an easement; “but all along the big problem has been where really is the easement because ...” (“T.R.” Vol. 2, page 12). The Court responded stating:

THE COURT: The Court of Appeals is pretty clear about the notion that this Court cannot deal with anything that’s not prayed for unless, you know, I did a quick review of this file, unless there’s something in there questioning what the easement is other than whatever is recorded in deed book 263, page 384.” (Vol. 2, page 13)

In response, Mr. Haywood averred that in the Appellants’ original answer to complaint, they deny there is an easement, but the Court of Appeals then ruled there was, so the question is, where is the easement? (“T.R.” Vol. 2, page 13). Counsel further stated that it was initially thought the easement was a main, paved road and not a little dirt road that goes off to the side. Counsel then presented a blown-up picture of the deed book and page number that the court referred to that says there is an easement, showing the only line that deed has is a yellow line that’s going across the deed. (“T.R.” Vol. 2, page 14). The Court then asked, “Are you sure the deed just says a yellow line?” (“T.R.” Vol 2, page 15). Counsel responded “yes”, asserting that the description of the easement in Deed Book 263, 384 simply states the easement is a yellow line and that a true grant of an easement must contain all the formal requirements of a grant of land and should be certain and definite in its terms, not just say follow the yellow line. (“T.R.”

Vol. 2, page 15). Mr. James S. Haywood, Jr. then referred back to the Answer which was filed by Joshua B. Shearon on behalf of the third-party defendants in the original action and that Mr. Shearon included an exhibit in his answer which showed the “yellow line” in question. (“T.R.” Vol. 2, page 15) Counsel then explained that during depositions, Appellees stated that the yellow line in Mr. Shearon’s Answer as an exhibit was not the same yellow line as shown in the courthouse. To verify, Mr. James S. Haywood, Jr. went to the courthouse and got the deed which he attempted to present in Court, and a copy of the documents which Mr. Joshua B. Shearon filed with his Answer with the Haywood Chancery Court. (“T.R.” Vol. 2, page 16) Mr. James S. Haywood, Jr. then explained that you cannot take a Xerox copy of the deed from the courthouse because the photocopy machine will not pick up the yellow line, so it makes it difficult to lay out a roadway when you can’t copy it. (“T.R. Vol. 2, pages 16-17). The Court asked then if that was part of the proof that was taken and Mr. Haywood stated no, and then the Court stated it was never prayed for. Mr. Haywood responded that the prayer is they’re saying the easement. (“T.R.” Vol. 2, page 17). The Court responded “the prayer has got to be specific. I don’t find anything in the complaint that mentions a yellow line. For whatever reason, the Court of Appeals says there is an easement, and I’m disinclined to deal with anything that says they are mistaken.” (“T.R. Vol. 2, page 17). Mr. James S. Haywood, Jr. then asked would the Court entertain the determination of the easement to continue, both counsels jointly amending their pleading or orally requesting the Court to establish it. (“T.R.” Vol. 2, page 18). The Court responded stating the Court of Appeals sent it back and said finish it up, and the only things to be finished are damages from what were in the pleadings. (“T.R.” Vol. 2, page 18). Mr. James S. Haywood, Jr. responded that if it was left without the easement being established, this issue

would be back to square one to which road is the easement because there was an easement on the same yellow line that was done years ago by a predecessor that Appellants' aver is the yellow line and Appellees' aver is the county road. ("T.R. Vol. 2, page 18). The Court then responded by reading the prayer which stated that at the hearing, the defendants (Appellants) be ordered to re-open and restore to the original condition the plaintiffs' (Appellees) easement and that the plaintiffs have a judgement for damages, actual and punitive, attorney's fees, court costs and the plaintiff have general relief. The trial Court further stated that "this was the first time this yellow line business has come up; and that the Court is under a mandate from the Court of Appeals to finish this up, and clearly damages, but that the Court can't get into something that didn't even go the Court of Appeals about the yellow line." ("T.R." Vol. 2, page 19). In continuation, the Court stated:

THE COURT: "I want to do what I think the Court of Appeals has ordered me to do, and I don't think I can do anymore even though I'm persuaded that as a practical matter - - but I think I am limited on what this Court can do from a mandate from the Court of Appeals." ("T.R." Vol. 2, page 20).

Appellants' Counsel, Mr. James S. Haywood, Jr. then asked for an offer of proof. The Court responded saying:

THE COURT: No. I am not going to defy what I see as a directive from the Court of Appeals. I really don't think I can do that. So this has come back with the issue of dam- -- if there are damages, what are the damages? ("T.R." Vol. 2, page 20)

Appellants' Counsel stated to the Court he had a surveyor as a witness to testify as to what the easement would have been, along the "yellow line" just like the deed book in reference states, but that it's a paved road rather than dirt road that Appellees' Counsel contends. The Court asked if that was argued before the Court of Appeals? ("T.R." Vol. 2, page 21). Mr.

James S. Haywood, Jr. answered “no”. The Court asserted that the case went up and that for whatever reason the issue of the yellow line was not part of the case and that this case was remanded to this Court to finish up and the only issue prayed for a not addressed is damages. (“T.R. Vol. 2, page 21). Counsel for the Appellees, Mr. Pat H. Mann, Jr., stated what was also prayed for was to re-open the easement. Then the Court stated “and apparently you got the easement, according to the Court of Appeals, that’s filed in deed book 263, page 384.” (“T.R. Vol. 2, page 22). Mr. Mann then asserted that although Mr. Haywood speaks of the easement as a paved road, the paved road does not go but a little over half of the way that the easement road goes over the farm where the Appellees were driving on it for ten (10) years prior to the Appellants’ got it. (“T.R. Vol. 2, page 22). The Court then tried to move to damages and Counsel for the Appellees, Mr. Mann, started to introduce an exhibit and was stopped by the Court who stated as follows:

THE COURT: But nobody prayed for a dispute as to what is the easement, and we’re just finishing up this case. If there’s a new issue, there’s a new issue. Apparently it sounds like there is, but that issue didn’t go to the Court of Appeals. (“T.R.” Vol. 2, page 22).

Mr. Mann responded saying the Appellees have the easement and the Court confirmed saying yes, it appears to be solid but it doesn’t sound like it is so but that the issue of the easement didn’t go up. (“T.R.” Vol. 2, page 23). Mr. Mann then stated “that might be a future lawsuit then,” and Mr. Haywood attempted to address the Court. The Court stopped Mr. Haywood stating “I have expressed the Court’s opinion two (2) or three (3) times, so let’s get started on the issue of damages. (“T.R.” Vol. 2, page 23). Counsel for Appellants, Mr. Haywood, then plead that the history of this stems from one of the Appellees driving through the

Appellants farm and he was charged with trespassing. The Appellee said he was using the easement that is on the yellow line and the Appellant, Malvin Carvin Pitts, Jr., told him no, the yellow line is on the paved road. The criminal case was ultimately dismissed because there was no clear way to tell where was the easement, which brings it back to the original issue, is the yellow line through the field. ("T.R". Vol. 2, page 24). The Court responded stating, "had that issue been prayed for, I think we would go forward, but this is pretty much new stuff for this file of this case." ("T.R". Vol. 2, page 24).

In opening statements, Mr. Pat H. Mann, Jr., Counsel for the Appellees, stated to the Court that his clients were seeking damages for being unable to access their landlocked property because the Appellants plowed up the road which granted access to their property. ("T.R". Vol. 2, page 25). He further stated that the Appellants had admitted through their Answer to Complaint that the Appellees could not access the property. Mr. Mann then stated that these acts prevented his clients from hunting the property and from taking care of any water that was built up by beavers which in turn caused the loss of fresh timber. ("T.R." Vol. 2, pages 25-26).

Mr. James S. Haywood, Jr., Counsel for Appellants, in turn averred that what was actually admitted by the Appellants in their Answer to Complaint was that the Appellees were conveyed the thirty (30) foot easement, ingress and egress, over and across an existing roadway. ("T.R." Vol. 2, page 26). Counsel continued stating that in the Answer and Counter-Complaint of the Appellants, Appellants never asked the Court for an injunction restraining the Appellees from going back and forth through their property except in number five (5) of their Counter-Complaint which requested upon a hearing of this matter, the Court grant a permanent restraining order or

injunction which enjoins the counter-defendants from coming upon the land belonging to the counter-plaintiffs; so, there was no legal prohibition from the Appellees going across the property and the file would clearly show that, if that was indeed the easement, which the Appellants contend it is not. ("T.R." Vol. 2, pages 26-27). Mr. James S. Haywood, Jr. then stated to the Court, that the Appellees were in fact able to access their land to take photographs of their damages as evidenced by the photograph marked "Exhibit 1", although the Appellees sought damages due to inability to access their land. ("T.R." Vol. 2, pages 27-28). Mr. Haywood further pointed out that the Appellees did not use the road they allege to be their easement to get to their property, but rather the paved road going down to the Goode property with a gate on the end. ("T.R." Vol. 2, page 28). He continued to state that when he took the Appellees depositions, the Appellees stated they never asked permission of Mr. Goode to use the gate but then somehow miraculously they get a key to the gate and can go back there when it is time to prepare for court. ("T.R." Vol. 2, page 28). Mr. Haywood then questioned the Appellees contention about being able to access and take care of the property, did they ever really try or were the Appellees just trying to use this as subterfuge here. ("T.R." Vol. 2, page 28). Then, Mr. Haywood addressed the crop damage that the Appellees prayed for, stating that when he took the Appellees depositions, Mr. Mann didn't talk about the crop damage because the corn that was planted was never harvested. It was always just planted for ducks, so they never lost any monetary damages as far as the corn. ("T.R." Vol. 2, page 29). In addressing the prayer for loss of timber, Mr. Haywood asserted that when he took the deposition of William James (third-party defendant in the original action), Mr. James testified that the reason he put trees there is because the soil was so bad it had clay and it held water. You could not put a crop on it because it held



water. ("T.R". Vol. 2, page 29). He continued his defense stating the Appellees' farm is a naturally low place and has been historically a duck blind and that if there are trees, it's going to kill the trees eventually, but those damages were not from his clients as the Appellees could have gotten to their property if they wanted to. ("T.R". Vol. 2, page 29). In response, Mr. Mann informed the Court that a week or two (2) before this hearing, his clients had contacted Mr. Goode's foreman to meet them at the property and unlock the gate as a favor for the Appellees to take a forester down there to look at the timber to assert damages. ("T.R". Vol. 2, page 30).

#### **DIRECT EXAMINATION OF STEPHEN LEATH**

Mr. Pat H. Mann, Jr. called his first witness, Stephen Leath, ("T.R." Vol 2, page 32) who purchased the landlocked farm in this case with Billy Butler in 2004. At that same time of the purchase, Mr. Leath testified he got an easement over another farm owned by William James to access his landlocked property. ("T.R." Vol. 2, page 33). Mr. Leath testified that the land was mostly timber but that fourteen (14) acres were crop, generally corn. ("T.R." Vol. 2, page 33-34) He further testified the main reason the property was purchased was for hunting, and that the duck blind and portable blind which were on the land would accommodate up to twelve (12) people to hunt at one (1) time, and that he and other hunters were able to use the land for this purpose from 2004 up until 2014, at which time the Appellant purchased the neighboring property. ("T.R." Vol. 2, pages 33-35). Appellees' Counsel then raised the issue of the beavers when there was a sizeable rain and Mr. Leath testified that he was able to use a rake and his

hands to unstop the pipe which could cause water buildup on his farm. ("T.R." Vol. 2, page 36). Mr. Leath continued to testify as to the amount of damages he was seeking for being unable to access his property for two (2) years of hunting, figuring that he and other members of his hunting club missed at least sixty (60) days of hunting. Based on experience from other hunting trips, Mr. Leath presumed a figure of One Hundred Dollars (\$100.00) lost per day, per hunter, at sixty (60) days, for a total of Six Thousand Dollars (\$6,000.00) a year. ("T.R." Vol. 2, pages 36-39).

Mr. Leath then stated that the culvert which was originally at the end of the easement road was dug up and moved to use at another entrance to the other side of the Appellants' farm. Leath's estimation of cost to have the culvert put back was Six Hundred Seventeen Dollars and Thirty Five Cents (\$617.35). Appellees' Counsel, Mr. Pat H. Mann, stated that Haywood County would put the culvert in for him and gravel over it. ("T.R." Vol. 2, pages 39-41). In continuation of Mr. Leath's testimony, Mr. Leath stated that he had entered into a contract with a farmer, Taylor Butterworth, who leased the property in 2015 to farm 13.86 acres at Seventy Five Dollars (\$75.00) an acre, totaling One Thousand Thirty Nine Dollars (\$1,039.00). Mr. Leath stated Mr. Butterworth was unable to farm the property due to the action herein for years 2015 and 2016 at a loss of One Thousand Thirty-Nine Dollars (\$1,039.00) for each year. ("T.R." Vol. 2, pages 42-43).

Next, Mr. Leath testified as to his loss for trees. He stated the gentlemen he purchased the property from planted 5.7 acres through a CRP program and the trees were in existence when he purchased the property in 2004. Mr. Leath stated that the trees died from the water standing in their own, which he could not remove because he was not allowed access to his property.

(“T.R.” Vol. 2, pages 43-45). When questioned by Mr. Mann how Barrow Taylor, a government agent, was able to get access to the property to observe the timber, Mr. Leath testified that he called the Goode family, who own the neighboring farm, for access through their gate at the end of the road. Mr. Leath asked if he would come open the gate and let them back there long enough to look at the timber, and he agreed. (“T.R.” Vol. 2, page 45-46). Mr. Leath then testified that the government agent, i.e. Barrow Taylor, estimated the cost to replace the trees would be Three Thousand Seven Hundred Dollars (\$3,700.00) with an additional cost to have a bulldozer clear the land before planting, so a final total of Five Thousand Dollars (\$5,000.00). (“T.R.” Vol. 2, pages 45-46).

#### **CROSS-EXAMINATION OF STEPHEN LEATH**

In cross-examination of Stephen Leath, Appellants’ Counsel, Mr. James S. Haywood, Jr. asked Mr. Leath if he ever asked anyone from the Goode family to access his landlocked property through their gate and Mr. Leath testified that he asked Mack Goode, now deceased, once when he purchased the property and again when this action arose and Mr. Goode stated “no” and that this response led Mr. Leath to ask for the easement down the dirt road so he could continue crossing into his property the same way the property had been accessed for the past fifteen (15) years. (“T.R.” Vol. 2, page 50-51). The Court interrupted Mr. Leath’s testimony to verify a map which shows the “yellow line” running parallel to a “little black line.” (“T.R. Vol. 2, page 51). Mr. Leath testified that the “little black line” used to be a ditch and was now a black top road. At the end of this black top road is the gate which is Mack Goode’s. The “yellow line” is the dirt road claimed as easment (“T.R”. Vol. 2, page 52). The witness continued with stating

that the man who owned the gate for twenty (20) plus years stated he didn't want people going in and parking on his property, that they (Appellees) could continue to cross his property the way they (Appellees) always had. ("T.R." Vol. 2, page 53). The witness then attempted to assert to a gentleman named Nick Nanney who owned neighboring property back in 2004 who had allegedly agreed to the same agreement as Mr. Goode as to the Appellees passing to their property the same way Mr. Goode agreed, Mr. James S. Haywood, Jr. interrupted his testimony by objecting as to hearsay. ("T.R." Vol. 2, page 54). Mr. James S. Haywood, Jr. then questioned Mr. Leath as to going across anyone else's property to access his own land, asserting that during the initial lawsuit Mr. Leath used the entrance to Mary Boykin's property. ("T.R. Vol. 2, pages 54-55). Mr. Leath admitted to crossing it once on his four-wheeler; however, the Appellant contacted the Sheriff's Department for trespassing. ("T.R." Vol. 2, page 55-56). When questioned further by Appellants' counsel why he didn't use this access through Ms. Boykin's property to drain his duck blind, Mr. Leath testified that there were crops planted on Ms. Boykin's property and, after having a warrant signed against him for trespassing, "who knows what was going to happen next." ("T.R." Vol. 2, pages 57-58). When asked by Mr. James S. Haywood, Jr. why he didn't walk to his property to drain his duck blind, Mr. Leath testified that chest waders or hip boots would be too heavy to carry such a distance and he could not have hired somebody to walk and drain the blind. ("T.R." Vol. 2, pages 59-60). Mr. James S. Haywood, Jr. then entered Exhibit "1", a photograph of the witness, Stephen Leath, exiting the Goode property through the Goode's gate, in his truck with his "Ranger" attached by trailer. ("T.R." Vol. 2, pages 60-61). (Vol. 4, Exhibit One). Counsel for the Appellants' continued to question Mr. Leath if there was any alternate way to enter into his property by any of the

neighboring farms and Mr. Leath testified these entrances were not options due to each of the landowners refusing access through their land. ("T.R." Vol. 2, pages 61-63). Counsel then asked the witness about a key he was given by the Appellants to access a gate through the neighboring "Johnson property" that the Appellant, Malvin Carvin Pitts, Jr., was working in order for the Appellees to get to their land. ("T.R. Vol. 2, page 63). The witness responded saying, "Tell me exactly how I'm supposed to cross the ditch that's full of water and the levee that's there to get to my property, I would like to know how." ("T.R. Vol. 2, pages 63-64). Counsel responded, "are you contending that water is out there because you couldn't get to it to clean it out? Kind of the cart before the horse, could you not get to it, and that's why the water is standing where you couldn't get there to clean it out?" ("T.R. Vol. 2, page 64). Witness responded, "there is a low field on that side that stays muddy and everything on the opposite side. It's hard to get there from that property." ("T.R. Vol. 2, page 64). Counsel responded, "Hard to get there but not impossible; is that right?" ("T.R. Vol. 2, page 64). The witness agreed, stating it was not impossible, it wasn't impossible to get there from Ms. Annette's property either, if she let him go that way, but he wasn't physically able to go that distance in a pair of chest waders. ("T.R. Vol. 2, page 64). Counsel asked did any of the members of the Appellee's hunting club not ever think to hire someone that was physically able to go to the property and clean it out and the witness replied, "no, I shouldn't have to." ("T.R. Vol. 2, page 65). Counsel asked the witness why he didn't continue to his land across Ms. Boykin's property as he had previously done and the witness stated "He (Malvin Carvin Pitts, Jr.), called and tried to get things stirred up with Ms. Boykin where they didn't want me going over there, which worked out. But I wasn't going back down there again to have somebody call the Sheriff's Department out there because I

was on the property next to them.” (“T.R. Vol. 2, page 66). The witness then testified it was a fact he was never on the Appellants’ property when this started as far as a criminal action. (“T.R. Vol. 2, page 66).

Mr. Leath then testified about the corn crop. He stated that they had corn planed on their property for five years. However, in the five years they never collected any rent on the corn. (“T.R.” Vol 2, page 68-69). After testifying further as to his damages, Stephen Leath stated that being unable to access his property to contend to the flooding from blockage of a pipe caused by the immense number of beavers. (T.R. Vol. 2, page 71-72). Mr. James S. Haywood, Jr. asked how the witness knew the flooding was caused by beavers if he was unable to access his property since the lawsuit began. Mr. Leath stated he had accessed the property “the other day” when looking at the timber after the Goode family allowed access through their gate “one time.” (“T.R.” Vol. 2, pages 73-74). The witness then testified to having two (2) duck blinds on his property. He claimed the first was built in in 2002 but has been added on since that time. He further stated that he had made various repairs and “brushed it” on the front to make it “blend better,” but that no construction was done since the filing of the lawsuit. (“T.R.” Vol. 2, pages 74-75). Mr. Leath further testified that he had been given a key by the Appellant to access the hunting property through the neighboring Johnson property, but that after having the Appellant sign a warrant against him for being on his property, he stated he never used the key again. (“T.R.” Vol 2, pages 78-80).

Mr. Haywood presented a picture to Mr. Leath and asked if he could identify it. Mr. Leath identified it as being a picture of his duck blind. Mr. Leath acknowledged that the picture showed no water. Asked how it got “drained out”, Mr. Leath responded, “I mean, in time some

of it evaporates and different things like that. You tell me because I haven't been down there at that point. I don't know." (Vol. 4, Exhibit Two) ("T.R." Vol. 2, pages 80-81). Mr. Haywood then presented the witness with a photograph which was entered into the record as "Exhibit 3" (Volume 4, Exhibit Three), which the witness identified as his deer stand. ("T.R. Vol. 2, page 81-82). Next, Counsel presented a photograph of a flat field with a duck blind in the middle, which the witness identified as his property with his duck blind. ("T.R. Vol. 2, page 82) (Vol. 4, Exhibit Four).

Continuing, Mr. James S. Haywood, Jr. stated and asked Mr. Leath the following, "all along this whole lawsuit is you're claiming that you have an easement going to your property that's parallel to the paved road on James Road; is that right"? Mr. Leath responded, "That's exactly right." ("T.R." Vol. 2, page 86). When Mr. Leath was asked by Mr. Haywood why he had not used the road which is parallel to the paved road which he contends is his easement to access the hunting property instead of accessing his farm through the Boykin property, Mr. Leath answered that the Appellant had dug up his road, and "I just – until we got this lawsuit settled I was trying not to stir up any –". ("T.R." Vol. 2, page 86).

#### **DIRECT EXAMINATION OF DR. BILLY BUTLER**

In his direct testimony, Appellee, Dr. Billy Butler, testified that in 2004 when he purchased his farm with Appellee Stephen Leath, he used an easement which he also purchased in 2004 from "the James brothers". The easement was, according to Dr. Butler's testimony, on another farm of the James', which they later sold to the Appellants. ("T.R." Vol. 2, pages 90-91).

Dr. Butler continued to testify that he and Stephen Leath were shut out of their property once the

Appellants bought the land from the James family, and that Appellant, Malvin Carvin Pitts, Jr. stated the Appellees could not use their easement and signed a warrant against Mr. Leath if they tried to access their land through other entrances. (“T.R. Vol. 2, page 93). Dr. Butler continued to testify in agreeance of the damages which Stephen Leath asserted to in his testimony. (“T.R.” Vol. 2, pages 94-96). To describe the easement which he used from 2004 up until 2014, the witness stated the easement was of little gravel and where the Appellees’ culvert was. He referenced Exhibit “6” (Volume 4, Exhibit Six) where there is still some gravel present. He then stated the culvert had been dug out and moved to a ditch at the other end of the field, going to the Appellant’s property, and that he had not given permission to have the culvert moved nor witnessed it being moved. (“T.R.” Vol. 2, pages 96-97).

#### **CROSS-EXAMINATION OF DR. BILLY BUTLER**

Mr. James S. Haywood Jr., Counsel for the Appellants’, cross-examined and asked Dr. Butler what the reason was he was unable to access his property since 2014, asserting there were no restraining orders or orders of protection preventing him from legally accessing his land. Dr. Butler was asked as follows, “There’s nothing legally in place to keep you from going on that property, is there?” (“T.R.” Vol. 2, page 98). Dr. Butler replied to the question stating he didn’t want to “test his own patience” with the Appellant having the opportunity to speak to him the way he had spoken to Stephen Leath so he had simply chosen not to. (“T.R.” Vol. 2, page 98).

#### **DIRECT EXAMINATION OF WILLIAM BARROW TAYLOR**

The Plaintiffs/Counter-Defendants called their next witness, William Barrow Taylor, who stated he is an area forester for the Tennessee Division of Forestry for the Department of



Agriculture. Mr. Taylor testified to having gone with the Appellee, Stephen Leath to view his duck hunting land. He stated they got onto the farm as follows: "We went to the end – I'm trying to remember exactly. We went to the end of the existing road and to a gate and were let through the gate onto a property". ("T.R." Vol 3, page 116). Mr. Taylor said they accessed the property by going down a paved road, through a gate, and that there was someone there waiting to unlock the gate when they arrived. ("T.R." Vol. 3, page 116). He continued to testify as to his knowledge of the timber damage on the Appellees' property, and calculated Three Thousand Two Hundred and Twenty-Six (\$3,226.00) Dollars to remedy the damages. ("T.R." Vol. 3, pages 117-121).

#### **CROSS EXAMINATION OF WILLIAM BARROW TAYLOR**

Mr. Taylor was cross examined as to his examination of the trees and he stated that he based these damages on his viewing of "Google Earth" pictures on what "appeared" to be dead as he was unable to personally get back to the area where the trees were located. ("T.R." Vol. 3, page 121-122). Mr. Taylor also testified that he was unable to see what was the cause of the water, whether or not from a levee, elevations of the land, etc. ("T.R." Vol. 3, pages 124 -125). He also stated that he had no personal knowledge as to how long the high water had been there or if the beavers had anything to do with the water level. ("T.R." Vol. 3, page 125)

#### **DIRECT EXAMINATION OF JOHN BUTLER**

John Butler, son of the Appellee Dr. John Butler, was called to testify by the Plaintiff/Counter-Defendants, to attest to the hunting conditions of the Appellee's farm. As a member of another hunting club, John Butler testified to having to pay Six Hundred (\$600.00) to

One Thousand Dollars (\$1,000.00) to hunt in Haywood County, Tennessee. (“T.R.” Vol. 3, pages 134-135).

### **CROSS EXAMINATION OF JOHN BUTLER**

Mr. John Butler was cross-examined by Mr. Haywood as to the different values of duck hunting blind rentals. He stated that how much is paid for the blind rental is hard to do because sometimes it is, “apples and oranges”. (“T.R.” Vol. 3, page 137). Mr. Bulter also on his cross examination stated that, “Sure it was mentioned” about draining the property. He responded to the question that, “It was probably going to take some equipment”. Mr. Butler was asked about why someone couldn’t go and clean it out like Mr. Stephen Leath had testified he did with his hands and a rake. (“T.R.” Vol. 3, page 135). Mr. Butler responded “Once all this started, we didn’t go down there.” (“T.R.” Vol. 3, page 138).

### **DIRECT EXAMINATION OF TONY REASONS**

Appellants’ Counsel, Mr. James S. Haywood, Jr., called Tony Reasons, an expert surveyor, who surveyed the particular property that the Appellants’ purchased from the James family. Said survey was dated February 20, 2014. Mr. Reasons testified that when doing a survey, he first gets the deed to the property he is surveying and those surrounding it, to avoid any underlaps or overlaps. However, no title search is performed by the surveyor. Mr. Reasons attempted to state that in doing the survey for the Appellants, there was not an “easement” mentioned in the deed, but is referred to as a “lane, both the Pitts deed and the --”. (“T.R.” Vol. 3, page 122). The witness was cut-off from continuing this testimony by the

Appellees' Counsel, Mr. Mann, who asserted that damages were the reason for the hearing – not the easement. The Court agreed with Mr. Mann stating, "I think the Court of Appeals has been pretty clear. That will have to be another case for another day. Today is damages." ("T.R." Vol. 3, pages 140-142).

Mr. Reasons was excused.

**DIRECT EXAMINATION OF MALVIN CARVIN PITTS, JR.**

In his testimony, Appellant, Malvin Carvin Pitts, Jr., told the Court that when he first purchased his property in 2014, there was a cable which blocked his property and he did not have a key for it. ("T.R. Vol. 3, page 145). He left a note for whoever had the key to come see him. Appellee, Stephen Leath, approached the Appellant, Malvin Carvin Pitts, Jr., "raising hell." ("T.R. Vol. 3, page 145). The second time the Appellee and the Appellant spoke, Appellee, Stephen Leath stated he had an easement. The Appellant told Mr. Leath to "go down the road like everyone has been going down for 150 to 200 years." ("T.R. Vol. 3, page 146) Mr. Pitts then provided Mr. Leath a copy of his deed which showed there was no easement. Mr. Pitts then testified that he told Mr. Leath until this matter was resolved, the Appellee could get a key from Mr. Goode to enter his property through his gate or he could get a key from Levada Kiestler. Mr. Pitts then claimed the key he provided the Appellees was through a gate from Levada Kiestler's land, not Mr. Johnson's as the Appellees' originally claimed. ("T.R." Vol. 3, pages 146-147). When questioned as to why he had called the Sheriff's Department for Stephen Leath

trespassing, Mr. Pitts stated that the Appellees were rutting up his fields, ruining his crop, his livelihood. (“T.R.” Vol. 3, page 150).

**CROSS EXAMINATION OF MALVIN CARVIN PITTS, JR.**

When questioned about moving the culvert by Pat H. Mann, Mr. Pitts testified that he had the culvert moved to the north of his property, to drain a pond of the north side of his farm. He further stated that “the county,” i.e. Haywood County, moved it because he had called and asked them to and they agreed because it would alleviate the water that the Appellants could not get off of their farm. (“T.R.” Vol. 3, pages 153-155).

**DIRECT EXAMINATION OF MALVIN CARVIN PITTS, III.**

Malvin Carvin Pitts, III. is the son of Malvin Carvin Pitts, Jr., both Appellants herein. Malvin Carvin Pitts, III. testified to having farmed the Appellants’ farm in 2012 and 2013, prior to the Appellants purchasing it in 2014 from the Jamesons. (“T.R.” Vol. 3, page 159). Prior to the Appellants purchasing their farm, Malvin Carvin Pitts, III. testified that his friend, Brian Speight, worked Mr. Mack Goode’s neighboring property. Mr. Pitts stated that Mr. Speight and his father used the road through the edge of the field, respectfully, not using it when it was too muddy and could damage the field. (“T.R.” Vol. 3, page 160). He stated they used the field because at that time there was a culvert on Mack Goode’s property, which later washed out. To access Mack Goode’s farm, Mr. Pitts testified that the Speights used the James’ property that his father, Malvin Carvin Pitts, Jr. owns now, just because the culvert was there. (“T.R.” Vol. 3, page 160). He continued that when his father purchased the farm, he asked that the culvert be put

back in place and they started going back down the blacktop lane. ("T.R." Vol. 3, page 160). Mr. Haywood then clarified with the witness that the culvert he was referring to was not the culvert on James Road. The witness confirmed stating the culvert he was referring to was past his father's property on Mack Goode. ("T.R." Vol. 3, page 161). When Mr. Pitts purchased the property in 2014, he asked to have the culvert put back in place and the Speights began using the blacktop road again. ("T.R." Vol. 3, page 161). Mr. Haywood then questioned the witness if he had ever seen anyone else go across the property "not respectfully." The witness stated yes, that on occasion there was a white truck parked there that he assumed was Stephen Leath, hunting, and that there would be ruts and "stuff". In the two (2) years he worked the farm, he had to fix the end of the field. ("T.R." Vol. 3, page 162). Counsel then asked if there was any exchange of words with Mr. Leath about this issue and the witness stated when he was on the farm working it was not during duck season. ("T.R." Vol. 3, page 162). He continued to testify that repairs had to be done where they would turn around their four-wheelers. ("T.R." Vol. 3, page 163). Finally, Counsel asked Mr. Pitts if he was familiar with the property going from the Appellants' property to Goode and to the Appellees' property, where the duck hole is. The witness responded no, you can just see it from a levee, and that you can walk down the levee and see the Appellees' pump and where they put boards to drain the water. ("T.R." Vol. 3, page 163).

### **CROSS EXAMINATION OF MALVIN CARVIN PITTS, III.**

In cross-examination, Mr. Mann asked the witness if he was familiar with this field road before he bought the farm. The witness replied he didn't buy the farm, which he was on the deed

but was supposed to be as a survivorship. (“T.R”. Vol. 3, page 164). Counsel then asked the witness how many years had he seen the field road and the witness responded since 2010 when the flood washed the culvert out. (“T.R. Vol. 3, page 165). Counsel then asked if Mr. Pitts had ever seen the Appellees driving in there from 2004-2008 and the witness replied he would never been around there during duck season. (“T.R.” Vol. 3, page 165). Counsel then questioned if he had ever seen a cable across the end of the road that was locked, and the witness stated “yes, there was two (2) steel posts.” (“T.R”. Vol. 3, page 165). When then asked what happened to it, the witness replied “to drain the ditch, the culvert would be too high, so you had to dig the culvert – it would be useless to dig a ditch deeper and not a culvert.” (“T.R”. Vol. 3, page 165). Counsel then asked why the county took the culvert out and what did the county do with the culvert and the witness answered to dig the ditch deeper and that it was moved to the north side of their farm and that Stephen Leath had not put that culvert in. (“T.R.” Vol. 3, pages 165-66). Mr. Mann then asked the witness to look at a “Google Earth” photograph to determine the field road and the county road. When asked about the dirt road, the witness testified it was actually plowed up and the Appellants are planting on it now. (“T.R”. Vol. 3, page 167). Mr. Mann then asked the witness could he identify in the photograph the locked gate on Mack Goode’s property and the witness did. (“T.R.” Vol. 3, page 168). The following exchange occurred:

**COUNSEL:** “And here is the easement road up there?”

**WITNESS:** “No. The easement road is right there.”

**COUNSEL:** “So you say. This is the road they have traveled on for ten (10) years right there.

**WITNESS:** “No, since 2010 or whenever the culvert was washed out, even the Speight Farm started using that road.” (“T.R”. Vol. 3, page 169)

**REDIRECT EXAMINATION OF MALVIN CARVIN PITTS, III.**

Mr. James S. Haywood, Jr. approached the witness with the same photograph that Mr. Mann used with the two (2) different roads ( Vol. 4, Exhibit Five) and asked what a “turnrow” was. The witness answered this meant in farming, when you have to turn around somewhere. (“T.R.” Vol. 3, page 170). Mr. Haywood then asked what the difference is between what Mr. Mann refers to as a road (i.e. dirt road) and a “turnrow” and Mr. Pitts answered that turnrows are just a crop going along the edge of the field versus the rows going this way. (“T.R.” Vol. 3, page 170). Mr. Haywood asked if there was any way to tell the difference between a “turnrow” or and a road if it is not graveled or paved and the witness answered that it looks like a field road that didn’t get planted all the way to the end. (“T.R. Vol. 3, page 170). Counsel (Mr. Mann) then made the photograph the witness was referencing “Exhibit 5” and the exhibit was marked. (“T.R.” Vol. 3, page 171). (Vol. 4, Exhibit Five).

Mr. Haywood then provided the witness with a “Google Earth” photograph of where the culvert used to be and asked the witness to draw a circle where the culvert was the county took out. The witness complied. (“T.R.” Vol. 3, page 172). Counsel then asked about the culvert in the back and who took it out and the witness testified that the rain did, by the 2010 flood, and that that culvert is not on the Pitts property but the Goode’s. Said photograph was entered into the record as “Exhibit 6”. (“T.R.” Vol. 3, page 172). On this same photograph, the witness stated the paved road is James Road, and then he pointed to where the culvert was that the county dug up. Mr. Malvin Pitts, III. stated that the only substantial way of draining it is along the

edge of the road because it is high ground. The map was made an exhibit to his testimony (Vol. 4, Exhibit Six) and (“T.R. Vol. 3, page 172). He continued to testify that with the culvert, you have to dig a ditch ten (10) feet deeper. If the culvert isn’t deeper, it’s not going to drain. (“T.R.” Vol. 3, page 173). Continuing his testimony, Mr. Pitts explained that for the people that farmed Mack Goode’s land, Speight Farms, to be able to farm Mack Goode’s property, they had to go through where the culvert was located. This culvert washed out in 2010, they then started going through here (the James’ property). (“T.R.” Vol. 3, pages 173-174). They didn’t have an easement and William James just let “anybody and everybody” go through the farm. When his father bought the farm, he asked Brian Speight to put the culvert back in as there was no reason to have two roads, which he did. (“T.R.” Vol. 3, page 174). Counsel for the Appellees (Mr. Mann) asserted after this Mr. Pitt’s testimony that. “this is not about my clients”. (“T.R.” Vol. 3, page 174).

### **RECROSS EXAMINATION OF MALVIN CARVIN PITTS, III.**

Mr. Mann, Counsel for Appellees, asked Mr. Pitts “do you usually have “turnrows” that have a culvert that goes down the “turnrow”?” Mr. Pitts answered, “You’re going to have a culvert however you have to enter a farm.” Counsel agreed, stating “You enter the farm there, and you drove right down this field road. People have been going over it for years haven’t they?”

Mr. Pitts answered, “Since 2010, I know.” Mr. Mann replied, “Before 2010,” and the witness said he wouldn’t know, he didn’t work the farm then. (“T.R.” Vol. 3, page 175).



## DIRECT EXAMINATION OF TASHA LEE MOSIER

Mr. James S. Haywood, Jr. began questioning by stating Tasha Lee Mosier used to be Tasha Lee Pitts, daughter of the Appellant, Malvin Carvin Pitts, Jr., and that she does not have any ownership to the Pitts farm but her parents do. ("T.R." Vol. 3, page 176). When asked what she knew of the Appellees' damages, the witness stated none to their part, but when the Appellees trespassed on her father's land they caused damages to his field. ("T.R." Vol. 3, page 177). Ms. Mosier then admitted to taking photographs of the Appellees' duck blinds that were marked as exhibits throughout the hearing, and that she had taken these photographs on the Johnson's neighboring property. ("T.R." Vol. 3, page 176). Mr. Haywood referred to the Appellees testifying it would be hard for them to get back to their duck blind because of all the water and asked Ms. Mosier if she had experienced trouble getting back to the levee. ("T.R." Vol. 3, pages 177-178). Ms. Mosier answered no, that unless there was a big rainfall, she could walk right onto their property, if she wanted to. ("T.R." Vol. 3, page 178). Counsel then asked Ms. Mosier since this lawsuit, how many times had she seen Mr. Leath go down to his duck blind? The witness answered once, on video, she had seen him go down there past the gate, but she had also seen him coming down the road. ("T.R." Vol. 3, page 178). She testified that she had not seen him on the back of his property but parked on Mack Goode's property, past the gate, with his truck and trailer. ("T.R." Vol. 3, page 179).

Mr. Haywood then asked Ms. Mosier had she noticed any changes to the Appellees' duck blinds since this lawsuit. Ms. Mosier stated yes, there was one in 2014 all the way down near the Johnson property and she had a photograph of it. ("T.R." Vol. 3, page 180). She stated it is no longer there because it is not on "Google Earth." She stated there was another that she had

taken pictures of, on May 9<sup>th</sup> of that year; that it looked like the same building, but had been remodeled, was built bigger and “different”. (“T.R.” Vol. 3, pages 180-181).

Ms. Mosier then reviewed the exhibits, testifying “Exhibit 3” was a deer stand which was still on the Appellees’ property. (“T.R.” Vol. 3, pages 181-182). Ms. Mosier stated “Exhibit 2” and “Exhibit 4” were the same duck blind from 2014. (“T.R. Vol. 3, page 182). She stated that a zoomed-in photograph which showed the blind with 2 by 4’s going down in a triangle shape, which counsel entered into record then as “Exhibit 7”, showed there had been “obvious changes” made to the duck blind since the lawsuit. (“T.R. Vol. 3, page 183). She referred to the picture and it was made an exhibit. (Vol. 4, Exhibit Seven).

#### **CROSS EXAMINATION OF TASHA LEE MOSIER**

Mr. Pat H. Mann, Jr., asked Ms. Mosier if the only time she had seen Mr. Leath down there past the gate was once and Ms. Mosier stated yes, on May 20<sup>th</sup>, but that her dad had seen him down there other times but couldn’t document it because he didn’t have a smartphone. (“T.R.” Vol. 3, page 185). Counsel asked Ms. Mosier since she stated the duck blind had been moved, was she indicating somebody was hunting in it? The witness stated yes. (“T.R.” Vol. 3, page 186). When asked had she heard them hunting, she said she heard shots, but unless they used the entrance through Mack Goode’s gate, they would have no proof because of a tree line. (“T.R.” Vol. 3, page 186). Then Counsel asked Ms. Mosier had she ever seen them hunting back there and she replied, “not hunting, but they’ve been back there.” (“T.R.” Vol. 3, page 186).

### **REDIRECT EXAMINATION OF TASHA LEE MOSIER**

Mr. Haywood asked Ms. Mosier if she brought a flash-drive with her to Court and she answered yes, that is goes from 2014-2016, which shows proof of garbage being disposed of on her father's property, pictures of the duck blind' structure, that it looked like the same building but had multiple additions added on. ("T.R." Vol. 3, page 187).

### **DIRECT EXAMINATION OF LUCY MARIE VESTAL**

Mr. Haywood started his examination of Ms. Vestal by asserting that she is the daughter of the Appellants, Malvin Carvin Pitts, Jr. and Marcia Lee Pitts. ("T.R." Vol. 3, pages 188-189). Ms. Mosier testified that on May 20<sup>th</sup>, she witnessed the Appellee, Stephen Leath's son enter through the gate and at that same time someone entered on a "Ranger" through the other side of her father's farm. ("T.R. Vol. 3, pages 189-190). She assumed the gate was open because there were mud track leaving out of the property so someone must have gone to town. ("T.R." Vol. 3, page 190). She continued by stating both individuals sat there for a few minutes staring until the Appellee's son got a fuel jug out of the back of the truck, and handed it to the person on the "Ranger". He then took the trailer, and turned it the opposite way around, which it was muddy. She stated she was sure they just wanted to turn the trailer around so they could get ready to load it back up. The "Ranger" then left to go back to where it came from, and the white truck started hooking up to the trailer. The "Ranger" then re-approached and loaded up. ("T.R." Vol. 3, pages 190-191). Counsel asked Ms. Vestal if she could identify who the individuals were, she stated her sister was on down the road from her and had gotten a video, and it was Stephen Leath (Appellee) and his son. It was just two (2) people. ("T.R.". Vol. 3, pages 191-192). Mr.

Haywood asked the witness if she saw Mr. Barrow Taylor or Mr. Casey Nanney during this time and she stated no, that Casey Nanney, who she knew drove a red truck and was very familiar with, came flying by headed towards the farm after she had returned to her sister's home. ("T.R." Vol. 3, pages 192-193).

Counsel then asked the witness had she done down to the levee that was referred to as the Johnson Levee and she stated yes, and agreed when asked by Counsel was that the main levee that holds the water of the Appellees' property. ("T.R." Vol. 3, page 193). The witness stated since this lawsuit, she had seen the levee dry and holding water and that could depend on the season. ("T.R." Vol. 3, page 194).

When asked was she a witness to the changes in the duck blind on the Appellees' property, Ms. Vestal said she knew the picture she took in 2014 was different from the one that was taken in 2016 and that you could tell it had more compartments on it." ("T.R." Vol. 3, page 195).

#### **CROSS EXAMINATION OF LUCY MARIE VESTAL**

Mr. Pat H. Mann, Jr. started by asking Ms. Vestal how many times she had seen Mr. Leath or Dr. Butler down there in the last two (2) years and she answered once, Mr. Stephen Leath, on May 20<sup>th</sup>. ("T.R. Vol. 3, page 196). Mr. Mann pointed out that the Mr. Leath testified they were down there on May 20<sup>th</sup> looking at the trees and that that was the same time the witness saw them down there. She agreed, but that it was only Mr. Leath and a young gentleman. ("T.R." Vol. 3, page 197).

### **REBUTTAL EXAMINATION OF STEPHEN LEATH**

Mr. Pat H. Mann, Jr. provided Mr. Leath with the photographs of the duck blinds and asked "what he could say about that". ("T.R". Vol. 3, page 204). Mr. Leath responded by saying the duck blind has not been added on to; that they're looking at two (2) different pictures of two (2) different sides of the blind, and that the wind blew it across the field, not the current carrying it. ("T.R". Vol. 3, page 204). Mr. Leath continued asserting there is no current because the water is basically standing, it was blown to the other end of the field, spun around into the woods, and that the picture with the 2 by 4's is the wood on the front. ("T.R Vol. 3, page 204). He explained to the Court by examining the photographs provided that the photographs showed the front, side and back of the blind, where there was a boat shed and bathroom that he built for his kids. ("T.R". Vol. 3, page 205-206). He continued that the duck blind was carried all the way back, to the woods, but the blind turned, that the blind has not changed. He continued to explain that they don't brush the back side of the blind because it used to be against a tree line, or if they're in corn, you've got corn stalks. ("T.R. Vol. 3, page 206). The Court asked did the witness agree that the blind is probably somewhere down in the trees and the witness responded, that when he was on the property previously to assert his damages, he was able to see the blind had floated back to the tree line. ("T.R. Vol. 3, page 207).

### **CROSS EXAMINATION OF STEPHEN LEATH**

Mr. Haywood asked the witness where the other blind was; wasn't there supposed to be two (2) blinds? ("T.R. Vol. 3, page 208). Witness responded, "there's a little blind down there somewhere, and I'm really not sure where it's floated off to." He continued answering that when he viewed his property last he didn't look to see if he could find the blind because the water was

so deep in the floor of his "Ranger". ("T.R. Vol. 3 page 208).

In closing statements, Mr. Pat H. Mann, Jr. reminded the Court that the issue they were there for was damages, that the Court of Appeals gave his clients an easement. ("T.R. Vol. 3, page 223). He continued that his client have been to their property one (1) time in the last two (2) years and they took Barrow Taylor, the forestry man, in to look at the trees that were dying; that the hunting for the two (2) years would be a minimum of Twelve Thousand (\$12,000) Dollars – that's a Hundred (\$100) dollars a day for a sixty (60) day season; his clients lost on a lease for corn crop for Two Thousand (\$2,000) dollars, a culvert at Six Hundred (\$600); the trees at Five Thousand (\$5,000); so they were asking for a judgment of Nineteen Thousand Six Hundred (\$19,600) Dollars. ("T.R. Vol. 3, page 224).

Mr. James S. Haywood, Jr. responded stating his clients were adamant the Appellees had been to their property to work on their duck blind, that he had testimony of hearing gun shots at the property, but the Appellees stated that had only been down there one (1) time. He stated if the Appellees said their property was flooding, then certainly someone could have gone down and opened the floodgates to let the water out. He then entered Exhibits 8 and 9 into the record, (Volume 4, Exhibits Eight and Nine), stating there were so many different areas that the Appellees could have gone through. ("T.R. Vol. 3, pages 225-226). "Number one (1)", he stated, "there was no court prohibition against the Appellees going down there. There was no injunction, restraining order, anything like that." ("T.R. Vol. 3, page 226). So, if the Appellees had gone down there, the Appellants couldn't have stopped them. ("T.R. Vol. 3, page 226). Mr. Haywood continued asserting that Stephen Leath testified he had used other properties to get to his property, several times, and that Mr. Pitts testified he had given Mr. Leath a key to get back

there through the Johnson property. (“T.R. Vol. 3, page 226). Mr. Haywood continued stating the Appellees could have hired someone to go to the property and clean it out, and they should have at least tried, and asserted to the fact that no one gave testimony stating they tried to get back there and open it up but were unable to. (“T.R. Vol. 3, page 227). Mr. Haywood continued in regard to the “easement situation”, stating that when Mr. Leath asked Mr. Goode could he use the gate to go back to his property and assert damages, Mr. Goode said “Sure, come on back.” (“T.R. Vol. 3, page 228). Mr. Haywood continued, asserting there was no testimony given where the Appellees attempted to ask Mack Goode’s son, since Mack Goode was deceased, if they could use the gate to access their property, they just never really asked him because Mack Goode said they couldn’t use it. (“T.R. Vol. 3, page 228). Mr. Haywood pointed out that it was really interesting that even though the Appellees couldn’t cross through Mack Goode’s property where the gate was, what was the difference between that entrance and ten (10) or fifteen (15) feet down where they’re going across Mr. Pitts and then still have to go across the Goode property in order to get to the duck blind? (“T.R. Vol. 3, page 229). He continued arguing the Appellees are still landlocked, that they still have nothing on paper, just that they have a “gentleman’s agreement”. (“T.R. Vol. 3, page 229). Mr. Haywood finished his closing argument by stating it was the Appellants’ contention there should be no damages because the Appellees could have gotten to their property; they could have opened any floodgates; they kept the water on by their own acknowledgement by the Ducks Unlimited gate; and if there were any damages to trees, then it’s not because they couldn’t get back there. (“T.R. Vol. 3, page 229). Mr. Mann responded saying his clients couldn’t get back there, and they didn’t get back there but once in the last two (2) years. (“T.R. Vol. 3, page 229). Then, the Court ruled:

THE COURT: "The Court finds that the unrefuted testimony is that as a result of not being able to use their farm for two (2) years, Billy Butler and Stephen Leath have suffered damages in the amount of Nine Thousand, Two Hundred and Ninety Six (\$9,296) Dollars. This breaks down to Three Thousand Two Hundred Twenty Six (\$3,226) Dollars for the damage to the trees testified to by Mr. Barrow Taylor who observed the trees on May 20<sup>th</sup> and has worked for the Tennessee Department of Forestry for thirty six (36) years. Two Thousand Seventy (\$2,070) Dollars for loss of land rent for the 13.8 tillable acres and Four Thousand (\$4,000) for the loss of hunting on this farm based on John Butler's testimony that this duck land fee would be a Thousand (\$1,000) Dollars each. Cost be taxed to the defendant."



## ARGUMENT

MAY IT PLEASE THE COURT:

### **Standard of Review**

Because this was a civil case heard without a jury, the standard of review is to review the trial court's findings of fact *de novo* with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); Shore v. Maple Lane Farms, LLC, 411 S.W.3d 405, 414 (Tenn. 2013); Rawlings v. John Hancock Mut. Life Ins. Co., 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001); Fowler v. Wilbanks, 48 S.W.3d 738, 740 (Tenn. Ct. App. 2000).

In order to preponderate against a trial court's findings, the evidence must support another finding of fact with greater convincing effect. Nw. Tenn. Motorsports Park, LLC v. Tenn. Asphalt Co., 410 S.W.3d 810, 816 (Tenn. Ct. App. 2011). When asked to review a trial court's determinations of witness credibility and the weight to be afforded particular testimony, we grant considerable deference to the trial judge who had the opportunity to observe the witnesses' demeanor and hear their in-court testimony. Estate of Walton v. Young, 950 S.W.2d 956, 959 (Tenn. 1997) (quoting Randolph v. Randolph, 937 S.W.2d 815, 819 (Tenn. 1996)); Saddler v. Saddler, 59 S.W.3d 96, 101 (Tenn. Ct. App. 2000). Unlike an appellate court, trial courts are able to observe a witness's live testimony, assess their demeanor, and evaluate other indicators of credibility., Saddler v. Saddler, 59 S.W.3d at 101. Therefore, the appellate court will not overturn a trial court's assessment of credibility on appeal absent clear and convincing

evidence to the contrary. Wells v. Tenn. Bd. of Regents, 9 S.W.3d 779, 783 (Tenn. 1999). The appellate court reviews questions of law de novo with no presumption of correctness. Graham v. Caples, 325 S.W.3d 578, 581 (Tenn. 2010); Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827, 836 (Tenn. 2008) (citing Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997)).

**ISSUE NUMBER ONE: WHETHER OR NOT THE “YELLOW LINE” DRAWN UPON A TAX MAP FILED AS BEING THE DESCRIPTION FOR THE EASEMENT, IS A VALID AND PROPER DESCRIPTION ACCORDING TO THE LAW.**

Your Appellants herein, Malvin Carvin Pitts, Jr., Marcia Lee Pitts, and Malvin Carvin Pitts, III., would respectfully avers herein to this Honorable Court that from the original complaint filed herein to the description of said “easement”, it is unclear as to the location of where the “alleged” easement is located. Appellants use the word “alleged” because the easement is extremely vague as to the location.

The original easement which this case is the entire basis of, is not a part of this record for the reasons mentioned below in the arguments and statements to the trial court from both parties. This original easement does NOT have any metes or boundaries but just states that the easement is what is shown on the exhibit attached to the easement document and “highlighted in yellow”. The line which is highlighted is indeed in yellow and is basically a “highlighted yellow marker” drawn down a line across the side of Appellant’s property line. Appellant contends this highlighted yellow line ALSO corresponds with the paved James Road which runs at the same

place. Appellees say and contend the line runs parallel to the James Road and is not the paved road.

If this Court takes up this argument, or remands it back for proof, it will probably be a case of first impression as Appellant cannot find any other cases where the easement is merely a yellow line drawn down a map. The first problem with this type of description is that the yellow line covers two separate theories of where the easement is. The second and maybe even more important is that the yellow line cannot be picked up by most copy machines in the Register's offices across the State. Unless one uses a color copier the line will not appear. Plus, there is a considerable amount of potential fraud in allowing this type of an alleged "description" because anyone with a yellow highlighter can change the distance and direction of the line simply by marking it on the filed original. There was actually two different copies of the location of this yellow line which was one of the things Appellant counsel wanted to show in the offer of proof as hereinafter set forth in this argument.

Both parties tried in vain to be allowed to enter proof at trial as to the deeds, and documents pertaining to the "easement" which would have also included the "yellow line" easement. ("T.R." Vol. 2, page 6). In first addressing the Court, Mr. Pat H. Mann, Jr., counsel for the appellees, attempted to introduce proof which he asserted showed exactly where the easement in question is located. In response, the Court contended that the issue of the location of the easement was never prayed for in the original Complaint which was taken to the Court of Appeals on June 18, 2015 in case number W2015-01124-COA-R3-CV, and that the Court of Appeals made it clear that there was an easement by their opinion filed February 12, 2016. ("T.R." Vol. 2, page 7). The Court then asserted that general damages were the only

issue left to determine at this hearing, including crop damages and the inability to duck hunt or plant crop in 2015. ("T.R." Vol. 2, page 8-9). Mr. Pat H. Mann, Jr. continued to attempt to introduce deeds and documents to establish exactly where this easement was, asserting that the Court of Appeals did determine that the easement was "good" but not where it was. ("T.R." Vol. 2, page 10). Again, in response, the Court asked where either party prayed for the location of the easement to be determined in the original complaint. ("T.R." Vol. 2, page 10). Mr. Pat H. Mann, Jr. stated it was in his complaint "as recorded in deed book so-and-so, page so-and-so in the register's office." ("T.R." Vol. 2, page 10). In response, the Court stated that the complaint stated "you conveyed an ingress and egress over this roadway by instrument from Williams James and Ewell James recorded in deed book 263, page 384 and it would appear there's some kind of description that the Court of Appeals says that's it." (Vol. 2, page 10). Mr. Pat H. Mann, Jr. attempted again stating it would just be three (3) or four (4) documents to enter into the record. ("T.R." Vol. 2, page 10). The Court then asked "what would be the point?" ("T.R." Vol. 2, page 10). Mr. Pat H. Mann stated then some of them are "Google Maps" that show the easement road and where it is located. ("T.R.". Vol 2, page 11) The Court then asserted that the Court of Appeals "bought" what was stated in the original complaint, apparently recorded in Deed Book 263, page 384, and that part was done and to move to damages. ("T.R.". Vol 2, page 11) When asked again by Counsel for the Appellees if the Court did not want Counsel to introduce the deed document, the Court stated, "The Court of Appeals instructed me -- it looks like they bought into this easement that's in deed book 263, page 384. So, it looks like that's the easement, so I'm thinking damages is all we'll be taking up this morning." ("T.R." Vol. 2, page 11-12)

In turn, Counsel for the Appellants, Mr. James S. Haywood, Jr., agreed with the Court that the Court of Appeals said there was an easement; “but all along the big problem has been where really is the easement because ...” (“T.R.” Vol. 2, page 12). The Court responded stating:

THE COURT: The Court of Appeals is pretty clear about the notion that this Court cannot deal with anything that’s not prayed for unless, you know, I did a quick review of this file, unless there’s something in there questioning what the easement is other than whatever is recorded in deed book 263, page 384.” (Vol. 2, page 13)

In response, Mr. Haywood averred that in the Appellants’ original answer to complaint, they deny there is an easement, but the Court of Appeals then ruled there was, so the question is, where is the easement? (“T.R.” Vol. 2, page 13). Counsel further stated that it was initially thought the easement was a main, paved road and not a little dirt road that goes off to the side. Counsel then presented a blown-up picture of the deed book and page number that the court referred to that says there is an easement, showing the only line that deed has is a yellow line that’s going across the deed. (“T.R.” Vol. 2, page 14). The Court then asked, “Are you sure the deed just says a yellow line?” (“T.R.” Vol 2, page 15). Counsel responded “yes”, asserting that the description of the easement in Deed Book 263, 384 simply states the easement is a yellow line and that a true grant of an easement must contain all the formal requirements of a grant of land and should be certain and definite in its terms, not just say follow the yellow line. (“T.R.” Vol. 2, page 15). Mr. James S. Haywood, Jr. then referred back to the Answer which was filed by Joshua B. Shearon on behalf of the third-party defendants in the original action and that Mr. Shearon included an exhibit in his answer which showed the “yellow line” in question. (“T.R.” Vol. 2, page 15) Counsel then explained that during depositions, Appellees stated that the yellow line in Mr. Shearon’s Answer as an exhibit was not the same yellow line as shown in

the courthouse. To verify this line, Mr. James S. Haywood, Jr. went to the courthouse and got the deed which he attempted to present in Court, and a copy of the documents which Mr. Joshua B. Shearon filed with his Answer with the Haywood Chancery Court. ("T.R." Vol. 2, page 16) Mr. James S. Haywood, Jr. then explained that you cannot take a Xerox copy of the deed from the courthouse because the photocopy machine will not pick up the yellow line, so it makes it difficult to lay out a roadway when you can't copy it. ("T.R. Vol. 2, pages 16-17). The Court asked then if that was part of the proof that was taken and Mr. Haywood stated no, and then the Court stated it was never prayed for. Mr. Haywood responded that the prayer is they're saying the easement. ("T.R." Vol. 2, page 17). The Court responded "the prayer has got to be specific. I don't find anything in the complaint that mentions a yellow line. For whatever reason, the Court of Appeals says there is an easement, and I'm disinclined to deal with anything that says they are mistaken." ("T.R. Vol. 2, page 17). Mr. Haywood then asked would the Court entertain the determination of the easement to continue, both counsels jointly amending their pleading or orally requesting the Court to establish it. ("T.R." Vol. 2, page 18). The Court responded stating the Court of Appeals sent it back and said finish it up, and the only things to be finished are damages from what were in the pleadings. ("T.R." Vol. 2, page 18). James S. Haywood, Jr. responded that if it was left without the easement being established, this issue would be back to square one to which road is the easement because there was an easement on the same yellow line that was done years ago by a predecessor that Appellants' aver is the yellow line and Appellees' aver is the county road. ("T.R. Vol. 2, page 18).

Mr. Haywood further made an "offer of proof" as to the easement, yellow line, etc.

The Court responded saying:

THE COURT: No. I am not going to defy what I see as a directive from the Court of Appeals. I really don't think I can do that. So this has come back with the issue of dam- -- if there are damages, what are the damages? ("T.R." Vol. 2, page 20)

Appellants' Counsel (Haywood) stated to the Court he had a surveyor as a witness to testify as to what the easement would have been, along the "yellow line" just like the deed book in reference states, but that it's a paved road rather than dirt road that Appellees' Counsel contends. The Court asked if that was argued before the Court of Appeals? ("T.R." Vol. 2, page 21). Mr. James S. Haywood, Jr. answered "no". The Court asserted that the case went up and that for whatever reason the issue of the yellow line was not part of the case and that this case was remanded to this Court to finish up and the only issue prayed for a not addressed is damages. ("T.R. Vol. 2, page 21). Counsel for the Appellees, Mr. Pat H. Mann, Jr., stated what was also prayed for was to re-open the easement. Then the Court stated "and apparently you got the easement, according to the Court of Appeals, that's filed in deed book 263, page 384." ("T.R. Vol. 2, page 22). Mr. Mann then asserted that although Mr. Haywood speaks of the easement as a paved road, the paved road does not go but a little over half of the way that the easement road goes over the farm where the Appellees were driving on it for ten (10) years prior to the Appellants' got it. ("T.R. Vol. 2, page 22). The Court then tried to move to damages and Counsel for the Appellees, Mr. Mann, started to introduce an exhibit and was stopped by the Court who stated as follows:

THE COURT: But nobody prayed for a dispute as to what is the easement, and we're just finishing up this case. If there's a new issue, there's a new issue. Apparently it sounds like there is, but that issue didn't go to the Court of Appeals. ("T.R." Vol. 2, page 22).

In the Tennessee case of Holder v. Serodino, 2015 Tenn. App. LEXIS 745, 2015 WL

5458377 (Tenn. Ct. App. Sept. 16, 2015) the appellate court stated as follows:

Even though drafters of deeds are encouraged to include a precise legal description of the servient estate and the portion of the estate over which the easement runs, instruments lacking "an easement's location or dimensions are commonplace." Mitchell, 149 S.W.3d at 45-46. "[T]hese sorts of omissions and oversights are not necessarily fatal to the easement." Id. at 46. An easement created without a precise location is sometimes referred to as a "general easement." USA Cartage Leasing, LLC v. Baer, 202 Md. App. 138, 32 A.3d 88, 110 (Md. Ct. Spec. App. 2011). These "general easements" express a clear intention to create an easement, but lack a sufficient description to properly locate it. (COPY OF CASE ATTACHED TO BRIEF AS IT ORIGINATED FROM ANOTHER JURISDICTION)

While there is no ambiguity as to the existence of a general easement, the lack of details as to its location **leaves an uncertainty that must be resolved.** {Emphasis supplied}. When confronted with such an issue, we may consider extrinsic evidence of the parties' intent to determine the easement's location. Mitchell, 149 S.W.3d at 46; see also ABN AMRO Mortg. Group, Inc. v. S. Sec. Fed. Credit Union, 372 S.W.3d 121, 127 (Tenn. Ct. App. 2011) ("Courts are reluctant to declare instruments void for an uncertain description and will look to attendant facts to make them certain."). In doing so, we may take into account:

(1) the purpose of the easement, (2) the geographic relationship between the dominant and the servient tenements, (3) the use of each of the tenements, (4) the benefit to the easement holder compared to the burden on the servient tenement owner, (5) the admissions of the parties, and (6) the use existing at the time of the easement's creation. Mitchell v. Chance, 149 S.W.3d at 46 (Tenn. Ct. App. April 2004).

The case of Mitchell v. Chance as cited above, i.e. 149 S.W.3d at 46 (Tenn. Ct. App. April 2004), states as follows:

The rules governing the interpretation of deeds are well-settled and are designed to enable the courts to ascertain the intention of the parties to the deed. Collins v. Smithson, 585 S.W.2d 598, 603 (Tenn. 1979); Barber v. Westmoreland, 601 S.W.2d 712, 714 (Tenn. Ct. App. 1980). The courts should first seek the parties' intention by examining the words in the deed, Hutchison v. Board, 194 Tenn. 223, 227-28, 250 S.W.2d 82, 84 (1952), and by considering these words in the context of the deed as a whole. Collins v. Smithson, 585



S.W.2d at 603; Barber v. Westmoreland, 601 S.W.2d at 714; Quarles v. Arthur, 33 Tenn. App. 291, 295, 231 S.W.2d 589, 590 (1950).

The Mitchell case as cited (Mitchell v. Chance, 149 S.W.3d at 46 (Tenn. Ct. App. April 2004)) also goes on to state as follows:

The courts customarily declines to consider parol evidence that adds to, varies, or otherwise contradicts the language of the deed. Stickley v. Carmichael, 850 S.W.2d 127, 132 (Tenn. 1992). However, parol evidence may be admissible to remove a latent ambiguity in the deed. Stickley v. Carmichael, 850 S.W.2d at 132; Estate of Burchfiel v. First United Methodist Church, 933 S.W.2d 481, 482 (Tenn. Ct. App. 1996). A latent ambiguity is found where the equivocality of expression, or obscurity of intention, does not arise from the words themselves, but from the ambiguous state of extrinsic circumstances to which the words of the instrument refer, and which is susceptible of explanation by the mere development of extraneous facts, without altering or adding to the written language, or requiring more to be understood thereby than will fairly comport with the ordinary or legal sense of the words and phrases made use of. Weatherhead v. Sewell, 28 Tenn. (9 Humph.) 272, 295 (1848); Estate of Burchfiel v. First United Methodist Church, 933 S.W.2d at 482.

Your Appellant argues herein that parol evidence is inadmissible to explain a patent ambiguity contained within the deed. Estate of Burchfiel v. First United Methodist Church, 933 S.W.2d at 482. That case states that a patent ambiguity is defined as one produced by the uncertainty, contradictoriness, or deficiency of the language of an instrument, so that no discovery of facts, or proof of declarations, can restore the doubtful or smothered sense without adding ideas which the actual words will not themselves sustain.

A patent ambiguity, for which extrinsic evidence is not admissible, is this particular situation.

A yellow line marking a map as indicating an easement. This ambiguity appears “on the face of the

easement” which was recorded and which is the basis for the lawsuit and this appeal.

The Tennessee courts have held that a patent ambiguity is produced by the uncertainty, contradictoriness, or deficiency of the language of an instrument, so that no discovery of facts, or proof of declarations, can restore the doubtful or smothered sense without adding ideas which the actual words will not themselves sustain. . . ambiguity that may be removed by parol evidence is not a doubt thrown upon the intention of the party in the instrument by extrinsic proof tending to show an intention different from that manifested by the words of the instrument. It must grow out of the question of identifying the person or subject mentioned in the instrument. Weatherhead v. Sewell, 28 Tenn. (9 Humph.) at 295; Estate of Burchfiel v. First United Methodist Church, 933 S.W.2d at 482. (Tenn. Ct. App. 1996). In other words, the Court states, a patent ambiguity is one which appears on the face of the deed; while a latent ambiguity is one which is not discoverable from a perusal of the deed but which appears upon consideration of the extrinsic circumstances. Estate of Burchfiel v. First United Methodist Church, 933 S.W.2d 481, 1996 Tenn. App. LEXIS 360 (Tenn. Ct. App. 1996).

The interpretation of a deed is a matter of law. Rodgers v. Burnett, 108 Tenn. 173, 184, 65 S.W. 408, 411 (1901); City of Memphis v. Wait, 102 Tenn. 274, 277, 52 S.W. 161, 162 (Tenn. 1899); Brown v. Brown, 45 Tenn. App. 78, 95-96, 320 S.W.2d 721, 728 (1958). Your Appellants herein argue that a yellow line” made by a “highlighter” and designating a description over property should not be allowed to stand as a lawful description.

Where the instrument is so drawn that upon its face it refers necessarily to some existing tract of land, and its terms can be applied to that one tract only, parol evidence may be employed to show where the tract so mentioned is located. But, where the description employed is one that must necessarily apply with equal exactness to any one of an indefinite number of

tracts, parol evidence is not admissible to show that the parties intended to designate a particular tract by the description. Baliles v. Cities Serv. Co., 578 S.W.2d 621, 1979 Tenn. LEXIS 416 (Tenn. 1979).

An early Tennessee court decision which is still cited states, “Where it is sought to identify the land sold by reference to some other instrument, the instrument which contains the description must be clearly referred to and identified by the memorandum or contract. Wright v. Harrison, 137 Tenn. 157, 192 S.W. 716, 1916 Tenn. LEXIS 63 (1916).” In this situation, the easement document which was not allowed to be presented to the court (even with an offer of proof), (“T.R.” Vol 2, page 20), refers to another instrument, i.e. Haywood County Tax Map and then has a yellow line. A line which is extremely ambiguous as to location.

**ISSUE NUMBER TWO: WHETHER OR NOT THE CHANCELLOR SHOULD HAVE TAKEN UP THE ISSUE PRESENTED BY BOTH PARTIES AS TO WHERE THE ALLEGED EASEMENT WAS LOCATED.**

Both the Appellants and the Appellees herein prepared for and tried to present proof as to the location of the easement. In first addressing the Court, Mr. Pat H. Mann, Jr., counsel for the appellees, attempted to introduce proof which he asserted showed exactly where the easement in question is located. In response, the Court contended that the issue of the location of the easement was never prayed for in the original Complaint which was taken to the Court of Appeals on June 18, 2015 in case number W2015-01124-COA-R3-CV, and that the Court of Appeals made it clear that there was an easement by their opinion filed February 12, 2016. (“T.R.” Vol. 2, page 7). The Court then asserted that general damages were the only issue left to determine at this hearing, including crop damages and the inability to duck hunt or plant crop

in 2015. ("T.R." Vol. 2, page 8-9). Mr. Pat H. Mann, Jr. continued to attempt to introduce deeds and documents to establish exactly where this easement was, asserting that the Court of Appeals did determine that the easement was "good" but not where it was. ("T.R." Vol. 2, page 10). Again, in response, the Court asked where either party prayed for the location of the easement to be determined in the original complaint. ("T.R." Vol. 2, page 10). Mr. Pat H. Mann, Jr. stated it was in his complaint "as recorded in deed book so-and-so, page so-and-so in the register's office." ("T.R." Vol. 2, page 10). In response, the Court stated that the complaint stated "you conveyed an ingress and egress over this roadway by instrument from Williams James and Ewell James recorded in deed book 263, page 384 and it would appear there's some kind of description that the Court of Appeals says that's it." (Vol. 2, page 10). Mr. Pat H. Mann, Jr. attempted again stating it would just be three (3) or four (4) documents to enter into the record. ("T.R." Vol. 2, page 10). The Court then asked "what would be the point?" ("T.R." Vol. 2, page 10). Mr. Pat H. Mann stated then some of them are Google Maps that show the easement road and where it is located. ("T.R." Vol. 2, page 11) The Court then asserted that the Court of Appeals "bought" what was stated in the original complaint, apparently recorded in deed book 263, page 384, and that part was done and to move to damages. ("T.R." Vol. 2, page 11) When asked again by Counsel for the Appellees if the Court did not want Counsel to introduce the deed document, the Court stated "The Court of Appeals instructed me -- it looks like they bought into this easement that's in deed book 263, page 384. So, it looks like that's the easement, so I'm thinking damages is all we'll be taking up this morning." ("T.R." Vol. 2, page 11-12)

In turn, counsel for the appellants, Mr. James S. Haywood, Jr., agreed with the Court that the Court of Appeals said there was an easement; “but all along the big problem has been where really is the easement because ...“ (“T.R.” Vol. 2, page 12). The Court responded stating:

THE COURT: The Court of Appeals is pretty clear about the notion that this Court cannot deal with anything that’s not prayed for unless, you know, I did a quick review of this file, unless there’s something in there questioning what the easement is other than whatever is recorded in deed book 263, page 384.” (Vol. 2, page 13)

In response, Mr. Haywood averred that in the Appellants’ original answer to complaint, they deny there is an easement, but the Court of Appeals then ruled there was, so the question is, where is the easement? (“T.R.” Vol. 2, page 13). Counsel further stated that it was initially thought the easement was a main, paved road and not a little dirt road that goes off to the side. Counsel then presented a blown-up picture of the deed book and page number that the court referred to that says there is an easement, showing the only line that deed has is a yellow line that’s going across the deed. (“T.R.” Vol. 2, page 14). The Court then asked, “Are you sure the deed just says a yellow line?” (“T.R.” Vol 2, page 15). Counsel responded “yes”, asserting that the description of the easement in Deed Book 263, 384 simply states the easement is a yellow line and that a true grant of an easement must contain all the formal requirements of a grant of land and should be certain and definite in its terms, not just say follow the yellow line. (“T.R.” Vol. 2, page 15).

The trial Court further stated that “this was the first time this yellow line business has come up; and that the Court is under a mandate from the Court of Appeals to finish this up, and clearly damages, but that the Court can’t get into something that didn’t even go the Court of Appeals about the yellow line.” (“T.R.” Vol. 2, page 19). In continuation, the Court stated:

THE COURT: "I want to do what I think the Court of Appeals has ordered me to do, and I don't think I can do anymore even though I'm persuaded that as a practical matter - - but I think I am limited on what this Court can do from a mandate from the Court of Appeals." ("T.R." Vol. 2, page 20).

Mr. James S. Haywood, Jr. then asked for an offer of proof. The Court responded saying as follows:

THE COURT: No. I am not going to defy what I see as a directive from the Court of Appeals. I really don't think I can do that. So this has come back with the issue of dam- -- if there are damages, what are the damages? ("T.R." Vol. 2, page 20).

Tennessee appellate courts "may take up an issue that has been waived if the issue constitutes a 'plain error' that affects the substantial rights of a party and consideration of the issue is necessary to do substantial justice." Grindstaff v. State, 297 S.W.3d 208, 219 n.12 (Tenn. 2009). This review for plain error is discretionary. State v. Hatcher, 310 S.W.3d 788, 808 (Tenn. 2010). In general, decisions regarding the admission or exclusion of evidence are entrusted to the trial court's discretion. Accordingly, reviewing courts will not disturb these decisions on appeal unless the trial court has abused its discretion. State v. Franklin, 308 S.W.3d 799, 809 (Tenn. 2010); State v. Lewis, 235 S.W.3d 136, 141 (Tenn. 2007). Appellees argue that this is the case as both parties were attempting to present the issue which they felt was extremely important to the case; a request was made to be allowed to make any amendments necessary ("T.R." Vol 2, page 18) and an offer of proof was made by the Appellant and denied ("T.R." Vol 2, page 20).

**ISSUE NUMBER THREE: WHETHER OR NOT THE DAMAGES ASSESSED  
BY THE CHANCELLOR AGAINST THE APPELLANTS WERE APPROPRIATE.**

Appellants never asked the Court for an injunction restraining the Appellees from going back and forth through their property except in number five (5) of their Counter-Complaint which requested that upon a hearing of this matter, the Court grant a permanent restraining order or injunction which enjoins the counter-defendants from coming upon the land belonging to the counter-plaintiffs; so, there was no legal prohibition from the Appellees going across the property at either of the two possible easement locations. ("T.R." Vol. 2, pages 26-27). Mr. James S. Haywood, Jr. then stated to the Court, that the Appellees were in fact able to access their land to take photographs of their damages as evidenced by the photograph marked "Exhibit One", although the Appellees sought damages due to inability to access their land. ("T.R." Vol. 2, pages 27-28). (Vol. 4, Exhibit One). Mr. Haywood further pointed out that the Appellees did not use the road they allege to be their easement to get to their property to access alleged damages, but rather they used the paved road going down to the Goode property with a gate on the end. ("T.R." Vol. 2, pages 28 and 45). Mr. Haywood stated to the trial court that when he took the Appellees depositions, the Appellees stated they never asked permission of Mr. Goode to use the gate but then somehow miraculously they get a key to the gate and can go back there when it is time to prepare for court. ("T.R." Vol. 2, page 28). Mr. Haywood then questioned the Appellees contention about being able to access and take care of the property, did they ever really try or were the Appellees just trying to use this as subterfuge here. ("T.R." Vol. 2, page 28). Then, Mr. Haywood addressed the crop damage that the Appellees prayed for, stating that when he took the

Appellees depositions, Mr. Mann didn't talk about the crop damage because the corn that was planted was never harvested. It was always just planted for ducks, so they never lost any monetary damages as far as the corn. ("T.R." Vol. 2, page 29). In addressing the prayer for loss of timber, Mr. Haywood asserted that when he took the deposition of William James (third-party defendant in the original action), Mr. James testified that the reason he put trees there is because the soil was so bad it had clay and it held water. You could not put a crop on it because it held water. ("T.R.". Vol. 2, page 29). He continued his defense stating the Appellees' farm is a naturally low place and has been historically a duck blind and that if there are trees, it's going to kill the trees eventually, but those damages were not from his clients as the Appellees could have gotten to their property if they wanted to. ("T.R.". Vol. 2, page 29). In response, Mr. Mann informed the Court that a week or two (2) before this hearing, his clients had contacted Mr. Goode's foreman to meet them at the property and unlock the gate as a favor for the Appellees to take a forester down there to look at the timber to assert damages. ("T.R.". Vol. 2, page 30).

When Appellee Stephen Leath was asked by James S. Haywood, Jr. why he didn't walk to his property to drain his duck blind, Mr. Leath testified that chest waders or hip boots would be too heavy to carry such a distance and he could not have hired somebody to walk and drain the blind. ("T.R." Vol. 2, page 60). Mr. James S. Haywood, Jr. then entered Exhibit "1", a photograph of the witness, Stephen Leath, exiting the Goode property through the Goode's gate, in his truck with his "Ranger" attached by trailer. ("T.R." Vol. 2, pages 60-61). (Vol. 4, Exhibit One).

A Motion was filed by the plaintiffs/Appellees in the trial court on October 21, 2015 stating that the Pitts have harvested their soybeans on the property involved in this cause of



action. The Motion further states that the plaintiffs were unable to hunt or plant a crop in 2015 “because of the action taken by the Pitts and have potential damage to trees caused by flooding.” (“Vol. 1, page 1-4). There never was any type of action, other than defense to this suit, which prevented the Appellees from getting to their property. There is nothing to cite in the record herein as there was no restraining order, bond, or other legal orders from the trial court preventing Appellees from going onto their property. Prior to the complaint being filed by the Appellees, there was a trespass action filed in the Haywood County General Sessions Court against Appellee Stephen Leath, but this was later dismissed by said court.

Mr. Leath in cross-examination testified that the Appellant had dug up his road, and “I just – until we got this lawsuit settled I was trying not to stir up any –“ (“T.R.” Vol. 2, page 86).

**CONCLUSION**

For all of the foregoing reasons set forth and stated herein, your Appellants, respectfully request that this Honorable Court reverse the decision of the Chancery Court of Haywood County, Tennessee and to disallow damages. Furthermore, Appellants request this matter be remanded back to the trial court for a new trial on the merits concerning whether or not the "yellow marker" on a tax map is sufficient description for an easement; and for such other proceedings as this Court determines to be appropriate under the circumstances of this case.

RESPECTFULLY SUBMITTED, this the 3<sup>rd</sup> day of March, 2017.

Respectfully submitted,

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KENNETH AND DEBBIE DAVIS LIVING TRUST

Dated the day of June, 2016

KENNETH AND DEBBIE DAVIS  
GRANTORS

KENNETH N. DAVIS AND DEBBIE L. DAVIS  
CO-TRUSTEES

NOTICE OF INTENT TO ADOPT TENNESSEE COMMUNITY PROPERTY ACT

PURSUANT TO TCA § 35-17—103(4), THE GRANTORS ACKNOWLEDGE THE FOLLOWING:

THE CONSEQUENCES OF THIS TRUST MAY BE VERY EXTENSIVE, INCLUDING, BUT NOT LIMITED TO, YOUR RIGHTS WITH YOUR SPOUSE BOTH DURING THE COURSE OF YOUR MARRIAGE AND AT THE TIME OF A DIVORCE. ACCORDINGLY, THIS AGREEMENT SHOULD ONLY BE SIGNED AFTER CAREFUL CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS AGREEMENT, YOU SHOULD SEEK COMPETENT ADVICE. THE PROVISIONS OF THIS TRUST ARE TENNESSEE SPECIFIC. THE GRANTORS ARE WARNED THAT SHOULD THEY MOVE TO A STATE OTHER THAN TENNESSEE, THIS DOCUMENT MAY REQUIRE IMMEDIATE MODIFICATION.

PREPARED BY:

Christopher N. Davis, Attorney  
54 South Johnson Street  
Alamo, Tennessee 38001  
(731) 696-4354

TRUST AGREEMENT THIS AGREEMENT is made this day of June, 2016, by and between KENNETH N. DAVIS and DEBBIE L. DAVIS of Crockett County, Tennessee, hereinafter called "Grantor" or "Grantors," and KENNETH N. DAVIS and DEBBIE L. DAVIS, hereinafter called the "Trustee." The plural shall be construed as singular and the singular shall be construed as plural as the context of the instrument shall require.

**W I T N E S S E T H:**

WHEREAS, the Grantors are establishing this Revocable Trust for the benefit of the Grantors, beneficiary or beneficiaries herein named or described; and

WHEREAS, the Grantors intend to create a Tennessee Community Property Trust as defined in TCA Section 35-17-103; and

WHEREAS, the Grantors deposit with the Trustee certain assets, which assets may be described on Schedule "A". The failure to complete Schedule "A" shall not affect the validity of the trust instrument or the transfer of any assets to the trust.

NOW, THEREFORE, IN CONSIDERATION OF THE PREMISES, the acceptance of this trust by the Trustee, the Grantors and the Trustee agree as follows.

**END OF INTRODUCTION**

**ITEM ONE**  
**STATEMENTS OF GRANTORS**

1.01 Name of Trust. This trust shall be known as the KEN AND DEBBIE DAVIS LIVING TRUST. It shall be sufficient to refer to this trust by its name without disclosing the name of the Trustee or any beneficiary. Assets held by the Trustee without specific designation to the contrary will be deemed to be held in this KEN AND DEBBIE DAVIS LIVING TRUST.

1.02. Intent to Create Tennessee Community Property Trust.

- (a) It is the Grantors' intention that the trust created under this Agreement be a Community Property Trust as described in TCA Section 35-17-101, et. seq.
- (b) During the lifetime of both Grantors, any and all property contributed to this trust by either or both Grantors or from whatever source and income earned by and retained in the trust is owned as Community Property.
- (c) During the lifetime of both Grantors, the trust may not hold separate property. All property in the trust is and shall be Community Property.
- (d) At the time of the funding of this trust, the Grantors first convey to each other an undivided one-half (1/2) interest as tenants in common in any and all property contributed to or to be held in this trust so that each is contributing an undivided one-half (1/2) interest in the property. The property shall thereafter immediately become Community Property upon being titled in the name of the trust. It is the specific intention of the Grantors to first convey all property which will ultimately become a trust asset to each other as tenants in common and immediately thereafter convert the property to Community Property.

(e) The Grantors are advised and recognize that in order to remain qualified as a Community Property Trust under TCA § 35-17-101, et seq., that at least one Trustee must be a Qualified Trustee which is a Tennessee resident or a company licensed to act as a fiduciary in Tennessee as provided in TCA § 45-2-1001.

(f) Any provision in this document which causes the trust not to be defined as a Tennessee Community Property Trust is void and any construction of this document shall be made accordingly.

1.03. Situs. The situs of this trust shall be the State of Tennessee.

1.04. State Law. This trust is established and administered under the laws of the State of Tennessee.

1.05. Marital Status. The Grantors are married.

1.06. Citizenship. Both Grantors are residents of Crockett County, Tennessee, and are U. S. citizens.

1.07. Children. The Grantors have three (3) children: CHRISTOPHER N. DAVIS, THOMAS N. DAVIS and ERICA L. MCNAIR.

1.08. Beneficiaries. The principal beneficiaries of this trust are the Grantors during their lifetime. Following the death of both Grantors, the principal beneficiaries shall be as outlined herein.

1.09. Purpose of Trust. The purpose of this trust is to establish a Revocable Grantor Trust to: (1) simplify the management of the Grantors' assets; (2) provide for a Trustee to manage the Grantors' financial affairs should the Grantors be disabled or incapacitated; (3) avoid Probate; and (4) hold assets as Community Property under the provisions of TCA § 35-17-101, et seq.

1.10. Statement of Grantors.

- (a) The Grantors agree that all assets held in this trust shall be held as Community Property with each of the Grantors owning an undivided one-half (1/2) interest as Community Property in the trust estate as it shall exist from time to time.
- (b) The interest of each Grantor shall be held as the Grantor's share of Community Property and shall be deemed to be held in a separate trust share of this single trust estate, one trust share for each of the Grantors.
- (c) Either Grantor may designate his or her separate non-trust assets to be payable to the trust upon the death of the Grantor by beneficiary designation or otherwise. Assets payable to the trust upon the death of a Grantor shall be held and distributed as a part of the Decedent's Trust.
- (d) The Grantors may elect to hold assets outside of this trust, jointly with right of survivorship, with the spouse, children, or others. Likewise, a Grantor may elect to hold assets outside of this trust, designating a beneficiary which may or may not be this trust. Assets held outside of the trust, jointly with right of survivorship, will pass to the surviving joint owner and will not be directed by this trust. Assets held outside of the trust which are payable by beneficiary designation will pass to the named beneficiary and will not be directed by this trust unless payable to this trust. Assets in the individual name of a Grantor and not payable by beneficiary designation may be distributed to this trust by pour-over Will of a deceased Grantor. Otherwise, such assets will be distributed as directed in the deceased Grantor's Will.

1.11. Conditions Precedent. To the extent that any otherwise taxable gift is produced by reason of the formation and/or funding of this trust, it is the agreement and intent of the Grantors that same qualify for the Marital Deduction and the provisions which follow shall control. The Trustee shall act accordingly.

(a) Where one Grantor transfers an interest in property to this trust (made an otherwise taxable gift):

(1) The donee spouse is annually entitled for life, upon demand, to all of the income from the interest transferred;

(2) The donee spouse shall have the right during life or at death to cause the assets of his/her one-half (1/2) share of the Community Property to be 5 distributed to himself/herself or his/her estate. Exercise of the power shall be by written instrument delivered to the Trustee during the lifetime of the Grantor exercising the power. It is the intent of the Grantors to give each spouse a general power of appointment, as the term is defined in Section 2041 of the Code, with respect to his/her share of the Community Property.

(3) No person other than the donee spouse, including a Trustee named herein, shall have the power to appoint any part of such interest or such portion to any person other than the donee spouse.

(b) It is the intent of the Grantors that any otherwise taxable gift by reason of the formation and/or funding of this trust be held, managed and distributed as required by Code Section 2523(e) in order to qualify for the Marital Deduction.



Any provision herein inconsistent with said intent, said Code Section and/or the provisions of this paragraph are void ab initio.

(c) As provided in TCA Section 35-17-104(b)(1), either spouse may amend the Community Property Trust regarding the disposition of that spouse's one-half (1/2) share of the Community Property in the occurrence of such spouse's death.

(d) The provisions of this section 1.11 are conditions precedent to the administration of this trust. The Trustee is specifically prohibited from administering this trust in a manner inconsistent with this section.

1.12. Tax Reform. The Grantors are advised that the current federal estate tax law and Generation-Skipping Tax laws will change and that modifications to this trust may be needed. The Grantors are advised that they should seek a review of this document at least annually in order to determine the need for revisions to the instrument, restructuring of asset ownership and/or changes in beneficiary designations.

**END OF ITEM**

(b) After the death of a Grantor, the Decedent's Trust shall be irrevocable. The surviving Grantor shall have the right to revoke the Survivor's Trust.

2.03. Powers Exercisable on Behalf of a Grantor.

(a) Any powers granted to or retained under this Item by a Grantor who is not competent may be exercised by his/her court appointed guardian or conservator or by an attorney-in-fact, if the attorney-in-fact is expressly authorized to do so under the power of attorney, and if the power of attorney expressly provides that it is not affected by the principal's disability and if, under applicable law, the power of attorney is not revoked or made ineffective by reason of such incompetency.

(b) The Grantors are warned by counsel that creating a power of attorney which grants the power in the attorney-in-fact to amend or revoke the trust may create legal, estate, and gift tax issues for the attorney-in-fact. Such power, if granted, should be carefully considered.

2.04. Form of Amendment or Revocation.

(a) Any amendment, whether by one or both Grantors, or the survivor, must be signed by the Grantor(s) making the amendment and the Trustee then serving.

(b) An amendment that results in the removal of a Trustee shall require notice to the Trustee being removed, but shall not require the signature of the Trustee being removed.

(c) The revocation of the trust (or the revoked portion thereof) shall require written notice of the intention to revoke to the other Grantor, if surviving, and the Trustee.

(d) Upon giving notice of revocation, the Trustee shall have a reasonable time to close the books and accounts of the trust and deliver the assets of the trust estate as directed.

2.05. Divorce. If either of the Grantors files for divorce, the Community Property held by this trust shall be divided upon entry of a Final Decree of Divorce in the same manner as Marital Property would be under the laws of the residence of the Grantors where the divorce is granted and distributed pursuant to the divorce decree of the court having jurisdiction over the Grantors' divorce. Unless otherwise ordered by the Court having jurisdiction over the parties or modified by the parties, each Grantor's separate share so divided shall continue to be held in a separate trust having the same terms as this trust, provided that the ex-spouse shall be deemed to have predeceased in the same manner, as provided in T.C.A. Section 32-1-202, until such time as each Grantor shall create new estate planning documents.

**END OF ITEM**

**ITEM THREE**  
**DISPOSITION OF TRUST, INCOME AND/OR CORPUS DURING LIFE OF BOTH GRANTORS**

3.01. Trust Management. During the life of both of the Grantors, the Trustee shall hold, manage and distribute trust assets pursuant to the provisions of this Item.

3.02. Limitations. Distributions under this Item are subject to the specific requirements and provisions of paragraph 1.1 l. Any provisions in this Item which would cause property gifted at the time of formation and/or funding to not qualify for the Marital Deduction are void ab initio.

3.03. Distribution of Income during Lifetime of Grantors.

(a) Each Grantor shall have the right to Withdraw the trust income at least annually. If both request all income, it shall be equally divided and distributed. If both Grantors request less than all of the income, but if the collective request is for more than all of the income, the income shall be distributed on a pro rata basis based on the amounts requested.

(b) In all events, income must be distributed as required to secure and maintain any Marital Deduction claimed with respect to any property contributed to the trust which would otherwise constitute a taxable gift.

(c) All distributions shall be made from this trust as a whole and not from any separate share of the trust.

3.04. Accumulation of Income. Income not distributed shall be added to corpus.

3.05. Distribution of Corpus during Life of Grantors.

(a) The Trustee shall pay so much of the corpus of this trust estate to or for the benefit of the Grantors, or either of them, or as the Grantors, or either of them, shall direct. All

distributions shall be made from this trust as a whole and not from the separate trust share held for a Grantor.

(b) Notwithstanding the above, no more than one-half of the principal of the trust may be distributed in any one year to or for the benefit of either Grantor over the objection of the other Grantor (or Attorney-in-Fact acting on behalf of an incapacitated Grantor).

3.06. Distributions of Property. All distributions to either or both Grantors shall be made at such time and in such manner as set forth in the demand. Pursuant to TCA Section 35-17-1()5(e), any property distributed from this trust shall no longer constitute Community Property. However, any property distributed shall be Marital Property regardless of how the property is thereafter titled.

3.07. Conflicting Directions. In the event any Trustee (assuming the Trustee is not a Grantor) receives conflicting directions from both Grantors, the Trustee may: (1) refuse to honor the conflicting directions of both Grantors until the conflict is resolved; (2) ignore the conflicting directions and thereafter administer the trust as though the Grantors are both disabled or incapacitated; (3) petition a court having jurisdiction over the Grantors and this trust for directions; or (4) terminate the trust as if both Grantors gave notice of revocation and distribute one-half (1/2) of the trust property to each Grantor.

3.08. Distribution of Income and Corpus during Disability of Grantors. In the event that the Trustee determines that one or both Grantors, because of sickness, advanced age or other infirmity is no longer legally capable of directing the disposition of the income or corpus, the Trustee is authorized to direct such portions of the income and/or corpus of this trust estate for the benefit of said disabled Grantor to provide for the reasonable health, support, medical care, maintenance in health and expenses of invalidism of said Grantor in the standard of living to

which the Grantor has become accustomed; all as the Trustee, in the reasonable discretion of the Trustee, deems appropriate and in the best interest of the Grantors. All distributions under this paragraph shall be made from this trust as a whole. Provided that, distributions in any one year of more than half of the trust assets to or for the benefit of a disabled Grantor may not be made over the objection of the other Grantor consistent with the provisions of 3.05.

3.09. Gifts During Disability of Grantor.

(a) In the event that a Grantor, because of sickness, advanced age or other infirmity is no longer legally capable of directing the disposition of the income and/or principal, the Trustee is authorized to act on the part of a disabled Grantor, as an Attorney-in-Fact, to exercise the disabled Grantor's general power of appointment over his/her trust share and initiate or continue a gifting program on behalf of the disabled Grantor (in the same manner that the Trustee believes the Grantor would have acted and in conjunction with the desires of the other Grantor) to the Grantors' family upon the following terms and conditions:

(1) The potential donees of any gift must be the children of the Grantors, children's spouses, children's issue, or the spouses of the issue of the children of the Grantors.

(2) Subject to the limitations imposed in paragraph 3.09(3) herein, the maximum amount which can be gifted to any potential beneficiary in any calendar year shall not exceed the maximum amount excludable from taxable gifts by Internal Revenue Code Section 2503(b), as amended.

(3) If a Trustee is a potential donee listed in paragraph 3.09(1) herein, the Trustee may not vote on or make a gift to himself/herself if it is in excess of the maximum

amount which does not constitute a lapse of a power of appointment under Section 2041(b)(2) or 25 14(e), as amended, (presently the greater of \$5,000 or 5% of the aggregate value of the assets out of which the lapsed power could be satisfied).

(4) Gifts to spouses of the children or issue of the Grantors are not required.

There is no obligation to equalize gifts between potential beneficiaries or family units.

(b) The Grantors state that it is their intention to split all gifts for gift tax purposes.

The Grantors agree to sign gift tax returns should they be required to evidence the split gift. The Grantors authorize the Trustee to sign any such returns as Attorney in Fact for a disabled Grantor.

(c) If making a gift directly from the trust invalidates any Marital Deduction claimed upon the formation and/or finding of this trust, then no gifts can be made directly from the trust. If gifting is desirable, the Trustee may distribute any amounts otherwise eligible for gifting outright to the Grantor and thus allow the Grantor (or the Attorney-in-Fact acting on behalf of a disabled Grantor) to make gifts directly from the disabled Grantor if the power of attorney authorizes same.

3.10. General Power of Appointment. Each Grantor shall have the right during life or at death to cause the assets of his/her one-half (1/2) share of the Community Property to be distributed to himself/herself or his/her estate. Exercise of the power shall be by written instrument delivered to the Trustee during the lifetime of the Grantor exercising the power. It is the intent of the Grantors to give each spouse a general power of appointment, as the term is defined in Section 2041 of the Code, with respect to his/her share of the Community Property.

3.11. Disposition of Trust Estate Following Death of a Grantor.

Kenneth and Debbie Davis Living Trust Agreement

(a) Subject to the exercise of the power of appointment above (with respect to the deceased Grantor's share of the Community Property), following the death of a Grantor with a Grantor surviving, the Trustee shall divide the trust on a fractional share basis into two equal shares. One share (the deceased Grantor's share of the Community Property) shall be allocated to the Decedent's Trust. One share (the surviving Grantor's share of the Community Property) shall be allocated to the Survivor's Trust. Subject to the provisions of ITEM Six which disposes of personal effects, the share allocated to the Decedent's Trust shall be divided and distributed as provided in ITEM Seven. The share allocated to the Survivor's Trust shall be held, administered, and distributed as provided in ITEM Four.

(b) Any amounts payable to this trust by reason of the death of a Grantor including, but not limited to, assets distributable from the probate estate of a Grantor, assets distributable by reason of beneficiary designation such as life insurance, retirement assets or otherwise, or any other assets of any nature and type which were not trust assets on the date of a Grantor's death shall be distributed to the Decedent's Trust and divided and distributed as provided herein.

**END OF ITEM**



**ITEM FOUR**  
**DISPOSITION OF TRUST. INCOME AND/OR CORPUS DURING LIFE OF**  
**SURVIVING GRANTOR - SURVIVOR'S TRUST**

4.01. Trust Management. During the life of the surviving Grantor (one Grantor is deceased), the Trustee shall hold, manage and distribute trust assets of the surviving Grantor pursuant to the provisions of this Item.

4.02. Limitations. Distributions under this Item are subject to the specific requirements and limitations under paragraph 1.11.

4.03. Name of Trust. This trust is referred to herein as the Survivor's Trust.

4.04. Distribution of Income during Lifetime of Grantor.

(a) The Trustee shall pay so much of the income of this trust estate to or for the benefit of the surviving Grantor or as the surviving Grantor shall direct.

(b) In all events, income must be distributed as required to secure and maintain any Marital Deduction claimed for any property contributed to this trust which would constitute a taxable gift at the time of formation or forming.

4.05. Accumulation of Income. Income not distributed or required to be distributed shall be added to principal.

4.06. Distribution of Corpus during Life of Grantor. The Trustee shall pay so much of the corpus of this trust estate to or for the benefit of the surviving Grantor or as the surviving Grantor shall direct.

4.07. Distribution of Income and Corpus during Disability of Grantor. In the event that the surviving Grantor, because of sickness, advanced age or other infirmity is no longer legally

capable of directing the disposition of the income or corpus, the Trustee is authorized to distribute such portions of the income and/or corpus of this trust estate for the benefit of the surviving Grantor to provide for the reasonable health, support, medical care, maintenance in health and expenses of invalidism of the surviving Grantor in the standard of living to which the surviving Grantor has become accustomed; all as the Trustee, in the reasonable discretion of the Trustee, deems appropriate and in the best interest of the surviving Grantor.

4.08. Gifts during Disability of Grantor. In the event that the surviving Grantor, because of sickness, advanced age or other infirmity is no longer legally capable of directing the disposition of the income and/or corpus, the Trustee is authorized to initiate or continue a gifting program to the surviving Grantor's family upon the following terms and conditions:

(a) The potential donees of any gift must be the children of the surviving Grantor, children's spouses, children's issue, or the spouses of the issue of the children of the surviving Grantor.

(b) Subject to the limitations imposed in paragraph 4.08(c) herein, the maximum amount which can be gifted to any potential beneficiary in any calendar year shall not exceed the maximum amount excludable from taxable gifts by Internal Revenue Code Section 2503(b), as amended.

(c) If a Trustee is a potential donee listed in paragraph 4.08(a) herein, the Trustee may not vote on or make a gift to himself/herself if it is in excess of the maximum amount which does not constitute a lapse of a power of appointment under Section 2041(b)(2) or 2514(e), as amended, (presently the greater of \$5,000 or 5% of the aggregate value of the assets out of which the lapsed power could be satisfied).

(d) Gifts to spouses of the children or issue of the surviving Grantor are not required.

There is no obligation to equalize gifts between potential beneficiaries or family units.

(e) If making a gift directly from the trust invalidates any Marital Deduction claimed upon the formation and/or funding of this trust, then no gifts can be made directly from this trust. In such event, the Trustee may distribute \_any amounts otherwise eligible for gifting outright to the surviving Grantor and thus allow the surviving Grantor (or the Attorney-in-Fact acting on behalf of a disabled surviving Grantor) to make gifts directly from the disabled surviving Grantor if the power of attorney authorizes same.

4.09. General Power of Appointment. The Surviving Grantor shall have the right during life or at death to cause the assets of this Survivor's Trust to be distributed to himself/herself or his/her estate. Exercise of the power shall be by Written instrument delivered to the Trustee during the lifetime of the Surviving Grantor exercising the power. It is the intent of the Grantors to give the Surviving Grantor a general power of appointment as the term is defined in Section 2041 of the Code with respect to the Survivor's Trust.

4.10. Disposition of Trust Estate Following Death of Grantor. Subject to the exercise of the power of appointment above, following the death of the surviving Grantor, the Trustee shall hold, manage and distribute the trust estate, together with any assets distributable to the Trustee from the estate of the surviving Grantor by reason of a pour-over provision in the surviving Grantor's Last Will and Testament, or otherwise by reason of this trust being designated as a beneficiary on any life insurance policies or other benefits of any nature whatsoever, pursuant to the terms set forth herein which provide for the distribution of the trust upon the death of both Grantors.

**END OF ITEM  
ITEM FIVE  
PAYMENT OF DEBTS, EXPENSES AND TAXES**

5.01. Debts and Expenses.

(a) Following the death of a Grantor and to the extent that assets of the deceased Grantor's probate estate are insufficient or not of a type which should be utilized for such purpose, the Trustee is authorized to pay from the trust share of the deceased Grantor (but not from the trust share of the other Grantor) all debts which are legally owing by the deceased Grantor. Mortgages or debts secured by deeds of trust may be paid or retained, in the discretion of the Trustee.

(b) The Trustee is authorized to pay the deceased Grantor's funeral expenses and the expenses of the administration of the deceased Grantor's estate from his/her share.

(c) The Trustee may, to the extent that the exercise of such power does not reduce the Marital or Charitable Deduction afforded the estate, pay all or any portion of the estate administration expenses out of the income and/or corpus during the period of administration. The Trustee may, in conjunction with the Personal Representative of the deceased Grantor, elect to deduct administration expenses either for federal estate tax purposes or federal income tax purposes, or partly for one or partly for the other. Estate transmission expenses, as defined in the Regulations issued under Sections 2055 and 2056 of the Internal Revenue Code, as amended, may not be paid from the assets or the share distributable in satisfaction of any bequests which qualify for the Marital or Charitable Deduction.

5.02. Taxes.

(a) The Trustee is authorized to pay from the trust share of the deceased Grantor (but not from the share of the other Grantor) all federal and state estate, inheritance, legacy and succession taxes (excluding Generation-Skipping Taxes which shall be charged to the property constituting the transfer subject to the tax in the manner provided by applicable law) which may be imposed and which are payable by reason of the Grantor's death, with respect to any distribution under the deceased Grantor's Will, under this trust, or otherwise, including taxes on proceeds of life insurance, whether or not the assets with respect to which said taxes are levied are part of this trust at the deceased Grantor's death.

(b) Taxes imposed on the estate of the first Grantor to die shall be charged against and paid from the property comprising the Decedent's Trust to the extent it is not qualified for the Marital Deduction by reason of a QTIP election or otherwise. Assets held in or distributed to the Survivor's Trust of the living Grantor may not be used to pay taxes imposed on the Decedent's Trust. Assets passing to or for the benefit of the Surviving Spouse or a qualified charity which qualify for the Marital or Charitable Deduction shall not bear any portion of the taxes. 22 (c) Taxes imposed on the estate of the second Grantor to die shall be charged against and paid from the property comprising the Survivor's Trust residue, subject to the provisions below. Assets passing which qualify for the Charitable Deduction shall not bear any portion of the taxes. (d) The deceased Grantors waive any right of reimbursement for recovery of or contribution toward the payment of any taxes, except for rights of recovery under Sections 2207, 2207A and 2207B of the Internal Revenue Code, as amended.

5.03. Life Insurance. If the estate of a Grantor is insolvent without taking into account life insurance payable to this trust, it is the specific intention and direction of the Grantors that any life insurance payable to the Personal Representative of the Grantors' estate or to this trust shall

not be subject to or charged with the payment of any debts. Rather, same shall be distributed to the beneficiaries in accordance with the other provisions contained in this document. It is the specific intention of the Grantors to afford life insurance the maximum protection under TCA Section 56-7-201.

**END OF ITEM**

**ITEM SIX  
PERSONAL EFFECTS**

6.01. Transfer to Trust. Upon the execution of this trust, the Grantors transfer and assign into the trust all of the Grantors' right, title and interest in and to all furniture, house furnishings and other household articles used by the Grantors, together with all other purely personal effects, including automobiles, jewelry and clothing. Said property is held- as Community Property.

6.02. Disposition of Personal Effects — Spouse Surviving. Upon the death of either Grantor, all of the furniture, furnishings and other household articles used by the Grantors and other purely personal effects, including automobiles, jewelry and clothing, shall be distributed to the Surviving Spouse outright and free of trust. Upon the direction of the Surviving Spouse (or his/her attorney in fact), same may be added to and continue to be held in the Survivor's Trust for the sole and exclusive benefit of the Surviving Spouse.

6.03. Disposition of Personal Effects — Spouse Not Surviving. If the Grantor's spouse is not surviving, then upon the death of the Surviving Spouse, all said furniture, house furnishings, household articles, automobiles, jewelry, clothing and other purely personal effects shall be distributed to the Grantors' surviving children, share and share alike. Issue of deceased children will receive a share of personal effects. The Grantors ask, as a precatory request, that the surviving children see that issue of deceased children receive items that have special meaning to them. The Trustee is authorized to add items of personalty to the Children's Trust established herein.

6.04. Special Instructions. In distributing the purely personal effects, the Grantors ask the Trustee to give consideration to any typed or handwritten letters of instruction which the Grantors may have prepared during lifetime which make known specific wishes and desires regarding said

items. The Grantors realize that such instructions, unless they meet the legal requirements of a modification to this trust, might not be legally binding. The Grantors ask the Trustee to consider same in making any discretionary division or distribution of such assets.

6.05. Classification. All questions as to whether any specific articles shall be included in the bequests in this Item shall be conclusively determined by the Trustee.

**END OF ITEM**



## ITEM SEVEN

### DISTRIBUTION OF ESTATE OF DECEASED GRANTOR — SPOUSE SURVIVING

7.01. Formula Gifts. This Section contains certain gifts effective at death based upon technical tax-related terms if the spouse is surviving. These terms are defined in the Miscellaneous Provisions Item herein and shall be applied under the law and the facts as they are at the time of the First Decedent's death.

7.02. Intent. It is the general intent of the Grantors that the share of the First Decedent to die (Decedent's Trust) shall be distributed and/or held, managed and distributed in the most tax efficient way. Under the law as contemplated to exist, this will likely result in the division of the Decedent's Trust into as many as three shares. One share known as the Family Trust will be funded with assets equal to the lesser of the state inheritance tax exemption or the amount that can pass tax free for federal estate tax purposes. A second share known as the Excess Exemption Trust (Excess Exemption QTIP Gift) will be funded with the excess of that which can pass tax free for federal estate tax purposes over that which can pass tax free for state inheritance tax purposes. A third share made up of remaining assets, known as the Marital Share (Optimum Marital Deduction Gift), will be distributed outright to the Surviving Spouse. The Grantors expect, but do not require, that the Surviving Spouse will cause said Marital Share assets to be added to his/her Survivor's Trust.

7.03. Optimum Marital Deduction Gift. The Trustee shall distribute a sum equal to the First Decedent's Optimum Marital Deduction, outright and free of trust, to the 26 Surviving Spouse. Upon the direction of the Surviving Spouse, said assets may be added to the Survivor's Trust.

7.04. Excess Exemption QTIP Gift. The Trustee shall distribute a sum equal to the First Decedent's Excess Exemption QTIP Gift, to the Trustee of the Excess Exemption Trust under Kenneth and Debbie Davis Living Trust Agreement

this Trust Agreement, to be disposed of under the terms of that trust and held as a separate trust. This gift is intended to equal the excess of (1) the larger of the amount that can pass tax free for federal estate tax purposes or the amount that can pass tax free for state inheritance tax purposes over (2) the smaller of those exemptions or amounts.

7.05. Special Rules for Formula Gifts. The amount of each Formula Gift shall be calculated using values as finally determined for the tax purposes for Which the Formula Gift is determined. Each Formula Gift shall carry with it a pro rata share of the income earned by the First Decedent's Property; provided that in no event shall the Surviving Spouse receive less income of the First Decedent's Property than that provided under applicable state law and that required to secure a Marital Deduction. In determining to what extent a distribution in kind satisfies a Formula Gift, property distributed in kind shall be valued at the date or dates of distribution. 7.06 First Decedent's Residuary Trust. The Trustee shall distribute the balance of the Decedent's Trust property, wherever located, including any property mentioned 27 above but not effectively disposed of to the Trustee of the Family Trust, to be disposed of under the terms of that trust.

**END OF ITEM**

**ITEM EIGHT**  
**EXCESS EXEMPTION TRUST**

8.01. Excess Exemption Trust. Assets delivered to the Trustee to be held as a part of the Excess Exemption Trust shall be held, managed and administered under the terms of this Item.

8.02. Name of Trust. This trust shall be known as the Excess Exemption Trust. It is commonly referred to as a Tennessee QTIP Trust. It may be divided into Exempt and Non-Exempt Trusts as allowed herein.

8.03. Apportionment Trust. The Trustee shall assign, convey and distribute to this trust the cash, securities or other assets, including real estate and any interest therein, and the proceeds from life insurance policies payable to this trust, which shall constitute said bequest. The cash, securities and other assets distributed must have an aggregate value at the date or dates of distribution amounting to no less than the amount of the bequest or transfer as provided above. The Trustee may not allocate to this trust assets which do not qualify for the Marital Deduction. The distribution to the trust shall carry with it the necessary share, if any, of trust income earned between the date of death and the date of allocation, which said income must be currently paid to the spouse as provided herein.

8.04. QTIP Election. It is likely, but not mandatory, that the Personal Representative and/or Trustee (whichever is applicable) will make a QTIP election over this trust for state inheritance tax purposes only and not for federal purposes. Regardless, the Personal Representative and/or Trustee (whichever is applicable) shall have the right to make an election to qualify all or any part of this trust for the Marital Deduction for federal and/or state estate or inheritance tax purposes. It is possible that no election may be made if such action is deemed to be beneficial to the estate of a deceased Grantor and spouse. If an election is made with respect to a portion of

Kenneth and Debbie Davis Living Trust Agreement

the trust, then the Trustee shall divide the trust into separate trust estates: one or more trust estates for which such a QTIP election is made and one or more trust estates for which no such QTIP election is made.

8.05. Purpose and Statement of Grantors. The Grantors state that at the time of the preparation of this trust inconsistencies exist between the amount which can pass tax free for federal estate tax purposes and state inheritance tax purposes. The Grantors recognize it is possible for the state inheritance tax exemption available at the death of a Grantor to be different from the federal estate tax exemption equivalent. This trust is designed to hold any excess state or federal exemption amount.

8.06. Beneficiary. The sole beneficiary of this trust is the Surviving Spouse of the deceased Grantor, also referred to as the Surviving Grantor.

8.07. Income to Spouse. From and after the death of a Grantor, the entire net income of this trust shall be distributable currently to the Surviving Spouse for and during lifetime. Distributions of income shall be made in monthly installments or as requested by the Surviving Spouse. In all events, income must be distributable at least annually.

8.08. Encroachment on Principal for Spouse. So much of the principal of this trust estate may be distributed to or for the benefit of the Surviving Spouse as may be necessary for the Surviving Spouse's reasonable support and maintenance in health and reasonable comfort. It is the intent that the Surviving Spouse be provided such portion or all of the principal of this trust estate to provide support in the Surviving Spouse's accustomed manner of living. The Trustee shall take into consideration other resources available to the Surviving Spouse from all sources of which the Trustee has actual knowledge. The principal shall generally be distributed from this trust only

after separate property of the Surviving Spouse (including the Survivor's Trust) has been exhausted or is determined not to be of a type suitable for distribution and use. Principal shall generally be distributed first from the portion of this trust for which a QTIP election is made.

8.09. Limited Testamentary Power of Appointment.

(a) Upon the death of the Surviving Spouse for whose benefit this trust is established, the Trustee shall pay to the Grantors' issue and/or any Charitable Organization, the principal and any accumulated but unpaid income not required to be distributed to the estate of the Surviving Spouse. Same shall be paid in such amounts and proportions, and upon such conditions and in such manner as the Surviving Spouse shall direct in a written document executed by the Surviving Spouse and delivered to the Trustee during the lifetime of the Surviving Spouse, in the Last Will and Testament of the Surviving Spouse, or Revocable Living Trust of the Surviving Spouse. Exercise of the power shall require specific reference to same.

(b) In no event shall the Surviving Spouse have the power or authority under this paragraph to direct the distribution of principal or accumulated but unpaid income to any person during the lifetime of the Surviving Spouse.

(c) In no event shall the Surviving Spouse have the power or authority under this paragraph to dispose of or appoint any of the principal or accumulated income of this trust estate in favor of the Surviving Spouse, the estate of the Surviving Spouse, any of the creditors of the Surviving Spouse, or the creditors of the estate of the Surviving Spouse, it being the intent herein to create a Limited Testamentary Power of Appointment in favor of the Surviving Spouse of a deceased Grantor as opposed to a limited inter vivos Power of Appointment or General Power of Appointment as defined under Section 2041 of the Code.

8.10. Termination of Trust. This trust shall continue in full force and effect until the death of the Surviving Spouse. Upon the death of the Surviving Spouse, the Trustee shall, to the extent necessary to secure and maintain any Marital Deduction which was claimed as a result of a QTIP election, pay and distribute any accrued, accumulated or unpaid net income from any portion of the trust for which a QTIP election was made to the legal representative of the estate of the Surviving Spouse. Unless altered by exercise of the power appointment above, the Trustee shall distribute all of the principal or balance of the trust pursuant to the Item which follows which directs the disposition of the estate following the death of both Grantors. Assets shall be divided between and allocated to any Exempt or Non-Exempt Trust created in this document based on their status for Generation-Skipping purposes.

8.11. Payment of Spouse's Death Taxes from Trust. After the death of a Surviving Spouse, but prior to distribution of any trust principal, there shall be paid from the principal of any portion of this trust for which a QTIP election was made, the amount of estate, inheritance or death taxes (but excluding any Generation-Skipping Tax which shall be charged to the property constituting the transfer in the manner provided by applicable law) which shall be payable in respect of all or that portion of the trust that shall not have been exhausted on the date of the death of the Surviving Spouse. The amount of such taxes shall be the amount by which said taxes increase as a result of including the assets of this trust in the gross estate of the spouse. If more than one trust established is for the benefit of the Surviving Spouse of a deceased Grantor is included in the estate of the Surviving Spouse for federal estate tax or state inheritance tax purposes, then the taxes shall be prorated between the trusts in the most tax efficient manner without disqualifying the Marital Deduction. Such taxes shall be paid by the Trustee to the appropriate tax authorities and not to the representatives of the estate of the Surviving Spouse.

8.12. Disclaimer. In the event that the Surviving Spouse disclaims all or any portion of the assets distributable under this Item, said assets shall pass as provided in the Family Trust under the next Item.

**END OF ITEM**

**ITEM NINE  
FAMILY TRUST**

9.01. Family Trust. Assets delivered to the Trustee of the Family Trust shall be held, managed and distributed as provided in this Item.

9.02. Name of Trust. This trust shall be known as the Family Trust. It may be divided into Exempt and Non-Exempt Trusts as allowed herein.

9.03. Beneficiaries. The beneficiaries of this trust are the Surviving Spouse of the Grantor and issue of the Grantors.

9.04. Purpose.

(a) The purpose of this trust is to maximize tax savings that are available for both federal estate tax and state inheritance tax purposes. Because these assets pass tax free at the death of the Surviving Spouse, it is suggested that assets not be distributed to or for the benefit of the Surviving Spouse unless no other assets are reasonably available to the Surviving Spouse. Regardless, the Surviving Spouse is the primary beneficiary of this trust and distributions shall be made or not made only after taking into consideration the present and expected future needs of the Surviving Spouse.

(b) Specific reference is also made to the purpose provisions found in paragraph 10.06, especially as it relates to the Grantor's children and descendants.

9.05. Income to Spouse. So much of the net income of this Family Trust may be distributed to or for the benefit of the Surviving Spouse as may be necessary for the Surviving Spouse's reasonable support and maintenance in health and reasonable comfort. It is the intent that the



Surviving Spouse be provided such portions or all of the net income of this Family Trust to provide support in the Surviving Spouse's accustomed manner of living.

9.06. Income to Children and Issue. After considering the needs of the Surviving Spouse, the Trustee is authorized to distribute such portions of the net income as the Trustee determines to be reasonably necessary for the reasonable support, maintenance in health and education of any of the Grantors' children, or any of their issue. Notwithstanding the above, income may not be distributed to the children or issue of the Grantors over the objection of the Surviving Spouse.

9.07. Accumulation of Income. Income not distributed shall be added to principal.

9.08. Encroachment on Principal for Spouse. So much of the principal of this trust estate shall be distributed to or for the benefit of the Surviving Spouse, as may be necessary for the Surviving Spouse's reasonable support and maintenance in health and reasonable comfort. It is the intent that the Surviving Spouse be provided such portions or all of the principal of this trust estate to provide support in the Surviving Spouse's accustomed manner of living. Principal of this Family Trust shall generally not be utilized unless the principal of any trust which qualifies for the Marital Deduction, separate property of the Surviving Spouse, or the Survivor's Trust have been exhausted or are not of a type suitable for distribution and/or use.

9.09. Encroachment on Principal for Children and Issue. The Trustee is authorized to distribute such portions of the principal of the Family Trust as the Trustee determines to be reasonably necessary for the reasonable support, maintenance in health and education of any of the Grantors' children, or any of their issue. It shall be in the full and absolute discretion of the Trustee whether or not to treat distributions of principal as loans from the principal of the Family Trust or advancements against such beneficiary's future rights in the estate. Notwithstanding the above,

principal may not be distributed to the children or issue of the Grantors over the objection of the Surviving Spouse.

9.10. Factors to be Considered. With respect to distributions of income and Factors to Be Considered principal, the Trustee shall take into account the individual circumstances of the trust beneficiary, minority, dependency and all other income and benefits being received from all sources whatsoever known to the Trustee, including income from property individually owned and income from other trusts created by the Grantors or any other person for the benefit of the beneficiary. The Trustee shall also take into account income tax, estate tax and Generation-Skipping Tax considerations in an effort to maximize the overall benefits.

9.11. Suspension of Payments. Distributions of income and/or principal may be suspended consistent with the provisions of the paragraph in ITEM Ten entitled, "Suspension of Payments."

9.12. Educational Provisions. Educational expenses may be incurred for issue consistent with the provisions of the paragraph in ITEM Ten entitled, "Educational Expenses."

9.13. Limited Power of Appointment. During the lifetime of the Surviving Spouse, or upon the death of the Surviving Spouse, the Trustee shall pay all or such portion of the principal and/or accumulated income of this trust to the issue of the Grantors and/or any Charitable Organization, in such amounts and proportions and upon such conditions and in such manner as the Surviving Spouse shall direct in a written instrument executed by the Surviving Spouse and delivered to the Trustee during the lifetime of the Surviving Spouse, in the Surviving Spouse's Last Will and Testament or Revocable Living Trust. Specific reference to this Limited Power of Appointment is required. In no event shall the Surviving Spouse have the power or authority to dispose of or appoint any of the principal or accumulated income of this trust estate in favor of the Surviving

Spouse, the estate of the Surviving Spouse, the creditors of the Surviving Spouse, or the creditors of the estate of the Surviving Spouse, it being the intent herein to create a Limited Power of Appointment as opposed to a General Power of Appointment as defined in the regulations issued under Code Section 2041.

9.14. Termination of Trust. Unless otherwise terminated or altered by reason of a distribution of trust assets or an exercise of the Limited Power of Appointment conferred above, this Family Trust shall continue in full force and effect until the death of the Surviving Spouse, at which time the Family Trust shall terminate or continue to be held in accordance with the provisions of the Item which follows. Assets shall be divided between and allocated to any Exempt or Non-Exempt Trust created in this document based on their status for Generation-Skipping Tax purposes.

9.15. Disclaimer. In the event that the Surviving Spouse disclaims all or any portion of the assets distributable under this Item, said assets shall pass as provided in the next Item.

**END OF ITEM**

**ITEM TEN**  
**DISTRIBUTION OF TRUST ESTATE UPON DEATH OF GRANTOR AND SPOUSE**

10.01. Specific Bequest. Upon the death of both Grantors, the Trustee shall distribute all property, cash, life insurance proceeds, stocks, bonds, retirement accounts, mutual funds, any interest in any partnership interest that may own real estate, rental houses, or farm land to Christopher N. Davis, Thomas N. Davis, and Erica L. McNair in equal shares, if surviving. If they are not surviving then to their issue but no property of any kind shall pass to the spouses of Christopher N. Davis, Thomas N. Davis, or Erica L. McNair. Alternatively, in the Trustee's discretion, this bequest may instead be distributed to the trust share established below for the benefit of Christopher N. Davis, Thomas N. Davis, and Erica L. McNair and their issue. If they are not surviving, then this bequest shall lapse and be distributed according to the paragraphs below.

10.02. Children's Share. Upon the death of both Grantors, after giving effect to the above bequest and to the extent that the assets of this trust estate are not otherwise directed through exercise of any Powers of Appointment granted above, this trust estate shall continue in full force and effect for the benefit of the children of the Grantors and/or their issue only. Any spouses of the Children are not a part of this Trust.

10.03. Name of Trust. This shall be known as the Davis Children's Trust. It may be divided into Exempt and Non-Exempt Trusts as allowed herein. Trusts for individual children may be named after the child for whose benefit the trust is established.

10.04. Trust Beneficiaries. The beneficiaries of this trust are the Grantors' three (3) children and their issue.

10.05. Separate Shares. As of now, the -trust is divided into three (3) separate trust shares, one share for each child of the Grantors who is living and one share for each child of the Grantors who is not living but has issue living. If a child is deceased and not survived by issue, then the share shall lapse and be reallocated to the other trust shares. The separate shares for the benefit of the Grantors' children and their issue shall be administered as separate trust estates and not as separate shares of a single trust estate. Assets of the separate trusts may be commingled for investment and management purposes.

10.06. Division and Allocation.

(a) The individual trust shares shall be further divided into two (2) separate trusts, one trust known as the Exempt Trust and one trust known as the Non-Exempt Trust. From the amounts distributable to the trust shares, assets shall be allocated between and distributed to the Exempt Trusts and the Non-Exempt Trusts as set forth in the following paragraph. The effect of this division will result in two (2) separate trust shares; one trust being an Exempt Trust and one trust being a Non-Exempt Trust.

(b) The total amount distributable to the Exempt Trusts shall equal but not exceed the maximum amount available which is exempt from Generation-Skipping Tax, taking into account all other transfers made by the Grantors during life or at death which are subject to said tax. It is the Grantors' intent to set aside into the Exempt Trusts an amount not more than the maximum available amount excludable from Generation-Skipping Tax and not subject the Grantors' estate or any beneficiary to any actual Generation-Skipping Tax liability. It is recognized that gifts made during life of the Grantors' or other conveyances at death which are subject to Generation-Skipping Tax may reduce the amount distributable to the Exempt Trusts at death.

(c) The Trustee shall assign, convey and distribute to the Exempt Trust the cash, securities and other property, including real estate and interests therein, which constitute said bequest. The cash, securities and other property distributed must, when added to the value of property otherwise passing to the Exempt Trust, have an aggregate fair market value at the date or dates of distribution amounting to no less than the amount of the pecuniary bequest as finally determined for federal estate tax and Generation-Skipping Tax purposes.

(d) In allocating the Generation-Skipping Trust exemption, the Trustee (and/or Personal Representative of the Grantors, whichever is applicable) shall give due consideration as to how to best allocate the exemption between the trust estates. It may be appropriate to allocate the exemption in an unequal manner. If a child is deceased, it may be appropriate to not allocate the exemption to the share established for the issue of a deceased child. The decision of the Trustee, operating under the fiduciary duties and guidelines imposed by law, shall be conclusive.

#### 10.07. Purpose of Trust.

(a) In order to protect the inheritance of the Grantors' children and descendants to the fullest extent permitted by law, trust shares have been designed so that the interests of the beneficiaries shall not be subject to legal process, divorce considerations, or claims of creditors. This protection is available while assets remain in the trust. The Grantors ask the Trustee not to hesitate to use trust assets for the benefit of the children and issue as permitted by the terms of the trust. However, the Grantors ask the Trustee, before making distributions, to ensure that the beneficiaries understand the long term advantages of asset protection Within the trust. The Grantors urge the beneficiaries to consider the benefit of allowing assets to remain in the trust before requesting a distribution.

(b) Due to the tax benefits of the trust, to the extent that it is exempt from death taxes of any nature or type, the Grantors urge the Trustee to make distributions to the child from that portion of the trust which will not be exempt upon the death of the beneficiary.

(c) It is the expectation of the Grantors that in establishing this trust that their children and issue will not look to this trust as their primary means of support. Rather, this trust is intended to supplement and assist them, especially prior to completing their education and during their later or retirement years. Children and their issue, after they have had a reasonable opportunity to complete their education, are expected to be gainfully employed (except for a stay at home mother), and to provide for themselves in a reasonable manner.

(d) The provisions of this grammatical paragraph are precatory.

10.08. Income to Child. So much of the net income of a trust share may be distributed to or for the benefit of the child of the Grantors who is a trust share beneficiary as may be reasonably necessary for the child's reasonable support, maintenance in health and education. It is the Grantors' intent that the Grantors' child be provided such portions or all of the net income of this trust estate to provide support in a reasonable standard of living.

10.09. Income to Issue. To the extent that the trust income is not paid to or for the benefit of the child of the Grantors who is a trust share beneficiary, the Trustee is authorized to distribute such portions of the balance of the trust net income as the Trustee determines necessary for the reasonable support, maintenance in health and education of the issue of the child for whose benefit the trust share is established. All decisions regarding distribution of income to the issue of a child who is a trust share beneficiary shall be made by the Trustee, in the Trustee's sole, absolute and uncontrolled discretion. Notwithstanding the above, income may not be distributed

to or for the benefit of the issue of a child of the Grantors over the objection of the child of the Grantors.

10.10. Accumulation of Income. Income not distributed shall be added to principal.

10.11. Principal to Child. So much of the principal of a trust share may be distributed to or for the benefit of the child of the Grantors who is a trust share beneficiary as may be reasonably necessary for the child's reasonable support, maintenance in health and education. It is the Grantors' intent that the Grantors' child be provided such portions or all of the principal of this trust estate to provide support in a reasonable standard of living.

10.12. Principal to Issue. The Trustee is authorized to distribute such portions of the principal of the trust share as the Trustee determines necessary for the reasonable support, maintenance in health and education of the issue of the child for whose benefit the trust share is established. All decisions regarding distribution of principal to the issue of a child who is a trust share beneficiary shall be made by the Trustee, in the Trustee's sole, absolute and uncontrolled discretion.

Notwithstanding the above, principal may not be distributed to or for the benefit of the issue of a child of the Grantors over the objection of the child of the Grantors.

10.13. Factors to Be Considered. With respect to distributions of income and principal, the Trustee shall take into account the individual circumstances of the trust beneficiary, minority, dependency and all other income and benefits being received from all sources whatsoever known to the Trustee, including income from property individually owned and income from other trusts created by the Grantors or any other person for the benefit of the beneficiary. The Trustee shall also take into account income tax, estate tax and Generation-Skipping Tax considerations in an effort to maximize the overall benefits. Distributions of income or principal to a child of the



Grantors who is a trust beneficiary shall be made first from the Non-Exempt Trust. Distributions of income or principal to the issue of a child shall generally be made first from the Exempt Trust.

10.14. Right of First Refusal on Lease and Sale of Real Property. Prior to entering into any sale and/or lease transaction with a third party involving real property, the Trustee of each trust share shall give a right of first refusal to each of his/her siblings and the Trustee of the trust shares established for each of his/her siblings and their issue. This right of first refusal must be submitted in writing at least ninety (90) days prior to the proposed sale or lease date to the prospective third party.

10.15. Educational Expenses. It is the desire of the Grantors that the beneficiaries receive the best possible education in keeping with each beneficiary's goals and abilities. Distributions for educational expenses which may be made by the Trustee shall include tuition, room, board, books, fees, transportation expenses and all other expenses reasonably required in order for the beneficiary to secure a public or private primary, secondary, college, technical or professional education. The Trustee may establish reasonable educational goals, guidelines and criteria with respect to courses taken, class performance and maintaining a proper lifestyle, in the same manner that any parent might establish. The Trustee shall be more liberal with a beneficiary who makes good grades and properly asserts himself/herself and very conservative with a beneficiary who abuses this opportunity.

10.16. Suspension of Payments. Should the Trustee determine that any beneficiary of this trust may be physically or emotionally dependent upon alcohol or drugs, the Trustee is authorized, in the Trustee's sole, absolute and uncontrolled discretion, to withhold distributions from the trust estate (including final distribution) to or for the benefit of such beneficiary during the time of the

alcohol or drug dependency. The Trustee may require the beneficiary to submit to drug or alcohol testing and may withhold distributions from the trust if the beneficiary fails to submit as requested. The Trustee is authorized to distribute trust funds for the medical and psychological care of the beneficiary to provide for alcohol or drug abuse treatment and/or services.

10.17. Limited Power of Appointment. During the lifetime of the child for whose benefit a trust share is established, or upon the death of the child, the Trustee shall pay all or such portion of the principal and/or accumulated income of this trust, as it shall exist, to the Grantors' issue and/or any Charitable Organization, in such amounts and proportions and upon such conditions and in such as the child who is the trust share beneficiary shall direct in a written instrument executed by the child and delivered to the Trustee during the lifetime of the child, in the child's Last Will and Testament or in the Revocable Living Trust of the child. Exercise of the power shall require specific reference. In no event shall the Grantors' child have the power under this paragraph to dispose of or appoint any of the principal or accumulated income of this trust estate in favor of himself/herself, his/her estate, his/her creditors, or the creditors of his/her estate, it being the intent herein to create a Limited Power of Appointment as opposed to a General Power of Appointment as defined under Code Section 2041. The Grantors' children are reminded that the exercise of this power during life over any Non-Exempt Trust share will likely produce gift and/or estate tax issues.

10.18. Termination and Distribution of Trust.

(a) Unless altered by exercise of a Power of Appointment granted above, this trust shall continue for the lifetime of the child who is a trust share beneficiary. Provided that, upon the death of the child, the Trustee shall distribute the Non-Exempt Trust to such person or

persons without limitation, including the estate of the child, as the child shall have appointed by specific reference in a written document executed by the child and delivered to the Trustee during the lifetime of the child, in the Last Will and Testament of the child or in the Revocable Living Trust of the child. Specific reference to this General Power of Appointment is required.

(b) Upon the death of the child who is a trust share beneficiary and upon failure to exercise any power of appointment granted above, the trust shall continue to be held for the collective benefit of the issue of the deceased child until all three (3) of the Grantors' children are- deceased and until the youngest surviving child of the deceased child who is a trust share beneficiary (the Grantors' grandchildren) shall attain the age of thirty (30) years. At that time, the trust shall terminate and the assets shall be distributed outright and free of trust, per stirpes, to the living issue of said deceased child. If a child dies without fully exercising a Power of Appointment granted above and without issue living or, if no issue are surviving to inherit, then the trust share shall pass to the trust share or shares established for the sibling(s) and issue of the deceased child of the Grantors. Assets shall be allocated to the Exempt and Non-Exempt Trusts based upon their status for Generation-Skipping Tax purposes.

10.19. Issue of Deceased Beneficiary. If any share of this trust which is set aside for the benefit of the issue of a deceased beneficiary of the Grantors becomes distributable to a beneficiary who is under the age of thirty (30) years, said property shall vest in said beneficiary, but the Trustee may, in the Trustee's discretion, retain such property in trust for the benefit of said beneficiary until he or she attains thirty (30) years of age or sooner dies, at which time the Trustee shall distribute the property to the beneficiary if living; otherwise, to the estate of said beneficiary. During such time as any property is retained in trust in accordance with these provisions, the Trustee is authorized, in the Trustee's discretion, to pay to, or use and apply for the benefit of Kenneth and Debbie Davis Living Trust Agreement

said beneficiary, as much or all of the net income and the principal of the property retained as the Trustee deems necessary or desirable for the maintenance, support and education of said beneficiary, taking into consideration any other resources available to said beneficiary of which the Trustee has actual knowledge. The Trustee shall not make distributions which discharge the beneficiary's surviving parent's legal obligations to support and educate the beneficiary.

10.20. Contingent Disposition. If the Grantors are not survived by any of the beneficiaries of this trust, or if the line of beneficiaries designated herein should not survive to receive the principal and accumulated income of any trust, then the Grantors direct that the principal and accumulated income of any trust be distributed: One Hundred and fifty thousand dollars (\$150,000.00) to Dora Lee Davis and One hundred and fifty thousand dollars (\$150,000.00) to Carol Ann Cole and the rest to Debbie L. Davis's sister and brother Sue Griffin and James Harris Williams.

**END OF ITEM**

**ITEM ELEVEN**  
**GENERAL POWERS, DUTIES AND OBLIGATIONS OF TRUSTEE**

11.01. General Powers.

(a) Except as specifically provided herein, the Grantors authorize the Trustee (including any Substitute or Successor Trustee), in the exercise of a reasonable discretion with respect to all property, real or personal, at any time forming part of this trust, to exercise any or all the powers set forth in TCA Section 35~50-110 (including any amendments thereto) to the extent applicable, all of which provisions and powers are incorporated herein by reference as fully as if copied herein verbatim. These powers (as set out in said statute on the date of the execution of this trust) are granted notwithstanding that said statute may be amended at the time of the Grantors' death.

(b) In addition to the above powers, the Trustee shall have the following additional powers, and in the event there is any conflict between the two, the additional powers shall control. 11.02 Inventory and Accountings. The Trustee is relieved from the duty of making an inventory or accounting to any court. Any and all statutory requirements concerning accountings by the Trustee are waived. Any court of competent jurisdiction may require a formal accounting upon the application of or on behalf of any beneficiary. The Trustee shall keep accurate books and accounts of all transactions pertaining to the trust, showing all disbursements, charges for services as Trustee, receipts and disbursements of principal and income and all investments and changes of investments. The Trustee, not less frequently than annually, shall render to the primary beneficiaries who are entitled to receive current payments of income or principal, statements reflecting the actual condition of the trust estate and/or shares, showing all receipts,

disbursements and changes of investments since the last report. There is no duty to provide contingent or secondary beneficiaries with such reports.

11.03. Delegation of Trust Management. The Trustee is authorized to employ attorneys, accountants, investment managers, specialists and such other agents as the Trustee shall deem necessary or desirable. The Trustee shall have the authority to appoint an investment manager or managers to manage all or any part of the assets of the trust, and to delegate to said investment manager the discretionary power to acquire and dispose of assets of the trust. The Trustee may charge the compensation of such attorneys, accountants, investment managers, specialists and other agents against the trust, including any other related expenses.

11.04. Purchase of Annuities. The Grantors authorize the Trustee to act as the Purchase of Annuities "Agent" for the Grantors for the purpose of purchasing annuities. Any annuities may name the Grantors or other trust beneficiary as the annuitant. Any annuities shall be held for the exclusive benefit of the Grantors. The Grantors may exercise control over the annuity as though the Grantors hold legal title. The Trustee's sole duty with regard to any such annuities shall consist of purchasing the annuity, receiving cash from the Grantors to purchase the annuity, sending money to the insurance company issuing the annuity and holding legal title to the contract. All other incidents of ownership shall be attended to by the Trustee as an "Agent" of the Grantors.

11.05. Dealing with Real Estate. The Trustee shall have full discretionary power to purchase, sell, convey, alter, repair, improve, partition and mortgage or otherwise encumber any real estate, and to make and execute any leases thereon for any period, however long, and beyond the term of any trust, and to execute and deliver any deeds, conveyances, mortgages, deeds of trust,

transfers and assignments, without the approval of any court, joinder of any beneficiary, and without disclosing any beneficiary of any trust.

11.06. Termination of Trusts. If unforeseen changes occur affecting property rights, taxation, or political or economic conditions Which, in the opinion of the Trustee, make it advisable and in the best interest of the beneficiary or beneficiaries that a trust be entirely terminated, or if any trust is or becomes of such size that, in the sole and exclusive opinion of the Trustee, it is not economically expedient to administer same as a trust, then the Trustee shall be fully empowered to terminate a trust and distribute the principal and accumulated income to the Grantors, if surviving. If a Grantor is deceased, the assets of any trust which was qualified for any Marital Deduction may only be distributed to the Surviving Spouse of the deceased Grantor. Assets of any trust which was not qualified for any Marital Deduction may only be distributed as though the Surviving Spouse of the deceased Grantor is not surviving. The assets of any other trust created herein may only be distributed to the trust beneficiaries, per stirpes, then entitled to receive current distributions of income. No beneficiary who is also serving as a Trustee or CO-Trustee and who would receive a distribution under this paragraph may participate in this decision.

11.07. Additions to Trust Estate. The Trustee is authorized to receive, add to principal, manage and distribute, as a part of any trust estate created herein, any additional property of any kind which any person may transfer to the Trustee by deed, Will or otherwise.

11.08. Final Distribution. When the trust estate or any part thereof is to be distributed, the distribution may, at the election of the Trustee, be made all in kind or partly in kind and partly in money. It is not a requirement that trust assets be sold and liquidated at the time of distribution.

11.09. Extent of Powers. All Fiduciary powers shall be broadly construed and may be exercised by the Trustee without court approval.

11.10. Compensation of Trustee. The Trustee shall receive reasonable compensation consistent with prevailing fees for like services in the community. Published fee schedules utilized by local Corporate Trustees shall represent reasonable compensation.

11.11. Custody of Assets. If a Corporate Trustee is serving, it shall have custody of all stocks, securities and muniments owned by any trusts hereunder, and shall be charged with the duty and responsibility of maintaining all accounting records of the trust operations, and shall handle all clerical details of administering any trusts. Its records, as to such trusts, shall be open at all reasonable times to inspection by the beneficiaries and natural or legal guardians or duly designated or authorized representatives of said beneficiaries as to the trust in which they have an interest.

11.12. Dealing with Estate of Grantor. The Trustee is authorized to purchase assets from the probate estate of a deceased Grantor without regard to whether or not the assets are of a type in which the Trustee could otherwise invest so long as the Trustee pays fair market value for same. The Trustee is authorized to loan funds to the probate estate of a deceased Grantor upon such terms, conditions and provisions as the Trustee reasonably deems appropriate and proper.

11.13. Limitation of Trustee Powers.

(a) No Trustee who is also a beneficiary of any trust established under this instrument may participate in any decision with respect to the distribution of income or principal to or for the benefit of said Trustee unless said distribution is limited by an ascertainable standard as defined in the regulations issued under Section 2041 of the Code.



(b) No Trustee may participate in any decision with respect to the distribution of income to or for the benefit of any other beneficiary to the extent that such distribution would operate to discharge legal obligations of a Trustee or obligations of support of a Trustee for a spouse or child of the Trustee.

(c) It is the Grantors' intent that with respect to any trust created by reason of the death of a Grantor that the Trustee be prohibited from participating in any discretionary decisions regarding distribution of income or principal from any trust established herein which would, in and of itself, result in the Trustee having a General Power of Appointment as defined under Section 2041 of the Code, or having any other power which would, in and of itself, cause the inclusion of the trust assets in the estate of the Trustee who is also a beneficiary.

(d) This paragraph shall not apply to the Grantors during the lifetime of both of the Grantors, nor shall it apply to the surviving Grantor with respect to the Survivor's Trust. 11.14 Dealing with Trustee. No person dealing with the Trustee, or any Successor Trustee, in the capacity of purchaser, seller, acquirer, lender, tenant, lessor, lessee, contractant or otherwise shall be bound to inquire into the capacity to act on the part of the Trustee, or into the authority for, or the propriety of, any act thereof or to see to the application or disposition of any money, or other property, paid, delivered or loaned to the Trustee.

11.15. Bond Waived. The Grantors waive the necessity of any Trustee, including any Successor Trustee, posting bond.

11.16. GST Election.

(a) The First Decedent hereby directs his or her Personal Representative (and/or Trustee whichever is applicable) to allocate his or her GST exemption first to the Family Trust  
Kenneth and Debbie Davis Living Trust Agreement

and next to the Excess Exemption Trust; provided that if, at the time the allocation is made, one or more Personal Representatives other than the Surviving Spouse or a descendant of the Grantors are in office, the First Decedent hereby authorizes that Personal Representative to allocate the First Decedent's GST Exemption in a different fashion if, in their sole and absolute discretion, they determine to do so.

(b) The Grantors also authorize the Trustee or Personal Representative (whichever is applicable) to make elections with respect to any trust estate established in this document as are appropriate to qualify all or any portion of any trust for exemptions from tax under the Generation-Skipping Tax Act in order to minimize Generation- Skipping Tax liabilities. This may include a Reverse QTIP Election. This may include an election for federal and/or state purposes.

(c) The Trustee may divide any such trust into separate trust estates. Trusts for which a Generation-Skipping Tax Election or Reverse QTIP Election is made shall be known as Exempt Trusts, and trusts for which no Generation-Skipping Tax Election or Reverse QTIP Election is made shall be known as Non-Exempt Trusts.

11.17. Disclaimer by Trustee. The Trustee is authorized to disclaim or renounce any right, power or authority granted to the Trustee. Any such disclaimer filed by the Trustee shall cause the disclaimed right, power or authority to be void ab initio and any such disclaimer shall be binding upon the trust and all Successor Trustees.

11.18. Administration of Trust — Administrative Actions. With the exception of decisions involving real property as outlined in paragraph 11.05 of this trust agreement, if this trust is being administered by more than one Trustee, with respect to any administrative action (e.g.,

signing checks, or transferring assets), the signature of only one Trustee shall be required. Any one Trustee can act and bind the trust. Accordingly, any person dealing with one of the Co-Trustees shall not be required to secure the signature or approval of the other Co-Trustees. Co-Trustees may appoint a Managing Trustee and delegate administrative duties.

11.19. Administration of Trust ~ Voting. With the exception of decisions involving real property as outlined in paragraph 11.05 of this trust agreement, if the trust is being administered by more than one Trustee, the vote of a majority of Trustees eligible to vote shall be required with respect to all matters associated with trust administration and the distribution of trust income and/or principal. If two Trustees are serving, and if both are eligible to vote, unanimous agreement is required. Where a majority is required, any dissenting Trustee shall be relieved of any liability by noting the dissent in writing in the trust records. The dissenting Trustee shall thereafter take any actions required to implement the decision of the majority.

11.20. Reference to Other Trust. Should the Trustee be holding any other trusts for the benefit of the same beneficiaries, the Trustee is empowered to commingle trust assets for investment purposes and to hold trust property with such other trust as tenants in common. The Trustee is also authorized to merge this trust with any other trust created for the same beneficiaries which contains substantially identical terms and conditions.

**END OF ITEM**

**ITEM TWELVE  
NO CONTEST**

12.01. Contest. The Grantors do not want their children and family to contest this document or engage in any public controversy over this trust or the estate of the Grantors. Should any conflicts develop, the Grantors urge the children and/or other beneficiaries to enter into mediation to attempt to resolve any conflict or controversy in a private way. Mediation shall not constitute an attempted contest.

12.02. Effect of Attempted Contest. If any person (other than a spouse of a deceased Grantor) directly or indirectly contests or attacks, with respect to the property or estate of either Grantor hereunder, this Trust Agreement or any trust or beneficial interest created hereunder or any Pour Over Will executed by such Grantor or conspires with or voluntarily assists anyone associated with any such contest or attack, singly or in conjunction with any other person(s), then in that event the First Decedent, if the action relates to the property or estate of the First Decedent, or the Surviving Spouse, if the action relates to the property or estate of the Surviving Spouse (herein "the Contested Grantor") specifically disinherits such person and such person's descendants and all interests and properties given to or created for the benefit of such person and such person's descendants directly or in trust under this Trust Agreement or such Pour Over Will shall be forfeited, and such property shall be disposed as if such person and their descendants had predeceased the Contested Grantor.

12.03. Acts Constituting a Contest. The acts described below shall constitute a contest for purposes of this Article:

(a) **Direct or Indirect Contest**. With respect to the property or estate of the Contested Grantor, such person unsuccessfully contests or, in any manner, attacks or seeks to impair or

invalidate any provision of this Trust Agreement or the Contested Grantor's Pour Over Will on any grounds whatsoever;

(b) **Unsuccessful Claim of Entitlement.** With respect to the property or estate of the Contested Grantor, such person unsuccessfully claims entitlement to any asset of the Contested Grantor's estate or any asset of the Contested Grantor passing under this Trust Agreement or the Contested Grantor's Pour Over Will based on any written, oral or implied contract, or any quantum meruit theory or alleged common law marriage, or nonmarital relationship (including a domestic partnership);

(c) **Claim of Common Law or Non-Marital Relationship.** With respect to the property or estate of the Contested Grantor, such person claims entitlement to any asset of the Grantors' estate or any asset passing under this Trust Agreement or the Contested Grantor's Pour Over Will based on any alleged common law marriage or nonmarital relationship (including a domestic partnership) which is hereby expressly disavowed by the Trustee;

(d) **Challenge of Fiduciary Appointment.** With respect to the property or estate of the Contested Grantor, such person unsuccessfully challenges the appointment of any person or entity named to serve as Trustee hereunder or the Pour Over Will of the Contested Grantor;

(e) **Objection to Construction or Interpretation.** With respect to the property or estate of the Contested Grantor, such person uses equitable action or legal process to object to any reasonable construction or interpretation of this Trust Agreement or the Pour Over Will of the Contested Grantor or any provision thereof that is adopted or proposed in good faith by the Trustee;

(f) Claim of Creditor Relationship. With respect to the property or estate of the Contested Grantor, such person files any creditor's claim against the Contested Grantor's estate that is reasonably and in good faith rejected by the Trustee, and thereafter files suit on the rejected claim or pursues a claim in probate (whether or not the claim is thereafter found to be valid); and

(g) Assistance and Conspiracy. With respect to the property or estate of the Contested Grantor, any person conspires with or voluntarily assists anyone attempting to do any of these things, undertakes any of these things as an agent or fiduciary, undertakes to do any of these things through an agent or fiduciary, or would benefit from any action so undertaken by an agent or fiduciary and does not openly demand that such agent or fiduciary cease and desist from undertaking such action.

12.04. Expenses of Contest. With respect to the property or estate of the Contested Grantor, expenses to resist any contest or attack of any nature (including the acts described in the section above entitled "Acts Constituting a Contest") upon any provision of this Trust Agreement or the Contested Grantor's Pour Over Will shall be paid from the Contested Grantor's property held or passing hereunder as an expense of administration or, if the contest or attack relates to a particular trust created hereunder, then from the property thereof as an expense of administration. Such expenses shall include, but not be limited to, attorneys' fees and costs and expenses and attorney fees of counsel preparing this document in assisting in the defense of such action and giving testimony in any such action. Attorney fees shall be paid at his/her then standard hourly rates. The Trustee is specifically authorized and encouraged vigorously to defend against any of the acts described in the section above entitled "Acts Constituting a Contest."

12.05. Miscellaneous. With respect to the property or estate of the Contested Grantor, if any provision of this Article is void or ineffective, all other provisions shall remain in full force and effect. A determination by the Trustee regarding the applicability of this Article shall be determinative, absent clear and convincing evidence that such determination was made in bad faith or was grossly negligent. This Article may apply to a claim of incapacity, undue influence or improper execution if such claim is not ultimately sustained, or a creditor's claim, contract claim, tort claim, or other claim filed with the Trustee.

12.06. Withdrawal of Contest. Notwithstanding the foregoing, with respect to the Withdrawal of Contest property or estate of the Contested Grantor, the provisions of this Article shall not apply unless and until the Trustee has given written notice of such fiduciary's intent to enforce the foregoing provisions against a particular person to such person or such person's authorized representative, and given such person the opportunity to voluntarily dismiss or withdraw any petition or action that such fiduciary deems to constitute a contest or to otherwise cooperate in defending or terminating a contest. If such person dismisses or withdraws such petition, contest or other claim or takes other actions requested by such fiduciary within thirty (30) business days after receipt of such notice, then this Article shall not apply with respect to such petition or contest or other claim; provided that such fiduciary shall have the broadest permissible discretion in terms of insisting on a particular form or scope of dismissal or withdrawal in order to ensure that the petition, contest or other claim will not reoccur.

12.07. Determination to Allow Action. With respect to the property or estate of Determination to Allow Action the Contested Grantor, the Trustee, in the exercise of sole and absolute discretion, may determine that a particular action should be allowed because the Contested Grantor would have wanted such action to be taken, even though such action otherwise would constitute a

violation of this Article and otherwise would result in a forfeiture. If the fiduciary makes such a determination, and executes and acknowledges a document declaring a particular action is not subject to this Article, then this Article shall not apply to such action, but only to the extent expressly provided in such document.

**END OF ITEM**



**ITEM THIRTEEN  
MISCELLANEOUS PROVISIONS**

13.01. Creation of Grantor Trust. The Grantors and the Trustee understand that certain provisions found in this trust agreement create a "Grantor Trust" as defined under Subchapter J of the Code. The Grantors are the owners of the trust for income tax purposes.

13.02. Reciprocal Trust. The Grantors state that this trust is not made in consideration of the agreement of the other to require assets of the surviving Grantor (Survivor's Trust) to be distributed in any agreed upon manner. There is no written or verbal agreement or understanding between the Grantors prohibiting the amendment or termination of this trust estate; the establishment of this trust being a totally independent action on the part of the Grantors.

13.03. Spendthrift Provision.

(a) Generally. No person who is a beneficiary under any of the provisions of any trust created herein shall have the right, power or authority to assign, give, grant, sell, convey, mortgage, pledge or otherwise dispose of, encumber or anticipate the income, or any installment thereof, or any share in the corpus, until same is actually transferred or paid to such beneficiary. Any such attempted assignment is void, the income and corpus of the trust estate shall not be subject to execution or any other legal process for any debt or liability, including the claim of a spouse or former spouse.

(b) Protection from Marital Claims. All benefits granted to a beneficiary under this instrument shall be the separate property of such beneficiary (as distinguished from marital property, community property, quasi-community property or any other form of property as to which such beneficiary's spouse might have a claim or interest arising out of the marital relationship under the law of any jurisdiction, domestic or foreign). All benefits granted to a  
Kenneth and Debbie Davis Living Trust Agreement

beneficiary hereunder shall also be free of any interference from, or control or marital power of, his or her spouse. For purposes of this paragraph, the term "benefits" shall include real or personal property, tangible or intangible, and the provisions of this paragraph shall apply not only to benefits actually paid to any beneficiary, but also to trust property allocated to a trust in which the beneficiary possesses an interest hereunder. In administering the trust estate, it is the intent of the Grantors that the provisions of the Tennessee Spendthrift Law, specifically TCA § 35-15-501 through 507 shall operate to the maximum extent allowed by law to protect assets for the benefit of the beneficiaries.

13.04. Restrictions and Limitations on Marital Trust. Notwithstanding anything herein to the contrary, any power, duty or discretionary authority granted to the Trustee herein, shall be absolutely void to the extent that either the right to exercise or the exercise thereof shall, in any way jeopardize or cause the Grantors' estate or any trust for which a Marital Deduction is claimed to lose all or any part of the tax benefit afforded the trust or estate by the Marital Deduction, under either federal or state law. Accordingly, the Trustee shall have no power or discretion which would deprive the Grantors' estate or any trust of the Marital Deduction claimed under the law. The Trustee is specifically directed to cause, to the extent necessary in order to avoid jeopardizing any claimed Marital Deduction, all assets of any trust for which a Marital Deduction is claimed to be retained in an income producing status. In no event may any trust for which a Marital Deduction is claimed be administered for the benefit of anyone other than the spouse.

13.05. Legal Disability. If a beneficiary eligible to receive net income or principal distributions is a minor or is under legal disability, or in the opinion of the Trustee is incapable of properly managing his or her financial affairs, the Trustee may make distributions directly to the

beneficiary, to a lawful Guardian of the beneficiary, or to a Custodian selected by the Trustee for the beneficiary under a Uniform Transfer to Minors Act or similar applicable law, a Section 529 Plan, or may otherwise expend the amounts to be distributed for the benefit of the beneficiary in such manner as the Trustee considers advisable. As used throughout this instrument, the term "lawful Guardian" shall mean successively in the order named (i) the court-appointed Guardian of the estate, (ii) either parent, or (m) the individual having personal custody, whether or not a court-appointed Guardian where no Guardian of the estate has been appointed. The provisions of this paragraph shall not allow the Trustee to withhold distributions of income payable to the Surviving Spouse from any trust that qualifies for the Marital Deduction.

13.06. Conversion to Special Needs Trust.

(a) Any Trustee of a trust created herein who is an Independent Trustee may, in the Trustee's discretion, convert any part of said trust to a Special Needs Trust when a beneficiary is under a disability which entitles such beneficiary to governmental assistance.

(b) The purpose of such Special Needs Trust is to provide for extra and supplemental care, maintenance, support, and education of the beneficiary in addition to the benefits the beneficiary will otherwise receive as a result of such beneficiary's disability from local, state, federal government or private agencies which provide services and/or benefits to disabled persons.

(c) If the Trustee elects to convert such beneficiaries' trust to a Special Needs Trust, the Trustee shall certify such conversion to all income beneficiaries of the trusts created hereunder and shall attach such certification to a copy of this trust.

(d) The income or principal of a Special Needs Trust created under this paragraph may not be used to pay for or reimburse the cost of a beneficiary's care provided by governmental or private funds, which care would otherwise be available without cost if the beneficiary had no assets.

(e) In exercising the discretion given to the Trustee to make distributions of income or principal to or for the benefit of the beneficiary of the Special Needs Trust, the Trustee shall distribute only so much of the income or principal as will not interfere with, prevent, or reduce payment of other funds from governmental or other sources for the beneficiary.

(i) if the Trustee is authorized to make payments of income or principal to the parent of the beneficiary or any other person whose income or assets would be deemed to be income or assets of the beneficiary, the Trustee shall distribute only so much of the income or principal as would not interfere with, prevent, or reduce payment of other funds from governmental or other sources available to the beneficiary.

(g) Conversion of the trust to a Special Needs Trust may be accomplished by the Trustee with or without court approval.

13.07. Retirement Benefits. The following provisions shall apply to any trust created herein if amounts are payable from a Qualified Retirement Plan (either directly or by reason of the provisions above) to the Trustee thereof. It is the intent that such trust estates created herein qualify as "See-Through Trusts" as the term is used in Reg. § 1.401(a)(9)-4, A-5(b) and as allowed in Reg. § 1.401(a)(9)-5, A-7(c)(3), Example 2. The Trustee shall administer the trust estates and retirement plans payable to the trust estates in accordance with those Regulations.

(a) **Qualified Retirement Plan.** Qualified Retirement Plan means a plan (of whatever type) qualified under Code Sec. 401, an individual retirement arrangement under Code Secs. 408 or 408A, a tax-sheltered annuity under Code Sec. 403, Code Section 457 plan, or any other plan, account or benefit subject to the minimum distribution rules of Code Sec. 401(a)(9) or equivalent rules under any other Code section.

(b) **Conduit Trust.** If a Qualified Retirement Plan allows the trustee to take required minimum distributions (as required by the Internal Revenue Code and Regulations) over the life expectancy of the oldest trust beneficiary, then each year, beginning with the year of death, the Trustee of such trust shall distribute all amounts distributed from said Qualified Retirement Plan to the Beneficiary (as defined below in this paragraph) free of trust, if the Beneficiary is then living. If the Beneficiary is not then living, the Trustee shall instead distribute the amount which would have been distributed to the Beneficiary had the Beneficiary been then living, to said Beneficiary's estate. If a Qualified Retirement Plan does not allow the trustee to take required minimum distributions (as required by the Internal Revenue Code and Regulations) over the life expectancy of the oldest trust beneficiary, then the Trustee may accumulate and hold in trust any distributions from a Qualified Retirement Plan or distribute them in accordance with the distribution standards of said trust.

(c) **Beneficiary.** As used in this section to define the person to whom amounts are to be distributed, the term "the Beneficiary" shall refer to the person otherwise designated as "the Beneficiary" thereof elsewhere in the instrument.

13.08. Trust Assets/Disclaimer. If any assets are payable into any trust established under this document by reason of a disclaimer filed by a Grantor's spouse, then said assets shall be held and

distributed under the terms of this Item as a separate trust, administered separate and apart from the other trust assets. In addition, such assets held in the separate trust created by reason of a disclaimer shall not be subject to any Limited Power of Appointment granted in the trust instrument. Rather, said assets must be held as provided in the applicable Item and distributed in accordance with the provisions therein.

13.09. Special Use Valuation. With respect to any trust created herein, if the Grantor's estate or this trust elects to qualify for Special Use Valuation under Section 2032A of the Code, and if assets which qualify for Special Use Valuation are held as a part of any trust estate, and if, in order to secure or maintain such deductions or elections, all of the trust income must be distributed to or for the benefit of the trust beneficiary or beneficiaries, then the Trustee is specifically directed to make such distributions to the beneficiary or beneficiaries.

13.10. Simultaneous Death. If the Grantors shall die simultaneously, or under such circumstances that there is not sufficient evidence to establish which of them died first, the Grantors direct that the Wife shall be deemed to have survived the Husband for the purposes of this trust, and they direct that the provisions of this trust shall be so construed, without respect to any provisions of law establishing a contrary presumption.

13.11. Terms Relating to Taxes in Effect at Death.

(a) The phrases that direct the disposition of the trust if there is a federal estate tax in effect at First Decedent's death or if there is a federal estate tax in effect at Surviving Spouse's death (or the past tense of either using the verb "was") shall, in this Trust Agreement, mean that Chapter 11 of Subtitle B of the Code applies to the estate of either the First Decedent or the Surviving Spouse, as the case may be, or is lawfully, retroactively reenacted so to apply, or

applies by election or otherwise, taking into account any retroactive reenactment, any election that is actually made, and any judicial declaration of unconstitutionality that occurs by the end of the calendar year immediately following the calendar year of the death of the First Decedent or the Surviving Spouse, as the case may be.

(b) The phrases that direct the trust if there is a federal Generation- Skipping Transfer Tax in effect at First Decedent's death or if there is a federal Generation-Skipping Transfer Tax in effect at Surviving Spouse's death (or the past tense of either using the verb "was") shall, in this Trust Agreement, mean that Chapter 13 of Subtitle B of the Code applies to Generation-Skipping transfers that are made under this Trust Agreement upon the death of the First Decedent or the death of the Surviving Spouse, as the case may be, or is lawfully, retroactively reenacted so to apply, or applies by election or otherwise, taking into account any retroactive reenactment, any election that is actually made, or any judicial declaration of unconstitutionality that occurs by the end of the calendar year immediately following the calendar year of the death of the First Decedent or the Surviving Spouse, as the case may be.

(c) The phrases that direct the trust if there is no federal estate tax in effect at First Decedent's death or if there is no federal estate tax in effect at Surviving Spouse's death (or the past tense of either using the verb "was") shall, in this Trust Agreement, mean that Chapter 11 of Subtitle B of the Code does not apply to the estate of the First Decedent or of the Surviving Spouse, as the case may be, and is not lawfully, retroactively reenacted so to apply, and does not apply by election or otherwise, taking into account any retroactive reenactment, any election that is actually made, and any judicial declaration of unconstitutionality that occurs by the end of the calendar year immediately following the calendar year of the death of the First Decedent or the Surviving Spouse, as the case may be.

(d) The phrases that direct the trust if there is no Generation-Skipping Transfer Tax in effect at First Decedent's death or if there is no Generation-Skipping Transfer Tax in effect at Surviving Spouse's death (or the past tense of either using the verb "was") shall, in this Trust Agreement, mean that Chapter 13 of Subtitle B of the Code does not apply to Generation-Skipping transfers that are made under this Trust Agreement upon the death of the First Decedent or the death of the Surviving Spouse, as the case may be, and is not lawfully, retroactively reenacted so to apply, and does not apply by election or otherwise, taking into account any retroactive reenactment, any election that is actually made, and any judicial declaration of unconstitutionality that occurs by the end of the calendar year immediately following the calendar year of the death of the First Decedent or the Surviving Spouse, as the case may be.

13.12. Terms Relating to Formula Gifts. The technical tax-related terms determining the Formula Gifts shall be defined as follows:

(a) The "First Decedent's Excess Exemption QTIP Gift" means the amount, if any, by which the greater of (1) The minimum amount necessary as the federal estate tax marital deduction in the First Decedent's estate to reduce the First Decedent's federal estate tax due by reason of the First Decedent's death to the lowest possible amount (determined Without regard to the Excess Exemption QTIP Gift) and (2) The minimum amount necessary as the estate tax marital deduction under the death tax laws of the state of the First Decedent's domicile in the First Decedent's estate to reduce such state death taxes due by reason of the First Decedent's death to the lowest possible amount (determined without regard to the Excess Exemption QTIP Gift) exceeds (3) The First Decedent's Optimum Marital Deduction, calculated as provided below.



(b) The "First Decedent's Optimum Marital Deduction" means the lesser of (1) and (2) below, provided however, if there is no federal estate tax effect at the first decedent's death, then the First Decedent's Optimum Marital Deduction shall be zero. (1) The minimum amount necessary as the federal estate tax marital deduction in the First Decedent's estate to reduce the federal estate tax due by reason of the First Decedent's death to the lowest possible amount (determined without regard to the Excess Exemption QTIP Gift) and (2) The minimum amount necessary as the Marital Deduction in the First Decedent's estate under the death tax laws of the state of the First Decedent's domicile, to reduce such state death tax due by reason of the First Decedent's death to the lowest possible amount (determined without regard to the Excess Exemption QTIP Gift).

(c) The above amounts and the resulting Formula Gifts shall be calculated using values as finally determined for the tax purposes for which the Formula Gift is determined, and the calculations shall take account of all non-deductible items entering into the calculation of that Grantor's federal estate tax, which include (for example) the Grantor's adjusted taxable gifts during life, non-deductible gifts under or outside this Trust Agreement, state death taxes (to the extent any state death tax paid is not allowed in full as a credit against the federal estate tax), and some administration expenses not allowed as estate tax deductions, as well as all deductible items, which include (for example) the Grantor's gifts under or outside this Trust Agreement that qualify for the Marital or Charitable Deduction, and some administration expenses allowed as estate tax deductions. However, in making the calculations, it shall be assumed that an election is made by the Grantor's Personal Representative to qualify all eligible property for the marital deduction regardless of what election is in fact made by the Grantor's Personal Representative. The calculations shall take into account all available subtractions and credits against the federal

Kenneth and Debbie Davis Living Trust Agreement

estate tax (other than a credit for previously taxed property that results from a death after the death of the Grantor in question), except that no credit shall be taken into account that does not reduce the federal estate tax to zero or the lowest possible amount, and if the only credits that can do that are the unified credit and the credit for state death taxes, the credit for state death taxes shall not be taken into account if the state imposes only a tax equal to that credit. The calculations shall be made before giving effect to any disclaimer. The Grantors recognize that some of these amounts may be zero, may be affected by changes in the law before a Grantor's death and by a deceased Grantor's Personal Representative or by the Trustee in exercising certain tax elections (for example, the selection of the valuation date and the deduction of some administration expenses) and Will be affected by some items (for example, state death taxes and some administration expenses not allowed as estate tax deductions) even though such items may initially be payable generally from the First Decedent's Property or the Survivor's Trust Fund, as the case may be.

#### 13.13. Definitions.

(a) The term "Adjusted Gross Estate" shall be defined as it is in Section 6166(b)(6) of the Code.

(b) The term "Applicable Exclusion Amount" shall be as defined under Section 2010 of the Code. This is the amount which can pass tax free for federal estate tax purposes without incurring any actual federal estate tax.

(c) The term "Adverse Trustee" shall be as used in the Grantor Trust provisions of (subpart E) Subchapter J of the Code. Specifically, an Adverse Trustee is a Trustee who, with respect to the person or persons with the right to appoint the Trustee, has a substantial beneficial

interest in the trust which would be adversely affected by the exercise or non-exercise of the power which he possesses respecting the trust, consistent with the definition of Adverse Party under Section 672(a) of the Code.

(d) The term “Charitable Deduction” shall refer to the deduction allowed under Section 170 of the Code.

(e) The term “Charitable Organization” shall refer to an organization which is exempt from federal income taxation under Code Section 501(a) as an organization described in Code Section 501(c)(3) and is also described in all of Code Sections 170(b)(1)(A), 170(c), and 2055(a).

(1) The term “Code” shall refer to the Internal Revenue Code of 1986, as amended.

(g) The term “Corporate Trustee” shall be defined as a banking institution with trust powers or a corporate trust company. Any Corporate Trustee must also qualify as an Independent Trustee.

(h) The term “Fiduciary” shall refer to the Personal Representative, Trustee or any Guardian named herein.

(i) The term “First Decedent” shall refer to the first Grantor to die.

(j) The term “Generation-Skipping Tax” shall refer to that tax set forth in Chapter 13 of the Code. Where appropriate, it shall also refer to any state Generation- Skipping Tax.

(k) The term “heirs at law” shall mean those heirs as defined by the statutes directing assets in the event of the death of a beneficiary without a Will, specifically the laws of intestacy of the state of the beneficiary’s domicile. The term “heirs at law” shall only refer to heirs who are younger than the deceased beneficiary.

(l) The term "Independent Trustee" shall be as used in the Grantor Trust provisions (Subpart E) of Subchapter I of the Code. Specifically, an Independent Trustee is a Trustee who is not, with respect to the 'person or persons with the right to appoint the Trustee, a Related or Subordinate Party as those terms are defined in Internal Revenue Code Section 672(0), as amended.

(m) The term "issue" means all descendants of the Grantors of any degree, including Grantors' adopted children or any beneficiary designated or described in this trust so long as the adoption is finalized prior to the beneficiary attaining the age of majority. Adult adoptions are not allowed. Every descendent (by blood or adoption) of such adopted child or beneficiary shall have the same status under this trust as one of the Grantors' blood descendants.

(n) The term "Marital Deduction" shall refer to the deduction allowed under Section 2056 of the Code and any applicable Marital Deduction claimed for state inheritance tax purposes.

(o) The term "Marital Property" shall be as defined in the Tennessee Code as same relates to divorce proceedings.

(p) The term "net income" as used herein with reference to distributions of income of the Marital Trust shall be taken as being used in the same sense as it is used in the provisions of the Internal Revenue Code in effect at the death of a Grantor to fully allow the Marital Deduction.

(q) The term "Personal Representative" shall refer to any Executor or Administrator appointed by any Court having jurisdiction over a deceased Grantor's estate.

(r) The term "QTIP election" shall refer to one or more of the elections allowed under Code Section 2056(b)(7), TCA Section 67-8-315(a)(6), and any comparable state statute which is applicable, as indicated by the context.

(s) The term "Qualified Trustee" shall refer to a natural person who is a resident of Tennessee or a company authorized to act as a fiduciary in Tennessee pursuant to TCA § 45-2-1001.

(t) The term "spouse" shall refer to the current spouse of each Grantor. It shall not apply to any future spouses by reason of remarriage following divorce or death of a Grantor.

(u) The term "Surviving Spouse" shall refer to the surviving Grantor following the death of a Grantor. The terms "Surviving Spouse" and "surviving Grantor" are used interchangeably.

(v) The term "TCA" shall refer to the Tennessee Code Annotated. (w) The term "Trustee" shall refer to any Successor or Co-Trustee named or appointed as provided herein.

**END OF ITEM**

**ITEM FOURTEEN  
PROVISIONS FOR SUCCESSOR TRUSTEE**

14.01. Successor Trustee - Resignation by Grantor. If a Grantor resigns as Trustee, then that Grantor shall be succeeded by such person, persons or Corporate Trustee as that Grantor shall appoint. Upon failure to appoint a Successor Trustee, then the Co-Trustee shall serve as the sole Trustee. Otherwise, the Trustee named in the paragraphs which follow shall serve.

14.02. Qualified Trustee. In all events during the lifetime of both Grantors, the trust must be administered by at least one Qualified Trustee.

14.03. Successor Trustee - Disability or Death of Trustee.

(a) Following such time as a Grantor is unable, by reason of illness, old age or other infirmity to handle legal or personal affairs, or in the event of the death of a Grantor, the Surviving Spouse shall serve as sole Trustee.

(b) The Grantors may appoint further successors to serve if neither are able or willing to serve as sole Trustee. They may remove and/or replace any successors so appointed.

(c) The Grantors may designate a method or manner for the appointment of further Successor Trustees if neither is able or willing to serve or if a further Successor is required.

(d) If neither Grantor is able or willing to serve or if a further successor is required, then CHRISTOPEHR N. DAVIS, THOMAS N. DAVIS and ERICA L. MCNAIR shall serve as Successor Co-Trustees. Each child shall have the authority to appoint a Successor in the event he/she is unable or unwilling to serve.

(e) If a child is unable or unwilling to serve as a Co-Trustee and has not provided for a Successor, then the remaining Co-Trustees shall serve alone.

14.04. Successor Trustee — Children's Trust. With respect to the Children's Trusts established herein, each child shall serve as sole Trustee over his/her trust. Each child may appoint successor trustees and/or a method or manner for appointment of successor trustees. Each child may remove any trustee so appointed. If a further successor is needed, and no other provisions above result in the appointment of a successor, the siblings of the child may designate one or more successors, including themselves.

14.05. Determination of Disability. For purposes of this trust, a Trustee shall be deemed disabled, terminating a Trustee's authority to serve as a Trustee, upon receipt by the Co-Trustee or Successor Trustee of a letter or affidavit signed by one (1) physician or licensed psychologist stating that he/she has examined the Trustee Within the immediate preceding thirty (30) days and that he/she is of the opinion that the Trustee, because of illness, accident, age or other infirmities is unable to handle financial affairs. The same procedure may be used to declare any beneficiary disabled or incapacitated. Receipt of said letter or affidavit shall be conclusive evidence of the Trustee or Successor Trustee's authority to act as provided herein.

14.06. Change of Corporate Trustee. If a Corporate Trustee is serving, the power to remove the Corporate Trustee and to substitute another Corporate Trustee is granted in this paragraph. The change of Trustee may be made, with or without cause, upon thirty (30) days written notice to the Corporate Trustee. The power shall include the authority to appoint a Successor Corporate Trustee should the Corporate Trustee resign or refuse to serve. The power granted in this paragraph first vests in the individual Co-Trustee who is serving, if any. If no individual Co-Trustee is serving, the power vests in the deceased Grantor's spouse, if surviving, and sui juris. If the deceased Grantor's spouse is not surviving or is not sui juris, the power vests in the group composed of the Grantors' surviving children who are sui iuris. If no surviving children are sui  
Kenneth and Debbie Davis Living Trust Agreement

juris, the power vests in the legal Guardians of any surviving children who are not sui juris. If no persons described above hold the power, then the power vests in the sui juris trust beneficiaries having a present interest in the trust (a right to receive current distributions of income or principal). In the case where the power vests in a group of individuals, unanimous agreement shall be required.

14.07. Successor Trustee. If at any time during the administration of any trust it is necessary that a Successor Trustee be appointed, and no other provisions allow for the appointment of a Successor, the then adult sui juris beneficiaries with a present interest in the trust (those who may receive current distributions of income or principal) and if none, the natural or legal Guardian of any non-sui juris beneficiaries with a present interest in the trust shall have the power and authority to designate and appoint a Successor Independent Trustee.

14.08. Resignation of Trustee. The Trustee may resign at any time by delivering a resignation, in writing, to the surviving Grantors. If the Grantors are not surviving, then same shall be delivered to the then adult beneficiaries, and if none, then to the natural or legal Guardians or Conservators of the non-adult or non beneficiaries. The resignation shall be effective as of the date indicated in the instrument of resignation. Such date shall be no earlier than thirty (30) days after the date of delivery of the resignation. The resigning Trustee shall deliver to the Co-Trustee or Successor Trustee all trust assets and the resigning Trustee shall be relieved from any further duties and responsibilities and shall not be liable for any acts of any Successor Trustee. If no Successor Trustee is appointed or able or willing to serve, the resigning Trustee may deliver trust assets to any court having jurisdiction over the parties or this trust.



14.09. No Court Approval. No court shall be required to approve or ratify the withdrawal, removal and/or appointment of a Trustee as allowed herein. The withdrawal, removal and/or appointment of a Trustee shall be reflected in the trust records maintained by the Trustee. Notice may be given by the filing of a Memorandum of Trust in the Office of the Register of Deeds in the county where the principal office of the trust is located, or in the county where any real property is located, or where any beneficiary resides. Nothing in this paragraph restricts the unlimited authority of a court having jurisdiction over the trust assets to remove a Trustee or appoint a Successor Trustee upon application by any interested party.

**END OF ITEM**

ITEM FIFTEEN.

This revocable Trust Agreement may be executed in any number of copies, each of which shall be an original and no other copy need to be produced.

END OF ITEM

IN WITNESS WHEREOF, this Trust Agreement has been executed by the parties thereto on the day and year first above written.

WITNESSES:

GRANTOR/TRUSTEE:

\_\_\_\_\_  
Signature- Witness #1

\_\_\_\_\_  
Kenneth N. Davis., - Grantor/Trustee

\_\_\_\_\_  
Name- Witness #1

\_\_\_\_\_  
Print Name- Grantor/Trustee

\_\_\_\_\_  
Address- Witness#1

GRANTOR/TRUSTEE:

\_\_\_\_\_  
Signature- Witness #2

\_\_\_\_\_  
Debbie L. Davis- Grantor/Trustee

\_\_\_\_\_  
Name- Witness #2

\_\_\_\_\_  
Print Name- Grantor/Trustee

\_\_\_\_\_  
Address- Witness#2

STATE OF TENNESSEE  
COUNTY OF CROCKETT

PERSONALLY came and appeared before me, the undersigned authority at law in and for the aforesaid jurisdiction, Kenneth N. Davis, who acknowledged that he executed, signed and delivered the above and foregoing Irrevocable Trust Agreement on the day and year therein shown.

GIVEN UNDER MY HAND AND OFFICIAL SEAL, this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires:

STATE OF TENNESSEE  
COUNTY OF CROCKETT

PERSONALLY came and appeared before me, the undersigned authority at law in and for the aforesaid jurisdiction, Debbie L. Davis, who acknowledged that he executed, signed and delivered the above and foregoing Irrevocable Trust Agreement on the day and year therein shown.

GIVEN UNDER MY HAND AND OFFICIAL SEAL, this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires: