

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

**State of Tennessee**

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

Name: Mary L. Wagner

Office Address: 140 Adams Ave, Room 212, Memphis TN 38103 Shelby County  
(including county)

Office Phone: [REDACTED] Facsimile: 901-222-3819

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Home Address: [REDACTED]  
(including county) Germantown, TN 38139

Home Phone: [REDACTED] Cellular Phone: [REDACTED]

**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.

Judge, Circuit Court for the Thirtieth Judicial District at Memphis, Division VII

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

2009, BPR No. 028165

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.

TN, BPR No. 028165. I was licensed in 2009 and my license is currently active.

MS, BPR No. 103235. I was licensed in 2009. My license is currently inactive. I placed it in inactive status shortly after being appointed as Circuit Court Judge as I would no longer be practicing in Mississippi.

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).

**State of Tennessee, Judge for the Circuit Court for the Thirtieth Judicial District at Memphis, Division VII**

**October 2016 to Present**

**Rice, Amundsen & Caperton PLLC**

**February 2011 to 2016**

- o Associate
- o Appellate Practice Group Chair

**University of Memphis School of Law**

**2012 to 2014**

- o Advanced Appellate Advocacy- Adjunct Professor. Teaching 2<sup>nd</sup> year law students advanced skills in legal writing and oral advocacy. Fall 2014.
- o Adjunct Legal Methods Professor – Teaching first year law students legal writing,

research, analysis and advocacy skills. Fall 2012 through Spring 2014.

**Leitner, Williams, Dooley and Napolitan PLLC September 2010 – February 2011**

- Associate

**Judge Steven Stafford, Tennessee Court of Appeals September 2009 – September 2010**

- Law Clerk

During college, I worked in retail sales. I worked for Pottery Barn Kids as a sales associate. I also worked for Gymboree. I started with Gymboree as a sales associate, rising to assistant manager and store manager of the store in Broomfield, Colorado. As store manager, I was fully responsible for retail operations for the children's clothing store that had over \$1,000,000 in sales each year. In addition to being responsible for sales and customer relations, I managed 10-15 employees. Our store set record sales for our district. I did this full-time while a full-time undergraduate student.

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.

I have not been unemployed since completion of my legal education.

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

I do not currently practice law.

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.

When first licensed as an attorney, I served as a law clerk to Judge J. Steven Stafford for the Tennessee Court of Appeals, Western Section. I performed detailed review of the records and briefs in all appeals assigned to me. I prepared bench briefs for oral arguments for the entire hearing panel. I drafted opinions for matters assigned to me. These varied from appeals as of right and interlocutory appeals, bench and jury trials, review of factual findings and legal issues and more. I assisted with the review of opinions drafted by other judges and assisted with review of motions filed in appeals.

Prior to serving in the current judgeship, I practiced in every civil court in Shelby County, including Federal Court. I also appeared in many Circuit and Chancery courts across West Tennessee. I have appeared before the Tennessee Court of Appeals and before the Tennessee Supreme Court.

My practice at Rice, Amundsen & Caperton PLLC constituted a broad civil litigation practice. A significant portion of my practice involved family law matters. I represented both men and women. My cases ranged from the basic uncontested divorce with simple assets to complex cases with high-value multi-faceted assets and/or complex custody determinations with custodial evaluations and psychological proof. I addressed issues of first impression such as divorces involving multi-million dollar trusts intertwined in sophisticated tax and estate planning and combined with a simultaneous claim for fraud and breach of duty by a fiduciary.

As a family law practitioner, I dealt with clients, opposing parties and counsel on perhaps their worst days. These cases were often fraught with emotion and tension. I understand that these cases demand jurists and lawyers who can separate themselves from the emotions and remain focused on the legal principles at issue.

As another portion of my practice at Rice, Amundsen and Caperton, I represented individuals and entities in personal injury claims. I handled these matters for both plaintiffs and defendants. As plaintiff's counsel, I evaluated and developed a case before preparing a lawsuit. At times, after talking with witnesses and examining the proof, I found it necessary to give the unwelcomed advice that no lawsuit should be filed. As defense counsel, I represented entities, mainly non-profit volunteer organizations, in defending against personal injury claims. I have been responsible for evaluating, strategizing and defending claims that at times involved injuries resulting in multi-million dollar medical bills and even death. In addition to being difficult cases due to damages and proof issues, they also included significant legal issues related to liability.

I also represented businesses, non-profit organizations and individuals in commercial disputes and transactions. This includes disputes between partners, disputes following the sale of a business, and contractual disputes handled through litigation and/or arbitration. It also consists of transactional work in assisting with the sale or transfer of a business and drafting and advising on organizational structures.

I chaired our firm's appellate practice section. I regularly took matters on appeal and consulted on appellate issues. This included both inner office matters and as outside counsel. This work involved preparation of briefs and oral argument before the Court of Appeals. It also includes the preparation and arguments of Motions for Rule 9 interlocutory appeals and Applications for Rule 9 and Rule 10 interlocutory appeals. I also prepared Rule 11 applications to the Tennessee Supreme Court. At times, I have been called on to review action in a trial court to determine if an appeal, interlocutory or as of right, is prudent. Often, I am also brought in to discuss and

strategize on preparing a proper record before the trial court. This includes participating in trial as appellate counsel.

At Leitner Williams, my practice focused on insurance defense. This included all types of personal injury claims, workers' compensation and unemployment claims. I was involved in all stages of litigation from the initial preparation of a defense upon receipt of a Complaint, to written discovery, motion practice, depositions, through trial and even appeal. I regularly appeared before the Department of Labor in addressing Workers' Compensation claims including participating in Benefit Review Conferences. My practice included appearing before the Tennessee Department of Labor, courts across West Tennessee, courts in Northern Mississippi and the Mississippi Department of Labor. In representing insurance companies, I also performed Examinations Under Oath to address coverage issues.

Through my litigation practice, I prosecuted and defended all manner of civil lawsuits. I have been responsible for prosecuting lawsuits and meeting burdens of proof, which always began before a Complaint was even filed. On the other hand, I have also been responsible for defending lawsuits starting from the first Answer through trial or resolution. Having been responsible on both sides of a variety of types of cases provides me with unique experience and skill to evaluate cases from the bench.

I have always taken seriously the need to understand the claim to be established, the legal principles involved, and the burdens of proof. Thorough knowledge of this, along with the rules of civil procedure and rules of court, enabled me to obtain the best possible result for my client. I understand that maintaining this knowledge and understanding is a continuing process involving dedicated ongoing study of the law. These are skills and principles that I brought to the trial bench and would be an asset to the appellate bench.

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

The following are notable cases from my law practice. Cases in which I presided as Judge are discussed below.

*Stanley Wickfall v. Maria Ann Michlin Wickfall*, Shelby County Circuit Court, CT-003157-12. This matter was a relatively straightforward divorce matter. The notable part, however, was my client. I agreed the morning of the trial in this matter to represent the Wife, who had been proceeding *pro se*. Not only did I take on this case *pro bono* the morning of the trial, but my client was currently in prison for 2<sup>nd</sup> degree murder. Locked in the jury room with my client (and her two guards), I set forth to begin to prepare for trial in thirty minutes. I listened to her concerns and wishes. I explained to her what the Judge could and could not decide that day and the possible outcomes. We discussed the documents that she had with her and her testimony. We analyzed what the Judge would likely do with what she would be able to prove. She was respectful and thankful. For the first time someone had included her in the legal process that was her divorce. With my involvement, advocacy and explanation to not only my client, but the other side's attorney, the parties were able to reach a resolution without a trial. This division included an equitable division of the property and even an alimony award to the Wife. While the legal issues were not notable, the parties demonstrated the issues of access to justice faced in all

of our trial courts. It was the poster case reflecting the need to treat all litigants with respect regardless of their status or representation.

*Davey and Teresa Mann v. Jeffrey Callicutt et al.*, Shelby County Circuit Court CT-003646-07, 380 S.W.3d 42 (Tenn. 2012)(I did not participate in this appeal), and 2013 WL 1188954, No. W2012-00972-COA-R3-CV (Tenn. Ct. App. March 22, 2013). This was a complex personal injury action. At its height, this case involved twelve different parties each with their own attorneys. It involved personal injury claims from a tragic car accident that resulted in life threatening injuries including over \$1,000,000 in medical bills. This case included claims based on drunk driving, social host liability, premises liability, agency, and vicarious liability. Litigation involved complex legal disputes and issues of first impression. It went twice to the Court of Appeals and once to the Tennessee Supreme Court on interlocutory appeals and was pending for almost seven years. I saw firsthand the need to apply the law consistently across the state and the effect that it can have on litigants when the law is not applied consistently. I saw and worked through the difficulty in preparing a case with complex issues of law and fact on damages and liability, involving a substantial number of parties and counsel.

*Hannah Culbertson v. Randall Culbertson*, Shelby County Circuit Court No. CT-005484-10, 393 S.W.3d 678 (Tenn. Ct. App. 2012)(cert. denied); 455 S.W.3d 107 (Tenn. Ct. App. 2014)(cert. denied). This was a divorce matter with highly contested custody issues relating to mental health. The main issue in this case centered on discovery of Father's mental health status. This matter involved detailed legal and factual arguments related to statutory interpretation and the application of case law. Due to the many contested issues, I represented my client in numerous contested evidentiary hearings on matters including temporary alimony and child support, order of protection, injunctive relief and custody. It involved the use of expert witnesses, many fact witnesses, and a Rule 35 evaluation. Due to the request by Mother (my client) to review Father's mental health records, there was significant litigation on this discovery issue. It resulted in two Rule 10 Extraordinary Appeals to the Tennessee Court of Appeals. Both of which I briefed and argued. Further, each party filed Rule 11 Applications for permission to appeal to the Tennessee Supreme Court. I was responsible for the briefing on behalf of Mother related to the Rule 11 applications.

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.

On October 24, 2016, Governor Haslam appointed me to serve as Judge for the Circuit Court for the 30<sup>th</sup> Judicial District at Memphis, Division VII. I was elected to continue serving in this Judgeship on August 2, 2018 and continue to serve in this role today.

The Judgeship in which I serve is one of the nine divisions of the Circuit Court of Shelby County. This judgeship is limited to exclusively civil matters. Across the nine divisions, there are between 5,000 and 6,000 cases filed and disposed of each year. Of these dispositions,

approximately 39.5% are damages/tort, 35.6% are family law, 13.8% are miscellaneous general civil, and 11% are contract/debt. Approximately 600-700 are disposed by trial each year. Of these trials, approximately 93% are bench trials, as opposed to jury trials. Each Circuit Judge presides over approximately 5-8 jury trials per year.

Since being appointed to this Judgeship, I have conducted 17 jury trials. These ranged from the less complex two day trials to a complex three and one-half week trial. In my first fiscal year on the bench, I disposed of 490 cases (October 25, 2016 – June 30, 2017). In my first full year on the bench, I disposed of 667 cases (July 1, 2017 – June 30, 2018). I regularly conduct bench hearings on non-jury matters and have heard countless dispositive and non-dispositive motions.

I am hesitant to discuss many of my significant cases in this application due to the Rules of Judicial Conduct. Many of them are either still in litigation, or in a status that they could still come back to be heard before me.

I would cite to the writing samples attached to this Application as examples of significant cases. These include:

*Louise and Ernest Faulkner v. Nationstar Mortgage, LLC*, CT-005376-14. This matter is a dispute between a home owner and mortgage company. Both parties filed motions for summary judgment. A hearing was conducted on April 25, 2018. A copy of my order and findings is attached.

*Shaynne Bradley, as Limited Conservator for Prince D. Bradley v. Support Solutions of the Mid-South, LLC*, CT-0023890-16. This is a medical malpractice and personal injury case. The Defendant brought a Motion for Judgment on the Pleadings arguing the claim was barred by the statute of limitations. It was argued April 21, 2017 and November 14, 2017. This was an issue of first impression and included arguments as to the constitutionality of the statute at issue. The Attorney General intervened. A copy of my order is attached.

*Harmon v. Harmon*, 2018 WL 6192233, No. W2017-02452-COA-R3-CV (Tenn. Ct. App. Nov. 27, 2018), CT-001670-13. This was a relocation case that was highly emotional for both parties. It involved legal issues of statutory interpretation and fact intensive rulings. It was heard over three days in October and November 2017.

I would also cite to:

*Diane Hamilton. Conservator o/b/ Cassie McGill v. Methodist Healthcare Memphis Hospitals d/b/a Methodist Lebonhuer Hospital Germantown, Tri-State Neurology, PLLC, Robert Rayder MD and James Wang, MD*, CT-003205-12. This was a complex medical malpractice case. Prior to trial, numerous motions in limine and dispositive motions were argued and I ruled upon them. Some involved complex legal issues and issues of first impression under the Health Care Liability Act. This was a complex trial tried in February 2018 over three and one-half weeks. The trial resulted in a hung jury. Shortly, before the second trial, the matter was non-suited.

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.

*The Estate of John O. Wagner*, Shelby County Probate Court, No. D0010904. I served as

*Administrator CTA of my grandfather's estate. The Estate was closed in 2012.*

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

**Judge Robert L. Childers Shelby County Circuit Court**

- May 2008- May 2009, Law Clerk
- I prepared the motion docket, researched legal issues, and drafted opinions. In this capacity, I had firsthand experience as to the role of a trial court. I learned the need to work hard, be fully prepared, and study the law. I also learned the importance of a proper and respectful judicial temperament.

**United States Attorney for the Western District of Tennessee**

- Summer 2008 – Extern

**Professor Andrew McClurg, Cecil C. Humphrey's School of Law**

- Summer 2007- Research Assistant

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.

In June 2016, I submitted an application for the appointment to the Judgeship for Circuit Court for the 30<sup>th</sup> Judicial District at Memphis, Division VII. The Trial Court Vacancy Commission interviewed applicants on August 8, 2016. I was one of the nominees submitted to Governor Haslam. On October 24, 2016, Governor Haslam appointed me to the Judgeship in which I continue to serve today.

**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.

The University of Memphis Cecil C. Humphreys School of Law - Juris Doctor 2009, *Magna Cum Laude*

- Attended August 2006-May 2009
  - GPA: 3.8; Rank: 4th
  - *Law Review*, Notes Editor 2008-2009, Staff 2007-2008
  - CALI Awards for Excellence (highest grade in a course): Evidence, Secured Transactions, Workers' Compensation, Business Organizations and Legislation.



- Joseph Henry Shepard Scholarship 2008-2009
- Cecil C. Humphreys Fellowship, 2007-2008

The University of Colorado at Boulder - Bachelor of Arts 2006

- Attended August 2003 – May 2006
  - Major: Political Science
  - GPA: 3.6
  - Dean’s List: Fall 2003, Spring 2004, Fall 2004, Spring 2006
  - Golden Key International Honour Society (Top 15% of Students)
  - Phi Beta Kappa Society

The University of Memphis

- Attended Spring 2003, Dean’s List
- GPA: 3.9
- Sigma Alpha Lambda National Leadership & Honors Organization
- I left the University of Memphis to attend the University of Colorado at Boulder.

The University of Alabama

- Attended Fall 2003, President’s List
- GPA: 4.0
- Emerging Leaders Member

I left the University of Alabama in order to attend the University of Colorado. I initially transferred to the University of Memphis for financial reasons.

**PERSONAL INFORMATION**

15. State your age and date of birth.

34, [REDACTED] 1984.

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

12 years.

I have lived continuously in the State of Tennessee since May 2006. I was a resident of the State of Colorado while I attended the University of Colorado. Prior to that I was continuously a resident of Tennessee since birth.

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

12 years.

While clerking for Judge J. Steven Stafford (September 2009-September 2010), I had an

apartment in Dyersburg (Dyer County) where I lived during the week. My residence remained in Shelby County during this time.

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

Shelby

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

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.

*June A. Floyd, Patricia Malone and Carolyn Kenyatta, Michael Floyd, Esquire, Individually and on behalf of all others and on behalf of all similar individuals vs. Shelby County Election Commission, Robert Myers, Norma Lester, Dee Nollner, Steve Stamson, Anthony Tate, in their Official Capacities as Members of the Shelby County Election Commission, Linda Phillips, Administrator of Elections, Judge Mary Wagner, Chancery Court of Shelby County, CH-18-1180. This was an election contest filed in August 2018. It was dismissed on Nov. 6, 2018.*

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.

**Germantown Kiwanis Club**

- Member 2011 – present

**Chi Omega Fraternity**

- Member since October 2017
- Member of the Mock Trial Committee

**Daughters of the American Revolution – Hermitage Chapter**

- Member since 2012
- National Defense Secretary 2013-2016- responsible for programs and projects on national defense history and civics in local high school

**University of Memphis Alumni Association, Member**

**Christ United Methodist Church, Member 2015 – present**

**Shelby County Republican Party**

- Chairman 2015-2016
- Chairman's Award for 2014

- Judicial Endorsement Subcommittee Chair 2014
- Candidate Recruitment Committee Member 2014
- Parliamentarian, 2011 and 2013 Convention
- Voter Registration Committee 2011-2012
- Contest and Credentials Committee Member 2011 and 2013
- Bylaws Committee Chair 2011-2013, 2013-2015
- District 95 Steering Committee Representative 2009-2011
- I have also been a member of the auxiliary clubs of the Shelby County Republican Party including the Shelby County Republican Women, the Women of Purpose, East Shelby Republican Club, Northeast Shelby Republican Club

**Shelby County Young Republicans**

- Joined 2006
- YR of the Year for 2009
- 2<sup>nd</sup> Vice Chair 2008 and 2009
- Chair 2013-2014

**Tennessee Young Republican Federation**

- General Counsel September 2013- 2016

**Germantown Baptist Church, Member from childhood through 2015**

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

Chi Omega Fraternity is an intergenerational women's organization that by its nature limits membership to females only. I do not plan to resign my membership unless required by the Rules of Judicial Conduct. Chi Omega serves to further friendship, personal integrity, excellence and intellectual pursuits, community involvement, and personal and career development for its members.

The Daughters of the American Revolution by its nature limits membership to females only. It does have a "brother" organization, The National Society, Sons of the American Revolution, for which only males are admitted. I do not plan to resign my membership unless required by the Rules of Judicial Conduct. The Daughters of the American Revolution serves noteworthy purposes including civic education, community service, preservation of history and patriotism.

### 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.

Memphis Bar Association

- Member, 2009- present
- Publications Committee 2011- 2016
- Law Week Committee 2016-2017
- Leadership Forum Class of 2012-2013 graduate

Association of Women Attorneys

- Member, 2016 to present

Tennessee Bar Association

- Member, 2009- present
- Appellate Practice Section, Chair 2016, Vice-Chair 2015-2016, West Tennessee Delegate 2013 to 2015 and member 2011 to present
- Tennessee Bar Association Leadership Law Class 2016
- Alimony Bench Book Committee – 2017 to present

Leo S. Bearman Sr., American Inn of Court

- Barrister Member 2017 to present
- Associate Member 2011 to 2014
- Student Member 2008 -2009

Mississippi Bar Association, Member since 2009

Republican National Lawyers Association, 2014-2015

The Federalist Society, Memphis Chapter, 2013-2015, 2018 to present

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.

2018 American Swiss Foundation Young Leaders Class. One of 25 Americans chosen to participate in a leadership conference with 25 Swiss. Each person was chosen based on his or her professional accomplishments and leadership.

2018 Twelve Most Outstanding Women, Honoring Women in the Judicial System. Chosen by the Memphis Inter-Denominational Fellowship Inc. as one of twelve honorees.

2018 Memphis Bar Foundation Fellow

2016-2017 Appellate Practice Section Chair, Tennessee Bar Association

2016 Tennessee Bar Association Leadership Law Class (1 of 33 from across the State)

2016 Rising Star for Super Lawyers

2015 Rising Stars for Super Lawyers

2012-2013 Memphis Bar Association Leadership Forum Class Member

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

Mary L. Wagner, Soft Skills to Excel in any Environment, Facts & Findings – The Magazine for Paralegals, Vol. XLII, 18 (Jan.-Feb. 2016). Republished in *MALA Moments*, by the Montana Association of Legal Assistants, September 2017.

Mary L. Wagner, Child Support 101: Compromise of Child Support Arrearages and Retroactive Modification, *Memphis Lawyer Magazine*, Vol. 32, Issue 5, 16 (Fall 2015).

Mary L. Wagner, Legal Methods Comes Back to Haunt – The Need for Properly Framed Legal Issues, *Memphis Lawyer Magazine*, Vol. 31, Issue 1, 20 (Jan./Feb. 2014).

Mary L. Wagner, Justice Scalia visits Memphis: 1<sup>st</sup> Justice to visit new Memphis Law Campus, *Memphis Lawyer Magazine*, Vol. 31, Issue 1, 8 (Jan./Feb. 2014).

Amy J. Amundsen & Mary L. Wagner, Alimony, You've Come A Long Way, *Tennessee Bar Journal* Vol. 48, No. 7, 14 (July 2012).

Coble Caperton & Mary L. Wagner, Tennessee Court Holds that National Fraternity Does Not Owe a Duty to Third Parties, *Fraternal Law*, No. 120 (March 2012).

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.

**University of Memphis School of Law**

- Advanced Appellate Advocacy- Adjunct Professor. Teaching 2<sup>nd</sup> year law students advanced skills in legal writing and oral advocacy. Fall 2014. I was under contract to teach again in Fall 2018, but the course was canceled due to enrollment numbers.
- Adjunct Legal Methods Professor – Teaching first year law students legal writing, research, analysis and advocacy skills. Fall 2012 through Spring 2014.

“Worst Practices Before the Bench” 12<sup>th</sup> Annual Professionalism Seminar hosted by the Memphis Bar Association, December 12, 2018. (with Judge Sherri Lipman, Judge Karen Massey, Judge Betty Thomas Moore, and Judge Bobby Carter).

“Culbertson I & II Admissibility and Discovery of Evidence: Mental Health Cases” Tennessee Judicial Conference. March 16, 2017.

“Privacy Issues in Litigation. Everything you Need to Know from HIPAA to Social Media” Memphis Bar Association Young Lawyers, May 26, 2016. (with Leslie Isaacman. My presentation focused on social media).

“Brief Writing” Tennessee Court of Appeals Academy by the Tennessee Bar Association, April 1, 2016.

“Appellate Practice 101” Larry Rice Divorce Seminar, March 18, 2015.

“Brief Writing 101” Memphis Bar Association Young Lawyer’s 101 Series, April 24, 2014.

“Appellate Practice 101” Greater Memphis Paralegal Alliance, April 17, 2013.

“Appellate Practice 101” Memphis Bar Association Young Lawyers, February 21, 2013 (with Judge J. Steven Stafford).

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.

Judge, Circuit Court for the Thirtieth Judicial District at Memphis, Division VII. I was appointed to this judgeship in October 2016 by Governor Haslam. I was elected to continue in this judgeship for the completion of the term in August 2018.

Post-Conviction Defender Oversight Commission Member. I was appointed by Governor Haslam in June 2015. I served in this position until my appointment as Judge.

Tennessee Republican Party – State Executive Committeewoman for District 33. I was elected to this position in August 2014. I resigned in August 2016 when I was nominated for judicial appointment.

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

No.

34. Attach to this application at least two examples of legal articles, books, briefs, or other

legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

I have attached four orders that I have written as a trial judge. They are my own work. My law clerks may have reviewed after my drafting for minor edits.

### **ESSAYS/PERSONAL STATEMENTS**

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

I seek this position to further serve the State of Tennessee. I am a third-generation lawyer—the first generation being my grandfather who grew up with 15 siblings in Hornbeak, Tennessee. From a young age, I learned the principles of working hard, respecting everyone no matter their station in life, always serving others no matter your station in life, and being passionate about the law. These principles guide my daily life and lead me to seek this position. I know that being a good judge requires hard work, long hours, dedication, and skill. It requires a servant's heart and a jurist who respects all parties who come before him or her. This position would allow me to further focus my skills of legal analysis and writing while simultaneously working to improve and protect the legal system that I grew to love and respect at a young age.

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)*

When in practice, I provided pro bono services. I also provided pro bono legal services to organizations in which I was involved. I served on the Post-Conviction Defender Oversight Commission. This committee oversees the Post-Conviction Defender in handling final appeals for those on death row on a pro bono basis.

As a judge, I remain vigilant of our pro se litigants and pro bono needs. I work to make sure they all are treated with respect and that all cases are handled the same. In managing my docket, I always keep in mind efficiency and cost of resolution. Often the time to conclusion of litigation and the cost of such can be a bar to those seeking justice. Time and costs incurred can have a devastating effect on the individuals involved, families, businesses and thus, our society. I understand that our courts must be accessible to all.

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 that I seek is one of twelve judgeships for the Tennessee Court of Appeals. This judgeship specifically is for West Tennessee. The judges, however, hear cases in all three grand divisions and work with all of the Judges from the Court of Appeals. The Court of Appeals handles appeals as of right and interlocutory appeals under Tenn. R. App. Pro. Rule 9 or 10 and Recusal Appeals under Tenn. Sup. Ct. Rule 10B. It hears all types of civil cases. The depth and



breadth of my experience would be a positive impact to the Court and would enable the Court to continue to issue quality opinions efficiently.

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

My community service focuses in four main areas: promotion of the legal system, mentoring youth, historic preservation, and service to our veterans. I do this primarily through my involvement with the Daughters of the American Revolution and the Germantown Kiwanis Club. The Daughters of the American Revolution works on projects to accomplish historic preservation and service to veterans. We work on many projects focused on serving those at the Veterans' Hospital. As a younger judge, I feel that I have an important role in being involved with our youth, mainly high school or college students. It is important to show them a role model and to encourage them to continue their education, make wise choices and think about their future. I have done this through speaking to groups, working on the S.C.A.L.E.S. project, volunteering for mock trial tournaments, and serving on the Chi Omega Fraternity mock trial committee. I also believe that as judges, we have a duty to educate the public on the legal system. One will only have confidence and trust in a system that they know and understand. For this reason, I believe it is important for us to work to educate the public on the legal system and also on simply who we are as judges. If appointed, I will continue this work.

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)*

At 10, I began working for my grandfather's law firm. They allowed me to work by filing lawsuits and pleadings at the courthouse, assisting with the preparation of pleadings and accountings, and other clerical tasks. I learned things about the legal system that you do not in law school. My daily work with my grandfather even further instilled his values in me. From growing up in rural west Tennessee, my grandfather learned at an early age and shared with us the values of hard work, service, humility and love of the legal system. Learning these values early, provided me with the tools to have the breadth of experience that I do.

In undergrad, I wanted to attend the University of Colorado. To do so, I had to pay all of my expenses on my own. Through those values, I did just that. I worked full time while maintaining a full course load and high grades. I knew, however, that I wanted to attend law school and return to Tennessee. I continued in law school, working part-time, to not only help with expenses, but to maximize my learning and experience.

Legal writing is one of my strengths and passions. This can be seen through my work as a law student and law clerk, through my appellate practice and in teaching legal writing. It is this love that guides me to seek this judgeship and the ability to further serve the State of Tennessee.

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

Yes.

“If you’re going to be a good and faithful judge, you have to resign yourself to the fact that you’re not always going to like the conclusions you reach. If you like them all the time, you’re probably doing something wrong.” (Justice Antonin Scalia). I may not always agree with the statute or rule at issue, or believe that its application results in the “fair” result. Regardless, I do and will apply the law as written without regard to my personal feelings or beliefs.

I experienced this first as a law clerk. I assisted in researching, analyzing and drafting those decisions which I did not like the result, but which complied strictly with the law.

I experienced this a trial judge also. For example, in a relocation case, due to facts of the case, the relocation statute did not allow me to consider the best interests of the children. Regardless of my thoughts on the best interests, I applied the statute strictly as written. I have also experienced this in a trial in which there was likely a basis for relief, but the plaintiff failed to present essential proof. Bound by the proof presented, I was required to grant a motion for directed verdict.

I understand that not only is it my legal duty to apply the law as written without regard to my personal feelings, but it is also a duty owed to protect our system of government.

#### 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. John Ryder. Attorney, Harris Shelton, Hanover & Walsh PLLC, 40 S. Main Street, Suite 2210, Memphis, TN 38103. [REDACTED]

B. Shannon Haynes. Director of Client Development, Emmaus Consulting, LLC. PO Box 254, 180 Walnut Extended, Alamo, TN 38001. [REDACTED]

C. Jim Rout. CEO & President, Bank Tennessee. 1125 W Poplar Avenue, Collierville, TN 38017. [REDACTED]

D. G. Coble Caperton. Attorney, Rice Amundsen & Caperton PLLC. 275 Jefferson Ave, Memphis TN 38103. [REDACTED]

E. Mike Keeney. Attorney, Lewis Thomason. 40 S. Main, Suite 2900, Memphis, TN 38103. [REDACTED]

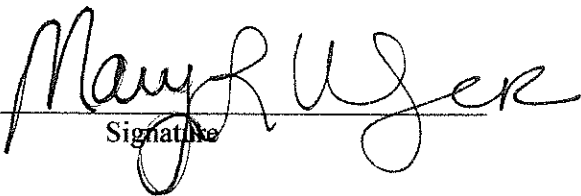
**AFFIRMATION CONCERNING APPLICATION**

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] Tennessee Court of Appeals, Western Section 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: Feb. 10, 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.

Mary L. Wagner  
Type or Print Name

Mary L. Wagner  
Signature

2/10/2019  
Date

028105  
BPR #

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

MS # 103235 (inactive)

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**IN THE CIRCUIT COURT OF TENNESSEE FOR THE  
THIRTIETH JUDICIAL DISTRICT AT MEMPHIS, SHELBY COUNTY**

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**SHAYNNE BRADLEY, as the Limited  
Conservator for PRINCE D. BRADLEY**

**Plaintiff,**

v.

**Cause No. CT-002389-16  
Div. VII**

**SUPPORT SOLUTIONS OF THE  
MID-SOUTH, LLC**

**Defendants.**

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**ORDER ON DEFENDANT'S  
MOTION FOR JUDGMENT ON THE PLEADINGS**

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This matter came to be heard on Defendant's Motion for Judgment on the Pleadings. The parties originally argued the Motion on April 21, 2017. Due to the fact that Plaintiff raised a constitutional challenge, the proceedings were stayed in accordance with Tenn. R. Civ. P. Rule 24.04 to provide notice to the Attorney General. The Attorney General intervened for the limited purpose of defending the constitutionality of Tenn. Code Ann. § 28-1-106 as amended in 2016. The Plaintiff, Defendant and the Attorney General further briefed the issues and argued these matters on November 14, 2017. Based upon the Defendant's Motion for Judgment on the Pleadings, Plaintiff's Response to Defendant's Motion to Dismiss, the State of Tennessee's Memorandum of Law in Support of the constitutionality of Tenn. Code Ann § 28-1-106, and all of the parties' supplemental briefs and memoranda of law, the Court finds as follows:

### *Background*

This matter began on June 10, 2016 when the Plaintiff, Shayanne Bradley, as the Limited Conservator for Prince D. Bradley, her son, brought this action against Support Solutions of the Mid-South LLC. The Complaint alleges that the Probate Court of Davidson County adjudicated Mr. Bradley incompetent on November 12, 2008. Ms. Bradley alleges that her son sustained injuries in February 2013 and September 2013 while residing in a group home managed by the Defendant.

### *Pre-Suit Notice*

Defendant's Motion first contends that this Complaint should be dismissed because Plaintiff's pre-suit notice did not substantially comply with Tenn. Code Ann. § 29-26-121. The Tennessee Supreme Court recently addressed a similar issue in *Bray v. Khuri*, 523 S.W.3d 619 (Tenn. 2017). The parties agreed that *Bray* addresses this issue and that the Plaintiff's compliance or non-compliance with Tenn. Code Ann. § 29-26-121 is no longer a basis for dismissal.

### *Statute of Limitations*

Defendant next contends that pursuant to Tenn. Code Ann. § 28-1-106, Plaintiff's claims have expired and therefore, should be dismissed. In its original Motion, Defendant argued that Plaintiff was not entitled to a tolling of the statute of limitations because Tenn. Code Ann. § 29-26-121(c)(2)(2016) required Plaintiff, as the conservator for her son, to bring these claims and prohibited her from relying on the tolling of the statute of limitations<sup>1</sup>. In response, Plaintiff

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<sup>1</sup> In its original Motion and Memorandum in Support of Defendant's Motion for Judgment on the Pleadings, Defendant does not dispute Mr. Bradley incompetency. At the second oral argument, the Defendant contended that Mr. Bradley had not been adjudicated incompetent. Also of note, the State of Tennessee contends in its brief (pg 1) that the Davidson County Court adjudicated Mr. Bradley incompetent.

argued that Tenn. Code Ann. §29-26-121 as amended in 2016 was an unconstitutional taking of a vested property right.

Because of Plaintiff's argument, the State of Tennessee Attorney General intervened in this matter. The State contends that, as originally argued by the Plaintiff, Tenn. Code Ann. § 29-26-121(c)(2) applied to this case would result in an unconstitutional taking of a vested property right. The State, however argues that Tenn. Code Ann. § 28-26-121(a) and (c) provide two different tolling provisions; one applicable to persons who have been adjudicated incompetent and one applicable to persons who lack capacity. Therefore, the State argues that subsection (a) – adjudicated incompetent – applies to this matter and the Court need not address the constitutional issue.

In response to the State, the Defendant then argued that Mr. Bradley had not been adjudicated incompetent in 2013; therefore, Tenn. Code Ann. § 29-26-121, as it existed in 2013, would not have applied to toll this matter and Mr. Bradley's right to bring an action would have expired in 2014. Accordingly, the first question this Court must address is whether Mr. Bradley was adjudicated incompetent at the time that this cause of action accrued in 2013.

Defendant contends that to be adjudicated incompetent, a court must use the magic language of "incompetent." In the alternative, Defendant contends that the 2008 Probate Court Order does not rise to a finding of incompetence. On December 13, 2007, Kathleen Clinton as Director of the Middle Tennessee Regional Office, Division of Mental Retardation Services for the State of Tennessee filed a Petition for Appointment of a Limited Guardian to be converted to a Limited Conservator Upon the Majority of the Respondent. On November 12, 2008, the Circuit Court for Davidson County, Tennessee entered an Agreed Order appointing Limited Conservator for Respondent (Mr. Bradley). In this Order, the Circuit Court accepted the report

of the Guardian ad Litem and found that Mr. Bradley “is a disabled person under T.C.A. § 34-1-101(7) and is in need of a limited conservator.”<sup>2</sup>

The issue of the terminology of “adjudicated incompetent” is an interesting one. In 1993, the Tennessee General Assembly amended the conservatorship statute. Prior to 1993, the creation of a conservatorship or limited guardianship required a judicial determination of incompetence. Tenn. Code Ann. § 34-4-202, -302 (Repealed 1992); *See In the Matter of Conservatorship of Ellen P. Groves*, 109 S.W.3d 317, 330-31 and FN28 & FN 29 (Tenn. Ct. App. 2003). Instead, with the amendment, courts are required to make a finding of “disability” as defined in Tenn. Code Ann. § 34-1-101(7). Since 1993, “conservatorship proceedings have focused on the capacity of the person for whom a conservator is sought.” *In the Matter of Conservatorship of Ellen P. Groves*, 109 S.W.3d at 331. “[T]he threshold question...is whether the person for whom a conservator is sought is disabled or incapacitated.” *Id.* The conservatorship statutes “do not define the concept of incapacity and do not identify particular illnesses or disabilities deemed to be disabling or incapacitating.” *Id.* The inquiry focuses on the diagnosis and the effect of that illness, injury or condition of the capacity of the person. *Id.*

Accordingly, this Court finds that a finding of disability pursuant to Tenn. Code Ann. § 34-1-101(7) amounts to an adjudication of incompetency as required by Tenn. Code Ann. § 28-1-106 (2008) and (2016). Therefore, because Mr. Bradley had been found to be a disabled person as defined by Tenn. Code Ann. § 34-1-101(7), Tenn. Code Ann. § 28-1-106 (2008) applies and the statute of limitations tolled in this matter.

That brings the Court to the application of Tenn. Code Ann. § 28-1-106(c)(2016). In 2016, the Tennessee General Assembly amended Tennessee Code Annotated § 28-1-106, adding

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<sup>2</sup> Tenn. Code Ann. § 34-1-101(7)(2013) provides “ ‘Disabled person’ means any person eighteen (18) years of age or older determined by the court to be in need of partial or full supervision, protection and assistance by reason of mental illness, physical illness or injury, developmental disability or other mental or physical incapacity.”



section c. The amendment was effective on April 27, 2016, the date of enactment. The State argues that subsection (c) applies to a different set of persons, those who lack capacity and not to those who have been adjudicated incompetent. Therefore, the State contends this Court can address this matter under subsection (a) and there is no need to address the constitutional arguments. Defendant argues that subsection (c)(2) was intended to apply to persons with conservators and therefore, if Mr. Bradley had been adjudicated incompetent, (c)(2) would apply. Plaintiff contends that (c)(2) would amount to an unconstitutional taking of Mr. Bradley's vested property rights. The Attorney General agrees that, if applied to this matter, (c)(2) raises constitutional concerns.

Tennessee Code Annotated §28-1-106, as amended in 2016, provides:

- (a) If the person entitled to commence an action is, at the time the cause of action accrued, either under eighteen (18) years of age, or adjudicated incompetent, such person, or such person's representatives and privies, as the case may be, may commence the action, after legal rights are restored, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from restoration of legal rights.
- (b) Persons over the age of eighteen (18) years of age are presumed competent.
- (c)(1) If the person entitled to commence an action, at the time the cause of action accrued, lacks capacity, such person or such person's representatives and privies, as the case may be, may commence the action, after removal of such incapacity, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from removal of such incapacity, except as provided for in subdivision (c)(2).
- (2) Any individual with court-ordered fiduciary responsibility towards a person who lacks capacity, or any individual who possesses the legal right to bring suit on behalf of a person who lacks capacity, shall commence the action on behalf of that person within the applicable statute of limitations and may not rely on any tolling of the statute of limitations, unless that individual can establish by clear and

convincing evidence that the individual did not and could not reasonably have known of the accrued cause of action.

- (3) Any person asserting lack of capacity and the lack of a fiduciary or other representative who knew or reasonably should have known of the accrued cause of action shall have the burden of proving the existence of such facts.
- (4) Nothing in this subsection (c) shall affect or toll any statute of repose within this code.
- (d) For purposes of this section, the term “person who lacks capacity” means and shall be interpreted consistently with the term “person of unsound mind” as found in this section prior to its amendment by Chapter 47 of the Public Acts of 2011.

In construing statutes, the Court must “adopt a construction which will sustain a statute and avoid constitutional conflict if any reasonable construction exists that satisfies the requirements of the Constitution.” *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 529 (Tenn. 1993). “[W]here the legislature includes particular language in one section of a statute but omits it in another section of the same statute, it is generally presumed that the legislature acted purposely in the subject included or excluded” *State v. Pope*, 427 S.W.3d 363, 368 (Tenn. 2013). Further, courts should apply a specific statutory provision over a more general one. *Washington v. Robertson Cnty.*, 29 S.W.3d 466, 475 (Tenn. 2000).

The Court has at issue the construction of section (a) and (c) from Tenn. Code Ann. § 28-1-106(2016). Section (a) operates to toll the statute of limitations for persons “adjudicated incompetent”. There are no exceptions to Section (a). Section (c) tolls the statute of limitations for persons “who lack capacity” except as provided in subsection (c)(2). Tenn. Code Ann. § 28-1-106 (c)(1)(2016). The exception provided in subsection (c)(2) requires “[an]y individual with court-ordered fiduciary responsibility towards a person who lacks capacity, or any individual who possesses the legal right to bring suit on behalf of a person who lacks capacity” to bring the

suit within the statute of limitations and prohibits reliance on the tolling provision provided in (c)(1). If subsection (c)(1) does not apply, section (c)(2) does not become an issue.

Therefore, the Court must determine whether Tenn. Code Ann. §28-1-106(a) or (c)(1) applies to this matter. Again, (a) addresses individuals who have been adjudicated incompetent while (c) addresses individuals who lack capacity. The terms “adjudicated incompetent” is a more specific provision than simply one who lacks capacity. Therefore, the Court finds that section (a) applies to this matter and the Court does not need to address the constitutionality of Tenn. Code Ann. §28-1-106(c)(2) as applied to this matter.

**IT IS THEREFORE ORDERED ADJUDGED AND DECREED**, that Defendant’s Motion for Judgment of the Pleadings is denied.

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HONORABLE MARY L. WAGNER

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of this Order has been forward to:

Richard M. Carter  
Rebecca K. Hinds  
6410 Poplar Ave suite 1000  
Memphis TN 38119-4839  
*Attorneys for Defendant*

Parke S. Morris  
25 Dr. M.L. King Jr. Ave  
Suite 208  
Memphis, TN 38103  
*Attorney for the Plaintiff*

Taylor W. Jenkins  
Assistant Attorney General for the State of  
Tennessee  
PO Box 20207  
Nashville TN 37202-0207

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**CLERK**

**Date:** \_\_\_\_\_

**IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE  
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS**

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**XIOMARA E. MELO**

**Plaintiff,**

**Docket No. CT-000611-18**

**vs.**

**Div. VII**

**WILLIAM D. MASSEY**

**Defendant.**

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**ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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This cause came to be heard on the 31<sup>st</sup> day of January, 2019 before the Honorable Mary L. Wagner, upon Defendant's Motion for Summary Judgment. Despite the requirements of Tenn. R. Civ. P. 56 and the local rules, Plaintiff failed to file a Response. Based upon Defendant's Motion for Summary Judgment, Statement of Undisputed Facts, and Memorandum in support thereof, and lack of response from the Plaintiff, the Court finds as follows:

The following are the undisputed material facts:

1. On or about September 25, 2015, Plaintiff retained Mr. Massey and his law firm to represent her in criminal charges alleging she committed two counts of healthcare fraud in violation of Title 18, United States Code, Section 1347.
2. On May 5, 2016, Plaintiff maintained she could only be charged for one count of healthcare fraud. In support of this claim, she emailed Mr. Massey adamantly claiming to have used a correct billing code, thereby eliminating one count against her.
3. Ultimately, Plaintiff entered a guilty plea to both counts on November 16, 2016, and Judgment was entered on February 17, 2017.

4. Plaintiff signed the Plea Agreement on November 16, 2016. This Agreement explicitly provides:

1. The Defendant agrees:

\* \* \*

that she has discussed the appeal waiver set forth in this agreement with her attorney and further agrees, together with the United States to request that the Court enter a specific finding that the Defendant's waiver of her right to appeal the sentence to be imposed in this case was knowing and voluntary;

(Exhibit D to Motion, Plea Agreement, Paragraph 1(e)). The Plea Agreement further provides that "By signing this document, the Defendant acknowledges that she has read this agreement and/or has had the agreement read to her, has discussed it with her attorney, and understands it." (Exhibit D to Motion, Plea Agreement, Paragraph 5).

5. On January 4, 2017, prior to Plaintiff's sentencing, she complained to Jennifer Perkins, U.S. Probation Officer Specialist, that she should have only been charged with one count, thereby potentially jeopardizing the information contained in her Acceptance of Responsibility statement, as Ms. Perkins considered including the information in her presentence report.

6. On January 4, 2017, Mr. Massey responded to Plaintiff in reference to her email to Ms. Perkins that she had wanted a trial, she should not have pled guilty.

7. Plaintiff appealed her conviction to the United States Court of Appeals for the Sixth Circuit, alleging there was an insufficient factual basis for the district court to conclude she was guilty of Count Two, therefore her trial counsel was ineffective for allowing her to plead guilty to Count Two, and her appeal was denied on July 3, 2017.

8. On August 23, 2017, Plaintiff filed a Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255, though it appears that the motion has never been heard,

and upon information and belief, is still pending before the United States District Court for the Western District of Tennessee.

9. On February 12, 2018, Plaintiff filed her Complaint in the instant action, alleging that Mr. Massey committed legal malpractice in his representation of her in her criminal matters.<sup>1</sup>

### SUMMARY JUDGEMENT STANDARD

Summary Judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. The moving party may satisfy this burden either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense. *Rye v. Women's Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235, 264–65 (Tenn. 2015). The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts. *Id.* at 265 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party. *Id.* Summary Judgment should be granted if the nonmoving party's evidence at the summary judgment stage is insufficient to establish the existence of a genuine issue of material fact for trial. Tenn. R. Civ. P. 56.04, 56.06.

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<sup>1</sup> This Court previously dismissed the law firm from this action by Order entered August 17, 2018. The Court dismissed the law firm as they were only named in the style of the Complaint, and no claim for relief was set forth against them in the Complaint.

## LEGAL CONCLUSIONS

Plaintiff brings this legal malpractice action asserting that Defendant committed malpractice and breached fiduciary duties by:

- (a) Failing to challenge the charge for a non-criminal behavior.
- (b) By failing to follow plaintiff's instructions and concluding a plea agreement despite numerous verbal and written objections to this faulty/illegal charge of Count two.
- (c) By holding himself out as the attorney for Plaintiff but not representing the best interest of Plaintiff.
- (d) By accepting without challenge the prosecution information concerning the restitution amount.
- (e) By failing to conduct independent investigation
- (f) By failing to investigate mitigating evidence.
- (g) By failing to advocate the plaintiff's theory of the case
- (h) By failing to object to factual errors in the PSR.
- (i) By failing to adequately prepare plaintiff for sentencing.
- (j) By failing to maintain adequate and timely communications with plaintiff.
- (k) By failing to investigate faulty/illegal warrant and seizure of property.
- (l) By failing to know or properly apply the law.

(Complaint Paragraph 5). At oral argument on this Motion, Plaintiff asserted that she had only four causes of action: (1) the Defendant committed malpractice by accepting a plea agreement without her consent; (2) that Defendant committed malpractice by not investigating the search warrant; (3) that Defendant committed malpractice by not advising her about appeal information; and (4) that Defendant committed malpractice by not investigating the legal or factual basis for either of her two charges. Defendant argues that all of Plaintiff's claims should be dismissed because they are barred by the statute of limitations and because she has not obtained post-conviction relief. The Court will address each argument separately.

### *Statute of Limitations*

The statute of limitations for legal malpractice in Tennessee is one year from the date the cause of action accrues. Tenn. Code Ann. § 28-3-104(c)(1).

A cause of action for legal malpractice accrues and the statute of limitations commences when: (1) the attorney had committed negligence; (2) the defendant's negligence causes the plaintiff to suffer a legal cognizable or actual injury; and (3) the plaintiff knows, or in the exercise of reasonable care and diligence should have discovered the existence of facts constituting negligence by the attorney at [sic] the injury cause thereby.

*Hartman v. Rogers*, 174 S.W.3d 170, 173 (Tenn. Ct. App. 2005).

With regard to claims (a), (b), (c), (d), (e), (f), (g), (k), and (l), the undisputed material facts demonstrate that Plaintiff knew or in the exercise of reasonable care and diligence should have discovered the existence of facts constituting negligence by the Defendant and the injury caused thereby on January 4, 2017, at the latest. Plaintiff did not file her Complaint until February 12, 2018. Therefore, Plaintiffs claims (a), (b), (c), (d), (e), (f), (g), (k), and (l) are barred by the statute of limitations.

With regard to claim (j), Plaintiff indicated at oral argument that this cause of action related to Defendant's alleged failure to provide her with appeal information. Plaintiff signed the Plea Agreement on November 16, 2016. This Agreement explicitly provides:

1. The Defendant agrees:  
\* \* \*  
that she has discussed the appeal waiver set forth in this agreement with her attorney and further agrees, together with the United States to request that the Court enter a specific finding that the Defendant's waiver of her right to appeal the sentence to be imposed in this case was knowing and voluntary;

(Exhibit D to Motion, Plea Agreement, Paragraph 1(e)). The Plea Agreement further provides that "By signing this document, the Defendant acknowledges that she has read this agreement and/or has had the agreement read to her, has discussed it with her attorney, and understands it."

(Exhibit D to Motion, Plea Agreement, Paragraph 5). Plaintiff knew or in the exercise of reasonable care and diligence should have discovered the existence of facts constituting



negligence by the Defendant and the injury caused thereby with regard to her claim of not providing her with appeal information, no later than November 16, 2016. Plaintiff did not file her Complaint until February 12, 2018. Therefore, the undisputed material facts demonstrate that Plaintiff's claim (j) is barred by the statute of limitations.

With regard to claims (h) and (i), the undisputed material facts do not demonstrate when the PSR or sentencing was complete. Therefore, the Court cannot determine whether these claims are barred by the statute of limitations.

#### *Failure to Obtain Post-Conviction Relief*

The Court will now address claims (h) and (i) with regard to the argument that Plaintiff failed to obtain post-conviction relief. Defendant is correct in that this Court does not have to stay the malpractice action until all of the post-conviction proceedings are complete. *Gibson v. Trant*, 58 S.W.3d 103, 108 (Tenn. 2001). Defendant's reliance on *Gibson*, however, beyond that is misplaced. In *Gibson*, the trial court did wait until post-conviction proceedings were complete and then considered the outcome of those proceedings in dismissing the case. *Id.* at 108. In *Gibson* the federal court that handled the post-conviction criminal proceedings denied the plaintiff post-conviction relief with a finding that he had voluntarily entered a plea of guilty and therefore, denied his claim for ineffective assistance of counsel. *Id.* at 113. For several reasons, including the issue of collateral estoppel, the *Gibson* court held that the plaintiff (defendant in the criminal case) should not be allowed to re-litigate his guilt or innocence in the civil court through the malpractice action. *Id.* at 113-16. For this reason, the *Gibson* court held that a "criminal defendant must obtain post-conviction relief in order to maintain a legal malpractice claim against his defense lawyer." *Id.* at 116.

In this case, contrary to *Gibson*, the undisputed material facts demonstrate that the post-conviction process is not complete. This Court cannot find, like the *Gibson* court did, that Plaintiff has failed to obtain post-conviction relief. Therefore, this Court cannot grant summary judgment on this argument.

To be clear, this Court is not finding that it must await the post-conviction process before it may address the merits of this matter. Further, there may be another basis upon which summary judgment may be appropriate. At this time, however, Defendant has failed to carry its burden to obtain summary judgment with regard to claims (h) and (i).

**IT IS SO ORDERED ADJUDGED AND DECREED** that for the reasons stated above, Defendant's Motion for Summary Judgment is granted as to claims (a), (b), (c), (d), (e), (f), (g), (k), and (l) and Defendant's Motion for Summary Judgment as to claims (h) and (i) is denied.

\_\_\_\_\_  
JUDGE MARY L. WAGNER

Date: \_\_\_\_\_

**IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE  
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS**

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**LOUISE and EARNEST FAULKNER**

**Plaintiffs,**

**Docket No. CT-005376-14**

**vs.**

**Div. VII**

**NATIONSTAR MORTGAGE, LLC**

**Defendant.**

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**ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND  
ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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This cause came to be heard on April 25, 2018 on Plaintiffs' Motion for Partial Summary Judgement and Defendant's Motion for Summary Judgement. This case stems from a dispute over a mortgage loan secured by Plaintiffs' residential real property located at 879 West Raines Avenue in Memphis, Tennessee by Defendant, Nationstar Mortgage, LLC. Plaintiffs bring this action alleging various claims against Defendant relating to its servicing of Plaintiffs' mortgage loan. Plaintiffs' claimed causes of action against Defendant are fraud, breach of contract, wrongful foreclosure, wrongful eviction, fraudulent conversion, violation of the Fair Debt Collection Practices Act 15 U.S.C. § 1692, negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress.

**UNDISPUTED MATERIAL FACTS**

1. Plaintiffs purchased the subject Property via deed recorded in December of 1970.
2. In April of 2004, Plaintiffs took out an additional mortgage loan with lender Centex Home Equity Company, LLC and executed a Deed of Trust on the Property to secure this loan.
3. The Deed of Trust was recorded on May 13, 2004.

4. Sometime after the inception of the loan, Plaintiffs received notice that all payments towards their loan were to be directed to Defendant, Nationstar Mortgage, LLC, who subsequently took over from former lender, Centex Home Equity Company.
5. In August of 2011, the Property was included in a bulk sale of property to Blue Spruce Entities for approximately four thousand dollars (\$4,000).
6. While Defendant maintained its personal business records regarding the sale of the Property, it never informed Plaintiffs about the sale or provided any records of the sale to Plaintiffs.
7. The Property was never listed for public sale.
8. Defendant never sent any letters of default or notice of foreclosure to the Plaintiffs.
9. Defendant never instituted any formal foreclosure procedures as required by the Deed of Trust and state law.
10. Defendant admits that the only right they had to sell the Property was through foreclosure.
11. On October 5, 2011, Plaintiffs witnessed a man installing a sign in their yard. Upon Plaintiffs' inquiry, the man handed Plaintiffs a document which indicated that the Property was now owned by non-party, U.S. Homeownership, and that an eviction was pending. Sometime thereafter, Plaintiffs received a stack of papers indicating that U.S. Homeownership now owned the property and that Plaintiffs have the option to remain on the property by entering into an Installment Purchase Land Contract.
12. After learning about the purchase of the Property by U.S. Homeownership, Plaintiffs' daughter called Defendant in October of 2011 and was informed that the Property was inadvertently sold.

13. Upon this discovery, Plaintiffs filed a Consumer Complaint with the Tennessee Department of Financial Institutions on December 15, 2011.
14. Subsequently thereafter, in a letter to Plaintiffs dated February 10, 2012, Defendant addressed Plaintiffs' Consumer Complaint stating that there were no irregularities in regards to the origination, servicing, or payment assistance process with Plaintiffs' loan.
15. Plaintiffs were never evicted from the Property and have never moved out of the Property.
16. Plaintiffs were never locked out of the Property nor prohibited from entering or exiting the Property.
17. Plaintiffs' belongings were never moved out of the Property.
18. A Forcible Entry Detainer Warrant was never filed or granted.
19. The Property's utility services were never cut off.
20. The Property was never uninhabitable or unfit to be lived in.
21. Defendant ultimately determined that foreclosing on the Property would not be advantageous, given that the loan balance was forty-three thousand dollars (\$43,000) and the Property was only valued at fifteen thousand dollars (\$15,000). No later than March 2012, Defendant elected to charge off Plaintiffs' account and allow Plaintiffs to keep the Property "free and clear."
22. Defendant returned the funds received from the sale of the Property to Blue Spruce Entities.
23. By letter dated April 5, 2012, Defendant advised Plaintiffs that in an effort to remedy the concerns brought by Plaintiffs, Defendant had released their mortgage lien and designated Plaintiffs' mortgage obligation as satisfied.

24. A Full Deed of Release was recorded in the Office of the Shelby County Register on April 10, 2012.

25. Prior to the filing of this suit, Plaintiffs have had no communications with Defendant since April of 2012.

### LEGAL CONCLUSIONS

Plaintiffs bring their Motion for Partial Summary Judgment requesting this Court to grant their motion and enter judgment as to Defendant's liability for all of Plaintiffs' claims. Defendant also brings its own Motion for Summary Judgment asserting that it is entitled to summary judgment on all of Plaintiffs' claims because there is no genuine issue of material fact.

Summary Judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." TENN. R. CIV. P. 56.04. The moving party may satisfy this burden either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense. *Rye v. Women's Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235, 264-65 (Tenn. 2015). The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts. *Id.* at 265 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party. *Id.* Summary Judgment should be granted if the nonmoving party's evidence at the summary judgment stage is insufficient to establish the existence of a genuine issue of material fact for trial. TENN. R. CIV. P. 56.04, 56.06.

### Wrongful Eviction

Plaintiffs bring their claim of wrongful eviction alleging that Defendant sold their Property to a third party without providing any notice or conducting a proper foreclosure sale. Additionally, Plaintiffs allege that Defendant attempted to deny Plaintiffs access to their home, and ultimately wrongfully dispossessed Plaintiffs of their home. The undisputed material facts show that Plaintiffs were never evicted from the Property and have never moved out of the Property. Furthermore, Plaintiffs were never locked out of the Property nor prohibited from entering or exiting the Property. The Property's utility services were never cut off and Plaintiffs' belongings were never moved out. The Property was never uninhabitable or unfit to be lived in. A Forcible Entry Detainer Warrant was never filed or granted. Accordingly, the Defendant has established that the undisputed material facts demonstrate that Plaintiffs will not be able to prove a claim for wrongful eviction. Therefore, the Court grants Defendant's Motion for Summary Judgment as to Plaintiffs' claim of wrongful eviction. As such, Plaintiffs' Motion for Partial Summary Judgment as to Defendant's liability regarding their claim of wrongful eviction is denied.

### Wrongful Foreclosure

Plaintiffs bring their claim of wrongful foreclosure alleging that Defendant failed to comply with the controlling terms of the Deed of Trust executed between the parties. In support of their claim for wrongful foreclosure, Plaintiffs cite to the case of *Progressive Bldg. & Loan Ass'n v. McIntyre*, which states that the law demands strict compliance with a deed of trust if the terms are sufficiently clear and originate in the deed of trust. 89 S.W.2d 336 (Tenn. 1936). The Deed of Trust executed between the parties sets forth the proper procedures for conducting a

foreclosure sale of the Property, the notices to be provided, and how and when notices are to be provided if the Lender invokes the power of sale.

In the present case, Plaintiffs' property was included in a bulk sale of property to third party, Blue Spruce Entities, for approximately four thousand dollars (\$4,000). While Defendant maintained its personal business records regarding the sale of the Property, it never informed Plaintiffs about the sale or provided any records of the sale to Plaintiffs. After witnessing a man install a sign in their yard and receiving papers indicating that their Property was now owned by U.S. Homeownership, Plaintiffs discovered through a telephone conversation between their daughter and Defendant that the Property was inadvertently sold. Defendant never instituted any formal foreclosure procedures as required by the Deed of Trust and state law. In addition, the Property was never listed for public sale and Defendant never sent any letters of default or notice of foreclosure to Plaintiffs.

As the Defendant cites, to state a claim of wrongful foreclosure, a plaintiff "must show that a legally held, conducted, and consummated foreclosure involved irregularity, misconduct, fraud, or unfairness." *CitiMortgage, Inc. v. Drake*, 410 S.W.3d 797, 802 (Tenn. Ct. App. 2013). Defendant admits that they inadvertently sold the Property. Defendant also admits that their only right to sell the Property was through foreclosure pursuant to the Deed of Trust. Defendant, however, admits that they never instituted any formal foreclosure procedures as required by the Deed of Trust and state law nor did they follow any other proper foreclosure procedures. Therefore, the undisputed material facts show that Plaintiffs are entitled to judgment as a matter of law as to Defendant's liability for their claim of wrongful foreclosure. As such, Defendant's Motion for Summary Judgment as to Plaintiffs' claim for wrongful foreclosure is denied. A subsequent hearing will be conducted as to the issue of damages.



### Fraudulent Conversion

In their claim for fraudulent conversion, Plaintiffs allege that Defendant intentionally misrepresented to a third party that it had a valid possessory interest in Plaintiffs' property while aware that the representation was false. By selling the Property to a third party, Plaintiffs allege that Defendant divested them of their ownership rights in the Property. As a result of Defendant's misrepresentation, Plaintiffs claim they were wrongfully dispossessed of their home. Defendant argues: (1) the claim is time barred by a three-year statute of limitation under Tenn. Code Ann. § 28-3-105, (2) Plaintiffs have failed to show that any alleged misrepresentation was intentional, and (3) Plaintiffs have not satisfied the heightened pleading standard of Rule 9.02 for claims of fraud. The Court will address each of these issues separately below.

#### *Statute of Limitations*

Defendant contends that Plaintiffs' claim for fraudulent conversion is time barred by the three (3) year statute of limitation set forth in Tenn. Code Ann. § 28-3-105 for "[a]ctions for injuries to personal or real property." The Court finds Defendant's reliance on Tenn. Code Ann. § 28-3-105 misplaced. This is because Tenn. Code Ann. § 28-3-105 only addresses actions for "conversion of personal property." Plaintiffs bring an action for conversion of real property.

When the meaning of certain statutory language is in question, well established canons of construction apply. The function of the judiciary is to carry out legislative intent without broadening the statute beyond its intended scope. *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002). There is a presumption that every word in a statute has meaning and purpose and should be given full effect so long as the obvious intention of the General Assembly is not violated by so doing. *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn. 2005). In discerning legislative intent, courts may employ the principle of *expressio unius est exclusio*

*alterius*, which provides that where the legislature includes particular language in one section of a statute but omits the same language in another section of the same act, it is generally presumed that the legislature acted purposely in the subject included or excluded. *State v. Pope*, 427 S.W.3d 363, 368 (Tenn. 2013) (citing *Sate v. Loden*, 920 S.W.2d 261, 265 (Tenn. Crim. App. 1995)).

In reviewing the statutory language of Tenn. Code Ann. § 28-3-105, subsection one states that the statute applies to "[a]ctions for injuries to personal or real property," while subsection two specifically applies to "[a]ctions for the detention or conversion of personal property." By applying the principle of *expressio unius est exclusio alterius*, the Court concludes that the legislature purposely intended for the statute to apply only to conversion actions of personal property. Therefore, the Court finds that the applicable statute of limitations for this action is stated in Tenn. Code Ann. § 28-3-110, which provides a ten-year (10) statute of limitations for "causes of action not otherwise provided for" in the Code.

As Defendant suggests, Plaintiffs had knowledge of their alleged injury as early as October 2011. Plaintiff's filed their Original Complaint on December 23, 2014, well within the ten-year statute of limitation under Tenn. Code Ann. § 28-3-110. Accordingly, this action was timely filed pursuant to Tenn. Code Ann. § 28-3-110.

#### *Intentionality*

Additionally, Defendant argues that Plaintiffs have failed to show that any alleged misrepresentation was intentional. In all claims sounding in fraud, the plaintiff must prove that there was "(1) an intentional misrepresentation with regard to a material fact; (2) knowledge of the representation's falsity—that the representation was made 'knowingly' or 'without belief in its truth,' or 'recklessly' without regard to its truth or falsity; (3) the plaintiff reasonably relied on

the misrepresentation and suffered damage; and (4) the misrepresentation relates to an existing or past fact." *Stacks v. Saunders*, 812 S.W.2d 587, 592 (Tenn. Ct. App. 1990) (citations omitted). Defendant argues that Plaintiffs have not provided any facts in their Complaint proving that any alleged misrepresentation was intentional. However, Plaintiffs contend that Defendant intentionally misrepresented to third party, Blue Spruce Entities, that it had valid possessory interest in Plaintiffs' property in order to sell the Property to the third party for Defendant's benefit. The Court finds that neither party has met their burden for summary judgment on the elements of fraudulent conversion.

*Rule 9.02 Heightened Pleading Standard*

Finally, Defendant asserts that Plaintiffs have not satisfied the heightened pleading standard under Tenn. R. Civ. P. 9.02 for claims arising out of fraud. Tenn. R. Civ. P. 9.02 requires that, "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity," while "malice, intent, knowledge, and other condition of mind of a person may be averred generally." Tenn. R. Civ. P. 9.02. In sum, Tenn. R. Civ. P. 9.02 requires "particularity." *Diggs v. Lasalle Nat. Bank Ass'n*, 387 S.W.3d 559, 565 (Tenn. Ct. App. 2012). In reviewing the Original Complaint, which is incorporated in the Amended Complaint, the Court finds that Plaintiffs state their claims asserting fraud with particularity pursuant to Tenn. R. Civ. P. 9.02.

With all the above considered, the Court finds that Plaintiffs' claim for fraudulent conversion was brought in a timely manner and satisfies the heightened pleading standard under Tenn. R. Civ. P. 9.02. The Court concludes that there still remains a question of fact as to this claim. Therefore, the Court denies both Plaintiffs' and Defendant's Motions for Summary Judgment as to the claim of fraudulent conversion.

Violation of the Fair Debt Collection Practices Act 15 U.S.C. § 1692

Plaintiffs claim that Defendant violated the Fair Debt Collection Practices Act ("FDCPA"). Specifically, Plaintiffs allege:

10. That in violation of 15 USC 1692 § 808, Defendant knowingly and intentionally threatened to collect a debt that was not expressly authorized by the loan agreement.

11. That in violation of 15 USC 1692 § 808, Defendant knowingly and intentionally threatened to conduct a nonjudicial foreclosure when there was no present right of possession to the property located at 879 West Raines Road, Memphis, Shelby County, Tennessee.

12. That in violation of 15 USC 1692 §808, Defendant knowingly and intentionally failed to validate a debt that it alleged that Plaintiff owed prior to foreclosing on the property.

Defendant argues that Plaintiffs' claim for violation of the FDCPA is time barred by the statute of limitations provided in 15 U.S.C. § 1692k(d), which states that a claim brought under the FDCPA must be brought "within one year from the date on which the violation occurs." Furthermore, Defendant contends that lack of discovery of the alleged violation has no impact on the statute of limitations, rather, the "focus is the date on which the violation occurs, not on the date on which the violation is known." *Brandon v. Fin. Accounts Servs. Team*, 701 F. Supp. 2d 990, 996-97 (E.D. Tenn. 2010). Accordingly, Defendant claims that Plaintiffs' allegation regarding an attempt to collect an authorized debt could only have occurred before the March 2012 write-off and April 5, 2012 letter to Plaintiffs regarding the same. Therefore, since Plaintiffs' Original Complaint was not filed until over two and a half years later on December 23, 2014, Defendant maintains that Plaintiffs' claim for violation of the FDCPA is time barred pursuant to 15 U.S.C. § 1692k(d).

As the Defendant suggests, the text of the statute of limitations found in Section 1692k(d) of the FDCPA indicates that the focus is the "date on which the violation occurs," not on the date in which the violation was known. *Brandon v. Fin. Accounts Servs. Team*, 701 F. Supp. 2d 990,

996-97 (E.D. Tenn. 2010). Additionally, the one-year (1) statute of limitations on a consumer's claim for violation of FDCPA begins anew upon each of the debt collector's alleged violations of the Act. *Osimubepi-Alao v. Plainview Fin. Serv., Ltd.*, 44 F. Supp. 3d 84, 91 (D.D.C. 2014). Therefore, each of Plaintiffs' alleged violations of the FDCPA will be considered separately for purposes of the statute of limitations.

The undisputed material facts show that all three of Plaintiffs' alleged violations of the FDCPA arise from the act of Defendant selling Plaintiffs' property to a third party without providing Plaintiffs any letters of default or notices that their home was in foreclosure, and by failing to follow the foreclosure procedures pursuant to the Deed of Trust. The undisputed facts demonstrate that Plaintiffs knew about the improper foreclosure in October 2011. The related allegations continued until the loan was charged off and released by the Defendant in April 2012. At the very latest, the alleged violations occurred in April of 2012 when Plaintiffs were notified by Defendant that the mortgage loan was satisfied and released of any liens. However, Plaintiffs' Original Complaint was not filed until December 23, 2014. The undisputed material facts demonstrate that Plaintiffs' asserted violations under the FDCPA are time barred pursuant to 15 U.S.C. § 1692k(d).

At oral argument, Plaintiffs argued that the statute of limitations cited by Defendant in 15 U.S.C. § 1692k(d) should be tolled under the theory of fraudulent concealment. "The doctrine of fraudulent concealment allows equitable tolling of the statute of limitations where (1) the defendant concealed the underlying conduct, (2) the plaintiff was prevented from discovering the cause of action by that concealment, and (3) the plaintiff exercised due diligence to discover the cause of action." *Fillinger v. Lerner Sampson & Rothfuss*, 624 Fed.Appx. 338, 341 (6th Cir. 2015) (quoting *Huntsman v. Perry Local Sch. Bd. of Educ.*, 379 Fed.Appx. 456, 461 (6th Cir.

2010)). As the Sixth Circuit has previously held, “the general rule is that [the court] will not extend the statute of limitations ‘by even a single day.’” See *Smith v. Lerner, Sampson & Rothfuss, L.P.A.*, 658 Fed.Appx. 268, 274 (6th Cir. 2016) (citing *Ruth v. Unifund CCR Partners*, 604 F.3d 908, 910 (6th Cir. 2010)); see also *Fillinger*, at 340-41. It is unclear whether the principle of equitable tolling through fraudulent concealment applies to the FDCPA. See *Id.* Even if it does apply, however, a plaintiff cannot claim that fraudulent concealment prevented them from discovering a legal theory that they had already uncovered. Plaintiffs became aware in October of 2011 that their house was sold by Defendant. Defendant told them this fact directly. Furthermore, Plaintiffs were aware of potential debt claims when they first contacted and filed their complaint with the Tennessee Department of Financial Institutions on December 15, 2011. For these reasons, the Court finds that the Plaintiffs knew of potential FDCPA violations prior to the statute of limitations tolling. Therefore, the undisputed material facts bar a claim for tolling under a fraudulent concealment theory.

With all the above considered, the Court grants Defendant's Motion for Summary Judgment as to Plaintiffs' claim for violations of the FDCPA, and denies Plaintiffs' Motion for Partial Summary Judgment as to the same.

#### Breach of Contract

There was much dispute during the arguments as to the two motions for summary judgment as to whether Plaintiffs even asserted a claim for breach of contract. Between both the original Complaint and Plaintiffs' First Amended Complaint, the only allegation is the statement “This action alleges breach of contract and Violation of the Fair Debt Collection Practices Act 15 USC 1692.” (Paragraph 1 Plaintiffs' First Amended Complaint). While Plaintiffs break down numerous claims in the remainder of the Complaint, at no other time do they mention breach of

contract. For this reason, Defendant argued that Plaintiffs did not assert a claim for breach of contract. Considering the requirement for only notice pleadings, the Court held that there was a claim for breach of contract and ordered the Defendant to provide a supplemental brief addressing this claim in light of the motions for summary judgment.

In the supplemental response, Defendant argues that the claim should be dismissed for failure to comply with Tenn. R. Civ. P. Rule 10.03. Rule 10.03 provides as follows:

Whenever a claim or defense is founded upon a written instrument other than a policy of insurance, a copy of such instrument or the pertinent parts thereof shall be attached to the pleading as an exhibit unless the instrument is (1) a matter of public record in the county in which the action is commenced and its location in the record is set forth in the pleading; (2) in the possession of the adverse party and this fact is stated in the pleading; (3) inaccessible to the pleader or is of such nature that attaching the instrument would be unnecessary or impracticable and this fact is stated in the pleading, together with the reason therefor. Every exhibit so attached or referred to under (1) and (2) shall be part of the pleading for all purposes.

Tenn. R. Civ. P. 10.03. A complaint may be dismissed if the plaintiff fails to comply with the rules set forth in the Tennessee Rules of Civil Procedure. Tenn. R. Civ. P. Rule 10.03 and 41.02. Plaintiffs did not attach a copy of the contract to the pleadings, nor did Plaintiffs include one of the exceptions enumerated in the averments of Plaintiffs' Amended Complaint. Thus, this Court finds that Defendant's Motion for Summary Judgment as to the claim for breach of contract should be granted due to Plaintiffs' failure to comply with Tennessee Rule of Civil Procedure 10.03.

#### Negligence

Plaintiffs bring their claim of Negligence alleging Defendant owed Plaintiffs a duty not to improperly interfere with their possessory interest in the property, and sell the property to a third party without informing Plaintiffs. Further, Plaintiffs allege Defendant failed to properly

research the history of Plaintiffs' mortgage loan prior to taking action and failed to conduct foreclosure proceedings as required by the mortgage contract, Tennessee law, and federal law.

A negligence claim requires proof of the following elements: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant falling below the standard of care amounting to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate or legal cause.

*Coln v. City of Savannah*, 966 S.W.2d 34, 39 (Tenn. 1998) *overruled on other grounds by Cross v. City of Memphis*, 20 S.W.3d 642 (Tenn. 2000). A negligence action cannot succeed in the absence of any one of these elements. *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993). Defendant asserts that they do not owe a duty outside the contractual obligation. “[I]f the only source of duty between a particular plaintiff and defendant is their contract with each other, then a breach of that duty . . . will not support a negligence action.” *Thomas & Assoc., Inc. v. Metropolitan Gov’t of Nashville & Davidson County*, 2003 Tenn. App. LEXIS 425, at \*18 (Tenn. App. 2003) (holding “conduct constituting a breach of contract becomes tortious only when it also violates a duty, independent of the contract.”); *see also Brown Brothers, Inc. v. Chattanooga Housing Auth.*, 1984 Tenn. App. LEXIS 3226, at \*19 (Tenn. App. Oct. 11, 1984) (“[A] mere breach of contract cannot be converted into a tort.”). Tennessee law does not impose a fiduciary duty with respect to debtor/creditor relationships. *See Glazer v. First Am. Nat’l Bank*, 1996 Tenn. LEXIS 582, at \*13 (Tenn. Sep. 16, 1996).

Plaintiffs state that Defendant’s duty was “based on the mortgage deed.” Plaintiffs have not pointed the Court to any case law or statutory provisions, nor has the Court found any under its own research, which impose a duty, outside of the contract, on the Defendant. Therefore, the Court grants Defendant's Motion for Summary Judgment as to Plaintiffs' negligence claim, and denies Plaintiffs' Motion for Partial Summary Judgment as to the same.



### Negligent Infliction of Emotional Distress & Intentional Infliction of Emotional Distress

Plaintiffs bring their claim for negligent infliction of emotional distress (“NIED”) and intentional infliction of emotional distress (“IIED”). Plaintiffs allege that Defendant was aware of the Plaintiffs’ advanced age and frailty and knowingly and intentionally took advantage of them. Plaintiffs further alleges that Defendant’s conduct in not providing proper notice of foreclosure, wholly abandoning all proper foreclosure procedures, selling the home to a third party without Plaintiffs’ knowledge, not properly calculating the amount of debt owed, and refusing to allow Plaintiffs to timely satisfy any alleged debt was negligent, reckless, intentional or with malice and constitute acts that so shocks the conscious of the ordinary reasonable behavior and thus caused negligent and intentional infliction of emotional distress. Additionally, Plaintiffs allege that Defendant’s conduct rendered Plaintiffs homeless, which caused extreme emotional distress, embarrassment, and depression. Plaintiffs claim Plaintiff Earnest Faulkner’s health began to worsen and subsequently died because of Defendant’s conduct.

Defendant asserts that Plaintiffs’ claim is barred by the one-year statute of limitation. Defendant contends that Plaintiffs would have been aware, at the latest, of NIED and IIED claims in April 2012 when the Loan was written off and communication with Defendant ceased.

A one-year statute of limitations applies to tort actions for personal injuries. Tenn. Code Ann. § 28-3-104. Claims for NIED and IIED are subject to this statutory provision. *See, e.g., Leach v. Taylor*, 124 S.W.3d 87, 91 (Tenn. 2004) (“[I]ntentional infliction of emotional distress is a personal injury tort, governed by the general one-year statute of limitations.”); *see also Jackson v. CVS Corp.*, No. M2009-02220-COA-R3-CV, 2010 Tenn. App. LEXIS 548, at \*11–12 (Tenn. Ct. App. Aug. 26, 2010) (“[N]egligent infliction of emotional distress is time barred under the one-year statute of limitations of Tenn. Code Ann. § 28-3-104.”). In Tennessee, the

discovery rule is “an equitable exception that tolls the running of the statute of limitations until the plaintiff knows, or in the exercise of reasonable care and diligence, should know that an injury has been sustained.” *Pero’s Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 621 (Tenn. 2002) (citing *Quality Auto Parts Co. v. Bluff City Buick Co.*, 876 S.W.2d 818, 820 (Tenn. 1994)). “Generally speaking, in applying the discovery rule, the issue of ‘[w]hether the plaintiff exercised reasonable care and diligence in discovering the injury or wrong is usually a fact question for the jury to determine.” *Shmank v. Sonic Auto., Inc.*, 2008 Tenn. App. LEXIS 291, \*8-9 (Tenn. Ct. App. May 16, 2008) (citing *Wyatt v. ACandS, Inc.*, 910 S.W.2d 851, 854 (Tenn. 1995)).

However, where the undisputed facts demonstrate that no reasonable trier of fact could conclude that a plaintiff did not know, or in the exercise of reasonable care and diligence should not have known, that he or she was injured as a result of the defendant’s wrongful conduct, Tennessee case law has established that judgment on the pleadings or dismissal of the complaint is appropriate.

*Id.* at \*9.

The undisputed material facts provide, on October 5, 2011, Plaintiffs witnessed a man installing a sign in their yard and received a document that indicated the Property was now owned by non-party, U.S. Homeownership, and that an eviction was pending. Thereafter, Plaintiffs received papers indicating U.S. Homeownership now owned the property. Plaintiffs were aware that their house had been sold after Plaintiffs’ daughter was informed by Defendant via phone call in October of 2011 that the Property was inadvertently sold. No later than March of 2012 did Defendant charge-off Plaintiffs’ loan. Plaintiffs received a letter from Defendant dated April 5, 2012 advising Plaintiffs that Defendant had released their mortgage lien and designated Plaintiffs’ mortgage obligation as satisfied. A full Deed of Release was recorded in the Office of the Shelby County Register on April 10, 2012. Prior to filing of this suit, Plaintiffs

had no communications with Defendant since April of 2012. Therefore, Plaintiffs were put on notice, at the latest, by April 10, 2012. The undisputed facts show that no reasonable trier of fact could conclude that a plaintiff did not know, or in the exercise of reasonable care and diligence should not have known, no later than April 10, 2012, that he or she was injured as a result of the defendant's wrongful conduct. Plaintiffs did not need to know the existence of Blue Spruce Entities to be put on notice that their house was sold in violation of the Deed of Trust and that they were injured. Therefore, the Court grants Defendant's Motion for Summary Judgment as to Plaintiffs' NIED and IIED claim, and denies Plaintiffs' Motion for Partial Summary Judgment as to the same.

### **CONCLUSION**

#### **IT IS SO ORDERED ADJUDGED AND DECREED** that

1. As to the claim of wrongful foreclosure, Plaintiffs' Partial Motion for Summary Judgment is **GRANTED** and Defendant's Motion for Summary Judgment is denied. This claim will continue on the issue of damages.

2. As to the claims for breach of contract, wrongful eviction, violation of the Fair Debt Collection Practices Act, negligence, negligent infliction of emotional distress and intentional infliction of emotional distress, Plaintiff's Motion for Partial summary judgment is **DENIED** and Defendant's Motion for Summary Judgment is **GRANTED**.

3. As to the claims for fraudulent conversion, both Plaintiff and Defendant's motions for summary judgment are **DENIED**.

4. The parties are hereby ordered to participate in Rule 31 mediation with Retired Judge Robert L. Childers. Costs of mediation shall be divided equally between the parties.

5. Costs of this matter shall be reserved pending the final resolution of the remaining claims.

\_\_\_\_\_  
JUDGE MARY L. WAGNER

Date: \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the forgoing has been mailed via US Mail to the following:

Terrell L. Tooten  
1160 Vickery Lane, Ste. 2  
Cordova, TN 38016

Lauren P. Roberts  
401 Commerce Street, Ste. 800  
Nashville, TN 37219

\_\_\_\_\_  
CLERK

Date: \_\_\_\_\_

**IN THE CIRCUIT COURT OF TENNESSEE FOR THE  
THIRTIETH JUDICIAL DISTRICT AT MEMPHIS, SHELBY COUNTY**

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**LINDSEY BAILEY HARMON,**

**Plaintiff,**

**Cause No. CT-001670-13**

v.

**Div. VII**

**RICHARD BRADLEY HARMON**

**Defendant.**

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**ORDER ON FATHER’S PETITION IN OPPOSITION TO RELOCATION AND FOR  
ENTRY OF PERMANENT PARENTING PLAN DESIGNATING FATHER AS  
PRIMARY RESIDENTIAL PARENT**

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This cause came to be heard on October 30 and 31, 2017 and November 1, 2017, before the Honorable Mary L. Wagner on Father’s Petition in Opposition to Relocation and for entry of Permanent Parenting Plan Designating Father as Primary Residential Parent and Mother’s Response thereto. The Court having heard the testimony of Richard Bradley Harmon (“Father”), Lindsey Williams Harmon (“Step-Mother”), Lindsey Bailey Jean (“Mother”), Dr. Robert Jean (Step-Father), Rachel Bennett, Julie Jimenez (“Godmother”), Jessica Harmon (Paternal Aunt), Mark Billingsley, Dr. Carter McDaniel, Bert Bailey (“Maternal Grandfather”), and arguments of counsel, the Court finds as follows:

**Legal Standard**

The Court recognizes and understands that the pending issue is a significant one, weighing heavily on both parties. “Parenting relocation cases are often wrenching, with weighty competing considerations and a profound impact on both parents and the children.” *Aragon v. Aragon*, 513 S.W.3d 447, 455, (Tenn. 2017). Other cases have described parental relocation as

“post-divorce flashpoints.” *Rudd v. Gonzalez*, No. M2012-02714-COA-R3-CV, 2014 WL 872816, at \*27 (Tenn. Ct. App. Feb. 28, 2014).

Tennessee Code Annotated § 36-6-108 governs parental relocation. The statute provides, in relevant part:

(c) If the parents are actually spending substantially equal intervals of time with the child and the relocating parent seeks to move with the child, the other parent may, within thirty (30) days of receipt of notice, file a petition in opposition to removal of the child. No presumption in favor of or against the request to relocate with the child shall arise. The court shall determine whether or not to permit relocation of the child based upon the best interests of the child. The court shall consider all relevant factors including those factors found in § 36-6-106(a)(1)-(15).

(d)(1) If the parents are not actually spending substantially equal intervals of time with the child and the parent spending the greater amount of time with the child proposes to relocate with the child, the other parent may, within thirty (30) days of receipt of the notice, file a petition in opposition to removal of the child. The other parent may not attempt to relocate with the child unless expressly authorized to do so by the court pursuant to a change of custody or primary custodial responsibility. The parent spending the greater amount of time with the child shall be permitted to relocate with the child unless the court finds:

- (A) The relocation does not have a reasonable purpose;
- (B) The relocation would pose a threat of specific and serious harm to the child that outweighs the threat of harm to the child of a change of custody; or
- (C) The parent's motive for relocating with the child is vindictive in that it is intended to defeat or deter visitation rights of the non-custodial parent or the parent spending less time with the child.

(2) Specific and serious harm to the child includes, but is not limited to, the following:

- (A) If a parent wishes to take a child with a serious medical problem to an area where no adequate treatment is readily available;
- (B) If a parent wishes to take a child with specific educational requirements to an area with no acceptable education facilities;
- (C) If a parent wishes to relocate and take up residence with a person with a history of child or domestic abuse or who is currently abusing alcohol or other drugs;
- (D) If the child relies on the parent not relocating who provides emotional support, nurturing and development such that removal would result in severe emotional detriment to the child;
- (E) If the custodial parent is emotionally disturbed or dependent such that the custodial parent is not capable of adequately parenting the child in the absence

of support systems currently in place in this state, and such support system is not available at the proposed relocation site; or

(F) If the proposed relocation is to a foreign country whose public policy does not normally enforce the visitation rights of non-custodial parents, that does not have an adequately functioning legal system or that otherwise presents a substantial risk of specific and serious harm to the child.

(e) If the court finds one (1) or more of the grounds designated in subsection (d), the court shall determine whether or not to permit relocation of the child based on the best interest of the child. If the court finds it is not in the best interests of the child to relocate as defined herein, but the parent with whom the child resides the majority of the time elects to relocate, the court shall consider all relevant factors including those factors found in § 36-6-106(a)(1)-(15).

In sum, if parents are spending substantially equal time with the child, the court applies a best interests determination and the factors in Tenn. Code Ann. § 36-6-106(a). On the other hand, “a parent spending the greater amount of residential parenting time with the child who seeks to relocate ‘shall be permitted’ to do so unless the parent opposing the move proves at least one of the three grounds.” *Aragon*, 513 S.W.3d at 459. In that situation, the Court only considers the best interests of the child if the parent with lessor time proves at least one of the three grounds in Tenn. Code Ann. § 36-6-108(d).

### **Findings of Fact**

This matter involves the issue of relocation with the parties’ minor child, Bailey Kate Harmon (“B.K.”). B.K. is six years hold. She is in the first grade. By all accounts she is a smart, loving, outgoing, well-adjusted little girl.

Mother and Father divorced in 2013, when B.K. was approximately two and one-half years old. The agreed Permanent Parenting Plan Order (“PPP”) designated Mother as the Primary Residential Parent with 209 days of parenting time and Father the Alternate Residential Parent with 156 days of parenting time. According to the parties, Father’s work travel during the week was the reason for the parenting schedule and division of parenting time set forth in the

PPP. The PPP provided joint decision making with Mother being the tie-breaker in the event of a disagreement, pending mediation at the request of Father. The PPP also provided “[i]n addition to the provisions provided in Part VII (Notice Regarding Parental Relocation) of this document, the parties agree that they will reside within 25 miles of each other for so long as the child is a minor.”

Immediately following entry of the PPP, the parties began deviating from the parenting time schedule. They would work together on a monthly basis to create a division of time. Father always had his allotted number of days per month, but at times would have more time with B.K. Mother, though, always insisted upon having more time than Father due to her designation as “primary residential parent.” During this time, Father continued to travel during the week for his job. In January 2017, to reduce some conflict between the parties and bring stability to the situation, Father insisted that the parties begin following the schedule set forth in the PPP, and they did. In May 2017, Father obtained employment that did not require travel. Father has requested more time from Mother, but has not been granted additional time. Mother always requires an exchange for any scheduling accommodation she provides to Father.

Mother also worked outside the home until February 2017. In February 2017, she left her employment to be a stay-at-home mom to B.K. and a new child. Mother realized she was missing out on things with her children in working. Mother has not ruled out returning to work in Chattanooga.

While the parties have at times had disputes, since the parties’ divorce, they have generally worked very well together and co-parented. For that the parties are commended. For example, the parties would alternate Christmas Eve and Christmas morning with B.K. On Mother’s year, the parties would all attend Christmas services with the child at Mother’s church.



On Father's year, they would all attend Christmas services at Father's church. They have consistently held joint birthday parties for B.K. Moreover, Mother and Father are in near constant and certainly daily communication regarding the child. The Court does note that there has, understandably, been increased tension between the parties during this litigation.

Both parents are involved extensively in B.K.'s activities. While both have missed a few events, both parents have attended the majority of the B.K.'s extra-curricular and school events. For example, Father attends parent-teacher meetings, reads to the class as the "mystery reader," attends school pumpkin carving events, veteran's day events and others. Father also attends the child's soccer, dance and cheer leading activities. Mother is the same. Father missed a few activities due to work travel. Mother also missed a few activities due to work and then due to the fact she did not have a sitter for her youngest child.

Father is a very active and loving parent towards B.K. Mother expressed concern about Father not being around for parenting time. Other than one instance of Father being gone for a four-wheeling bachelor party the year B.K. was born, there was no credible proof supporting this allegation. To the contrary, multiple credible witnesses testified that Father was active with B.K., constantly present, and chose B.K. over doing other things.

In 2015, both Mother and Father remarried. Mother married Dr. Jean. The two began dating in 2014, while Dr. Jean was completing his medical training and living in Chattanooga. Dr. Jean moved to Memphis in 2015 shortly before he and Mother married. Dr. Jean and Mother also have another child, B.K.'s half-sibling, born in August of 2016. Father began dating Step-Mother in August 2013. Father and Step-Mother now also have a child together, born in July 2016. By all accounts, B.K. is close with both of her half-siblings.

Dr. Jean has a son from a prior relationship. Dr. Jean currently sees his son every other weekend and for a total of 80 days per year. Prior to moving to Memphis in 2015, Dr. Jean saw his son one weekend a month. His plan upon moving to Chattanooga is to see his son at least one weekend per month. Dr. Jean does not participate in any activities at his son's school. He attempted to once and it caused his son, who has disabilities, to have a negative reaction. Dr. Jean has not attempted to work with professionals to integrate himself into the daily life of his son. Dr. Jean describes his relationship with his son as focusing on quality time not quantity of time; the same thing he proposes for Father in this situation. Interestingly, he noted "it's the little things" with B.K. and his involvement in her daily life, as what was important with regard to B.K. Dr. Jean equated his relationship with his son to how Father's relationship with B.K. should be also. Dr. Jean does not have a good relationship with his son's Mother and the two have limited communication. Mother has spoken poorly of the child's mother in front of Dr. Jean's son. By all accounts, B.K. enjoys her time with her step-brother and it has been a positive experience for her.

Both step-parents care for B.K. They are, however, involved at different levels. Step-Mother attends many of the B.K.'s extra-curricular and school events. She and her mother have even attended school events when neither parent could attend. Step-Mother coached B.K.'s soccer team. Step-Father is involved and loving towards the child. His time and involvement is more limited. He works Monday through Friday from approximately 7:00 am to 6:00 or 7:00 pm and he is on call approximately five nights a month and one weekend every four to six weeks. His daily work schedule is not flexible, but he can plan in advance at times to be off for big events. Dr. Jean's employment schedule in Chattanooga will be very similar.

While there was some concern voiced at trial that Step-Mother has overstepped her role and attempted to insert herself as Mother, the proof did not support this. It is obvious to this Court, that Step-Mother loves B.K. as if she was her own, but Step-Mother is also very aware and respectful of her role as Step-Mother. After hearing and observing the testimony, the Court cannot say the same of Dr. Jean. Among other things, Dr. Jean repeatedly referred to “our family unit” to the exclusion of Father, and called B.K., “my daughter.”

B.K. has extended family on both sides that deeply care for the child and are involved in some capacity in her life. This was exhibited in many ways through proof presented and through the fact that the Court’s gallery was full of supporting family on both sides throughout the duration of this trial. The child is close with her paternal grandparents. She does activities with them and spends the night regularly. She is close with Father’s sister and brother, as well as Father’s aunt and uncle. She is also close with her Step-Mother’s extended family. This includes Step-Mother’s siblings, grandfather, aunts, uncles and cousins. They all treat her as one of their own and attend many events for her. B.K. interacts with these individuals on multiple times a week generally.

Mother’s parents, step-parents, and sister’s family live in Knoxville, approximately one to one-half hours from Chattanooga. Mother’s parents and step-parents are all retired and are able to travel. In the past year, Mother’s father and step-mother have been to Shelby County at least once per month and sometimes more. They have been here as much as three times in one month. Mother’s mother and step-father come about once every other month, but can come more if needed. As Mother stated, “They are here quite a bit.” Mother’s sister owns her own business and has middle/high school children. It is more difficult for them to travel. Mother’s brother and his family live in Greenville, South Carolina which is approximately three hours

from Chattanooga according to Mother. Dr. Jean's family comes to Memphis once every two to three months. There was no proof that Mother's family could not continue to visit Shelby County.

B.K.'s godmother, Ms. Jimenez, also lives in Shelby County and has been actively involved in her life. Even after the parties' divorce, M. Jimenez would assist both parents and attend events for the child at both parents' homes.

It is clear to the Court that Mother is very proud of her title as "Primary Residential Parent." She is very protective of this role and sees this litigation as "protecting her parental rights." She has refused to provide Father additional time for the pure reason of protecting her title. She has used the Parenting Plan as a threat when Father would not agree to a schedule change during the time when the parties were not following the plan. She even in an email threatened to only allow Father one day of parenting time in December 2016 so as to not "overpay" Father with too many days. This exchange was in response to Father requesting, by email, a change to child support so that he did not overpay for 2016. Mother did not end up denying Father any time.

It is clear to the Court that Mother insists on being the one in control. She will not allow a disagreement to stop and will retaliate if she does not get her way. She views her role as "traditional mother role." When asked if Father would assist with the care of the child, she explained that it's normal for Mother's to take care of it. While Mother attempted to demonstrate that she could not trust Father to take care of parental responsibilities, she presented no proof that he had neglected a responsibility in the past. Moreover, she testified that he is more than willing to do anything. The parties have divided registering the child for camps and extra-curricular activities. Mother has been the parent who has primarily registered the child for

school and addressed medical needs. But, this is not from a lack of willingness of Father. For example, B.K. was recently ill with bug bites. Father was available and willing to keep the child and miss work. Mother insisted that Father bring B.K. to her home and that Mother care for her since she was a stay-at-home mom. Additionally, B.K. attended a spend the night party during Father's parenting time, Mother insisted on packing the B.K.'s bag and taking it to the friend's home. There was no indication that Father would not address this need. Instead, it was apparent that it was Mother's need to be in control. Finally, a new supply list was provided at a parent-teacher meeting. Father asked for a copy so that he could assist. Again, Mother insisted that she be the one to just get all of the supplies. Again, all accounts support that Father is willing and available to address all parenting needs. Mother even seemed irritated with the fact that Father had testified that he was there for one of the child's "firsts" (first time swimming alone). She wanted the Court to be sure to know that she was actually the one there for that first.

Shortly after the parties' separation, Ms. Bennett, a mutual friend was attempting to invite B.K. to her child's birthday party. Ms. Bennett asked Father whether B.K. would be with Mother or Father that weekend. It was Father's weekend. Therefore, Ms. Bennett sent the invite to Father's residence. She would have sent it to Mother's if it had been Mother's weekend. Mother learned of this and sent a text explaining to Ms. Bennett and Father that Mother was the primary residential parent and made the decisions for B.K. Mother also explained that she and Ms. Bennett were no longer friends.

Mother and Dr. Jean seek to relocate due to Dr. Jean's employment. Dr. Jean was first contacted about the potential relocation on May 11, 2017. He received an unexpected call from a doctor with University Surgical Associates, for whom he used to work, inquiring as to his possible interest in a position. Within the next couple of weeks, he had a second phone call

regarding the job with his mentor, also a doctor with that group. In June 2017, Mother and Dr. Jean went to Chattanooga. While there, Dr. Jean met with the group and discussed further the job possibility. In June 2017, they were in contact with a realtor in Chattanooga. On August 3, 2017, Dr. Jean received a formal written offer. He and Mother spent the next week or so evaluating the offer, asking questions and negotiating the Contract. Dr. Jean signed the Contract on August 11, 2017, and gave notice to his current employer on August 14, 2017. After signing the contract, Mother and Step-Father took a weekend trip to Chattanooga with B.K. It was only then that they began looking at schools and considering activities for B.K. in Chattanooga.

Dr. Jean is currently employed with a group associated with Tenet Healthcare. He cites multiple reasons for accepting this new position. One, the new position offers the opportunity to work in an academic environment. He currently earns \$326,939 and the maximum he can earn is \$350,000. In his new position, his base salary is \$375,000 with no maximum for bonuses. He is also receiving a signing bonus of \$25,000, a payment towards his student loans of \$75,000, and \$10,000 towards moving expenses. He also believes that the health insurance and retirement benefits are better in the new position.

Dr. Jean also cites to concerns regarding the stability of his current employment. After accepting his current position in Memphis, he learned that Tenet was No.3 in the market in Memphis, behind Baptist and Methodist. He also cited to recently learning of instability within the company including lawsuits, investigations, and news that the CEO resigned. He, however, admitted that he still would have accepted this position even if he knew about the lawsuits beforehand. He admitted he receives regular solicitations for employment. He also has not made any efforts to obtain a different position here in Memphis. His own business partner admitted there are other surgical positions available in Memphis.

Both Mother and Dr. Jean cited to their individual happiness as a reason to move, particularly to Dr. Jean's happiness. They each explained that B.K. will thrive if they are happy. When asked about reasons for the move, Mother only cited to benefits for Dr. Jean. This continued even when asked directly about B.K.

One additional benefit of the move described by both Mother and Dr. Jean, is that B.K. will not have to go to her Father's during the school week. They each pointed out that this was a concern for them and they each described Father's parenting time as an interruption.

At this time, Dr. Jean is in a contract for employment in Chattanooga that has a \$450,000 buyout clause should he not go. He is scheduled to begin work in mid-November. He has turned in his notice with his current employer. He does not know if he could get his job back at this time. In past situations with others, Tenet has refused to re-hire. Mother and Dr. Jean have placed their home on the market to be sold.

Not until August 13, 2017, did Mother provide Father with any notification or hint that they were considering relocating. This was after Dr. Jean had signed the contract and committed to moving across the State. Mother chose first to tell B.K. of her plans to move and went further and told B.K. that Father would be upset. This directly placed the child in the middle of this dispute. Father was understandably caught off guard by this decision, especially in light of the no-move away provision in the PPP.

On another occasion Mother directly placed the child in the middle of the parties' dispute. Per the schedule, Father was to have parenting time the Saturday and Sunday of Labor Day weekend. Mother wanted to take B.K. to Knoxville. There was some dispute or at minimum communication issues between the parties. Father did not agree to give up his time with B.K. As Mother explained to the Court, she made Father tell B.K. that the child was not

going to Knoxville as she wanted B.K. to know that it was not mommy's fault, but daddy's. This could have easily been handled in a different way so that there was not fault equated to either party.

B.K. is very attuned to her Mother's emotions. It is clear that the child reacts either positively or negatively depending on her Mother's reaction. This can place a burden on a child to carry the emotions of a parent and place the child between disputes of the parents. One example of this is Mother's reaction to items bearing Ole Miss Insignia. Mother became upset with Father when B.K., while with Father, wore an Ole Miss t-shirt that was purchased for her as a gift. This rose to a level that Father and Step-Mother removed the shirt from B.K.'s room so as to stop the dispute. Mother's reaction bothered B.K. to the extent that on another occasion when face-timing with Mother, B.K. moved an Ole Miss cup out of the way of the screen.

Mother, Step-Father and Mother's Father also cited to how Mother was raised in support of relocation. Mother's parents were divorced. When Mother was younger, her Mother and Step-Father moved to Colorado, while Mother's Father and Step-Mother lived in Alabama. As Maternal Grandfather explained it was twenty years ago in Alabama and he could not oppose the move unless he could show the mother to be unfit. He saw his children every two to three months. He and Mother desire for B.K. to replicate how Mother was raised and the division of parenting responsibilities from Mother's parents.

The Court had the opportunity to observe the parties and their witnesses. The Court finds Step-Mother to be highly credible and genuine in her testimony. Also, the Court finds Ms. Bennett and Godmother to be credible. Ms. Bennett was extremely genuine in her remarks, but clearly distraught and visibly emotional about having been placed in the position between the parties. After having observed Mother's demeanor and behavior while testifying and in the



Courtroom, the Court finds Mother not to be credible. There were times during the testimony when Mother was smirking and laughing to herself at testimony given by Father's witnesses. This behavior demonstrates to this Court that Mother does not take these issues seriously or see any issue with her conduct in any way. With regard to Ms. Bennett, Mother visibly leaned forward in her seat, unlike her position with any other witness. She stared at Ms. Bennett the entire time with a smile in what would appear to be an effort to intimidate the witness. Mother smiled and smirked throughout Dr. Jean's testimony.

### **Conclusions of Law**

At trial the parties disputed whether they are spending substantially equal time with the minor child and therefore, also disputed which statutory provision applied to this matter. Mother contends that they are not and therefore, Tenn. Code Ann. § 36-6-108(d) applies. Father contends that they are spending substantially equal time with the child and therefore, the Court should engage in a best interests determination. Accordingly, the Court will first address the issue of substantially equal time.

### Substantially Equal Time

Tennessee Code Annotated § 36-6-108 does not define what constitutes "substantially equal intervals of time." The Court has done an extensive review of Tennessee case law to determine what constitutes "substantially equal." The Tennessee Supreme Court has directed that the Court is to first look at the provisions of the residential parenting schedule. *Kawatra v. Kawatra*, 182 S.W.3d 800, 803-04 (Tenn. 2005). The Court is to consider the time actually spent with the child and compute it in units of a day. *Id.* at 801. Then, the Court is to consider additional time spent by either parent not reflected in the parenting schedule, and whether either parent interfered with the other's parenting time. *Id.* at 804. "To allocate a day to one parent

when both parents claim credit for that day, the trial court should examine 1) the hours each parent actually spend with the child on that day; 2) the activities in which each parent engaged with the child; 3) the resources the parent expended on the child's behalf during that time, including the costs of any meal or any other costs directly related to that parent's care and supervision of the child; and 4) any other factor that the trial court deems relevant." *Id.* The period considered should generally be the twelve months preceding the hearing. *Id.*

That still leaves the Court with the determination of what amount of parenting days equate to "substantially equal." *Monroe v. Robinson*, No. M2001-02218-COA-R3-CV, 2003 WL 132463, at \*12 (Tenn. Ct. App. Jan. 16, 2003). Mother contends, relying on *Lima v. Lima*, No. W2010-02027-COA-R3-CV, 2011 WL 3445961 (Tenn. Ct App. Aug. 9, 2011)(citing *Collins v. Coode*, No. M2002-02557-COA-R3-CV, 2004 WL 904097 (Tenn. Ct App. Apr. 27, 2004)) that to be substantially equal the division of parenting time must be virtually equal, i.e. 50%-50%.<sup>1</sup> This Court does not believe that to be so. First, if the General Assembly had meant equal, they would have adopted the terminology equal and not "substantially equal." Second, the case law does not support this conclusion. Numerous cases hold that a 60%-40% split is not substantially equal. *See e.g. Kawatra*, 182 S.W.3d 800 (62.2%-37.8% split); *Sansom v. Sansom*, No. M2016-01111-COA-R3-CV, 2017 WL 1948690 (Tenn. Ct. App. May 10, 2017)(62%-38% split); *Slavko v. Slavko*, No. M2015-01267-COA-R3-CV, 2016 WL 4768883 (Tenn. Ct. App. Sept. 9, 2016)(67%-32% split); *Helig v. Helig*, No. E2014-00586-COA-R3-CV, 2015 WL 3654948 (Tenn. Ct. App. June 15, 2015)(60%-40% split); *Redmon v. Redmon*, No. W2013-01017-COA-R3-CV, 2014 WL 1694708 (Tenn. Ct. App. Apr. 29, 2014)(70%-30% split); *Goddard v. Goddard*, No. E2011-00777-COA-R3-CV, 2012 WL 601183 (Tenn. Ct. App. Feb.

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<sup>1</sup> The Court also notes that *Lima v. Lima* dealt with a 63%-37% split and *Collins v. Coode* addressed a 33.2%-66.8% split.

24, 2012)(65%-35% split); *Price v. Bright*, No. E2003-02738-COA-R3-CV, 2005 WL166955 (Tenn. Ct. App. Jan. 26, 2005)(65.4%-34.6%); *Bulick v. Thompson*, No. W2004-00816-COA-R3-CV, 2005 WL 123502 (Tenn. Ct. App. Jan. 18, 2005)(64.3%-35.7%). But the area between 50%-50% and 60%-40% is gray. Only one Court has addressed a division within that range. The Court of Appeals in *Monroe v. Robinson*, No. M2001-02218-COA-R3-CV, 2003 WL 132463 (Tenn. Ct. App. Jan. 16, 2003) found an approximate 43%-57% split of parenting time to be substantially equal.<sup>2</sup>

The proof presented in this regard was limited in many respects. Both parties testified that since January 2017, they followed the parenting plan as far as parenting time allocation. They both agreed there had been a few exchanges of days. The Permanent Parenting Plan Order entered on July 17, 2013 provides Mother with 209 days and Father with 156 or 57% to 43% split.

Both parties agreed that prior to January 2017, they did not follow the Parenting Plan schedule. Instead, immediately after the divorce they began negotiating parenting time on a month-to-month basis. Mother, however, always received more days than Father in this process. But, Father always had his allotted number of days and exercised more at times. This all occurred while Father was traveling for work, which he is no longer doing. This testimony is not as helpful because the Supreme Court has instructed this Court to focus its evaluation on the twelve months immediately preceding the hearing. It is helpful, however, in considering what was occurring in late 2016.

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<sup>2</sup> The Court recognizes that Mother cites to *Rudd v. Gonzales*, No. M2012-02714-COA-R3-CV, 2014 WL 872816 (Tenn. Ct. App. Feb. 28 2014) wherein the trial court found that father's 154 days (or 42%-58%) was not substantially equal. This Court does not find that case to be helpful as the issue of whether the trial court's finding on substantially equal was not raised by either party on appeal and therefore, not considered by the appellate court. This is especially true in light of *Monroe v. Robinson*.

Both parties presented calendars which they contended accurately reflected the time actually exercised by both parties. Mother presented calendars from December 2016 through September 2017. By the Court's count, Mother's calendars reflect 172 days for Mother and 129 days for Father out of a total of 304 days or a 56.6% - 42.4% split. The calendars representing Father's calendars were presented by Step-Mother for December 2016 through October 2017. By the count reflected on the calendars themselves, Mother had 180 days and Father had 155 days of 335 total days or 53.7%-46.3%. By the Court's Count, Father's calendars reflect 182 days for Mother and 153 days for Father of a total of 335 days or 54.3%-45.7% split.<sup>3</sup> Mother only presented minor discrepancies as she saw in Father's calendars. Overall, even if these discrepancies are correct, the results are negligible with regard to the total number of days spent by each party. In 2016, according to Mother's own email, Father had 169 days of parenting time (46.3%). Moreover, both parties agree that for 2017 they were following the parenting plan which provides a 57%-43% split and that in the months prior to that, they were exercising that or more time for Father. Considering all of this, the Court finds the parties to be exercising substantially equal time.

#### Best Interests

Having found that the parents spend substantially equal time with the child, the Court now considers the factors in Tenn. Code Ann. § 36-6-106(a)(1-15) to determine the child's best interests. In weighing these factors, the Court considers all of the facts as found above.

*(1) The strength, nature, and stability of the child's relationship with each parent, including whether one (1) parent has performed the majority of parenting responsibilities relating to the daily needs of the child;*

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<sup>3</sup> The difference appears to be caused by how the day of the exchange was calculated.

Both parents have a loving and active relationship with B.K. While Mother has technically performed the majority of the parenting responsibilities, the Court, as discussed in more detail above, does not find that it comes from Father's unwillingness or inability. In a large part, it stems from Mother's desire to be in control and insistence upon performing a "traditional Mother role." To some extent, Mother has even prevented Father from taking on responsibilities.

The Court believes that both parents jointly parent. This active parenting by both parents has been a positive and constant factor in this child's life. It has allowed her to thrive. This stability is threatened by Mother's decision to move.

*(2) Each parent's or caregiver's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, consistent with the best interest of the child. In determining the willingness of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, the court shall consider the likelihood of each parent and caregiver to honor and facilitate court ordered parenting arrangements and rights, and the court shall further consider any history of either parent or any caregiver denying parenting time to either parent in violation of a court order;*

The Court fully believes that each parent is equally capable and willing to perform parenting responsibilities.

The Court has concerns about Mother's ability and willingness to encourage and facilitate a relationship between Father and B.K. The Court recognizes Mother and Dr. Jean's invitation to Father to visit B.K. and stay in their home any time he wants. That, however, does not encourage and facilitate the strong and constant relationship that Father and B.K. have now or the relationship B.K. has now with extended support network in Memphis.

This Court's concern in this regard is caused by multiple factors. One is Mother's desire to serve in a "traditional Mother role." While this may work in her relationship and division of labor with Dr. Jean, it is not a role that Father has accepted nor must be relegated to. In fact, Father has shown the exact opposite and been an active and engaged parent. Additionally, Mother has willingly placed the child in the middle of disputes between the parties to the detriment of the relationship between Father and B.K. For example, she wanted B.K. to believe it was Father's fault when the parenting plan was not deviated from over Labor Day weekend. Also, after getting B.K. excited about a potential move to Chattanooga, Mother explained to B.K. that Father would be upset, thereby, setting Father up for the blame if the child is not allowed to go. Also, Mother is committed to limiting Father to only the role that her father played in her life. She is unwilling to consider anything different. Mother holds her title of Primary Residential parent, very dear as just that, a title. She is sure to explain to other that she is the one in control. Also she has threatened to relegate Father to one day for an entire month when he raised a question about child support. Further, Mother refers to Father's parenting time during the week as an interruption, as if a parent's time with a child is an annoyance or inconvenience. For all of these reasons, the Court has concerns about Mother's willingness to facilitate and encourage a close and continuing relationship between Father and B.K. at a distance. This is a significant concern to the Court.

The Court does not have any similar concerns with regard to Father.

*(3) Refusal to attend a court ordered parent education seminar may be considered by the court as a lack of good faith effort in these proceedings;*

This factor is not applicable.

*(4) The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care;*

Both parents are equally willing and able to provide the child with food, clothing, medical care, education and other necessary care. Although, the Court does have concern that Mother and Step-Father would contract themselves to a move to Chattanooga before ever considering schools for B.K.

*(5) The degree to which a parent has been the primary caregiver, defined as the parent who has taken the greater responsibility for performing parental responsibilities*

Mother has been the primary caregiver for B.K. when it comes to things such as registering her for school and medical care. This, as discussed above however, does not stem from Father's unwillingness or inability to address these needs. Both parents have been actively involved with B.K. in many respects.

*(6) The love, affection, and emotional ties existing between each parent and the child;*

There is obviously a strong bond between both parents and B.K. Both parents take on an active role in this child's life. The Court cannot say that this factor weighs in favor of either parent.

*(7) The emotional needs and developmental level of the child;*

All evidence shows that this is a child who is well developed and mature for her age. No evidence demonstrated any emotional or development needs of the child.

The Court is concerned with Mother's willingness to look out for the best interests of the child's emotional needs for several reasons. First, Mother equated the child's happiness with that of Dr. Jean. The first and almost sole consideration in the move to Chattanooga was Dr.

Jean and his desire for new employment. Dr. Jean also equated the child's happiness to that of Mother. It is clear that the child bears the burden of her Mother's emotions. If Mother is not happy or is upset, so is the child. Mother has been willing on more than one occasion to directly place the child in the middle of a dispute between the parents. In addition to placing an undue burden on the child, this discourages and negatively impacts the relationships between the parents and child. Finally, Mother is unwilling to control her emotions regarding trivial matters, to the extent it causes the child to be fearful of her Mother seeing what glass she is drinking from while at Father's home.

*(8) The moral, physical, mental and emotional fitness of each parent as it relates to their ability to parent the child.*

No evidence was presented that would challenge either parties moral, physical or mental fitness to parent.

The Court does have concern with Mother's emotional fitness. This is based on Mother's need to be in control at all times and Mother's extreme interest in the title "primary residential parent" as a title. The Court is also concerned that Mother described the child as being the only reason to go on during a time of high stress. This is an extremely high burden to place on a child.

*(9) The child's interaction and interrelationships with siblings, other relatives and step-relatives, and mentors, as well as the child's involvement with the child's physical surroundings, school, or other significant activities;*

B.K. now has two half-siblings. She is equally close and involved with both. Certainly, whether she moves or not, her relationship with one of these half-siblings will be impacted.

Beyond half-siblings, she has a step-sibling who will remain in Memphis.



Moreover, she has an extensive family network in Memphis. This includes Father's parents, brother, aunts and uncles and Step-Mother's extended family. It also includes her Godmother. As described above, all are intimately involved in this little girl's daily life. B.K. sees these individuals on a consistent and regularly basis weekly, if not multiple times a week. This will be discontinued if B.K. moves to Chattanooga.

B.K. is close to her family on Mother's side. However, it is not the daily or weekly interaction from Father's side of the family. Mother's family regularly visits Memphis. The Maternal Grandfather even travels from Knoxville up to three times a month. The Maternal Grandmother is here regularly as well. While they will be closer, the relationships will not drastically change. There is nothing preventing them from this continued level of interaction if B.K. remains in Shelby County.

Further, Mother will be in Chattanooga with two young children while Step-Father works extensively. While Mother's family will be closer, B.K. will be losing an extensive extended family network that is involved with her and supports her daily. Additionally, while in Memphis should Mother not be able to attend a school event due to lack of childcare, B.K. has another parent and numerous other family members that can easily attend and do. The same would not be so in Chattanooga.

B.K. would be leaving the school, friends and activities in which she has always been involved.

For all of these reasons, this is a significant factor.

(10) *The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;*

B.K. has lived in the Memphis area her entire life. Here, she has always lived in a stable and satisfactory environment. She is a thriving, smart, loving and energetic little girl. B.K. is an

outgoing and friendly child. She would likely adjust well to a new environment. There is no indication that Chattanooga's environment would not be satisfactory, but, it does not have her extended support network or her community, church or school involvement. She would be at a significant loss with the loss of her extended support network and involvement here in Shelby County.

(11) *Evidence of physical or emotional abuse to the child, to the other parent or to any other person. The court shall, where appropriate, refer any issues of abuse to juvenile court for further proceedings;*

This factor is not applicable.

(12) *The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child;*

As is the Court's concern with Mother, the Court is concerned with Dr. Jean's role in encouraging and promoting a relationship between B.K. and Father. It was very apparent to the Court that Dr. Jean expected Father to take a role in B.K.'s life similar to the role he plays in his son's life. Dr. Jean and his son have a very different dynamic and limited involvement for many of reasons. There is no reason for Father to be limited to that role. More importantly, it would not be in B.K.'s best interests for Father to be limited to that role.

Additionally, Dr. Jean places the entire burden on Father in being involved in B.K.'s life should she move to Chattanooga. He did not see any burden on him or Mother in fostering this relationship. He further equated Father to the role of grandparents in visiting the child. This all causes the Court concern for Dr. Jean's willingness to foster and encourage a relationship between Father and B.K. at a distance.

The Court does not have similar concerns with regard to Step-Mother. Step-Mother clearly loves B.K. and cares for her dearly. She, however, quite clearly recognizes and respects

that she is not B.K.'s Mother. She is greatly involved in the child's day to day activities. She even, at the request of B.K., coached B.K.'s soccer team. She attends many school events and assists when the parents are not able. She is a positive influence and relationship in B.K.'s life that will be negatively impacted with the move.

*(13) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preference of older children should normally be given greater weight than those of younger children;*

This factor is not applicable.

*(14) Each parent's employment schedule, and the court may make accommodations consistent with those schedules; and*

The Court finds this factor to be neutral. While Father is employed, he no longer has to travel for work. Additionally, he has a flexible schedule and is able to work remotely so that he can be there for the child as necessary. Mother is a stay-at-home Mom. Mother does have the limitation that she has another child. As she admitted, she has been required to miss a few school events for B.K. due to a lack of child care for her youngest child. Both parties limitations by their day-time duties are similar in scope.

*(15) Any other factors deemed relevant by the court.*

Considering all of these factors, the Court does not find that the relocation is in the best interests of B.K. Therefore, Father's Petition shall be granted in that Mother will not be allowed to relocate with B.K.

The only issue before this Court is relocation and opposition to the relocation. Mother has testified that she does not intend to move without B.K. The Court understands, however, that Dr. Jean has entered into a contract in Chattanooga and terminated his employment in Shelby

County such that Mother may find that she needs to relocate. Should Mother relocate to Chattanooga without the child, the Court finds the attached Permanent Parenting Plan to be in the best interests of B.K.

**IT IS SO ORDERED ADJUDGED AND DECREED,** Father's Petition in Opposition of Relocation of the children and Petition to Modify Permanent Parenting Plan shall be granted in that Mother shall not relocate with the child to Chattanooga. Should Mother relocate to Chattanooga without the child, the attached Permanent Parenting Plan will be in effect. If Mother relocates, both parties are ordered to ensure that the Amended Permanent Parenting Plan attached is entered as an Order of the Court. If Mother relocates, child support shall be based upon Mother's income when she left full time employment and Father's current income. If the parties cannot agree on child support this issue shall be submitted to the divorce referee.

If Mother does not relocate, the July 17, 2013 Permanent Parenting Plan Order remains in effect.

This Order disposes of all issues between the parties. Both parties' requests for attorney fees is denied. Any other relief heretofore requested that has not been addressed is denied. Costs of this matter shall be assessed against Mother.

\_\_\_\_\_  
HONORABLE MARY L. WAGNER

DATE: \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of this Order has been forward to all parties or their counsel of record at their last known address.

\_\_\_\_\_  
**CLERK**

**Date:** \_\_\_\_\_