

Tennessee Judicial Nominating Commission
Application for Nomination to Judicial Office

Rev. 26 November 2012

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INTRODUCTION

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

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Deputy Attorney General, Public Interest Division, Office of Tennessee Attorney General

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

1989 BPR # 013889

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

Tennessee 1989 BPR # 013889 – active
Sixth Circuit Court of Appeals – 1997
Ninth Circuit Court of Appeals – 2001
Tenth Circuit Court of Appeals - 2000

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).

Judicial Law Clerk – Honorable William C. Koch, Tennessee Court of Appeals, September 1989 – May 1992

Assistant Attorney General, Financial Division, Office of Tennessee Attorney General (OTAG) – May 1992 – 1998

Senior Counsel, Financial Division, OTAG 1998 – 2006

Senior Counsel, Special Litigation Division, OTAG, 2006 – 2009

Deputy Attorney General, Public Interest Division, OTAG, 2009 - present

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable

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

I currently serve as the Deputy of the Public Interest Division of the Office of TN Attorney General. The Public Interest Division has three major areas of the law that it is responsible for: (1) elections, including campaign finance issues; (2) regulation of nonprofits, including public benefit hospitals, and other charitable issues; and (3) public records and open meetings act issues. I currently handle all of the litigation for the Division, in addition to my duties as Deputy of the Division. I also serve on two Office internal committees: the Technology Committee and the Electronic Discovery Committee. Approximately 10% of my time is spent on supervising the work of the other 2 attorneys and paralegal in the Division, service on the Technology and Electronic Discovery committees, and my administrative duties as a Deputy.

I provide legal advice to the Secretary of State and State Election Coordinator on issues concerning local and state elections and provide legal representation to them in state and federal court in lawsuits involving elections, as well as lawsuits challenging the validity and/or constitutionality of election-related laws. I also provide legal advice to the Tennessee Bureau of Ethics and Campaign Finance, particularly on campaign finance issues. I also obtain judgments in chancery court for the administrative civil penalties assessed by the Registry of Election Finance and the Ethics Commission divisions of the Bureau. In non-election years, I spend approximately 25-30 percent of my time on election-related matters. During election years, that number can increase to 50% of my time, particularly if there is an election contest involving a state office, such as trial judge, public defender, etc. In that instance, I provide legal representation to the county election commission(s) involved in the election contest.

Under the Nonprofit Corporation Act, the Attorney General is to receive notice of and to review any merger, dissolution or sale of all or substantially all of the assets of a Tennessee nonprofit corporation, which includes public benefit hospitals. Initial reviews are handled by the other two attorneys in the Public Interest Division, with final review by me as the Deputy. I handle all litigation involving nonprofit corporations. The Division also represents the Division of Charitable Solicitation and Gaming in the Secretary of State's Office. I provide legal advice to that Division, as well as enforcement of their administrative civil penalties. Under the Uniform Trust Code, the Attorney General has the rights of a qualified beneficiary of any charitable trust. I currently represent the Attorney General in all matters involving charitable trusts, such as petitions to reform or to amend, appointments of successor trustees, nonjudicial settlement agreements, etc. I also handle any litigation involving charitable trusts, particularly any *cy pres* actions or actions to enforce the charitable intent of the donor. The Attorney General also has the duty under the Charitable Beneficiaries Act to represent the interests of the people of the State of Tennessee in all matters involving charitable gifts. As with charitable trusts, I represent the Attorney General in any such matters, including in any litigation. Finally, I currently serve on the Board of the National Association of State Charities Officials (NASCO), as well as several NASCO Committees. I spend approximately 25-30% of my time on nonprofit and charitable-related issues.

I provide legal advice to all officials and employees in state government on Public Records and Open Meetings Act questions. I assist officials and employees in state government in responding to public records requests, which often includes preparing responses to requests and reviewing

documents to determine if: (1) they are responsive and (2) if they are privileged and/or confidential. I also represent any state official, employee, department or agency in a public records or open meetings act lawsuit. I also serve as the Attorney General's designee on the Advisory Committee on Open Government. I spend approximately 35% of my time on public records-open meetings act issues.

Finally, the Attorney General's Office is required by statute to issue formal advisory opinions to state officials and to review rules promulgated by state departments and agencies. I currently handle all of the opinion requests and rule reviews for the Division. I spend approximately 5% of my time on responding to opinion requests and/or reviewing rules.

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

I began my legal career as a judicial law clerk for Judge William C. Koch on the Tennessee Court of Appeals. What was initially intended to be a one-year clerkship developed into a three-year clerkship, where I was able to hone my research, writing and legal analysis skills. In 1992, I took a position as an Assistant Attorney General with the Financial Division of the Office of Tennessee Attorney General. While in the Financial Division, I represented a number of different State Departments and Agencies in their regulatory capacity, as well as defended them in state and federal court. One of my primary clients was the Department of Financial Institutions. In addition to providing general legal advice, I represented the Department in cases seeking judicial review of an administrative decision in a contested case hearing under the Uniform Administrative Procedures Act ("UAPA"). I also represented the Department in regulatory actions involving troubled financial institutions where the Commissioner was forced to take possession and place such institutions into receivership.

I also represented various divisions within the Department of Commerce and Insurance, including the Insurance, Securities, Burial Services and TennCare divisions. I represented all four of these divisions in actions in state court to place regulated entities into receivership. For the Insurance Division, this involved actions to enjoin unlicensed and illegal insurance

companies from continuing to operate in Tennessee and placing them in receivership. For the Securities Division, my representation involved regulatory actions to enjoin unlicensed agents and broker/dealers from selling securities in Tennessee, and to enjoin the sale of unregistered securities in and from Tennessee. For the Burial Services Division, my representation involved seizing unlicensed and/or underfunded cemeteries and placing them in receivership. Finally, the TennCare Division of the Department was charged with regulating the HMOs that participated in the TennCare program. Many of these HMOs developed significant financial difficulties and I was involved in a number of actions placing these HMOs into receivership due to their insolvency. In most, if not all of these actions, there was an evidentiary hearing in which the State (I) had the burden of proving that the entity or individual was operating illegally or that the entity was insolvent.

A significant portion of my time and practice while in the Financial Division was devoted to various election issues. I have represented the Tennessee Registry of Election Finance (now a division of the Tennessee Bureau of Ethics and Campaign Finance) 1992 and I continue to represent them today. I routinely provide legal advice on the interpretation and application of the campaign finance statutes to the Registry. I also assist the Registry in enforcing the campaign finance statutes by obtaining personal judgments in chancery court for the administrative orders assessing civil penalties, and if necessary, obtaining mandatory injunctive relief to require a candidate or political campaign committee (PAC) to comply with the reporting requirements. I have also provided legal advice to the Registry on other issues, such as personnel, public records and open meetings act issues.

I began representing the State Election Coordinator in 1995 and continue to do so today. I have had significant litigation in state and federal court involving elections and election-related issues, including a number of challenges to the constitutionality of state election laws. By statute, the Attorney General's Office is to represent any local county election commission in an action involving a state election or a state statute. In 2006, I successfully defended the seven county election commissions comprising the 13th Judicial District in an election contest involving a state court judicial election (Sells v. Patterson), as well as the four county election commissions comprising the 8th Judicial District in an election contest involving the public defender election (Jeffers v. Yoakum). In addition to representing the State Election Coordinator and local county election commissions in state and federal court, I routinely provide legal advice to the State Election Coordinator on the interpretation and application of the election statutes.

I also represented the Department of Economic and Community Development. In particular, I represented the State Planning Office and its employees. I successfully defended the constitutionality of the Comprehensive Growth Plan Act in state court. I also successfully defended two employees of the State Planning Office in a 1983 lawsuit brought against them in the individual capacities in federal court. Finally, I represented the Department in actions to collect on defaulted Community Development Block Grant (CDBG) loans.

In 1997, the Tennessee General Assembly enacted the Charitable Beneficiaries Act of 1997. I successfully defended a challenge to the constitutionality of this Act in Bradley County Chancery Court in a will contest involving a charitable gift/trust. The case was ultimately settled with approximately \$40 million of the estate going to the establishment of the charitable trust/private foundation. In 2004, the General Assembly adopted the Uniform Trust Code and I began representing the Attorney General in all matters involving charitable trusts. I continue to

represent the Attorney General and the interests of the people of the State of Tennessee in any litigation involving charitable trusts and/or charitable gifts.

In 2003, the Tennessee Constitution was amended to allow for the creation of a state-operate lottery with the proceeds to be used for scholarships for Tennessee students to attend colleges and universities in Tennessee. I assisted and advised the Board in all aspects of their set-up, including preparing an RFP for hiring outside legal counsel for the Tennessee Education Lottery Corp. (TELC) I reviewed rules promulgated by the TELC, as well as various contracts. I advised the Board with respect to their meetings, and in particular, how to conduct their meetings in accordance with the Open Meetings Act. Finally, I represented the TELC in actions that they brought against retailers and vendors, as well as lawsuits brought against the TELC.

In addition to representing these specific clients, I also advised and/or represented all state departments, agencies, officials and employees on issues involving the Public Records Act and Open Meetings Act. This included providing legal advice, reviewing documents for production and providing representation in lawsuits filed under the Public Records Act and Open Meetings Act.

In my early years, I also handled a number of bankruptcy cases for the State, primarily where the debtor was seeking to discharge debts owed the state.

In 2006, I transferred to the Special Litigation Division in the Office, but continued to represent the State Election Coordinator and the Registry of Election Finance, as well as handle all issues and litigation involving the Public Records Act, the Open Meetings Act, charitable trusts under the UTC and charitable gifts under the Charitable Beneficiaries Act. Additionally, in 2006, the General Assembly passed the Comprehensive Governmental Ethics Act which, among other things, created the Tennessee Ethics Commission (which is now a division of the Bureau of Ethics and Campaign Finance). I served as Legal Counsel and administrative staff for the Ethics Commission for the first six to seven months until the Commission was able to hire an Executive Director and General Counsel. During that time period, I advised the Commission on numerous issues, drafted proposed rules, and handled a number of administrative tasks. I continue to represent the Commission in actions to enforce their administrative orders assessing civil penalties and in providing legal advice. Additionally, the Attorney General's office is charged with conducting an investigation of any sworn complaint that is referred by the Ethics Commission and submitting a report to the Commission of our factual investigation. I have conducted a number of these investigations and/or supervised other attorneys in conducting investigations.

In 2009, as part of an internal reorganization of the Office, the Public Interest Division was created and I was named Deputy of that Division. The Division's practice consists of three main areas of the law: (1) elections and campaign finance; (2) public records and open meetings act; and (3) nonprofit regulation and other charitable issues. I have two attorneys and one paralegal that I supervise. I currently handle all of the litigation for the Division. I also serve on two Office internal committees: the Technology Committee and the Electronic Discovery Committee. See Response to # 8 for discussion of my present practice in the Public Interest Division.

Additionally, there have been times where Divisions in the Office have been understaffed and/or in need of short term assistance. As such, I have handled several taxpayer appeal

cases, criminal appeals, and a number of constitutional challenges to state statutes. I also assisted with the institutional class action lawsuit against TennCare (*John B.*) until the Health Care Division was created in the Office. Finally, I assisted the Consumer Advocate in proceedings before the Tennessee Regulatory Authority in cases involving the unbundling of services by telecommunications companies.

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

Federal Cases – Sixth Circuit Court of Appeals

Green Party v. Hargett, 700 F.3d 816 (6th Cir. 2012) – I represented Secretary of State and State Election Coordinator in this case involving a challenge to constitutionality of state statutes governing minor party ballot access. District court ruled in favor of the plaintiffs; 6th circuit reversed on all issues and remanded for consideration in light of statutory amendments.

Ford v. Wilder, 469 F.3d 500 (6th Cir. 2006) – I was lead counsel representing the Tennessee Senate in an action to enjoin the voiding of a special election to fill a vacancy in the Senate where there were multiple allegations of election fraud. The appeal was ultimately dismissed by the Sixth Circuit as moot after a majority of the Senate had voted to void the election based upon the report of the Ad Hoc Committee.

Johnson v. Bredesen, 624 F.3d 742 (6th Cir. 2010) – this case involved a challenge to the constitutionality of the felon disenfranchisement statutes. I handled the appeal before the Sixth Circuit, which affirmed the district court's order finding that the statutes did not violate the Equal Protection Clause, the 24th Amendment, Ex Post Facto and the Privileges and Immunities Clause of the federal and state statutes.

McKay v. Thompson, 226 F.3d 752 (6th Cir. 2000) – I represented the State Election Coordinator in this case challenging the state law requiring a person's social security number in order to vote as being in violation of the federal Privacy Act. The district court found that the statute was grandfathered in and, therefore, did not violate the Act. The Sixth Circuit upheld this decision on appeal.

McLaughlin v. Weathers, 170 F.3d 577 (6th Cir. 1999) – this case involved a challenge to the constitutionality of Tennessee's prejudgment attachment statute. The district court found that the statute was constitutional and this finding was upheld by the Sixth Circuit on appeal.

Kurita v. State Primary Board of the Tennessee Democratic Party, 472 Fed.Appx. 398 (6th Cir. 2012) – this case involved a challenge to the constitutionality of the state statute that allows the State Executive Committee of a state political party to decide an election contest in a state primary election. The district court found that the statute was constitutional and this finding was upheld by the Sixth Circuit on appeal.

Johnson v. Bredesen, 356 Fed.Appx. 781 (6th Cir. 2009) – this case involved a challenge to the statutes governing the selection and retention election of appellate court judges (the Tennessee Plan) under the federal constitution. The district court found that the plaintiffs did not have standing and/or their claims were barred by res judicata. The district court went on to find that

even if the plaintiffs did have standing and/or not barred by res judicata, the Tennessee Plan did not violate either the Equal Protection or the Due Process clause. The Sixth Circuit affirmed on appeal. Steve Hart was co-counsel on this case with me.

Federal Cases – District Court

Moncier v. Jones, 2013 WL 1497886 (M.D.Tenn. 2013) – I represent the former Chief Disciplinary Counsel for the Board of Professional Responsibility, Nancy Jones, in her individual capacity in this 1983 lawsuit seeking \$ 2 million in damages due to actions taken by Ms. Jones during the course of the plaintiffs’ attorney disciplinary hearing. The district court found that Ms. Jones was entitled to absolute immunity and dismissed the lawsuit. It is currently on appeal before the Sixth Circuit.

Teel v. Darnell, 2008 WL 474185 (E.D. Tenn. 2008) – I represented the Secretary of State and State Election Coordinator in this case involving a challenge to the constitutionality of state statutes governing the residency requirements in order to register to vote. The district court found that the statutes were not unconstitutional and the plaintiffs did not appeal that decision.

Turner-Golden v. Hargett, 2012 WL 3202307 (M.D. Tenn. 2012) – this case involved an as-applied challenge to the constitutionality of the Voter Photo ID Act under the Equal Protection Clause. After hearings in which the district court denied plaintiffs’ motions for a temporary restraining order and for a temporary injunction, plaintiffs ultimately voluntarily dismissed their case. Steve Hart was co-counsel on this case.

Tigrett v. Cooper, No. 10-2724 (W.D. Tenn) – I am representing the Secretary of State, State Election Coordinator, Attorney General and Shelby County Election Commission in this case involving a challenge to the dual majority vote requirement for city-county consolidation referendum contained in Art. XI, Section 9 of the Tennessee Constitution and Tenn. Code Ann. § 7-2-106 as being in violation of the Equal Protection Clause and § 2 of the Voting Rights Act of 1964. I currently have a motion for summary judgment pending.

Davis v. Haslam, No. 2-12-0023 (M.D. Tenn. 2012) – I represented the Governor, Secretary of State and State Election Coordinator in this lawsuit alleging that the State’s system for purging voters violates the National Voter Registration Act, as well as other provisions of state and federal law. After a temporary injunction hearing, the parties entered into a Consent Decree that, by its own terms, expired December 31, 2012.

Hutcherson v. Lauderdale, County, et al., No. 96-3046-TU-A (W.D. Tenn.) – I represented two employees of the Tennessee State Planning Office of the Department of Economic and Community Development in this § 1983 lawsuit, which sought \$5 million in compensatory damages and \$1 million in punitive damages. The district court granted my motion to dismiss these defendants on the grounds of qualified immunity and the plaintiffs did not appeal.

Hooker v. All Members of the Tennessee Supreme Court, No. 3-02-0787 (M.D. Tenn.) – this lawsuit was filed against the members of the Supreme Court and the Middle Section Court of Appeals challenging the Tennessee Plan and alleging that these judges had all been unconstitutionally elected. The district court dismissed on the basis of res judicata and no appeal was taken.

State Cases - Supreme Court

King v. Pope, 91 S.W.3d 314 (Tenn. 2002) – I represented the Commissioner of the Department of Commerce and Insurance in this case which was an appeal from a UAPA hearing finding that the Defendant King had been selling unregistered securities in the form of an investment contract. The chancery court had affirmed the ALJ’s ruling, which had relied upon the Hawaii Market test for an “investment contract” adopted by the Court of Criminal Appeals in *State v. Brewer*. The Court of Appeals reversed finding that the appropriate test was the Sixth Circuit’s test in *Howey-Forman*. The Supreme Court reversed and held that the test for determining what constitutes an investment contract is Hawaii Market test.

Bredesen v. Tennessee Judicial Selection Commission, 214 S.W.3d 419 (Tenn. 2007) – I represented Governor Bredesen in this declaratory judgment action to determine whether the Commission could include members of a first panel on the second panel where the governor has rejected the first panel. The chancery court held that the Commission could not. The Supreme Court reached down and assumed jurisdiction of the case and affirmed the chancery court’s decision.

City of Memphis v. Hargett, et al., No. M2012-021410-SC-R11-CV – I represent the Secretary of State and State Election Coordinator in this case which involves a facial challenge to the constitutionality of the Voter Photo ID Act under the Tennessee Constitution. The chancery court and court of appeals both upheld the facial constitutionality. The case has been fully briefed and argued and is currently pending before the Supreme Court. Steve Hart assisted with this case in the trial court.

Hooker v. Haslam, No. M2012-01299-SC-R11-CV – this case involves another challenge to the constitutionality of the Tennessee Plan, as well as a challenge to the statewide retention election of the intermediate appellate court judges as being in violation of Art. VI, Section 4 of the Tennessee Constitution. The circuit court dismissed the general challenge to the Tennessee Plan on the basis of stare decisis and found that the statewide retention election did not violate the Constitution as long as only the voter from Middle Tennessee were counted. The court of appeals affirmed the dismissal based on stare decisis and found that the statewide retention election did not violate Art. VI, Section 4 as the members of the intermediate appellate courts are assigned to the entire State as their district. The case has been fully briefed and is set to be heard before a Special Supreme Court on July 19, 2013.

State Cases – Court of Appeals

Public Records Lawsuits

The Tennessean v. Tennessee Department of Personnel, 2007 WL 1241337 (Tenn. Ct. App. 2007) – involved privileged attorney client communications and attorney work product in investigation of complaints of sexual harassment

Nashville Post Co. v. Tennessee Education Lottery Corp., 2007 WL 3072778 (Tenn. Ct. App. 2007) – involved issue of attorney’s fees

Bottei v. Ray, 2011 WL 4342652 (Tenn. Ct. App. 2011) – involved records concerning drugs used in executions by lethal injection

State ex rel. Guzman v. Darnell, 1994 WL 585684 (Tenn. Ct. App. 1994) – involved UCC-1 filings in Secretary of State’s office

Arnold v. City of Chattanooga, 19 S.W.3d 779 (Tenn. Ct. App. 1999) – involved challenge to constitutionality of Public Records Act

Coleman v. Kisber, 338 S.W.3d 895 (Tenn. Ct. App. 2010) – involved records of Commissioner of Economic and Community Development and of Commissioner of Revenue

Election-related Cases

James v. State, 2003 WL 22136840 (Tenn. Ct. App. 2003) – potential candidate appealed trial court’s ruling that TN Highway Official’s Certification Board had not acted arbitrarily and capriciously in not certifying candidate as qualified to run for office of County Road Superintendent. Court of Appeals affirmed.

Mills v. Shelby County Election Commission, 218 S.W.3d 33 (Tenn. Ct. App. 2006) – challenge to constitutionality of statute allowing use of electronic voting machines rather than paper ballots. Trial court upheld statute and Court of Appeals affirmed.

Littlefield v. Hamilton County Election Commission, 2012 WL 3987003 (Tenn. Ct. App. 2012) – challenge to constitutionality of statute governing recall petitions and elections. Trial court upheld constitutionality and Court of Appeals affirmed.

Johnston v. Davidson County Election Commission, No. M2011-02740-COA-R3-CV – appeal of trial court’s ruling that state statute governing procedures for when a write-in candidates votes are to be counted is constitutional. Case has been fully briefed.

Hooker v. Sundquist, 107 S.W.3d 532 (Tenn. Ct. App. 2002) – plaintiff brought suit against Governor, Lt. Governor, Speaker and Attorney alleging violation of Art. 10, Section 3 of the Tennessee Constitution. Defendants suit Rule 11 sanctions. Trial court dismissed complaint but denied Rule 11 sanctions. Court of Appeals affirmed dismissal but reversed denial of sanctions and remanded for determination of sanctions.

Hooker v. Sundquist, 150 S.W.3d 406 (Tenn. Ct. App. 2004) – (companion case to previous case) – Court of Appeals upheld screening mechanism put into place by trial court as Rule 11 sanctions.

Hooker v. Crawford, 2006 WL 140379 (Tenn. Ct. App. 2009) – (companion to previous case) plaintiff filed 1983 suit against appellate court judges and trial judge for monetary damages to punish the judges for their judicial actions in imposing Rule 11 sanctions in *Hooker v. Sundquist*. Trial court dismissed and found that additional Rule 11 sanctions were appropriate. Court of Appeals affirmed.

Hooker v. Alexander, 2005 WL 1212617 (Tenn. Ct. App. 2005) – as independent candidate for US Senate, plaintiff sought to void election Senator Alexander on grounds that he had used his own money and had accepted campaign contributions in violation of the qualifications clause, and the equal and due process clauses of the federal and state constitutions. The trial court dismissed and the Court of Appeals affirmed.

Hooker v. Thompson, 978 S.W.2d 541 (Tenn. Ct. App. 1998) – plaintiff as candidate for U.S. Senate filed actions alleging that giving or receiving of campaign contributions violated Art. X,

Section 3 of the Tennessee Constitution. The trial court held that the Federal Election Campaign Act preempted any provision of state law with respect to federal elections and the Court of Appeals affirmed.

Charitable Trust/Gift Related Cases

Georgia O'Keeffe Foundation (Museum) v. Fisk University, 312 S.W.3d 1 (Tenn. Ct. App. 2009) – private university, to which 101 pieces of art owned by artist and late husband's estate had been conditionally gifted by artist, filed ex parte declaratory judgment action seeking permission to sell two pieces of art. Museum intervened, arguing that any sale of collection violated conditions of gift and should result in entire collection reverting to museum as successor-in-interest to artist's estate. Attorney General intervened to represent interests of people of State of Tennessee. Court of Appeals ruled that assignee of residuary beneficiary of artist's estate did not have right of reversion in the pieces of art where artist had only had a life estate in the art. I was lead counsel in this case for the Attorney General, with Will Helou assisting.

In re Fisk University, 392 S.W.3d 582 (Tenn. Ct. App. 2011) – (companion case to previous case) court of appeals upheld trial court's finding that university had demonstrated that cy pres relief was appropriate and that the relief requested most closely approximated the donor's intent. I was lead counsel in this case with Will Helou assisting.

Fischer v. Eldon Stevenson, Jr. Scholarship Fund Trust, 2005 WL 2012773 (Tenn. Ct. App. 2005) – court of appeals upheld trial court's interpretation of provisions of charitable trust.

Morrow v. SunTrust Bank, 2011 WL 334507 (Tenn. Ct. App. 2011) – court of appeals upheld validity of charitable trust established for benefit of organizations that provide service to the disabled.

In re Estate of Goza, ___ S.W.3d ___, 2012 WL 1247210 (Tenn. Ct. App. 2012) – (companion case to previous case) court of appeals affirmed probate court's ruling that petition by administrator of decedent's estate for trustee to turn-over property in charitable trust was barred by res judicata.

In re Estate of Ledford, 2013 WL 1460561 (Tenn. Ct. App. 2013) – decedent had joint holographic will leaving all property to charitable trust with income to be paid to life beneficiaries; life beneficiaries sought to terminate charitable trust on the grounds that it was uneconomical due to the small amount of funds left in estate for trust. Charitable beneficiary and Attorney General challenged personal representative's payment of remediation costs for real property not owned by estate and payment of certain attorney's fees out of assets of the estate. Trial court approved payments; court of appeals reversed finding that there was no evidence in the record that estate was ever liable for these costs, no claim for these costs were ever filed and personal representative had no authority to pay these costs.

Financial Institution Related Cases

In re Liquidation of United American Bank of Knoxville, 2000 WL 145078 (Tenn. Ct. App. 2000) – challenge to constitutionality of statute allowing Receiver of state bank placed into receivership to terminate lease and only pay 60 days' rent from date of notice of termination. Trial court upheld constitutionality and court of appeals affirmed.

National Loans v. Tennessee Department of Financial Institutions, 1997 WL 194992 (Tenn. Ct. App. 1997) – case involved revocation of licenses of three branch offices of an industrial loan

and thrift company. The revocation was upheld in a contested case hearing under the UAPA. On appeal to the chancery court, the chancery court upheld revocation of two licenses but reversed on the third. Additionally, Plaintiff argued that the Department had selectively enforced the Industrial Loan and Thrift Act and the chancery court allowed discovery on that issue. On appeal, the Court of Appeals found that the additional discovery was unwarranted, that the Department had not selectively enforced the Act and that revocation of all three licenses was appropriate.

In re Sentinel Trust Co., 206 S.W.3d 501 (Tenn. Ct. App. 2005) – Commissioner of Financial Institutions took possession of trust company with \$7 million deficit and placed into receivership. Trust company filed petition for writ of supersedeas and for common law writ of certiorari. The trial court denied the writ of supersedeas and on review under the writ of certiorari, found that the Commissioner had acted within his jurisdiction in taking possession and that there was substantial and material evidence to support his decision to take possession. The Court of Appeals affirmed.

In re Sentinel Trust Co., 2007 WL 1237697 (Tenn. Ct. App. 2007) – (companion to previous case) challenge to sale of office building owned by Trust Company that had been placed into receivership by Commissioner of Financial Institutions – trial court approved sale and court of appeals affirmed.

Criminal Cases

State v. Harmon, 1995 WL 623775 (Tenn. Crim. App. 1995) – Court of Criminal Appeals upheld conviction and sentence for aggravated kidnapping, rape and assault.

State v. Morgan, 1996 WL 715423 (Tenn. Crim. App. 1996) – Court of Criminal Appeals upheld conviction and sentence for second degree murder, aggravated robbery and attempted aggravated robbery.

Miscellaneous Cases

Davidson v. Bredesen, 330 S.W.3d 876 (Tenn. Ct. App. 2009) – court of appeal's affirmed trial court's finding that former enrollee in TennCare was not entitled to injunctive relief; that collateral estoppel and res judicata barred claims for fraud, breach of fiduciary duty and RICO violations and that former enrollee failed to state claim for retaliation under 1983 in violation of First Amendment with respect to damages caused from loss of program benefits or to state claim for malicious harassment. Steve Hart assisted with this case until he had to recuse himself.

Tennessee Downs, Inc. v. William L. Gibbons, 15 S.W.3d 843 (Tenn. Ct. App. 1999) – racetrack, which proposed to conduct pari-mutual wagering, sought declaration that such activity was legal and not prohibited after Tennessee Horse Racing Commission went out of existence. Trial court granted injunction enjoining District Attorney General from prosecuting racetrack for illegal gambling. Court of Appeals held that chancery court lacked jurisdiction to enter injunction under 1983 to prohibit prosecution of racetrack.

National Gas Distributors v. Sevier County Utility Dist., 7 S.W.3d 41 (Tenn. Ct. App. 1999) – private propane dealer challenged constitutionality of state statute authorizing utility district to sell propane. Trial court dismissed for failure to state a claim. Court of Appeals affirmed finding that the dealer did not have standing to challenge constitutionality of statute on ground that it treated other utility districts differently and that the dealer failed to state claim that statute

violated its due process or equal protection rights.

Ragsdale v. City of Memphis, 70 S.W.3d 56 (Tenn. Ct. App. 2001) – declaratory judgment action seeking declaration that actions of city and county to procure and provide financing for new arena violated state constitution. Chancery Court issued injunction against expenditure of city or county funds for construction of arena without a referendum election. Court of Appeals reversed and held that construction of sports arena was valid public purpose and therefore, issuance of bonds and/or contribution of funds by city and county were not unconstitutional giving or lending of credit.

Moncier v. Hearing Panel of the Board of Professional Responsibility, No.E2012-01850-COA-R3-CV – appeal of trial court’s finding that hearing panel of the BPR is not a governing body subject to the Open Meetings Act. Case has been fully briefed and argued.

Moncier v. Board of Professional Responsibility, No. M2012-00779-COA-R3-COA, slip op. (June 6, 2013) – appeal of trial court’s finding that BPR is not governing body subject to Open Meetings Act and that minutes of confidential portion of the Board’s meeting are not subject to the Public Records Act. Case has been fully briefed and argued.

Moncier v. Jones, et al., No. M2012-01429-COA-R3-CV, slip op. (June 6, 2013) – appeal of trial court’s finding that former Chief Disciplinary Counsel sued in her individual capacity is entitled to absolute immunity and that actions alleged in plaintiff’s complaint were all within the scope and course of her duties as Chief Disciplinary Counsel for the Board.

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

Not applicable.

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

I served as the *administratrix cta* of my maternal grandmother’s estate in North Carolina. The value of her estate was approximately \$250,000. I am currently the Trustee of the Morrisett Family Trust, a trust established by my father. I am also named as the Executor of my father’s estate in his Will.

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

In addition to my litigation practice, during my 21 years with the Attorney General's Office, I have authored at least 143 formal Attorney General Opinions. A number of these opinions concerned pending legislation and thus, had to be produced on a short turn-around. Attached as an appendix to this application is a list of those opinion with citations to Westlaw.

Also, I have participated regularly in the mentoring and development of new attorneys in the Attorney General's Office and sat as a judge on a number of moot court panels. While I was in the Financial Division (1992-2006), I was the Supervising Attorney for our summer law clerks and put in place a process that would ensure that the clerks got a variety of matters to work on and would further ensure that the clerks got feedback from the attorneys on their work.

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

None

EDUCATION

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

King College, Bristol, TN 1982-1986

Degree: Bachelor of Arts, summa cum laude

Major: Double major in American History and Classics (emphasis on Latin)

Awards/Recognition: Recipient of the King Scholar Scholarship all 4 years (full tuition); Graduated # 1 in class; R.T.L. Liston Award for Academic Excellence; Latin and History awards.

University of Tennessee, George C. Taylor School of Law 1986 – 1989

Degree: J.D., magna cum laude

Awards/Recognition: Recipient of John Green Scholarship for first year law students; Graduated # 7 in the class; Order of the Coif; research assistant for Professor Amy Hess (tax professor and editor of *Pritchard's on Wills and Estates*).

PERSONAL INFORMATION

15. State your age and date of birth.

48

September 9, 1964

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

All of my life

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

24 years

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

Davidson County

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

Not applicable

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

No

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

No

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

Not applicable

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

No

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

Second Presbyterian Church, Nashville, Tennessee

Member since 1990; Elder since 2000; member of Adult Choir since 1990; Sunday School Teacher for grades 1-6 since 2000; Chair of the Fellowship Committee 2000-2001; Chair of Children's Committee 2001-2003

Downtown YMCA, Nashville, Tennessee

Member since 1989; Board member since 1996; Chair – We Build People Campaign 2000-2001; Board Vice-President 2001 - 2002; Board President 2002 - 2004; Chair of Membership Experience Committee 2011 – present; Volunteer of the Year Award – 2000; Spirit of the Y Award - 2001

NaCoMe Camp and Conference Center, Pleasantville, Tennessee

Board member 2007-2011; Board Secretary 2010-2011; Chair of Personnel Committee 2010-2011

Hume-Fogg High School Parent-Teacher Organization, Nashville, Tennessee

Board Member 2006-2012; Sophomore Parent Representative 2006-2007; Junior Parent Representative 2007-2008; Chair of Hospitality Committee 2008 – 2012

Hume-Fogg High School Theatre Department, Nashville, Tennessee

2006 – present: I serve as the props, costume and make-up coordinator for the Theatre Department’s fall and spring theatre productions

Walk/Bike Nashville, Nashville, Tennessee

Member and volunteer since its inception in 1989; volunteer with annual Tour de Nash bike ride and bike valet parking at various community events such as “Live on the Green.”

27. Have you ever belonged to any organization, association, club or society which limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.
- a. If so, list such organizations and describe the basis of the membership limitation.
 - b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No

ACHIEVEMENTS

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

National Association of State Charities Officials (NASCO)

Board member since 2011; Board Secretary 2012; Board Vice-President and President-Elect 2013

NASCO Conference Agenda Committee – NASCO sponsors an annual conference each year for state and federal regulators, academics and members of the nonprofit community. This committee is responsible for planning the Agenda each year for the conference, recruiting speakers, preparing presentations and participating in panel discussions.

NASCO Legislation committee – this committee is responsible for collecting, reviewing and reporting on all pending state and federal legislation related to nonprofit/charitable regulation.

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

Named Senior Counsel in 1998:

Attorneys in the Attorney General’s Office are eligible for nomination as Senior Counsel following eight years of licensure and experience and after six of those years in the Attorney General’s Office. To qualify for Senior Counsel, attorneys must have progressed in terms of expertise gained, skills developed and practices, and complexity and volume of matters which they can handle. Attorneys must increasingly exhibit the traits which the Attorney General’s Office particularly fosters in its attorneys, *i.e.*: creativity (*e.g.*, in problem solving, research, work environment problems, office problems, *etc.*); Aggressiveness (in all aspects of practice, teaching, learning, *etc.*); Respect (for self, for the Office for other lawyers and staff, for clients and for the legal profession); Excellence (in all aspects of job performance), and Soundness (in skills and judgment).

Received William M. Leech, Jr. Award in 2011:

The Leech Award, named for former Attorney General William M. Leech, Jr., is presented each year for outstanding service to the Attorney General’s Office. The Leech Award recognizes individuals who have made significant contributions to the high quality of work in the Office. The recipients of the Award exhibit professionalism, excellence, good judgment, respect, loyalty, ethics and innovation. Persons must have five or more years of service in the Attorney General’s Office to be eligible for nomination.

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

Not applicable

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.

Panel Presentation – *Issues in Nonprofit Receiverships*, National Association of State Charities Officials Annual Conference (NASCO), Silver Springs, MD, October 2013

Public Records – Recent Developments, Nashville Bar Association Government Lawyer’s CLE, August 2013

Judicial Elections in Tennessee, Tennessee Judicial Conference, March 2013

Public Record Review – District Attorney Generals’ Conference, January 2013

Role of an Attorney in Advising a Public Body in Context of the Open Meetings Act – Tennessee Bar Association CLE, November 2012

Role of the Lawyer in Politics, Belmont University Inns of Court, November 2012

Public Records Act Review – Shelby County District Attorney General’s Office, September 2012

Public Records Seminar – District Attorney Generals’ Drug Task Force, Nashville, August 2012

Electronic Discovery – Ethical Issues, Tennessee Municipal Attorneys Association, Knoxville, June 2012

Lorman Election Law Seminar - *Upcoming First Amendment Issues in Election Law*, Nashville, May 2012

Public Records Act Review, Tennessee Department of Health Executive Committee, Nashville, March 2012

Electronic Discovery – A Primer, Tennessee Department of Human Resources Government Lawyers CLE, Nashville, December 2011

Ethical Issues in Electronic Discovery, Nashville Bar Association Government Lawyer’s Ethics CLE, December 2011

Public Records Act Review – Tennessee Department of Commerce and Insurance, Nashville, February 2010

Guest Lecturer, *Public Records and Open Meetings Act*, Administrative Law course, Nashville School of Law, December 2012

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

None

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

No

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

I have attached a copy of the Attorney General’s Brief in <i>In re Estate of Ledford</i> and Tenn. Att’y Gen. Op. 09-52. These writings are entirely my own work other than some minor editing/proofreading by the Solicitor General’s Office.

ESSAYS/PERSONAL STATEMENTS

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

<p>As a young girl, I was the victim of a violent crime. A positive result from that otherwise terribly negative event was that I knew at a young age that I wanted to be an attorney. I was not focused on the criminal justice system, <i>per se</i>, but I saw first-hand the positive impacts that thoughtful and compassionate judges and attorneys could have on a person’s life. I suppose I was fortunate that the legal system “worked” in my case because the result for me was a life-long interest in the value of our laws and in the fair application of those laws. That interest was encouraged during my clerkship with Judge Koch and continues to be encouraged with my trial and appellate practice.</p> <p>Additionally, both my husband and I are committed to community service and participation and have tried to live out that commitment – my husband by serving as a Council member on the Nashville Metro Council, and myself by working in the Attorney General’s Office. As an attorney in the Attorney General’s Office, I am always conscious that I represent the people of the State of Tennessee and consequently, I have always been committed to serving their best interests. Appointment to the Court of Appeals would allow me to continue that service.</p>

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

During most of my time with the State Attorney General’s Office, I was prohibited by statute from participating in direct pro bono work. Instead of traditional pro bono, I have participated in

other uncompensated law-related activities in support of various non-profit and community organizations. For the past four years I have served as a judge at the Vanderbilt University First Amendment Center's National Moot Court Competition – providing input and guidance to participants during the initial and semi-final rounds. I also have been an instructor and panelist for the past four years at the Waller Law Firm's Annual Nonprofit Seminar. At that event, middle Tennessee nonprofits receive free instruction and advice on a variety of legal and regulatory topics. I also speak regularly to outside groups about the Public Records Act. Finally, my husband and I support the Nashville pro bono program through financial contributions to the Legal Aid Society of Middle Tennessee.

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 Tennessee Court of Appeals was created by the Tennessee General Assembly in 1925 “to lighten the labors of the Supreme Court.” Pursuant to Tenn. Code Ann. § 16-4-102, there are twelve (12) judges of the court of appeals, of whom not more than four (4) shall reside in one (1) grand division of the state, and each of whom shall not be less than thirty (30) years of age and shall have been a resident of the state (5) years before qualification; and be learned in the law. I am applying for a vacancy on the Middle Section of the Court of Appeals. The jurisdiction of the court is appellate only for all civil cases, with the exception of workers’ compensation cases appeals pursuant to Tenn. Code Ann. § 37-10-304(g) and appeals in attorney disciplinary proceedings pursuant to Tenn. Sup. Ct. R. 9, § 1.3. The court of appeals also has jurisdiction over civil or criminal contempt arising out of a civil matter.

If nominated and appointed to the Court of Appeals, I would bring to the court a commitment to the rule of law. The Attorney General’s Office has always required its attorneys to exhibit a high level of competency and professionalism. I believe I have met those standards throughout my career with that office and would bring the same dedication to the court. Equally as important, I hope to bring to the court an overt respect for the litigants. It is important for members of the bench to remember that for most parties before the court, the lawsuit is probably a huge milestone in their lives. Although the attorneys and judges may be focused on arcane and technical legal issues, for most litigants the lawsuit will have an impact on their lives and may, in fact, have become the major focus of their lives for several years. I also have come to appreciate judges who are respectful of both parties and members of the bar by recognizing the value of and constraints on their time.

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

I am fortunate to be able to say I “come from good people.” My family was blessed with more than some people, and certainly less than others. Although I have had my share of hardship and sadness – my mother passed away too young in 1987 – life has generally been good. Because of that, I have always felt the only appropriate response is to give of my time to organizations that I

believe promote a positive mission.

When our children were much younger, I stayed active in organizations that affected our children's lives through serving on the Board of their school Parent Teacher Organizations, serving on the board of directors for the nonprofit aftercare entity, and – with my husband – as co-Cubmaster of a Cub Scout Pack. I also served on the steering committee for the Miss Julia Green Fund for Education, which raised approximately \$3 million to allow the school to build a new and also provided seed money to allow the Nashville Community Foundation to provide fundraising support for other Nashville schools.

More recently, now that my children are in college, I have shifted my community involvement to the other organizations, which are listed in response to Question 26 of this application. I believe in the mission of the YMCA to build strong kids, strong families and strong communities. When my children were students at Hume-Fogg Academic Magnet High School, I saw first-hand how participating in theater helps young people gain confidence. My husband and I realized last year that just because we no longer have children at the school does not mean our involvement in the HFA theater program had to end, so we have continued to be active volunteers. Finally, it is not my nature to be overtly evangelical, but I will say that few things give me more joy than the hour I have been able to spend each week for the past 13 years with children as part of Second Presbyterian Church's "Peaceable Kingdom" Sunday school program.

Fortunately for me, serving on the court is not likely to pose any conflict of interest with any of these activities. For that reason, I do not intend to decrease my involvement should I be fortunate enough to be nominated and chosen for the position.

In addition to my current community involvement, I would hope to build on my experience in public speaking and become involved in many of the programs established by the Tennessee Judiciary, such as the CASE Project, the GAVELS program and the Speakers Bureau.

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

If I had to choose a word to describe how I have tried to live my life, that word might be "balance." Throughout my life I have tried to balance hard work with having a normal life – whatever that is. I worked hard in school and graduated among the top in my class. At the same time, from my junior year in high school through law school, I worked outside of school, whether at a law firm, Eastman Chemical Company, or Pizza Hut. But, it's also true that all work and no play makes for a dull life. So I also tried to enjoy myself. I sang in the choir in high school, and participated in theatre in college and high school. In law school my (now) husband and I would go hiking in the Smokies and host parties for other students.

As an adult, I have tried my best to be an excellent and hard-working member of the Attorney General's office and I think my work speaks to that. I have tried to balance that hard work, though, with involvement in my children's activities and with the activities I enjoy. I love to cook and to putter around in the garden. And heaven help the person who tries to take away my

annual vacation to the beach in South Carolina.

As a judge, I would hope to bring that same balance to the bench by balancing judicial acumen and adherence to the law with practicality, reasonableness, and efficiency. Opinions should be accurate, clear, and produced in a timely manner and I believe that my experiences would allow me to meet that standard.

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, as long as the law is consistent with the state and federal constitutions. When I joined the Attorney General's Office, I was required to take an oath to uphold the laws of the State of Tennessee, as well as the state and federal constitution. This is an oath that I have taken very seriously. There definitely have been times during my career where I may have disagreed personally with the policy behind a statute or rule. But again, as long as that statute is consistent with the state and federal constitution, then I have a duty under my oath, as well as an ethical obligation under the Rules of Professional Conduct, to defend that statute to the best of my ability.

The only specific example I can think of where I personally have disagreed with the substance of a law has been a provision in the Public Records Act that allows governments to charge for copies of records in order to recover the costs incurred in retrieving, producing, and where necessary, redacting information from the documents. The Act does not allow governments to charge for inspection of records, even though the government may incur the exact same costs in producing them for inspection. Although I believe such a distinction is illogical and irrational, I have consistently advised everyone in state government – from the Governor's legal counsel, to the Secretary of State, to D.A.'s, to employees in state departments – as to what the Act provides rather than what I might believe it should provide.

REFERENCES

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

A. Robert E. Cooper, Jr., Tennessee Attorney General, 425 5th Avenue North, Nashville, TN 37243 (615) 741-6474

B. Kenny Alonzo, Group Vice President, YMCA of Middle Tennessee, 1000 Church Street, Nashville, TN 37203 (615) 256-9622, ext. 70910; [REDACTED]

C. Cathy Hoop, Director of Children's Ministries, Second Presbyterian Church, 3343

Belmont Avenue, Nashville, TN 37212 (615) 292-3343
D. Justice William C. Koch, Supreme Court Building, Suite 321, 401 7 th Avenue North, Nashville, TN (615) 741-5150
E. Knox Walkup, Wyatt Tarrant & Combs LLP, 2525 West End Avenue, Suite 1500, Nashville, TN 37203 (615) 251-6713

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] Court of Appeals for the Middle Grand Division of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

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

Dated: June 10, 2013.

Janet M. Klieftho
Signature

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



TENNESSEE JUDICIAL NOMINATING COMMISSION

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

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

WAIVER OF CONFIDENTIALITY

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

Janet M. Kleinfelter _____
Type or Printed Name

Janet M. Klif _____
Signature

June 10, 2013 _____
Date

013889 _____
BPR #

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

APPENDIX

List of 144 results for Janet Kleinfelter

1. Honorable Douglas Henry

Tenn.A.G. | May 22, 2006 | Tenn. Op. Atty. Gen. No. 06-095 | 06-095 | 2006 WL 1557048

...Janet M. Kleinfelter...

2. Honorable Mike Turner

Tenn.A.G. | April 27, 2006 | Tenn. Op. Atty. Gen. No. 06-078 | 06-078 | 2006 WL 1557065

...Janet M. Kleinfelter...

3. Honorable Curt Cobb

Tenn.A.G. | October 12, 2006 | Tenn. Op. Atty. Gen. No. 06-163 | 06-163 | 2006 WL 3102002

...Janet M. Kleinfelter...

4. Honorable Marsha Blackburn

Tenn.A.G. | August 16, 1999 | Tenn. Op. Atty. Gen. No. 99-152 | 99-152 | 1999 WL 728597

...Janet M. Kleinfelter...

5. Honorable Frank Buck

Tenn.A.G. | August 22, 2001 | Tenn. Op. Atty. Gen. No. 01-132 | 01-132 | 2001 WL 1048622

...Janet M. Kleinfelter...

6. The Honorable Gerald McCormick

Tenn.A.G. | August 13, 2007 | Tenn. Op. Atty. Gen. No. 07-119 | 07-119 | 2007 WL 2819330

...Janet M. Kleinfelter...

7. Honorable Bill Dunn

Tenn.A.G. | January 19, 2006 | Tenn. Op. Atty. Gen. No. 06-013 | 06-013 | 2006 WL 370936

...Janet M. Kleinfelter...

8. The Honorable William A. Baird

Tenn.A.G. | April 03, 2008 | Tenn. Op. Atty. Gen. No. 08-83 | 08-83 | 2008 WL 950210

...Janet M. Kleinfelter...

9. The Honorable David Hawk

Tenn.A.G. | February 25, 2009 | Tenn. Op. Atty. Gen. No. 09-17 | 09-17 | 2009 WL 512401

...Janet M. Kleinfelter...

10. The Honorable Ulysses Jones, Jr.

Tenn.A.G. | April 15, 2010 | Tenn. Op. Atty. Gen. No. 10-51 | 10-51 | 2010 WL 1557459



...Janet M. Kleinfelter...

11. Representative John Hood

Tenn.A.G. | December 01, 1997 | Tenn. Op. Atty. Gen. No. 97-158 | 97-158 | 1997 WL 783126

...Janet M. Kleinfelter...

12. The Honorable Gary Moore

Tenn.A.G. | July 10, 2008 | Tenn. Op. Atty. Gen. No. 08-122 | 08-122 | 2008 WL 2764627



...Janet M. Kleinfelter...

13. The Honorable Debra Maggart

Tenn.A.G. | December 08, 2009 | Tenn. Op. Atty. Gen. No. 09-183 | 09-183 | 2009 WL 4733553

...Janet M. Kleinfelter...

14. Jerry Cooper

Tenn.A.G. | April 29, 1997 | Tenn. Op. Atty. Gen. No. 97-058 | 97-058 | 1997 WL 289959

...Janet M. Kleinfelter...

...JANET M. KLEINFELTER...

15. The Honorable Beth Harwell

Tenn.A.G. | December 06, 2007 | Tenn. Op. Atty. Gen. No. 07-160 | 07-160 | 2007 WL 4800779

...Janet M. Kleinfelter...

16. Honorable Michael W. Catalano

Tenn.A.G. | July 14, 2008 | Tenn. Op. Atty. Gen. No. 08-123 | 08-123 | 2008 WL 2782558



...Janet M. Kleinfelter...

17. The Honorable Mike Stewart

Tenn.A.G. | March 24, 2010 | Tenn. Op. Atty. Gen. No. 10-37 | 10-37 | 2010 WL 1189476



...Janet M. Kleinfelter...

18. W. Michael McCown

Tenn.A.G. | July 03, 1995 | Tenn. Op. Atty. Gen. No. 95-069 | Opinion No. 95-069 | 1995 WL 399143

...Janet M. Kleinfelter...

19. The Honorable Frank Buck

Tenn.A.G. | April 28, 1998 | Tenn. Op. Atty. Gen. No. 98-094 | 98-094 | 1998 WL 227416

...Janet M. Kleinfelter...

20. The Honorable Kent Williams

Tenn.A.G. | September 10, 2008 | Tenn. Op. Atty. Gen. No. 08-146 | 08-146 | 2008 WL 4211694

...Janet M. Kleinfelter...

21. The Honorable Jimmy A. Eldridge

Tenn.A.G. | August 27, 2010 | Tenn. Op. Atty. Gen. No. 10-94 | 10-94 | 2010 WL 3427212

List of 144 results for Janet Kleinfelter

...Janet M. Kleinfelter...

22. The Honorable Roscoe Dixon

Tenn.A.G. | August 26, 1994 | Tenn. Op. Atty. Gen. No. 94-090 | OPINION NO. 94-090 | 1994 WL 477732

...Janet M. Kleinfelter...

23. Honorable John S. Wilder

Tenn.A.G. | April 21, 2006 | Tenn. Op. Atty. Gen. No. 06-074 | 06-074 | 2006 WL 1197468

...Janet M. Kleinfelter...

24. Harry A. Green

Tenn.A.G. | August 15, 2006 | Tenn. Op. Atty. Gen. No. 06-129 | 06-129 | 2006 WL 2929081

...Janet M. Kleinfelter...

25. Honorable Mike Kernell

Tenn.A.G. | February 13, 2007 | Tenn. Op. Atty. Gen. No. 07-17 | 07-17 | 2007 WL 579119

...Janet M. Kleinfelter...

26. Honorable Debra Young Maggart

Tenn.A.G. | July 03, 2007 | Tenn. Op. Atty. Gen. No. 07-98 | 07-98 | 2007 WL 2221359

...Janet M. Kleinfelter...

27. Honorable Paul R. Stanley

Tenn.A.G. | October 05, 2006 | Tenn. Op. Atty. Gen. No. 06-153 | 06-153 | 2006 WL 3101992

...Janet M. Kleinfelter...

28. Representative Ronnie M. Cole

Tenn.A.G. | October 02, 1995 | Tenn. Op. Atty. Gen. No. 95-101 | Opinion No. 95-101 | 1995 WL 590717

...Janet M. Kleinfelter...

29. Honorable Steve McDaniel

Tenn.A.G. | August 28, 1998 | Tenn. Op. Atty. Gen. No. 98-176 | 98-176 | 1998 WL 661350

...Janet M. Kleinfelter...

30. Ms. Rebecca G. Paul

Tenn.A.G. | July 19, 2005 | Tenn. Op. Atty. Gen. No. 05-113 | 05-113 | 2005 WL 1839893

...Janet M. Kleinfelter...

31. Honorable Joe McCord

Tenn.A.G. | September 20, 2005 | Tenn. Op. Atty. Gen. No. 05-143 | 05-143 | 2005 WL 2755407

...Janet M. Kleinfelter...

32. The Honorable Frank Buck

Tenn.A.G. | February 22, 2006 | Tenn. Op. Atty. Gen. No. 06-038 | 06-038 | 2006 WL 853275

List of 144 results for Janet Kleinfelter

...Janet M. Kleinfelter...

33. The Honorable Glen Casada

Tenn.A.G. | March 11, 2010 | Tenn. Op. Atty. Gen. No. 10-30 | 10-30 | 2010 WL 936085

...Janet M. Kleinfelter...

34. Representative L. Don Ridgeway

Tenn.A.G. | March 12, 1996 | Tenn. Op. Atty. Gen. No. 96-040 | Opinion No. 96-040 | 1996 WL 115826

...Janet M. Kleinfelter...

35. Judge James L. Cotton, Jr.

Tenn.A.G. | August 30, 1996 | Tenn. Op. Atty. Gen. No. 96-108 | 96-108 | 1996 WL 549142

...Janet M. Kleinfelter...

36. The Honorable James F. Kyle

Tenn.A.G. | February 12, 2004 | Tenn. Op. Atty. Gen. No. 04-023 | 04-023 | 2004 WL 367640

...Janet M. Kleinfelter...

37. Brook Thompson

Tenn.A.G. | July 26, 2005 | Tenn. Op. Atty. Gen. No. 05-115 | 05-115 | 2005 WL 2215821



...Janet M. Kleinfelter...

38. The Honorable Bill Dunn

Tenn.A.G. | July 28, 2009 | Tenn. Op. Atty. Gen. No. 09-133 | 09-133 | 2009 WL 2360722

...Janet M. Kleinfelter...

39. Honorable Russell Johnson

Tenn.A.G. | October 31, 2005 | Tenn. Op. Atty. Gen. No. 05-166 | 05-166 | 2005 WL 3521004



...Janet M. Kleinfelter...

40. Senator Jerry W. Cooper

Tenn.A.G. | December 28, 1992 | Tenn. Op. Atty. Gen. No. 92-69 | Opinion No. 92-69 | 1992 WL 545046

...Janet M. Kleinfelter...

41. Representative Robert S. McKee

Tenn.A.G. | June 04, 2001 | Tenn. Op. Atty. Gen. No. 01-090 | 01-090 | 2001 WL 764475

...Janet M. Kleinfelter...

42. The Honorable Jimmy Matlock

Tenn.A.G. | March 10, 2008 | Tenn. Op. Atty. Gen. No. 08-48 | 08-48 | 2008 WL 687171

...Janet M. Kleinfelter...

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43. The Honorable Michael Harrison

Tenn.A.G. | October 16, 2009 | Tenn. Op. Atty. Gen. No. 09-167 | 09-167 | 2009 WL 3479585

...Janet M. Kleinfelter...

44. The Honorable Stacey Campfield

Tenn.A.G. | November 02, 2009 | Tenn. Op. Atty. Gen. No. 09-174 | 09-174 | 2009 WL 3666431

...Janet M. Kleinfelter...

45. The Honorable Matthew Hill

Tenn.A.G. | July 12, 2011 | Tenn. Op. Atty. Gen. No. 11-57 | 11-57 | 2011 WL 4031224

...Janet M. Kleinfelter...

46. The Honorable Mike Stewart

Tenn.A.G. | March 27, 2013 | Tenn. Op. Atty. Gen. No. 13-29 | 13-29 | 2013 WL 1384294



...Janet M. Kleinfelter...

47. Representative Steve K. McDaniel

Tenn.A.G. | March 26, 1996 | Tenn. Op. Atty. Gen. No. 96-052 | Opinion No. 96-052 | 1996 WL 147605

...Janet M. Kleinfelter...

48. Honorable Jim Bryson

Tenn.A.G. | January 30, 2006 | Tenn. Op. Atty. Gen. No. 06-021 | 06-021 | 2006 WL 370946

...Janet M. Kleinfelter...

49. The Honorable Susan Lynn

Tenn.A.G. | May 14, 2007 | Tenn. Op. Atty. Gen. No. 07-65 | 07-65 | 2007 WL 1558704

...Janet M. Kleinfelter...

50. The Honorable H. Greeley Wells, Jr.

Tenn.A.G. | January 25, 2010 | Tenn. Op. Atty. Gen. No. 10-08 | 10-08 | 2010 WL 376304

...Janet M. Kleinfelter...

51. The Honorable Stacey Campfield

Tenn.A.G. | January 28, 2010 | Tenn. Op. Atty. Gen. No. 10-11 | 10-11 | 2010 WL 376307

...Janet M. Kleinfelter...

52. Senator Gene Elsea

Tenn.A.G. | May 19, 1994 | Tenn. Op. Atty. Gen. No. 94-070 | Opinion No. 94-070 | 1994 WL 235604

...Janet M. Kleinfelter...

53. The Honorable Steve Cohen

Tenn.A.G. | April 27, 2005 | Tenn. Op. Atty. Gen. No. 05-063 | 05-063 | 2005 WL 1182338

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54. Honorable Henri E. Brooks

Tenn.A.G. | October 05, 2006 | Tenn. Op. Atty. Gen. No. 06-152 | 06-152 | 2006 WL 3101991

...Janet M. Kleinfelter...

55. The Honorable Gary Odom

Tenn.A.G. | September 11, 2008 | Tenn. Op. Atty. Gen. No. 08-147 | 08-147 | 2008 WL 4255674

...Janet M. Kleinfelter...

56. The Honorable Doug Jackson

Tenn.A.G. | November 10, 2008 | Tenn. Op. Atty. Gen. No. 08-172 | 08-172 | 2008 WL 4898402



...Janet M. Kleinfelter...

57. Brook K. Thompson

Tenn.A.G. | September 08, 2003 | Tenn. Op. Atty. Gen. No. 03-111 | 03-111 | 2003 WL 22256612

...Janet M. Kleinfelter...

58. Honorable Debra Maggart

Tenn.A.G. | June 23, 2006 | Tenn. Op. Atty. Gen. No. 06-104 | 06-104 | 2006 WL 2104245

...Janet M. Kleinfelter...

59. Honorable Susan Lynn

Tenn.A.G. | August 15, 2006 | Tenn. Op. Atty. Gen. No. 06-128 | 06-128 | 2006 WL 2929080

...Janet M. Kleinfelter...

60. Honorable Mike Kernell

Tenn.A.G. | February 26, 2007 | Tenn. Op. Atty. Gen. No. 07-20 | 07-20 | 2007 WL 778907

...Janet M. Kleinfelter...

61. The Honorable Dewayne Bunch

Tenn.A.G. | May 01, 2009 | Tenn. Op. Atty. Gen. No. 09-68 | 09-68 | 2009 WL 1258488

...Janet M. Kleinfelter...

62. The Honorable Brian Kelsey

Tenn.A.G. | May 29, 2009 | Tenn. Op. Atty. Gen. No. 09-103 | 09-103 | 2009 WL 1570326

...Janet M. Kleinfelter...

63. The Honorable Mike Stewart

Tenn.A.G. | March 26, 2013 | Tenn. Op. Atty. Gen. No. 13-26 | 13-26 | 2013 WL 1384291

...Janet M. Kleinfelter...

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64. Representative L. Don Ridgeway

Tenn.A.G. | July 16, 1996 | Tenn. Op. Atty. Gen. No. 96-087 | 96-087 | 1996 WL 417136

...Janet M. Kleinfelter...

65. Honorable Joe F. Fowlkes

Tenn.A.G. | October 12, 1998 | Tenn. Op. Atty. Gen. No. 98-198 | 98-198 | 1998 WL 746215

...Janet M. Kleinfelter...

66. The Honorable Randy McNally

Tenn.A.G. | July 09, 2007 | Tenn. Op. Atty. Gen. No. 07-101 | 07-101 | 2007 WL 2221362

...Janet M. Kleinfelter...

67. The Honorable Dewayne Bunch

Tenn.A.G. | May 18, 2009 | Tenn. Op. Atty. Gen. No. 09-90 | 09-90 | 2009 WL 1430920

...Janet M. Kleinfelter...

68. The Honorable Gerald McCormick

Tenn.A.G. | December 30, 2010 | Tenn. Op. Atty. Gen. No. 10-126 | 10-126 | 2010 WL 6209897

...Janet M. Kleinfelter...

69. The Honorable Ken Yager

Tenn.A.G. | June 07, 2012 | Tenn. Op. Atty. Gen. No. 12-62 | 12-62 | 2012 WL 2153494

...Janet M. Kleinfelter...

70. Honorable Henri E. Brooks

Tenn.A.G. | August 28, 2006 | Tenn. Op. Atty. Gen. No. 06-137 | 06-137 | 2006 WL 2920041

...Janet M. Kleinfelter...

71. The Honorable Debra Young Maggart

Tenn.A.G. | October 03, 2008 | Tenn. Op. Atty. Gen. No. 08-152 | 08-152 | 2008 WL 4533263

...Janet M. Kleinfelter...

72. The Honorable Mark Goins

Tenn.A.G. | June 29, 2009 | Tenn. Op. Atty. Gen. No. 09-124 | 09-124 | 2009 WL 1903705

...Janet M. Kleinfelter...

73. The Honorable Brenda Gilmore

Tenn.A.G. | May 24, 2010 | Tenn. Op. Atty. Gen. No. 10-74 | 10-74 | 2010 WL 2150258

...Janet M. Kleinfelter...

74. Senator John N. Ford

Tenn.A.G. | July 23, 1993 | Tenn. Op. Atty. Gen. No. 93-50 | Opinion No. 93-50 | 1993 WL 475434

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75. Don Bird

Tenn.A.G. | March 09, 1998 | Tenn. Op. Atty. Gen. No. 98-062 | 98-062 | 1998 WL 129920

...Janet M. Kleinfelter...

76. Mike Kernell

Tenn.A.G. | March 09, 1998 | Tenn. Op. Atty. Gen. No. 98-061 | 98-061 | 1998 WL 129924

...Janet M. Kleinfelter...

77. The Honorable Ken Givens

Tenn.A.G. | May 14, 1999 | Tenn. Op. Atty. Gen. No. 99-117 | 99-117 | 1999 WL 321952

...Janet M. Kleinfelter...

78. Honorable Rob Briley

Tenn.A.G. | July 25, 2006 | Tenn. Op. Atty. Gen. No. 06-116 | 06-116 | 2006 WL 2338873

...Janet M. Kleinfelter...

79. Senator Stephen I. Cohen

Tenn.A.G. | March 18, 1994 | Tenn. Op. Atty. Gen. No. 94-035 | Opinion No. 94-035 | 1994 WL 94137

...Janet M. Kleinfelter...

80. The Honorable G. A. Hardaway

Tenn.A.G. | May 19, 2008 | Tenn. Op. Atty. Gen. No. 08-112 | 08-112 | 2008 WL 2158599

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81. The Honorable Charlotte Burks

Tenn.A.G. | December 01, 2008 | Tenn. Op. Atty. Gen. No. 08-182 | 08-182 | 2008 WL 5112279

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82. The Honorable Tony Shipley

Tenn.A.G. | June 06, 2012 | Tenn. Op. Atty. Gen. No. 12-60 | 12-60 | 2012 WL 2153492



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83. Honorable Curtis Johnson

Tenn.A.G. | April 05, 2006 | Tenn. Op. Atty. Gen. No. 06-060 | 06-060 | 2006 WL 1197454

...Janet M. Kleinfelter...

84. Honorable Bill Dunn

Tenn.A.G. | September 08, 2006 | Tenn. Op. Atty. Gen. No. 06-138 | 06-138 | 2006 WL 2920043

...Janet M. Kleinfelter...

85. Senator Stephen L. Cohen

Tenn.A.G. | January 17, 2003 | Tenn. Op. Atty. Gen. No. 03-004 | 2003 WL 174004

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86. Honorable Leslie Winningham

Tenn.A.G. | April 14, 2003 | Tenn. Op. Atty. Gen. No. 03-042 | 03-042 | 2003 WL 21030182

...Janet M. Kleinfelter...

87. Honorable Frank Niceley

Tenn.A.G. | February 12, 2007 | Tenn. Op. Atty. Gen. No. 07-14 | 07-14 | 2007 WL 579116

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88. The Honorable Bill Dunn

Tenn.A.G. | May 20, 2008 | Tenn. Op. Atty. Gen. No. 08-113 | 08-113 | 2008 WL 2158600

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89. The Honorable Ulysses Jones, Jr.

Tenn.A.G. | November 13, 2009 | Tenn. Op. Atty. Gen. No. 09-178 | 09-178 | 2009 WL 3858021

...Janet M. Kleinfelter...

90. The Honorable Jimmy Matlock

Tenn.A.G. | December 21, 2007 | Tenn. Op. Atty. Gen. No. 07-170 | 07-170 | 2007 WL 4800789

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91. The Honorable Tim Burchett The Honorable Jamie Woodson

Tenn.A.G. | August 19, 2008 | Tenn. Op. Atty. Gen. No. 08-139 | 08-139 | 2008 WL 3905631



...Janet M. Kleinfelter...

92. The Honorable Vince Dean

Tenn.A.G. | March 19, 2008 | Tenn. Op. Atty. Gen. No. 08-63 | 08-63 | 2008 WL 769071

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93. The Honorable Jamie Woodson

Tenn.A.G. | August 19, 2008 | Tenn. Op. Atty. Gen. No. 08-138 | 08-138 | 2008 WL 3905630

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94. The Honorable Eddie Yokley

Tenn.A.G. | March 30, 2010 | Tenn. Op. Atty. Gen. No. 10-39 | 10-39 | 2010 WL 1267806



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95. Honorable Leslie Winningham

Tenn.A.G. | May 02, 2001 | Tenn. Op. Atty. Gen. No. 01-069 | 01-069 | 2001 WL 575452

...Janet M. Kleinfelter...

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96. Honorable Frank Buck

Tenn.A.G. | June 27, 2002 | Tenn. Op. Atty. Gen. No. 02-076 | 02-076 | 2002 WL 1733780

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97. Honorable Gerald McCormick

Tenn.A.G. | March 01, 2007 | Tenn. Op. Atty. Gen. No. 07-23 | 07-23 | 2007 WL 778910

...Janet M. Kleinfelter...

98. Honorable Michael L. Kernell

Tenn.A.G. | October 05, 2006 | Tenn. Op. Atty. Gen. No. 06-154 | 06-154 | 2006 WL 3101993

...Janet M. Kleinfelter...

99. The Honorable Dennis Ferguson

Tenn.A.G. | December 29, 2008 | Tenn. Op. Atty. Gen. No. 08-192 | 08-192 | 2008 WL 5427509

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100. Drew Rawlins

Tenn.A.G. | December 07, 2005 | Tenn. Op. Atty. Gen. No. 05-172 | 05-172 | 2005 WL 3521010

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101. The Honorable Randy McNally

Tenn.A.G. | August 13, 2007 | Tenn. Op. Atty. Gen. No. 07-120 | 07-120 | 2007 WL 2819331

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102. The Honorable W. Kent Coleman The Honorable Charlotte Burks

Tenn.A.G. | April 08, 2009 | Tenn. Op. Atty. Gen. No. 09-52 | 09-52 | 2009 WL 983587

...Janet M. Kleinfelter...

103. The Honorable Steve K. McDaniel

Tenn.A.G. | January 04, 2011 | Tenn. Op. Atty. Gen. No. 11-1 | 11-1 | 2011 WL 999200

...Janet M. Kleinfelter...

104. The Honorable Mike Faulk

Tenn.A.G. | July 31, 2012 | Tenn. Op. Atty. Gen. No. 12-79 | 12-79 | 2012 WL 3257606

...Janet M. Kleinfelter...

105. The Honorable Jim Bryson

Tenn.A.G. | August 15, 2005 | Tenn. Op. Atty. Gen. No. 05-124 | 05-124 | 2005 WL 2215830

...Janet M. Kleinfelter...

106. Honorable Mike Kernell

Tenn.A.G. | November 22, 2006 | Tenn. Op. Atty. Gen. No. 06-171 | 06-171 | 2006 WL 3749854

...Janet M. Kleinfelter...

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107. Peggy Nance Catalano

Tenn.A.G. | March 18, 1994 | Tenn. Op. Atty. Gen. No. 94-034 | Opinion No. 94-034 | 1994 WL 94140

...Janet M. Kleinfelter...

108. Honorable Jeanne Richardson

Tenn.A.G. | January 25, 2008 | Tenn. Op. Atty. Gen. No. 08-11 | 08-11 | 2008 WL 542914

...Janet M. Kleinfelter...

109. The Honorable Steve McManus

Tenn.A.G. | March 05, 2012 | Tenn. Op. Atty. Gen. No. 12-30 | 12-30 | 2012 WL 775083

...Janet M. Kleinfelter...

110. Representative Frank Buck

Tenn.A.G. | March 18, 1999 | Tenn. Op. Atty. Gen. No. 99-068 | 99-068 | 1999 WL 238967

...Janet M. Kleinfelter...

111. Drew Rawlins

Tenn.A.G. | February 07, 2008 | Tenn. Op. Atty. Gen. No. 08-21 | 08-21 | 2008 WL 542923

...Janet M. Kleinfelter...

112. The Honorable Jim Cobb

Tenn.A.G. | December 29, 2008 | Tenn. Op. Atty. Gen. No. 08-191 | 08-191 | 2008 WL 5427508

...Janet M. Kleinfelter...

113. The Honorable Mark Goins

Tenn.A.G. | May 20, 2009 | Tenn. Op. Atty. Gen. No. 09-92 | 09-92 | 2009 WL 1434339

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114. Honorable Rob Briley

Tenn.A.G. | April 12, 2006 | Tenn. Op. Atty. Gen. No. 06-068 | 06-068 | 2006 WL 1197462

...Janet M. Kleinfelter...

115. Honorable Judd C. Matheny

Tenn.A.G. | April 12, 2006 | Tenn. Op. Atty. Gen. No. 06-069 | 06-069 | 2006 WL 1197463

...Janet M. Kleinfelter...

116. The Honorable Ward Crutchfield

Tenn.A.G. | September 08, 2003 | Tenn. Op. Atty. Gen. No. 03-109 | 03-109 | 2003 WL 22256610

...Janet Kleinfelter...

117. The Honorable G. A. Hardaway, Sr.

Tenn.A.G. | February 13, 2008 | Tenn. Op. Atty. Gen. No. 08-24 | 08-24 | 2008 WL 474303

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118. The Honorable Chad Faulkner

Tenn.A.G. | March 10, 2010 | Tenn. Op. Atty. Gen. No. 10-29 | 10-29 | 2010 WL 936084

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119. The Honorable Bill Ketron

Tenn.A.G. | April 02, 2009 | Tenn. Op. Atty. Gen. No. 09-45 | 09-45 | 2009 WL 930173

...Janet M. Kleinfelter...

120. Honorable Ronald L. Ramsey

Tenn.A.G. | January 09, 2006 | Tenn. Op. Atty. Gen. No. 06-005 | 06-005 | 2006 WL 370928

...Janet M. Kleinfelter...

121. Honorable Bill Ketron

Tenn.A.G. | April 25, 2007 | Tenn. Op. Atty. Gen. No. 07-58 | 07-58 | 2007 WL 1451645

...Janet M. Kleinfelter...

122. The Honorable Bill Ketron

Tenn.A.G. | May 05, 2011 | Tenn. Op. Atty. Gen. No. 11-41 | 11-41 | 2011 WL 3013850

...Janet M. Kleinfelter...

123. The Honorable Drew Rawlins

Tenn.A.G. | December 29, 2011 | Tenn. Op. Atty. Gen. No. 11-83 | 11-83 | 2011 WL 6962443

...Janet M. Kleinfelter...

124. The Honorable Jerry W. Cooper

Tenn.A.G. | October 20, 1999 | Tenn. Op. Atty. Gen. No. 99-207 | 99-207 | 1999 WL 1012986

...Janet M. Kleinfelter...

125. County employee - member of county legislative body

Tenn.A.G. | October 09, 2000 | Tenn. Op. Atty. Gen. No. 00-153 | Opinion No. 00-153 | 2000 WL 1597471

...Janet M. Kleinfelter...

126. Drew Rawlins

Tenn.A.G. | September 09, 2003 | Tenn. Op. Atty. Gen. No. 03-112 | 03-112 | 2003 WL 22256613

...Janet M. Kleinfelter...

127. The Honorable Tim Burchett

Tenn.A.G. | March 31, 2008 | Tenn. Op. Atty. Gen. No. 08-68 | 08-68 | 2008 WL 906478

...Janet M. Kleinfelter...

128. Representative Steve K. McDaniel

Tenn.A.G. | March 27, 1996 | Tenn. Op. Atty. Gen. No. 96-054 | Opinion No. 96-054 | 1996 WL 147607

...Janet M. Kleinfelter...

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129. The Honorable Lincoln Davis

Tenn.A.G. | August 04, 2000 | Tenn. Op. Atty. Gen. No. 00-123 | 00-123 | 2000 WL 1210883

...Janet M. Kleinfelter...

130. The Honorable Jim Hackworth The Honorable Mike Faulk

Tenn.A.G. | June 10, 2009 | Tenn. Op. Atty. Gen. No. 09-112 | 09-112 | 2009 WL 1664970

...Janet M. Kleinfelter...

131. Cecil Crowson, Jr.

Tenn.A.G. | January 19, 1999 | Tenn. Op. Atty. Gen. No. 99-003 | 99-003 | 1999 WL 45262

...Janet M. Kleinfelter...

132. The Honorable Jerry N. Estes

Tenn.A.G. | May 03, 2002 | Tenn. Op. Atty. Gen. No. 02-058 | 02-058 | 2002 WL 870788

...Janet M. Kleinfelter...

133. Drew Rawlins

Tenn.A.G. | October 11, 2007 | Tenn. Op. Atty. Gen. No. 07-142 | 07-142 | 2007 WL 4898462

...Janet M. Kleinfelter...

134. The Honorable Lowe Finney The Honorable Craig Fitzhugh The Honorable Mike Turner

Tenn.A.G. | April 12, 2011 | Tenn. Op. Atty. Gen. No. 11-34 | 11-34 | 2011 WL 3013842

...Janet M. Kleinfelter...

135. Honorable Ward Crutchfield

Tenn.A.G. | January 31, 2001 | Tenn. Op. Atty. Gen. No. 01-015 | 01-015 | 2001 WL 138941

...Janet M. Kleinfelter...

136. The Honorable Stephen Cohen

Tenn.A.G. | April 19, 2005 | Tenn. Op. Atty. Gen. No. 05-049 | 05-049 | 2005 WL 998617

...Janet M. Kleinfelter...

137. The Honorable Robert Rochelle

Tenn.A.G. | January 22, 2003 | Tenn. Op. Atty. Gen. No. 03-007 | 03-007 | 2003 WL 174007

...Janet M. Kleinfelter...

138. Honorable Ben West, Jr.

Tenn.A.G. | April 08, 1999 | Tenn. Op. Atty. Gen. No. 99-086 | 99-086 | Tenn. Op. Atty. Gen. No. 98-053

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139. Ms. Peggy Nance Williams

Tenn.A.G. | July 10, 1998 | Tenn. Op. Atty. Gen. No. 98-121 | 98-121 | 1998 WL 424007

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140. The Honorable John P. Morgan

Tenn.A.G. | March 24, 2008 | Tenn. Op. Atty. Gen. No. 08-64 | 08-64 | 2008 WL 824235

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141. The Honorable Doug Jackson

Tenn.A.G. | May 12, 2010 | Tenn. Op. Atty. Gen. No. 10-66 | 10-66 | 2010 WL 1980278

...Janet M. Kleinfelter...

142. The Honorable Tommie F. Brown

Tenn.A.G. | December 21, 2007 | Tenn. Op. Atty. Gen. No. 07-169 | 07-169 | 2007 WL 4800788

...Janet M. Kleinfelter...

143. Honorable Tim Burchett

Tenn.A.G. | February 27, 2007 | Tenn. Op. Atty. Gen. No. 07-22 | 07-22 | 2007 WL 778909

...Janet M. Kleinfelter...

144. Senator Victor H. Ashe

Tenn.A.G. | February 19, 1980 | Tenn. Op. Atty. Gen. No. 80-100 | Opinion No. 80-100 | 1980 WL 103917

...See, e.g., *Morgan v. Sproate*, 432 F. Supp. 1130, 1136 (S.D. Miss. 1977) (Eighth Amendment applies to juveniles); *Janet D. v. Carros*, 362 A.2d 1060, 1071 (Pa. 1976)...

LEGAL WRITINGS

**IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION AT KNOXVILLE**

IN RE)
)
ESTATE OF HAZEL N. LEDFORD,) **Appeal No. E2012-01269-COA-R3-CV**
)
Petitioner-Appellee.) **On Appeal From Bradley County**
) **Probate Court No. 91-093**

**BRIEF OF RESPONDENT-APPELLANT ATTORNEY GENERAL AND
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ORAL ARGUMENT REQUESTED

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ISSUES PRESENTED FOR REVIEW

- I. Whether the trial court erred in approving amounts paid by the Personal Representative out of assets of the Estate for remediation of property not owned by the Estate.
- II. Whether the trial court erred in approving certain attorneys' fees paid by the Personal Representative out of assets of the Estate.

STATEMENT OF THE CASE

Hazel N. Ledford (the “Decedent”) died testate on June 22, 1991. (T.R. Vol. 1 at 7). On July 1, 1991, Martha Powell and John M. Powell, Jr., filed a Petition to administer the Decedent’s estate. (T.R. Vol. I at 7-9). The Petition stated that the estimated value of the Decedent’s personalty was \$340,000 and that the estimated value of the realty was \$130,000. (*Id.* at 7). The Petition further specifically identified the Bradley Memorial Hospital Citizens’ Endowment Fund as one of the legatees or devisees of the Decedent’s estate under a holographic Joint Will executed by Wilson A. Ledford and Hazel N. Ledford on November 30, 1989. (*Id.*). Under the terms of the Joint Will, a charitable remainder trust, the Wilson A. and Hazel N. Ledford Trust (“the Charitable Trust”), was to be established and funded with the remainder of the Decedent’s estate. The income from this Charitable Trust was to be paid to the children and grandchildren of Wilson Ledford and the remainder paid to the Bradley Memorial Hospital Citizens’ Endowment Fund. (T.R. Vol. I at 2-6).

The probate court admitted the Joint Will to probate on July 1, 1991, and ordered that Letters Testamentary be issued to Martha Ledford Powell and John M. Powell, Jr., as co-executors in accordance with the provisions of the Will.¹ (T.R. Vol. 1 at 10). John M. Powell, Jr., subsequently resigned as Co-Executor on August 18, 1992, leaving Martha Ledford Powell as the sole Personal Representative. (T.R. Vol. 1 at 12-13).

The Notice to Creditors was published in the Cleveland Daily Banner on July 3 and 10, 1991, in accordance with the provisions of Tenn. Code Ann. § 30-2-306. The Notice specifically stated:

¹The Will named Mrs. Powell as the administrator of the Estate and a hand-written codicil named John M. Powell, Jr., as the alternate executor. (T.R. Vol. I at 2-6).

All persons, resident and non-resident, having claims, matured or unmatured, against her estate are required to file same with the Clerk of the above named Court within six (6) months from the date of the first publication of this notice, otherwise their claims will be forever barred.

(T.R. Vol. I at 11). No inventory or accounting was filed by the Personal Representative as required by Tenn. Code Ann. § 30-2-301 and § 30-2-601. Additionally, it does not appear from the record that any claims were filed with the Clerk of the Bradley County Chancery Court, Probate Division.

The Personal Representative filed her first accounting on December 30, 2009, approximately 18 years after the Estate was opened for administration. (T.R. Vol. I at 14-23). Shortly thereafter, the Personal Representative filed her Final Accounting for the Estate on February 25, 2010. (T.R. Vol. I at 24-29). By the time the Final Accounting was filed, the Personal Representative had taken *no* steps to establish the Charitable Trust provided for under the terms of the Joint Will. Respondent Bradley Healthcare and Rehabilitation Center Citizens' Endowment Fund ("BHRCEF") filed its Objection to the Final Accounting on March 16, 2010.² (T.R. Vol. I at 30-32).

After a hearing on the Final Accounting, the Bradley County Clerk and Master filed his Report on May 28, 2010. (T.R. Vol. I at 33-36). The Report noted that the income and expenditures as listed in the Final Accounting were not date-specific, which made the Clerk and Master's review very difficult. (*Id.* at 34). The Report further concluded:

The Administrator of the estate accepts the "Ledford Family Trust" document of 1981 and the "Agreement" document of 1992 as being in full force and having direct influence upon the administration of the Estate. Should either of these documents be

² Bradley Healthcare and Rehabilitation Center Citizens' Endowment Fund is the successor-in-interest to the Bradley Memorial Hospital Citizens' Endowment Fund.

deemed not relative to the Estate, the evaluation of the accounting would change drastically.

The “agreement” document was signed by all parties, including a representative of Bradley Memorial Hospital, therefore, I have reviewed the accounting based on that document authorizing the abatement expenditures. The reasonableness and necessity of the majority of the expenditures rest in the validity of said documents.

(T.R. Vol. I at 36).

The trustees of BHRCCF filed their Exception to the Report on June 23, 2010 (T.R. Vol. I at 39-48), and the Tennessee Attorney General filed his exception to the Report on June 28, 2010. (T.R. Vol. I at 49-52).³ BHRCCF and the Attorney General excepted to various payments from assets of the Estate by the Personal Representative, including (1) payments for and related to the removal and remediation of underground storage tanks on real property that was not owned by the Decedent at the time of her death, (2) payment of various attorneys’ fees without proper approval, and (3) interest payments to the named income beneficiaries the Charitable Trust without any authority to make these payments. (T.R. Vol. 1 at 39-40, 49).

On November 18, 2010, a hearing was held on the Exceptions filed by BHRCCF and the Attorney General. No evidence or testimony was submitted at that hearing in support of any of the attorneys’ fees that had been paid by the Personal Representative out of assets of the Estate. (T. Vol. II at 193-94). Thereafter, on December 20, 2010, the Personal Representative filed a motion seeking approval of attorneys’ fees in the amount of \$16,593.75 and expenses totaling \$1,504.70. (T.R. Vol. I at 57-59). This motion was supported by the affidavits of Roger E. Jenne and Joshua H. Jenne with attached itemizations for services. (T.R. Vol. I at 60-83).

³Pursuant to Tenn. Code Ann. § 35-15-110(b), the Attorney General has the rights of a qualified beneficiary of a charitable trust. Accordingly, since the beneficiary of the remainder of the Decedent’s estate was the Charitable Trust, the Attorney General had the right to file an exception to the Clerk and Master’s Report on the Personal Representative’s Final Accounting.

The Personal Representative also filed a motion for additional compensation beyond the \$5,000 fee provided for in the Will. (T.R. Vol. I at 84-87).

BHRCCEF filed responses in opposition to both motions on January 20, 2011 (T.R. Vol. I at 88 – 131), and the Attorney General filed responses in opposition on January 24, 2011. (T.R. Vol. I at 132-151). With respect to the request for attorneys' fees, both BHRCCEF and the Attorney General objected to any attorneys' fees for Roger and Joshua Jenne in excess of the \$6,084.75 identified in the Personal Representative's sworn Final Accounting. (*Id.* at 88-151). BHRCCEF and the Attorney General also objected to the payment of any of the attorney fees to Frederick Hitchcock, as the Personal Representative had provided no affidavit or other documentary evidence in support of those fees. (*Id.* at 90, 135-144). With respect to the Personal Representative's request for additional compensation, the Attorney General and BHRCCEF asserted that under the applicable law she was limited to the \$5,000 fee set forth in the Will. (*Id.* at 117-119, 132-133).

On February 28, 2011, the trial court issued an order from the November 18 hearing in which it approved the payments by the Personal Representative related to the removal and remediation of underground storage tanks on the property owned by the Ledford Family Trust, as well as the distributions of interest payments to the income beneficiaries of the Charitable Trust under the Will. (T.R. Vol. I at 152-157). The court did order that all attorneys' fees paid concerning the lawsuit filed under Bradley County Chancery Court docket number 07-244 were not properly chargeable to the Estate and therefore had to be repaid to the Estate by the Personal Representative. Accordingly, the trial court allowed counsel for the Personal Representative additional time to file affidavits in support of their fee requests but ruled that any attorneys' fees

not found to be properly payable by the Estate would have to be reimbursed to the Estate by the Personal Representative. (*Id.*).

On March 14, 2011, the Personal Representative filed an Amended/Supplemental Motion for Approval of Attorney Fees requesting approval of fees and expenses already paid to Frederick Hitchcock in the amount of \$11,076.53⁴ and approval of fees in the amount of \$15,156.25 to Jenne, Scott & Jenne, PLLC. The affidavits of Mr. Hitchcock, Roger Jenne and Joshua Jenne were filed in support of the motion. (T.R. Vol. II at 158-176).

On April 19, 2011, BHCCEF and the Attorney General filed a joint Response in opposition noting that the Personal Representative was once against seeking fees for services rendered prior to the filing of the Final Accounting that were in excess of the amount listed in that sworn document. (T.R. Vol. II at 177-182). The Response also objected to a number of fees sought for services rendered in the separate action filed by the Personal Representative under Bradley County Chancery Court No. 07-244, which the trial court had already ruled were not chargeable against the Estate. The Response continued to object to any attorneys' fees associated with the removal and remediation of the underground storage tanks, and the Response further objected to any fees incurred in defending the Personal Representative's administration of the Estate as reflected in the Final Accounting. (*Id.*).

On June 14, 2011, the trial court entered an order ruling that (1) the fee of the Personal Representative was limited to \$5,000 as set forth in the Will; (2) the Personal Representative was judicially estopped from requesting additional attorneys' fees for services provided prior to the sworn Final Accounting; and (3) the Personal Representative's attorneys' fees for defending her administration of the Estate were chargeable against the Estate. (T.R. Vol. II at 183-186). The

⁴ The Final Accounting reflects that Mr. Hitchcock was actually paid only \$10,576.53 in fees and expenses rather than the \$11,076.53 requested in the Amended/Supplemental Motion. (T.R. Vol. 1 at 26-27).

trial court also allowed the payment of attorneys' fees to Frederick Hitchcock, Roger Jenne, and Joshua Jenne in connection with the removal and remediation of the underground storage tanks on the property owned by the Ledford Family Trust. (*Id.*). Finally, the trial court ordered that the fees of Roger and Joshua Jenne were to be amended to fall within the guidelines of the court's order, but it did not state specifically which fees were allowed or disallowed. (*Id.*).

On June 30, 2011, BHRCCCF and the Attorney General filed a Motion for Additional Findings essentially requesting that the trial court specify which fees of Roger and Joshua Jenne it was allowing and which fees it was disallowing. (T.R. Vol. II at 187-190). On May 9, 2012, the trial court entered an Order providing some further specification as to the fees allowed and disallowed and then otherwise ordered that "[a]ny outstanding motions not argued and adjudicated by an Order previously entered are deemed abandoned and therefore are denied." (T.R. Vol. II at 191-193).

The Attorney General and BHRCCCF timely filed their Notice of Appeal on June 8, 2012. (T.R. Vol. II at 194-198).

STATEMENT OF THE FACTS

The Decedent, Hazel Ledford, and her husband, Wilson A. Ledford, were both residents of Bradley County, Tennessee. Hazel Ledford was Wilson Ledford's second wife. Wilson Ledford had three children from his first marriage and six grandchildren. Mr. Wilson owned several pieces of real property in Bradley County, and for a number of years he operated a gas station on one of the pieces of property. A commercial building and several underground storage tanks were located on that property. (T. Vol. II at 152, 172; Exh. A to Exh. 5). However, by 1972, he had ceased operating the gas station. (T.R. Vol. II at 153).

Ledford Family Trust

In 1981, Mr. and Mrs. Ledford established the Ledford Family Trust. The Trustees of that Trust are Mr. Ledford's three children, including Martha Ledford Powell. The beneficiaries of the Trust are also Mr. Wilson's three children, as well as his six grandchildren. The property on which the gas station had been located and another piece of real property in Bradley County were both transferred to the trust in 1982. (T. Vol. II at 153; Exh. A to Exh. 4). After the transfer of this property to the Ledford Family Trust, the property was apparently commercially leased by the Trustees of the Trust. (T. Vol. II at 172). The Trustees of the Ledford Family Trust were aware that underground storage tanks were located on the property where Mr. Ledford had operated a gas station. (T. Vol. II at 152).

Bradley Memorial Hospital Citizens' Endowment Fund

In September 1984, Mr. and Mrs. Ledford made a gift of \$10,000 to the Bradley County Memorial Hospital to provide for indigent care. (T.R. Vol. I at 3.). As a result of this gift, the Bradley County Memorial Hospital ("Hospital) established the Bradley Memorial Hospital Citizens' Endowment Fund ("the Citizens' Endowment Fund" or "the Fund"). (T. Vol. I at 73-

75; Exh. 3). The Declaration of Trust establishing the Fund provides that the Trustees are to be the Trustees of Bradley County Memorial Hospital and requires that in order for any instrument executed in connection with the Fund to be valid it must be executed in the name of the Fund by a majority of the Trustees. (T. Exh. 3 at p.2).

The Declaration of Trust further provides that if the Hospital ceases to be maintained and operated as a public instrumentality of Bradley County, Tennessee, then the Trust Funds are to be given to the Bradley County Nursing Home (now known as Bradley Healthcare and Rehabilitation Center) to be maintained as the Bradley County Nursing Home Citizens' Endowment Fund under a substantially identical declaration of Trust. (*Id.* at p. 4). In 2005, the Hospital was sold, and Bradley Healthcare & Rehabilitation Center Citizens' Endowment Fund ("BHRCCF") succeeded to all interests and rights of the Bradley County Memorial Hospital Citizens' Endowment Fund. (T. Vol. II at 127, 130, 191-192; Exh. 8, 13).

Wilson A. and Hazel N. Ledford Joint Will

In 1989, Mr. and Mrs. Ledford together prepared a handwritten Joint Will, which they both signed on November 30, 1989. (T. Exh. 6; T.R. Vol. I at 7). The Joint Will named the surviving spouse as the Administrator and provided that after the payment of any indebtedness, the remainder of the estate was to be paid over to the surviving spouse. Upon the death of the surviving spouse, or if the Ledfords died together, the Joint Will named Martha Ledford Powell as Administrator and Willene Ledford Pardue as the alternate Administrator in the event Martha Powell was not living or unwilling to serve. The Will specifically provided that the Administrator was to be paid a fee of \$5,000. (T.R. Vol. I at 2).

The Joint Will contained certain express provisions for the disposition of the Ledfords' estate. After the payment of any indebtedness, Section 2 of the Joint Will required the

Administrator to pay any outstanding balance on a \$50,000 pledge the Ledfords had made to the Bradley County Memorial Hospital Citizens' Endowment Fund. Section 3 of the Joint Will required the Administrator to set up a Perpetual Care fund in the amount of \$5,000 for the care and maintenance of the Ledfords' cemetery plots at Fort Hill Cemetery. Section 4 provided for the distribution of furniture and other items of personalty to family members. (*Id.* at 3-4).

Section 5 of the Joint Will directed the Administrator to sell the Decedent's real property and stocks "as soon as you can profitably do so and the money from them be combined with the money from our Certificates of Deposits, other bank accounts, and any money owed us and be set up in a new Wilson A. and Hazel N. Ledford Trust" (the "Charitable Trust"). (*Id.* at 4). This Section did not, however, name a Trustee for this Charitable Trust. Section 6 required that the money in the Charitable Trust be invested only in bank certificates of deposit, government bonds, or other government insured accounts. Section 7 provided for the distribution of the income of the Charitable Trust, with a 25% share to be distributed to each of Wilson Ledford's three children and the remaining 25% share to be distributed among Wilson Ledford's six grandchildren (*i.e.*, a 1/6 share of the remaining 25% interest). (*Id.*).

Section 8 of the Joint Will provided that upon the death of any of these income beneficiaries, "the percent of the Trust they are receiving earnings from be given to Bradley County Memorial Hospital Citizens' Endowment Fund." Upon the death of the last income beneficiary, all funds in the Charitable Trust would have been distributed to the Fund, and the trust would by its own terms terminate. (*Id.* at 4-5).

Estate of Wilson A. Ledford

Mr. Ledford died on May 10, 1990, less than six months after executing the Joint Will. The original Joint Will was filed with the Bradley County Chancery Court, Probate Division,

docket number P90-122, for the administration of the Estate of Wilson A. Ledford. (T.R. Vol. I at 7). As the surviving spouse, Mrs. Ledford received all of Mr. Ledford's estate. (T.R. Vol. I at 2). However, Mrs. Ledford never received any interest in the property on which the gas station was located because, as previously discussed, that property had been transferred to the Ledford Family Trust nine years prior to Mr. Ledford's death. (T. Vol. II at 153; Exh. A to Exh. 4; Exh. 5).

Estate of Hazel N. Ledford

After the death of Mr. Ledford, Hazel Ledford apparently executed a handwritten codicil to the will naming John M. Powell, Jr. as an alternate Administrator. On June 22, 1991, Mrs. Hazel Ledford passed away. On July 1, 1991, Martha Powell and John M. Powell, Jr., filed a Petition to administer Mrs. Ledford's estate. (T.R. Vol. I at 7-9). The Petition stated that the estimated value of the Decedent's personalty was \$340,000 and that the estimated value of the realty was \$130,000. (*Id.* at 7). The Petition further specifically identified the Bradley Memorial Hospital Citizens' Endowment Fund as one of the legatees or devisees of the Decedent's estate under the terms of the Joint Will. (*Id.*). Martha Powell and John Powell, Jr., were appointed Co-Personal Representatives, and Letters Testamentary were issued to them. (T.R. Vol. I at 10). John M. Powell, Jr. subsequently resigned in August 1992, and Martha Powell continued as the sole Personal Representative. (T.R. Vol. I at 12-13).

Neither of the Co-Personal Representatives filed an inventory of the Decedent's estate in accordance with the provisions of Tenn. Code Ann. § 30-2-301. They did have the Notice to Creditors published twice in the local newspaper, the Cleveland Daily Banner, as required by Tenn. Code Ann. § 30-2-306. The Notice informed creditors that any claim, matured or unmatured, not filed with the Bradley County Chancery Court Clerk within six months from the

date of first publication (July 1, 1991) would be forever barred. (T.R. Vol. I at 11). No claims were apparently ever filed with the Clerk as none appear in the court record.

In addition to not filing the inventory, neither Co-Personal Representative filed the accounting required by Tenn. Code Ann. § 30-2-601. Instead, Mrs. Powell testified that she “[took] care of all the bills” and “got the house ready to sell.” (T. Vol. II at 150). She further testified that in July 1992, the Estate CPA advised here that she “needed to be getting things out of the Estate that were mandated . . . in the Will.” (*Id.*). Accordingly, Mrs. Powell testified that on July 31, 1992, she wrote a check to the Bradley County Memorial Hospital Citizens’ Endowment Fund (“the Fund”) for the balance of the pledge as required by Section 2 of the Will; that she set up the Perpetual Care fund as required by Section 3 of the Will; and that she paid herself the \$5,000 fee for serving as administrator. (T. Vol. II at 150-151).

1992 Agreement

At some time prior to Hazel Ledford’s death in June 1991, the Trustees of the Ledford Family Trust were aware of environmental problems presented by the underground storage tanks located on the property owned by that Trust. (T. Vol. II at 152). The Trustees began investigating the problem and determined that since the underground storage tanks were no longer in use, they should be removed. Accordingly, the Trustees removed the tanks that were located on the corner of the property. (*Id.* at 152-53).

There were also several tanks located under the commercial building on the property. The Trustees discovered that there was a process that would allow them to close underground storage tanks in place. Mrs. Powell, one of the Trustees, testified that “since they were under the building, that’s what, of course, we wanted to do, where we could have closure so that the property would be free and clear of, you know, tank stuff.” (*Id.* at 154). Mrs. Powell further

testified that the Trustees had testing done but that her stepmother, Hazel Ledford, died before they received the results of the testing. (*Id.*). At this point, the Trustees of the Ledford Family Trust had spent over \$19,000 for the removal of underground storage tanks from the property it had owned since 1982. (T.R. Vol. I at 17, 26, T. Exh. 5).

After realizing that the removal and remediation of the underground storage tanks on the Ledford Family Trust property “was a really big issue,” the Trustees of the Ledford Family Trust called a meeting of the beneficiaries of the Joint Will. (T. Vol. II at 155). This meeting took place on July 13, 1992. Mrs. Powell testified that, as the Personal Representative for the Estate of Hazel Ledford, she was there on behalf of the Estate and that her siblings, the other two Trustees of the Ledford Family Trust, were there on behalf of that Trust. She further testified that Jim Whitlock, the Administrator of the Bradley County Memorial Hospital, was there on behalf of the hospital, “the beneficiary of the Endowment.” (*Id.* at 156). No representative of the Bradley Memorial Hospital Citizens’ Endowment Fund itself was present at this meeting.

During the course of this meeting, an agreement was reached that the Estate of Hazel Ledford would be responsible for all costs for the removal and remediation of the underground storage tanks on the property owned by the Ledford Family Trust. (T. Vol. II at 157). This included reimbursing the Ledford Family Trust for the more than \$19,000 it had already spent. (T.R. Vol. I at 17, 26).

After this agreement was reached, Mrs. Powell testified that she then contacted Rick Hitchcock, an attorney who had some expertise with underground storage tanks and requested that he draft a document reflecting the agreement reached at the July 13 meeting. (T. Vol. II at 157-158). On July 27, 1992, Mr. Hitchcock sent a letter to Mrs. Powell with “a draft agreement *between the Estate of Wilson A. Ledford and the Ledford Family Trust* by which the Estate

acknowledges ownership of and responsibility for the tanks located on Trust property.” (T. Exh. 9) (emphasis added). The letter states, in part, “[w]e understand that the tanks were last used prior to 1974, when Mr. Ledford owned the property” and “[b]ecause your father was the last person to own the underground storage tanks prior to November 8, 1984, Mr. Ledford would meet the definition of ‘owner’ discussed above, and *his Estate should be liable for such costs.*” (*Id.*) (emphasis added). Finally, Mr. Hitchcock notes in his letter that while the agreement has been drafted to be signed by authorized representatives of the Estate of Wilson A. Ledford and the Ledford Family Trust, he is unsure of the identify of these representatives or the steps that must be taken to authorize their action. (*Id.*)

Thereafter, on July 31, 1992, Mrs. Powell testified that she signed the Agreement (hereinafter referred to as the “1992 Agreement”). (T. Vol. II at 161-162). The document itself reflects that Martha Ledford Powell signed the 1992 Agreement as the “duly authorized representative” of the Estates of Wilson A. Ledford and Hazel N. Ledford and of the Ledford Family Trust, and as a beneficiary of the Estate. (T. Exh. 4). There is no evidence in the record that Martha Ledford Powell was ever appointed Administrator or Personal Representative of the Estate of Wilson A. Ledford or that she otherwise had authority to act on behalf of the Estate of Wilson A. Ledford.

The 1992 Agreement further reflects that it was signed by Jim Whitlock in his capacity as the “Bradley Memorial Hospital Administrator.” (*Id.*). However, there is no indication in the document itself, or other evidence in the record, that Mr. Whitlock also signed the agreement on behalf of the Bradley Memorial Hospital Citizens’ Endowment Fund. Instead, the record reflects that the 1992 Agreement was never presented to the Board of the Citizens’ Endowment Fund (T. Vol. I at 88-90) or the Board of the Hospital for approval, and thus neither Board took any action

on this matter. In fact, the Chairman of the Board of the Citizens' Endowment Fund and of the Board of the Hospital testified that the first time he saw the 1992 agreement was the week of the court hearing on November 18, 2010. (*Id.* at 72-73, 75-76, 83). The record further reflects that neither Board was informed by the Personal Representative, Mrs. Powell, of the on-going remediation costs. (*Id.* at 83-87).

After the 1992 Agreement was signed, the Personal Representative testified that she began making distributions of interest payments to the income beneficiaries of the Charitable Trust in November 1992, even though she had not taken any steps to establish the Charitable Trust or to have a Trustee appointed. (T. Vol. II at 162). The Personal Representative further testified that she began making payments out of assets of the Decedent's Estate for the removal and remediation of the underground storage tanks. (*Id.*). The Clerk and Master's Report reflects that the Personal Representative distributed \$345,720 in "abatement related expenses" for the period of May 1992 through May 24, 2005, when "regulation compliance was achieved." (T.R. Vol. I at 35; T. Vol. II at 166).

The record reflects that no claim for these "abatement related expenses" was ever filed with the Clerk of the Bradley County Chancery Court, Probate Division as required by the Notice of Creditors published by the Personal Representative and Tenn. Code Ann. § 30-2-307 and § 30-2-310.

Petition to Terminate Charitable Trust

After 2005, when removal and remediation of the underground storage tanks had been completed, the Personal Representative took no action to close the Decedent's Estate. Instead, in 2008, the Personal Representative, in her capacity both as the Personal Representative and as an income beneficiary of the Charitable Trust, filed an amended petition in Bradley County

Chancery Court seeking to terminate the Charitable Trust (even though it had never actually been established) as being uneconomical, pursuant to Tenn. Code Ann. § 35-15-414. (T. Exh. 11). The amended petition states that “a major portion of the estate included real estate that had been formerly operated as a gas station. The bulk of the estate was consumed by reason of the demands of the Environmental Protection Agency for remediation.” (*Id.* at ¶ 3). The petition further alleges that there is approximately \$120,000 left in the Estate and that it is uneconomical to maintain this amount as a trust. (*Id.* at ¶¶ 3, 5).

Since the Personal Representative had not filed any accountings in her administration of the Estate, an issue arose as to the exact value of the assets remaining in the Estate (as well as payments made by the Personal Representative out of Estate assets). As a result, on December 30, 2009, the Personal Representative filed her first accounting since being appointed by the Probate Court on July 1, 1991. (T.R. Vol. I at 14-23). Two months later, on February 25, 2010, the Personal Representative filed her sworn Final Accounting. (T.R. Vol. I at 24-29).

It was only after the Personal Representative filed these two accounting that the Respondents, BHRCCF and the Attorney General, became aware of the payments made by the Personal Representative out of assets of the Estate for the costs of removal and remediation of the underground storage tanks on the property owned by the Ledford Family Trust, including attorneys’ fees. Furthermore, despite the fact that the sworn petition filed by Martha Ledford Powell, as well as sworn discovery responses from Mrs. Powell, stated that this property was owned by the Estate of Hazel Ledford (T. Exh. 11 and 12), during the Clerk and Master’s review of the Final Accounting, Mrs. Powell revealed for the first time that the property was actually owned by the Ledford Family Trust, of which she was both a Trustee and beneficiary. (T.R. Vol. I at 33-36).

STANDARD OF REVIEW

This case was tried in the chancery court without a jury, and thus appellate review is *de novo* upon the record. *See Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn. 1995). There is a presumption of correctness of the trial court's findings of fact, unless a preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d). The trial court's legal conclusions, however, are reviewed *de novo* with no presumption of correctness. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993).

A trial court's ruling on a request for reimbursement of attorneys' fees out of an estate is reviewed under an abuse of discretion standard. *Merchants & Planters Bank v. Myers*, 644 S.W.2d 683, 688 (Tenn. Ct. App. 1982). The abuse of discretion standard is a "review constraining concept," but it does not immunize discretionary decisions completely from appellate review. *Beard v. Board of Professional Responsibility*, 288 S.W.3d 838, 860 (Tenn. 2008); *Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1990).

While this standard prevents an appellate court from second-guessing the trial court, *White v. Vanderbilt Univ.* 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999), and from substituting its own discretion for that of the trial court, *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998); *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000), it does not prevent an appellate court from examining a trial court's decision to determine whether it has taken the applicable law and the relevant facts into account. *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996).

Thus, an abuse of discretion occurs when a court strays beyond the framework of the applicable legal standards or when it fails properly to consider the factors customarily used to guide that discretionary decision. *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007).

Appellate courts' deference to trial courts' "discretionary" decisions should not promote result-oriented opinions or seemingly irreconcilable precedents. The law's need for consistency, predictability, and reliability requires the elimination of apparently whimsical authority on both the trial and appellate levels.

Flautt & Mann v. Council of Memphis, 285 S.W.3d 856, 872-73 (Tenn. Ct. App. 2008) (quoting *BIF, A Division of General Signal Controls, Inc. v. Service Construction Co., Inc.*, No. 87-136-II, 1998 WL 72409 at * 3 (Tenn. Ct. App. July 13, 1988) (no appeal filed)); see *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010).

Accordingly, appellate courts have held that a trial court has "abused its discretion" when it has applied an incorrect legal standard, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or has employed reasoning that causes an injustice to the complaining party. *Konvalinka v. Chattanooga-Hamilton County Hosp. Authority*, 249 S.W.3d 346, 358 (Tenn. 2008) (citing *Mercer v. Vanderbilt Univ.*, 134 S.W.3d 121, 131 (Tenn. 2004); *Perry v. Perry*, 114 S.W.3d 465, 467 (Tenn. 2003)). A trial court by definition abuses its discretion when it makes an error of law; "[t]he abuse-of-discretion standard includes review to determine that the decision was not guided by erroneous legal conclusions." *Johnson v. Nissan North America, Inc.*, 146 S.W.3d 600, 605 (Tenn. Ct. App. 2004); *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 2047, 135 L.Ed.2d 392 (1996).

ARGUMENT

I. THE TRIAL COURT ERRED IN APPROVING AMOUNTS PAID BY THE PERSONAL REPRESENTATIVE OUT OF ASSETS OF THE ESTATE FOR REMEDIATION OF PROPERTY NOT OWNED BY THE ESTATE.

A. The Trial Court Erred In Ruling That The Hospital Administrator Had Apparent Authority To Bind The Citizens' Endowment Fund With Respect To The 1992 Agreement.

Despite finding that there was no proof that the Bradley County Memorial Hospital Administrator, Jim Whitlock, had any authority, express or implied, by a majority of the Board of Trustees of the Bradley Memorial Hospital Citizens' Endowment Fund ("Citizens Endowment Fund" or "Fund") to execute the 1992 Agreement, nor any proof that the Fund's consent to the 1992 Agreement was ever obtained, the trial court held that the Personal Representative could rely on the apparent authority of Mr. Whitlock to bind the Fund with respect to that 1992 Agreement. Accordingly, the trial court approved the amounts paid by the Personal Representative out of assets of the Estate for the removal and remediation of underground storage tanks on property owned by the Ledford Family Trust.⁵

The evidence in the record does *not*, however, support the trial court's ruling that the Hospital Administrator was an agent of the Fund with the apparent authority to sign the 1992 Agreement on behalf of the Fund. Accordingly, the trial court erred in approving payment of the remediation costs pursuant to the 1992 Agreement out of the Estate's assets.

The existence of an agency relationship is "'a question of fact under the circumstances of the particular case'" and is determined by examining the agreement between the parties or the parties' actions. *White v. Revco Disc. Drug Ctrs., Inc.*, 33 S.W.3d 713, 723 (Tenn. 2000). *See*

⁵The amounts paid by the Personal Representative for the removal and remediation of the underground storage tanks are set forth in Appendix A.

also 3 Am.Jur.2d *Agency* § 15 (agency relationship created “at the will and by the act of the principal and its existence is a fact to be proved by tracing it to some act of the alleged principal and turns on facts concerning the understanding between the alleged principal and agent”).

As this Court has recognized, “[a] principal is bound neither by contracts made by a person not his agent, nor by those of his agent beyond the scope of his actual and apparent authority, which he has not ratified and is not estopped to deny.” *Edmond Bros. Supply Co., Inc. v. Boyle and Adams*, 44 S.W.3d 530, 534 (Tenn. Ct. App. 2000) (quoting *Bells Banking Co. v. Jackson Centre, Inc.*, 938 S.W.2d 421, 424 (Tenn. Ct. App. 1996)). Apparent authority is defined as

the power held by the putative agent “to affect a principal’s legal relations with third parties when a third party reasonably believes the [putative] agent has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations.” In Tennessee, apparent authority has been described as:

- (1) such authority as the principal knowingly permits the agent to assume or which he holds the agent out as possessing;
- (2) such authority as he appears to have by reason of the actual authority which he has;
- (3) such authority as a reasonably prudent man, using diligence and discretion, in view of the principal’s conduct, would naturally suppose the agent to possess.

Franklin Distrib. Co. v. Crush Intern (U.S.A.), Inc., 726 S.W.2d 926, 930-31 (Tenn. Ct. App. 1986) (internal citations omitted).

Apparent authority is established through the acts of the principal rather than those of the agent or through the perception of a third party. *Boren ex rel. Boren v. Weeks*, 251 S.W.3d 426, 432-33 (Tenn. 2008). Thus, as the Tennessee Supreme Court stated in *Southern Ry. Co. v. Pickle*, 197 S.W. 675 (1917):

The apparent power of an agent is to be determined by the acts of the principal and not by the acts of the agent; a principal is responsible for the acts of an agent within his apparent authority only where the principal himself by his acts or conduct has clothed the agent with the appearance of authority, and not where the agent's own conduct has created the apparent authority. The liability of the principal is determined in any particular case, however, not merely by what was the apparently authority of the agent, but by what authority the third person, exercising reasonable care and prudence, was justified in believing that the principal had by his acts under the circumstances conferred upon his agent.

Id. at 677 (quoting 2 *Corpus Juris* 574, 575).

The burden is on the claimant to show the authority of the agent. *John J. Heirigs Const. Co. v. Exide*, 709 S.W.2d 604, 608 (Tenn. Ct. App. 1986) (citing *Action Ads, Inc. v. William B. Tanner Co.*, 592 S.W.2d 572 (Tenn. Ct. App. 1979); *Robertson v. Lyons*, 553 S.W.2d 754 (Tenn. Ct. App. 1977)). Furthermore, this Court has recognized that

[a] third person, by undertaking to deal with a known or purported agent, is put upon inquiry as to the nature and scope of his powers, and must use due care to discovery them or else suffer the consequences if they are exceeded.

.....

In applying this rule, it has been held that no one is bound to deal with an agent, and, that where anyone does so as to matters beyond the actual authority conferred, any trust and confidence as to such matters is reposed by him and not by the principal, so that the latter cannot be deemed liable under the principle that where one of two innocent parties must suffer from the wrongful acts of a third person, that one must bear the loss who by a confidence reposed in the person acting wrongfully has made it possible.

Bells Banking Co. v. Jackson Centre, Inc., 938 S.W.2d 421, 426-27 (Tenn. Ct. App. 1996).

The trial court specifically found that the principal, the Bradley Memorial Hospital Citizens' Endowment Fund, did not give *any authority, express or implied*, to the Hospital Administrator to execute the 1992 Agreement. Instead, the trial court held that the Hospital Administrator had the apparent authority to sign the 1992 Agreement on behalf of the Fund

based upon: (1) the fact that the Hospital Administrator was on the Hospital Board of Trustees and the Citizens' Endowment Fund Board of Trustees, as well as the Executive Committee of the Bradley Healthcare Foundation and (2) the fact that the Citizens' Endowment Fund and Bradley Memorial Hospital used identical boards. (T.R. Vol. II at 152-157).

However, the undisputed evidence in the record clearly contradicts the trial court's finding that the Hospital Administrator was a member of the Hospital Board of Trustees and the Citizens' Endowment Fund Board of Trustees. Mr. Sam Bettis, who was a Trustee of both of these Boards from 1982 to 2002, specifically testified that the Hospital Administrator, Jim Whitlock, was *never* a trustee of the Bradley County Memorial Hospital or the Citizens' Endowment Fund. (T. Vol. 1 at 72-73, 96-97). No other witness testified that the Hospital Administrator was a member of the Board of Trustees of either the Hospital or the Fund, and there is no documentary evidence in the record that would show that the Hospital Administrator was a member of the Board of the Hospital or the Fund. Thus, given that the undisputed proof in the record clearly demonstrates the Hospital Administrator was *not* a member of the Board of the Hospital or of the Fund, the trial court erred in finding that such alleged membership was a basis for the Personal Representative to assume that the Hospital Administrator had apparent authority to sign the 1992 Agreement on behalf of the Fund.

The evidence in the record also fails to reveal any conduct or course of dealing between the Hospital Administrator and the Fund that would show either the Fund or the Hospital's intent that the Hospital Administrator have the authority to sign the 1992 Agreement on behalf of the Fund. As noted, Mr. Bettis specifically testified that the Board of the Fund never authorized the Hospital Administrator to sign the 1992 Agreement. (T. Vol. 1 at p. 90). Mr. Bettis further testified that Mr. Whitlock was hired to administer the Hospital, *i.e.*, to act on behalf of the

Hospital Board of Trustees (*Id.* at p. 80) and that the Fund was a separate entity from the Hospital. (*Id.* at p. 87, 98).

Mr. Bettis also testified that, while he was aware that the “remediation . . . was sort of a hiccup that happened” and that it “was a part of settling the Estate,” he was never informed as a member of the Board of the Hospital or the Fund about the 1992 Agreement or the ongoing cost of the remediation process. (*Id.* at p. 82-83). Indeed, Mr. Bettis testified that he did not even see the 1992 Agreement until the week of the hearing on November 18, 2010. (*Id.* at 83.). At best, Mr. Bettis testified that the Hospital Administrator *may* have given a verbal summary to the Board of the Hospital but that Board took no action on it. (*Id.* at 83-84). Moreover, Mr. Bettis specifically testified that the issue about the Personal Representative’s spending money for remediation costs never came before the Board of the Hospital.⁶ (*Id.* at 85). This testimony was corroborated by Lynn Voelz, the Executive Director of the Bradley HealthCare Foundation. Ms. Voelz testified that as the Executive Director she attended meetings of the Hospital Board of Trustees and that she did not recall this issue concerning the cost of remediation being discussed at those meetings. (*Id.* at 109).

In light of this undisputed evidence in the record, the trial court erred in ruling that the mere fact that the Hospital and the Fund had identical Boards was sufficient to establish that the has held the Hospital Administration out as possessing the authority to sign the 1992 Agreement on behalf of the Fund. Furthermore, there is nothing in the record to indicate any conduct by the Fund (or the Hospital) that would have allowed the Personal Representative to “naturally suppose” that the Hospital Administrator had authority to sign the 1992 Agreement. In the first

⁶ This testimony is directly contrary to the trial court’s finding that the Personal Representative “informed the Bradley Memorial Hospital Board, the Citizens’ Endowment Fund Board, and subsequently the Bradley Healthcare Foundation Board, that before the Citizens’ Endowment Fund would receive money from her parents’ estate as the residuary beneficiary, the cost of remediation must be paid.” (T.R. Vol. II at 153-54).

instance, there is no testimony from the Personal Representative that she reasonably believed or “naturally supposed” that the Hospital Administrator had the authority to sign the 1992 Agreement on behalf of the Fund.

The Chairman of the Board, Mr. Bettis, testified that it was the Hospital Board’s practice that “the administrator of the hospital acted on behalf of the Board of Trustees on a regular basis with contracts, agreements, [and] purchases” and that the Hospital Administrator had signed documents or agreements on behalf of the Hospital Board.” (*Id.* at 80). However, Mr. Bettis was unable to identify any documents that the Hospital Administrator had signed on behalf of the Fund Board other than the 1992 Agreement, and, as previously discussed, the Fund Board never met to authorize the Hospital Administrator to sign that Agreement. (*Id.* at 89-90). Moreover, the 1992 Agreement clearly reflects on its face that the Hospital Administrator signed that Agreement on behalf of the Hospital and not on behalf of the Fund. (T. Vol. II, Exh. 4).

In fact, there is no evidence in the record that the members of the Board of Trustees, whether acting as the Board of the Hospital or acting as the Board of the Citizens’ Endowment Fund, ever authorized the Hospital Administrator to act on behalf of the Fund or, in particular, to sign the 1992 Agreement on behalf of the Fund. Moreover, even if the Fund Board had wanted to delegate authority to the Hospital Administrator to sign the 1992 Agreement on its behalf, such delegation was prohibited under the express terms of the Declaration establishing the Citizens’ Endowment Fund. That Declaration specifically provides that “[a]ny instrument executed in connection with this Trust shall be valid if executed in the name of this Trust by a majority of the Trustees.” (T. Vol. 2, Exh. 3 at p.2).⁷ There is no evidence in the record of any

⁷ It should be noted that Mr. Bettis was one of the Trustees who signed the Trust Declaration and, thus, clearly should have been aware of this provision. (T. Vol. 2, Exh. 3 at p. 5).

document authorizing the Hospital Administrator to act on behalf of the Fund, including signing the 1992 Agreement on behalf of the Fund. (T. Vol. 1 at p. 90).

Nor did the Hospital Administrator's role on the Executive Committee of the Bradley Healthcare Foundation indicate any conduct by the Fund (or the Hospital) that would have allowed the Personal Representative to "naturally suppose" that the Hospital Administrator had authority to sign the 1992 Agreement. The Foundation was established by the Hospital Board of Trustees as "some sort of financial entity . . . to handle donations to the [H]ospital and to expend those funds." (*Id.* at p. 77). The Executive Director of the Foundation testified that the 1992 Agreement never came up as an issue that had to be dealt with by the Executive Committee of the Foundation and that the Foundation was not involved in any of the decision-making about the costs of remediation. (T. Vol. 1 at pp. 108, 121). Furthermore, while the Hospital Administrator served on the Executive Committee of the Foundation, the Foundation's role with respect to the Fund was to simply manage the investment of the assets contained in the Fund with no authority over the disposition of those assets. (*Id.* at pp. 101-102, 106, 117-118). The trial court correctly found that this duty to administer the funds of the Citizens' Endowment Fund was not sufficient to confer upon the Hospital Administrator the authority to sign the 1992 Agreement on behalf of the Fund. (T.R., Vol. at 155).

It should be noted that the one person who could have confirmed whether or not he had the authority to sign the 1992 Agreement on behalf of the Fund was the Hospital Administrator, Jim Whitlock. However, the Personal Representative did not call Mr. Whitlock as a witness and there is no indication in the record that Mr. Whitlock was unavailable for that hearing. (T.R. Vol. I at 70; Vol. II at 173). "A party's failure to call a witness with particular knowledge of the facts, who would naturally favor that party's position, and who is not unavailable, generally

raises an inference that the testimony would have been unfavorable to the party who failed to call that witness.” *Milliken Group, Inc. v. Hays Nissan, Inc.*, 86 S.W.3d 564, 569 (Tenn. Ct. App. 2001) (citing Neil P. Cohen, et al., *Tennessee Law of Evidence* § 4.01[14][a] (4th ed. 2000); *State v. Bigbee*, 885 S.W.2d 797 Tenn. 1994)).

Finally, the record is also devoid of any evidence of ratification by the Board of the Fund (or of the Hospital) of the 1992 Agreement. For a ratification to exist, Tennessee courts have held that there must be a concurrence of three elements: “(1) [a]cceptance by the principal of the benefits of the agent’s act, (2) with full knowledge of the facts and (3) circumstances or an affirmative election indicating an intention to adopt the unauthorized arrangement.” *Bells Banking Co. v. Jackson Centre, Inc.*, 938 S.W.2d at 427 (quoting 2A C.J.S. *Agency* § 71 (1972)). It is obvious that no benefit was bestowed upon or accepted by the Citizens’ Endowment Fund resulting from the 1992 Agreement. Rather, the 1992 Agreement has conferred a detriment on the Fund in that it has substantially reduced the amount of funds otherwise going into the Charitable Trust that the Citizens’ Endowment Fund will receive upon the deaths of the lifetime beneficiaries. And, as the evidence previously discussed demonstrates, the 1992 Agreement was never presented to the members of the Board of Trustees, either in their capacity as the Board of the Hospital or as the Board of the Fund, and no action was taken with respect to the 1992 Agreement by the Board in either capacity.

In light of this evidence, the Hospital Administrator clearly was acting outside the scope of his authority when he executed the 1992 Agreement on behalf of the Citizens’ Endowment Fund; the trial court’s ruling that the Personal Representative could rely on the apparent authority of Mr. Whitlock to bind the Fund with respect to that 1992 Agreement is in error and should be reversed.

B. The Trial Court Erred In Approving Payment Of The Costs Of Remediation Out Of Assets Of The Estate For Property Not Owned By The Estate Where No Claim For Such Costs Was Ever Filed Pursuant To Tenn. Code Ann. § 30-2-307.

Even if the trial court correctly found that the Hospital Administrator had apparent authority to sign the 1992 Agreement on behalf of the Citizens' Endowment Fund, the trial court still erred in approving payment of the costs of remediation out of Estate assets; no claim for such costs was ever filed as required by Tenn. Code Ann. § 30-2-307 and § 30-2-310.

In 1939, the Tennessee General Assembly enacted Public Chapter 175, which established a comprehensive statutory scheme for the administration of estates of decedents. As stated in the title of the Act, it is

[a]n Act to regulate the administration of estates of deceased persons by providing for [1] the giving of notice to creditors of the qualification of the personal representative, for [2] the probate and registration of claims against such estates and limiting the time therefor, for [3] the classification of claims, for [4] the contest of disputed claims, and for [5] the sale of real estate in insolvent estates; and repealing all laws in conflict with this Act.

Commerce Union Bank v. Gillespie, 156 S.W.2d 425, 427 (Tenn. 1940) (quoting 1939 Tenn. Pub. Acts ch. 175).

Under the provisions of the Act, as since amended and now codified at Tenn. Code Ann. §§ 30-2-301 to 323, the personal representative, within thirty days from the issuance of his or her letters, is required to publish notice to creditors. Tenn. Code Ann. § 30-2-306(a). In turn, creditors, within four months from the first publication of such notice, must file their claims against the estate with the clerk of the county or probate court in which the estate is being administered. Tenn. Code Ann. § 30-2-307(a).

Each claim filed with the clerk is to be entered in a claim book, and the clerk is required within five days after the filing of a claim and entry in the claim book to give written notice to

the personal representative of the filing of the claim. Tenn. Code Ann. §§ 30-2-312, -313. “The giving of this written notice by the clerk to the personal representative or those interested in protesting the claim is mandatory.” *Cromwell v. Dobbins*, 231 S.W.2d 577 (Tenn. 1950). The personal representative or any creditor, distributee, or heir may except to a claim as filed by filing written exceptions with the clerk, and all issues upon these exceptions are tried by the probate judge without formal proceedings upon oral evidence. Tenn. Code Ann. § 30-2-314. Any claims whatsoever not filed within twelve months from the date of death of the decedent are forever barred. Tenn. Code Ann. § 30-2-310.

Hazel Ledford died on June 22, 1991, and, therefore, the administration of her estate was clearly controlled by this statutory scheme.⁸ However, there is *no* evidence in the record that any claim was filed against the estate by the Ledford Family Trust, or by any of its Trustees or beneficiaries on behalf of the Ledford Family Trust, for the costs of removal and remediation of the underground storage tanks located on the property currently owned by the Ledford Family Trust but previously owned by Wilson Ledford. Moreover, the undisputed evidence in the record does reflect that the Trustees of the Ledford Family Trust were clearly aware of the environmental issues concerning the underground storage tanks located on the property owned by the Family Trust. Indeed, the Personal Representative, who was also a Trustee of the Ledford Family Trust, testified that she knew of this issue before the death of her stepmother, Hazel Ledford. (T. Vol. II, at pp. 152-154).

The Personal Representative further testified that the Trustees had removed the tanks located on the corner of the property and had done some testing on the tanks located under the building on the property, but that Hazel Ledford died before they got the results back from the

⁸The statutory deadlines discussed above were the same in 1991 when the Estate of Hazel Ledford was opened.

testing. (*Id.*)⁹ The Personal Representative testified that a meeting was held on July 13, 1992, to determine who would be responsible for the costs of remediation of the property owned by the Ledford Family Trust. (*Id.* at p. 156). The Personal Representative testified that she was at the meeting on behalf of the Ledford Estate, while her two siblings, the other two Trustees of the Ledford Family Trust, were there on behalf of that Trust. (*Id.*). At the conclusion of that meeting, the Personal Representative testified that an agreement was reached that the Ledford Estate would bear the responsibility of paying for the costs of remediation. (*Id.* at 157-158).¹⁰ Finally, the Personal Representative testified that “if an agreement had not been reached, . . . the Trust entity was going to have to file suit against the Estate, . . . for the Estate to pay the remediation.” (*Id.* at 158).

This testimony clearly reflects that the Ledford Family Trust was aware that it had a contingent claim against the Ledford Estate for the costs of remediation, but no claim was ever filed in accordance with the requirements of Tenn. Code Ann. §§ 30-2-306, 307 and 310.¹¹ Despite the fact that no claim was ever filed, the trial court approved the payment of these remediation costs out of the assets of the estate because “the State of Tennessee on behalf of the Citizens’ Endowment Fund has not shown the Ledford Estate would not have been liable for the cleanup of the underground storage tanks. They have not proved the Personal Representative

⁹ The Final Accounting filed by the Personal Representative reflects that after the 1992 Agreement was executed, the Estate reimbursed the Ledford Family Trust \$19,059.66 for removal and remediation costs previously incurred. (T.R. Vol. at 17, 26). The Final Accounting does not, however, indicate when those costs were actually incurred, *i.e.*, before or after the death of Hazel Ledford.

¹⁰ Contrary to the trial court’s finding, the Personal Representative’s testified that she did not seek legal advice from separate environmental counsel about the issue of ownership of the tanks until after this meeting had occurred on July 13 and an agreement had already been reached that the Ledford Estate would be responsible for the costs of remediation. (T. Vol. II at pp. 157-158). This testimony is corroborated by the letter from that attorney to the Personal Representative, which is dated July 27, 1992. (T. Vol. II, Exh. 9). That letter included a copy of the 1992 Agreement, which had been prepared by counsel at the request of the Personal Representative. (*Id.*).

¹¹ That the Ledford Family Trust was aware of its potential claim against the Estate is further evidenced by the Personal Representative’s testimony that the Family Trust decided not to pursue a claim against the Estate for lost income from the commercial use of the property while the remediation was ongoing. (T. Vol. II at pp. 172).

acted in bad faith.” (T.R. Vol. II at 156). But this ruling ignores both the fundamental purpose behind the statutory scheme for the administration of estates, as well as the plain language of Tenn. Code Ann. §§ 30-2-307 and 310, as good faith or bad faith is simply not relevant to whether a claim was timely filed.

Statutory enactments barring claims that are filed against an estate beyond a certain time period, such as Tenn. Code Ann. §§ 30-2-307 and 30-2-310, are often referred to as “nonclaim” statutes. *Bowden v. Ward*, 27 S.W.3d 913, 918 (Tenn. 2000). The Tennessee Supreme Court has concluded that these provisions constitute a statute of limitations, *Woods v. Palmer*, 496 S.W.2d 474, 476 (Tenn. 1973), and are therefore jurisdictional in nature. *Alamo Development Corp. v. Thomas*, 212 S.W.2d 606, 607 (Tenn. 1948). Tennessee courts have recognized that the purpose served by these nonclaim provisions is the promotion of an “orderly, expeditious, and exact settlement of estates of decedents.” *Bowden v. Ward*, 27 S.W.3d at 918 (quoting *Alamo Dev. Corp. v. Thomas*, 212 S.W.2d at 607); *see also Needham v. Moore*, 292 S.W.2d 720, 722 (Tenn. 1956) (“purpose of Act is to afford a very simply and expeditious remedy for the administration of estates, and in doing so the Act is liberally construed”); *Wilson v. Hafley*, 226 S.W.2d 308, 311 (1949) (“[C]laims should be set out in written form as an informal statement of the cause of action . . . to afford a simple, inexpensive, and expeditious remedy for administration of decedent estates. [The statute] should be liberally construed to advance the remedy and dispense with formal pleadings.”); *Minton’s Estate v. Markham*, 625 S.W.2d 260, 262 (Tenn. Ct. App. 1981) (“[I]t has been uniformly held that the statute was designed to expedite the administration of estates and to provide a uniform procedure in connection therewith.”).

The filing of a claim pursuant to this statutory scheme “in effect amounts to a demand for payment and is the equivalent of the beginning of an action.” *Needham v. Moore*, 292 S.W.2d at

722 (citing *Wilson v. Hafley*, 226 S.W.2d at 313). It puts those interested in defending the estate against the claim on notice that they must file exceptions, or the claim will be allowed and they will be forever barred from objecting and the claim becomes a judgment against the estate. *Id.*; see *Coin Automatic Co. v. Estate of Dixon*, 375 S.W.2d 858, 861 (Tenn. 1963); *Miller v. Morelock*, 206 S.W.2d 427, 429 (Tenn. 1947).

Based upon the evidence in this record, there is a real issue as to whether the estate of Hazel Ledford would have been liable for the costs of removal and remediation of the underground storage tanks contrary, to the trial court's finding. The July 27, 1992 letter from Frederick L. Hitchcock, upon which the trial court relied, states: "Because *your father* was the last person to own the underground storage tanks prior to November 8, 1984, Mr. Ledford would meet the definition of "owner" discussed above, and *his* Estate should be liable for such costs." (T. Vol. II, Exh. 9) (emphasis added). Mr. Ledford died on May 10, 1990, and under the terms of the Joint Will all of his property passed to his wife, Hazel Ledford. However, the property in question had already been transferred to the Ledford Family Trust in 1982, eight years before Mr. Ledford's death. As such, no interest in that property ever passed to Mrs. Ledford. Additionally, the Deed transferring the property to the Ledford Family Trust reflects that Mr. Ledford was the only owner of record of the real property in question.¹² (T. Vol. II, Exh. A to Exh. 4). Thus, this Deed on its face demonstrates that Mrs. Ledford was never the "owner" of the property in question; therefore, it appears that her estate would not have been liable for the removal and remediation costs. However, because no claim was filed by the Ledford Family

¹²Specifically, the prior deed reference in the Deed reflects only Wilson A. Ledford as the owner of the property. There is no other evidence in the record reflecting ownership of this property by Hazel Ledford.

Trust, those interested in defending the estate against such a claim were never put on notice or given the opportunity to object and defend against it.¹³

The language of the statutory scheme first enacted by the legislature in 1939 is quite broad and leaves no room for doubt. It requires the filing of *all* claims, including those that are contingent and not matured, within one year from the date of the decedent's death; otherwise payment of such a claim out of the assets of the estate is barred. Tenn. Code Ann. §§ 30-2-306(b), 307(a) and 310(a); see *Bowden v. Ward*, 27 S.W.3d at 918; *Bonham v. Bonham*, 175 S.W.2d 328, 330 (Tenn. 1943); *Minton's Estate v. Markham*, 625 S.W.2d at 262-63 (citing *Eslick v. Friedman*, 235 S.W.2d 808, 814 (Tenn. 1951)). Indeed, Tenn. Code Ann. § 30-2-110 explicitly states that all claims are "forever barred" if not filed within one year following the death of the decedent. By approving the payment of the costs of remediation by the Personal Representative pursuant to the 1992 Agreement, the trial court has, in effect, circumvented this statutory scheme and permitted a 19-year delay in the filing of a claim by the Ledford Family Trust for the costs of removing and remediating the underground storage tanks.¹⁴ In *Commerce Union Bank v. Gillespie*, 156 S.W.2d at 428, the Tennessee Supreme Court specifically recognized that no court has the authority permit such a delay, stating:

[N]either the County Court of Davidson County nor any other court has power or jurisdiction to permit any delay in the filing of any such claims, *i.e.*, to permit the filing of any claims after the expiration of the said twelve months period

¹³ Of course, had a claim been timely filed by the Ledford Family Trust, the Personal Representative would have had an obvious conflict of interest, as she is both a trustee and beneficiary of that Trust. See *In re Estate of Rose Spradlin*, No. 03A01-9312-CV-00439, 1994 WL 317517, at *2 (Tenn. Ct. App. July 6, 1994) (no appeal filed).

¹⁴ Mrs. Ledford died on June 22, 1991, and the estate was admitted to probate on July 1, 1991. The agreement to pay any removal and remediation costs out of the Estate was signed by the Personal Representative on July 31, 1992. The Personal Representative did not file her Final Accounting, which for the first time sought court approval for the payment of the remediation costs by the Personal Representative, until February 25, 2010. The trial court's order approving those payments was not entered until February 28, 2011.

Finally, it should be noted that under the terms of the Joint Will of Wilson and Hazel Ledford, the Personal Representative did not have the authority to enter into the 1992 Agreement. Under the terms of the Joint Will, the Personal Representative was authorized to: (1) pay any debts owed by the Ledfords; (2) pay any amount remaining on their \$50,000 pledge to the Citizens' Endowment Fund; (3) set a perpetual care trust fund in the amount of \$5,000 for the care and maintenance of the Ledfords' cemetery lots; (4) distribute items of personalty fairly among the children and grandchildren; and (5) sell their real property and stock "as soon as you can profitably do so and the money from them be combined with the money from our Certificates of Deposits, other bank accounts, and any money owed us and be set up in a new Wilson A. and Hazel N. Ledford Trust." (T. Vol. II, Exh. 6). The Will did not incorporate any of the powers of a fiduciary contained in Tenn. Code Ann. § 35-50-110, including the power "[t]o enter into contracts binding upon the estate, but not upon the fiduciary in the fiduciary's individual capacity, that are reasonably incident to the administration of the estate, and that the fiduciary in the exercise of the fiduciary's best judgment believes to be for the best interests of the estate" or the power "[t]o settle, by compromise, or otherwise, claims or demands against the estate, or held in behalf of the estate." Tenn. Code Ann. § 35-50-110(10) and (11).

Accordingly, the Personal Representative had no authority to enter into the 1992 Agreement to make the Estate of Hazel Ledford liable for the costs of remediation of property not owned by that Estate. *See* Tenn. Code Ann. § 35-50-109(a); *Cleveland Bank and Trust Co. v. Olsen*, 682 S.W.2d 200, 201 (Tenn. 1984). Moreover, there is no evidence in the record that the Personal Representative ever had any authority to act for or on behalf of the Estate of Wilson A. Ledford. As such, she clearly had no authority to sign the 1992 Agreement on behalf of the Estate of Wilson Ledford.

The longstanding policy of this State, as reflected in the provisions of Tenn. Code Ann. §§ 30-2-306, 307 and 310, requires the prompt filing of claims against estates of deceased persons, whether matured or not. The trial court's determination that the costs of removal and remediation of the underground storage tanks should be approved because the State of Tennessee has not shown that the Ledford Estate would not have been liable for the cleanup of the underground storage tanks constitutes an erroneous application of this law. Thus, even if this Court affirmed the ruling that the Hospital Administrator had apparent authority to sign the 1992 Agreement on behalf of the Citizens' Endowment Fund, the trial court still erred in approving the Personal Representative's payment of the costs of remediation out of assets of the estate where no claim for such costs, timely or otherwise, was filed and where the Personal Representative had no authority under the Will to enter into such a binding agreement.¹⁵ Accordingly, the trial court's order approving the payment of the costs of removal and remediation of the underground storage tanks out of assets of the Estate should be reversed.

II. THE TRIAL COURT ERRED IN APPROVING PAYMENTS OF CERTAIN ATTORNEYS' FEES BY THE PERSONAL REPRESENTATIVE.

A. The Trial Court Erred In Approving The Payment Of Attorneys' Fees Associated With The Removal And Remediation Of The Underground Storage Tanks On Property Not Owned By The Estate.

In addition to seeking approval for payment of the costs of removal and remediation of the underground storage tanks on the property owned by the Ledford Family Trust, the Personal Representative also sought approval of attorneys' fees associated with the removal and remediation, which she had paid out of the assets of the Estate. This included \$11,076.53 in fees

¹⁵It should be noted that even if the 1992 Agreement could somehow be construed as a "claim" on behalf of the Ledford Family Trust for purposes of Tenn. Code Ann. § 30-2-307, it was not executed until July 31, 1992, which was more than twelve months after the date of Hazel Ledford's death and, therefore, still would not have been timely pursuant to Tenn. Code Ann. § 30-2-310.

paid to Frederick Hitchcock and an additional \$2887.50 paid to Roger Jenne.¹⁶ With respect to the fees paid to Mr. Hitchcock, the trial court approved these fees, finding that they “are reasonable and necessary in the administration of this estate. This was an extraordinary issue and necessary for resolution of the underground storage situation.” (T.R. Vol. II at 184). The trial court did not make any similar finding with respect to the fees paid to Mr. Jenne but instead summarily dismissed the Respondents’ objections to payment of those fees. (T.R. Vol. II at 192). In approving these fees, the trial court failed to conduct any sort of evidentiary hearing or make any finding that these fees were reasonable and that they benefited the entire Estate. The only evidence in the record clearly would *not* support such a finding; therefore, the trial court abused its discretion in approving payment of these attorney’s fees out of assets of the Estate.

Under Tennessee law, executors have the authority to retain counsel to assist them with their duties; however, when an executor retains an attorney, he or she is personally liable for the legal expenses until a court determines that the services were required and that the expenses were reasonable. If the court approves the fee, the executor may charge it back against the estate as one of the costs of administration under Tenn. Code Ann. § 30-2-606. *State ex rel. Dahlberg v. American Sur. Co.*, 121 S.W.2d 546, 547 (1938); *In re Estate of Wallace*, 829 S.W.2d 696, 703 (Tenn. Ct. App. 1992).

Courts will not permit an executor’s legal fees to be paid as an administrative expense unless the executor demonstrates: (1) that the services for which the fees are claimed were required, *see Vaccaro v. Cicalla*, 14 S.W. 43, 46-47 (Tenn. 1890); *In re Estate of Wallace*, 829 S.W.2d at 703; (2) that the services benefitted the entire estate, *Leaver v. McBride*, 506 S.W.2d 141, 145 (Tenn. 1974); *McFarlin v. McFarlin*, 785 S.W.2d 367, 372-73 (Tenn. Ct. App. 1989);

¹⁶ The specific attorney’s fees are set out in Appendix B. Additionally, it should be noted that the Final Accounting actually reflects that Mr. Hitchcock was paid \$10,576.53 in fees, which is \$500 less than the amount requested and approved by the trial court. (T.R. Vol. I at 14-30).

and (3) that the requested fee is reasonable. *In re Estate of Wallace*, 829 S.W.2d at 703. A request for approval of attorneys' fees should be supported by "precise information" about the time spent on the matter. *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 181 (Tenn. 2011).

In determining the reasonableness of an attorney's fee, the Tennessee Supreme Court has held that a trial court should apply the factors set forth in Tenn. Sup. Ct. R. 8, RPC 1.5(a)(1)-(10). *Wright*, 337 S.W.3d at 185 (Tenn. 2011). Those factors include the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fee customarily charged in the locality for similar legal services;
- (4) The amount involved and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) Whether the fee is fixed or contingent;
- (9) Prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
- (10) Whether the fee agreement is in writing.

Tenn. Sup. Ct. R. 8, RPC 1.5(a).

The Supreme Court has further established the procedure that should be followed by a trial court in making any determination as to a fee's reasonableness.

In terms of procedure, the trial court should develop an evidentiary record, make findings concerning each of the factors, and then determine a reasonable fee that “depend[s] upon the particular circumstances of the individual case.” *White*, 937 S.W.2d at 800. To enable appellate review, trial courts should clearly and thoroughly explain the particular circumstances and factors supporting their determination of a reasonable fee in a given case. *See Hoffert*, 656 F.2d at 166 (finding no abuse of discretion in fee award to attorney representing minor tort victim where trial court considered each of the DR 2–106 factors and provided factual findings, “fully supported by the record,” that were “sufficiently detailed to permit appellate review”); *Ex parte Peck*, 572 So.2d at 429 (“A reviewing court must be able to ascertain from the record what factors the trial court considered in awarding the attorney fee.”).

Wright, 337 S.W.3d at 185-86.

It is clearly evident from the record that, in approving the attorneys’ fees associated with the removal and remediation of the underground storage tanks, the trial court did not follow with the Tennessee Supreme Court’s directions in *Wright* to “develop an evidentiary record, making findings concerning each of the factors [in RPC 1.5(a)(1) – (10)], and then determine a reasonable fee that ‘depend[s] upon the particular circumstances of the individual case.’” *Id.* Indeed, the orders approving payment of these attorneys’ fees out of assets of the estate contain no express consideration of any of the above factors (T.R. Vol. II at 183-186, 191 193), in contravention of both the *Wright* decision and Rule 52.01 of the Tennessee Rules of Civil Procedure, which provides in pertinent part:

In all actions tried upon the facts without a jury, the court shall find the facts specially and shall state separately its conclusion of law and direct the entry of the appropriate judgment. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.

This Court has held that this provision requiring findings of fact and conclusions of law is “not a mere technicality,” as the requirement serves the important purpose of “facilitat[ing] appellate review and promot[ing] the just and speedy resolution of appeals.” *In re K.H.*, No. W2008-01144-COA-R3-PT, 2009 WL 1362314, at *8 (Tenn. Ct. App. May 15, 2009) (no appeal filed). In particular, with respect to cases involving attorneys’ fees, the Tennessee Supreme Court has stated that “[t]o enable appellate review, trial courts should clearly and thoroughly explain the particular circumstances and factors supporting their determination of a reasonable fee in a given case.” *Wright*, 337 S.W.3d at 186. Both *Wright* and Tenn. R. Civ. P. 52.01 thus impose a mandatory duty on the trial court to make express findings as to those factors in Tenn. Sup. Ct. R. 8, RPC 1.5(a)(1)-(10). The trial court, however, did not fulfill this duty in approving the attorneys’ fees associated with the removal and remediation of the underground storage tanks. Accordingly, the trial court abused its discretion in approving these fees by failing “to properly consider the factors customarily used to guide the particular discretionary decision.” *Lee Medical, Inc.*, 312 S.W.3d at 524.

The trial court further abused its discretion in approving these fees because its decision was based solely upon the erroneous legal conclusion that “resolution of the underground storage issue” was necessary for the administration of the Estate. (T.R. Vol. II at 183). As discussed in the previous section, no claim was ever filed by the Ledford Family Trust for the costs of removal and remediation of the underground storage tanks on the property owned by that Trust; thus, resolution of the underground storage tank issue was not necessary for the administration of Mrs. Ledford’s Estate.¹⁷

¹⁷Additionally, the evidence in the record reflects that at least some of the legal services were provided to the Ledford Family Trust and not the estate. Specifically, the July 27, 1992 letter from Frederick Hitchcock identifies the Ledford Family Trust in the “Re:” section of the letter. (T. Vol. II, Exh. 9).

Finally, the only evidence in the record with respect to the attorneys' fees paid to Frederick Hitchcock was his affidavit. (T.R. Vol. II at 175-76). That affidavit contains a very general description of the legal services provided and summarily concludes that all the legal services rendered "were reasonable and necessary for the proper and orderly administration of this aspect of the Estate of Hazel Ledford." There is no billing statement or time sheet, and the affidavit does not provide any information regarding to the amount of time spent by Mr. Hitchcock or anyone else with his law firm, when the time was spent, or even Mr. Hitchcock's hourly rate. (*Id.*). The Final Accounting filed by the Personal Representative provides even less information. It just lists the total amounts paid to Mr. Hitchcock; as the Personal Representative testified, she did not itemize anything but "just put all the fees paid to certain individuals, a total amount." (T. Vol. II at 193-194). Thus, had trial court attempted to conduct an evidentiary hearing to evaluate the reasonableness of these fees under the factors set forth in RPC 1.5(a)(1)–(10), it simply could not have found that these fees were reasonable.

Similarly, the only evidentiary support for the fees paid to Mr. Jenne is his affidavit. (T.R. Vol. II at 167-174). While this affidavit does contain a general itemization of the time spent by Mr. Jenne, it fails to include the level of "precise information" necessary for a court to make a determination as to whether the services were reasonable, necessary, and benefited the entire Estate. And, as previously discussed, given that no claim for the costs of removal and remediation of the underground storage tanks was ever filed against the Estate, these fees clearly did not benefit the entire estate; rather, they benefited the beneficiaries of the Ledford Family Trust which included the Personal Representative.

The Personal Representative failed to meet her burden of demonstrating (1) that the services for which the fees are claimed were required; (2) that the services benefitted the entire

Estate; and (3) that the requested fee is reasonable.¹⁸ As such, the trial court abused its discretion in approving payment of these attorneys' fees out of assets of the Estate; its decision should be reversed, and the Personal Representative should be required to reimburse the Estate for these fees.

B. The Trial Court Erred In Approving Attorneys' Fees For Defending The Personal Representative's Administration Of The Estate As Reflected In The Final Accounting.

The trial court approved attorneys' fees for Roger and Joshua Jenne with respect to the defending of the Personal Representative's administration of Hazel Ledford's estate as reflected in her Final Accounting.¹⁹ Once again, in approving these fees, the trial court did not follow with either the Supreme Court's directive in *Wright* or Tenn. R. Civ. P. 52.01 in approving these attorneys' fees but instead approved payment of these fees based upon a finding that the Personal Representative acted in good faith. (T.R. Vol. II at 156, 184). Accordingly, the trial court abused its discretion in approving these fees by failing "to properly consider the factors customarily used to guide the particular discretionary decision," and such decision should be reversed. *Lee Medical, Inc.*, 312 S.W.3d at 524.

Furthermore, in *In re Estate of Wallace*, 829 S.W.2d 696 (Tenn. Ct. App. 1992), this Court adopted a strict rule with regard to fees charged against an estate, stating:

An estate should not be charged with an executor's legal expenses if the executor's conduct is at the root of the litigation. Thus, when an executor is charged with breach of its fiduciary duties or when its accounting is challenged, it is the outcome of the proceedings that determines whether the executor's legal expenses incurred in

¹⁸It is questionable whether the Personal Representative would ever be able to meet her burden of demonstrating the reasonableness of these fees given the attorney's statement in his affidavit that he does not have access to any of his time records or other billing information and the Personal Representative's testimony that she did not keep any itemized statements.

¹⁹ The specific fees are set out in Appendix C.

defending against the challenge should be assessed against the estate.

If the executor successfully defends its conduct, its legal expenses may be charged against the estate. If, however, the account is defective then the estate should not be charged. *If the executor does not prevail completely*, or where it is partially to blame for bringing about unnecessary litigation, the executor rather than the estate should be responsible for its legal expenses. (emphasis added)

829 S.W.2d at 704 (internal citations omitted). Here, the record clearly reflects that the Personal Representative did not prevail completely in defending her accounting and administration of the estate. For example, the trial court twice denied the Personal Representative's request for payment of attorneys' fees for administration of the Estate that were in excess of the amount sworn to in her Final Accounting. (T.R. Vol. II at 183-186, 191-193). The trial court further denied requests for fees under Case No. 07-244 as not being properly payable by the Estate. (*Id.*). The trial court also denied fees for the hearing that occurred on November 18, 2010. (T.R. Vol. II at 191).

Finally, this Court has held that application of the rule articulated in *Wallace* does not require the establishment of the "executor's bad faith or breach of fiduciary duty." *Estate of Boote v. Shivers*, No. M2003-02656-COA-R3-CV, 2005 WL 1277867, at *5 (Tenn. Ct. App. May 27, 2005) (no appeal filed). Thus, the trial court's finding that the Personal Representative acted in good faith or that the State of Tennessee had failed to prove that the Personal Representative acted in bad faith is not sufficient grounds for approving the Personal Representative's legal fees incurred in defending her administration of the Estate. Again, as this Court stated in *Wallace*:

Executors, as fiduciaries, owe a duty of undivided loyalty to the estate and must deal with the beneficiaries in the utmost good faith.

Part of this duty includes incurring only those expenses that are reasonably necessary for the proper administration of the estate.

While some hardship could conceivably result in adopting a strict rule with regard to fees charged against an estate, the best way to insure that fiduciary obligations are met is to follow the rule that an estate will not be required to pay the executor's legal expenses incurred to defend its request for fees unless the court determines that all the requested fees were necessary and reasonable. This approach will inure to the benefit of estates by promoting conservatism in the administration of estates and by deterring requests for questionable fees.

829 S.W.2d at 705.

The record clearly reflects that the trial court did *not* determine that all of the requested fees were necessary and reasonable for the proper administration of the Estate. Moreover, a review of the affidavits submitted by Roger and Joshua Jenne reflect that very little of their time was spent in providing legal services associated with the actual administration of the Estate, mainly because there was very little actual administration of the Estate. After obtaining her letters testamentary from the probate court in 1991, the record reflects that the Personal Representative took none of the actions statutorily required to administer her stepmother's estate until December 30, 2009 when she filed an interim accounting.²⁰ (T.R. Vol. I at 14-23). The affidavits of Roger and Joshua Jenne reflect that the vast majority of legal services provided were for: (1) the removal and remediation of the underground storage tanks on the property owned by the Ledford Family Trust, for which no claim was ever filed against the Estate; (2) the separate action filed in Bradley County Chancery Court Case No. 07-244, to terminate the Charitable Trust created under the Joint Will (but never actually established by the Personal

²⁰ As discussed in the Statement of Facts, the Personal Representative did not file an inventory as required by Tenn. Code Ann. § 30-2-301 and did not file the accountings required by Tenn. Code Ann. § 30-2-601.

Representative); and (3) the defense of the Personal Representative's administration of the Estate. (T.R. Vol. I at 60-83; Vol. II at 161-174).

None of these legal expenses were reasonable and necessary for the proper administration of the Estate, and no such finding was ever made by the trial court in accordance with the requirements of Tenn. Sup. Ct. R. 8, § 1.5(a)(1)-(10) and Tenn. R. Civ. P. 52.01. Accordingly, the trial court abused its discretion in approving the Personal Representative's request that these fees be paid out of the assets of the Estate, and such decision should be reversed.

CONCLUSION

For these reasons, the judgment of the trial court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Tenn. Op. Atty. Gen. No. 09-52 (Tenn.A.G.), 2009 WL 983587

Office of the Attorney General

State of Tennessee
Opinion No. 09-52
April 8, 2009

Dismissal of County Administrator of Elections Based On Party Affiliation

*1 The Honorable W. Kent Coleman
State Representative
32 Legislative Plaza
Nashville, TN 37243-0149

The Honorable Charlotte Burks
State Senator
304 War Memorial Building
Nashville, Tennessee 37243-0215

QUESTION

Whether a county administrator of elections can be dismissed solely on the basis of party affiliation.

OPINION

In light of the all the relevant authority, a court could find that the dismissal of a county administrator of elections solely on the basis of political party affiliation constitutes a violation of that individual's First and Fourteenth Amendment rights under the United States Constitution. If, however, a county election commission can demonstrate that it has delegated broad discretionary policymaking authority regarding budgetary matters and/or the implementation of its goals and programs to the administrator of elections, then under those circumstances a court could find that political affiliation is an appropriate requirement for the effective performance of that particular administrator's position.

ANALYSIS

The question posed is whether a county administrator of elections may be dismissed based solely upon that administrator's party affiliation. Tenn. Code Ann. § 2-12-201 provides that an administrator of elections shall be appointed by the county election commission. The administrator shall be the "chief administrative officer of the commission and shall be responsible for the daily operations of the commission office and the execution of all elections." Tenn. Code Ann. § 2-12-116(a)(1). The county election commissioners may not appoint themselves or any of their spouses, parents, siblings, in-laws or children to the position of administrator. Tenn. Code Ann. § 2-12-201(a)(14). Additionally, any person appointed for the first time to the position of administrator must possess a high school education or GED. Tenn. Code Ann. § 2-12-116(a)(1). In evaluating a prospective appointee, the county election commission is to consider the knowledge and experience of such prospective appointee in the following areas: administrative, managerial, instructional, communication, budgetarial, purchasing, promotional, legal and general office skills and other related skills necessary to fulfill the statutory requirements of administrator. *Id.*

The United States Supreme Court has held that the First and Fourteenth Amendments to the United States Constitution protect state and local government employees from discharge or other significant adverse employment actions taken because of their

political affiliations. See *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 79, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990); *Elrod v. Burns*, 427 U.S. 347, 359, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). If, however, the exercise of those rights interferes with the discharge of public duties, then the Court has held that the rights may have to yield to the government's interest in maintaining effectiveness and efficiency. *Elrod*, 427 U.S. at 366, 96 S.Ct. 2673.

*2 Limiting patronage dismissals to policymaking positions is sufficient to achieve the valid governmental objective of preventing holdover employees from undermining the ability of a new administration to implement its policies. *Elrod*, 427 U.S. at 366. In contrast, “[n]onpolicymaking individuals usually have only limited responsibilities and are therefore not in a position to thwart the goals of the in-party.”

Hall v. Tollett, 128 F.3d 418, 422 (6th Cir. 1997) (quoting *Elrod*, 427 U.S. at 367, 96 S.Ct. at 2687). However, the scope of this exception was not clearly delineated by the Court in *Elrod*:

No clear line can be drawn between policymaking and nonpolicymaking positions. While nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. Employee supervisors, for example, may have many responsibilities, but those responsibilities may have only limited and well-defined objectives. An employee with responsibilities that are not well-defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an advisor or formulates plans for the implementation of broad goals.

427 U.S. at 367-368, 96 S.Ct. at 2687.

In *Branti v. Finkel*, 445 U.S. 507, 518, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), the Court observed that circumstances could exist in which “a position may be appropriately considered political even though it is neither confidential nor policymaking in character,” while on the other hand, “party affiliation is not necessarily relevant to every policymaking or confidential position.” *Id.* at 518, 100 S.Ct. at 1294. Thus, the *Branti* Court held that the “ultimate inquiry is whether the hiring authority can demonstrate that party affiliation [or sponsorship] is an appropriate requirement for the effective performance of the public office involved.” *Id.* In *Branti*, the Court found that this test could not be met in the case of an assistant public defender, because “[t]he primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State,” and for such an official to be subject to discharge for lack of allegiance to the dominant political party “would undermine, rather than promote, the effective performance of [his] office.” *Id.* at 519-520, 100 S.Ct. at 1295.

In elaborating on this *Branti* exception, the Sixth Circuit has held that, in determining whether a position is afforded protection against politically motivated dismissal or other adverse action, any such inquiry “must look beyond the mere job title and examine the actual duties of the specific position.” *Hall*, 128 F.3d at 423. As such, it is the inherent duties of the position in question, and the duties as envisioned for the new holder which must be examined, *Faughender v. City of North Olmsted*, 927 F.2d 909, 913 (6th Cir. 1991), rather than the duties as performed by the person currently holding the position. *Williams v. City of River Rouge*, 909 F.2d 151, 154 (6th Cir. 1990). If this examination reveals that the position is inherently political in nature, then political affiliation is an appropriate requirement for the job. *Blair v. Meade*, 76 F.3d 97, 100 (6th Cir. 1996). However, the Supreme Court has rejected the argument that, because a public employee serves at the pleasure of the public employer and can be dismissed for good cause, bad cause or no cause at all, such employee can be dismissed because of his or her political affiliation. See *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712, 716, 116 S.Ct. 2353, 135 L.Ed.2d (1996) (“Government officials may indeed terminate at-will relationships ... without cause; but it does not follow that this discretion can be exercised to impose conditions on expressing, or not expressing, specific political views.”).

*3 The Sixth Circuit Court of Appeals has not yet had the opportunity to determine whether political party affiliation is required for the position of county administrator of elections. It has, however, set forth a system to assist courts in determining whether

political affiliation is an appropriate element of personnel decisions by creating four categories which attempt to capture the positions that could possibly fall into the *Branti* exception. The categories are as follows:

1. Positions specifically named in relevant federal, state, county, or municipal law to which discretionary authority with respect to the enforcement of that law or the carrying out of some other policy of political concern is granted;
2. Positions to which a significant portion of the total discretionary authority available to category one position-holders has been delegated; or positions not named in law, possessing by virtue of the jurisdiction's pattern or practice the same quantum or type of discretionary authority commonly held by category one positions in other jurisdictions;
3. Confidential advisors who spend a significant portion of their time on the job advising category one or category two position-holders on how to exercise their statutory or delegated policymaking authority, or other confidential employees who control the lines of communications to category one positions, category two positions or confidential advisors; and
4. Positions that are part of a group of positions filled by balancing out political party representation or that are filled by balancing out selections made by different governmental agencies or bodies.

Heggen v. Lee, 284 F.3d 675, 682 (6th Cir. 2002) (citing *McCloud v. Testa*, 97 F.3d 1536, 1557 (6th Cir. 1996)).

The duties and responsibilities of a county administrator of election are set out by statute and include: (1) the employment of all office personnel; (2) preparation of the annual operating budget and, upon approval of the commission, submission to the county legislative body for funding; (3) requisition and purchase of supplies necessary for operation of office and conduct of all elections; (4) maintenance of voter registration files, campaign disclosure records and any other required records; (5) conducting of instruction class for poll workers or designation of another qualified person to conduct such class; (6) preparation of all required notices for publication; (7) preparation and maintenance of all fiscal records necessary for daily operation of office and all elections; (8) compilation, maintenance and dissemination of information to public, candidates, voters, press and all inquiring parties in regard to all aspects of the electoral process on all governmental levels; (9) promotion of electoral process through supplemental registrations, public functions, press releases and media advertising; (10) attendance at any required seminar and other education seminars, as funding permits; (11) knowledge of all current laws pertaining to the election process and any changes mandated by the general assembly; and (12) assistance in planning and implementation of any plan of apportionment or reapportionment. Tenn. Code Ann. § 2-12-201.

*4 While many of the statutory duties outlined in Tenn. Code Ann. § 2-12-201 appear to be ministerial, county administrators of elections are given the duty to prepare a budget for approval by the county election commission. The Sixth Circuit has held that because money consistently plays a very important role in politics, “budgetary decisions are among the most significant, and the most political, actions which government officials take” and that the “efficient and orderly administration of a budget is an integral part of the budgetary process and certainly has key political implications and consequences.” *Blair v. Meade*, 76 F.3d at 100. Thus, because the county administrator of elections has been delegated the authority to prepare an annual operating budget for approval by the county election commission, that position conceivably falls under Category Two. However, the Sixth Circuit has declined to hold that there is an “inextricable connection between politics and funds” such that any budgetary discretion in a position's duties means Category Two designation is appropriate. *McCloud v. Testa*, 227 F.3d 424, 429 (6th Cir. 2000). Rather, that court has looked to see whether there is any delegated discretionary policymaking authority regarding budgetary matters to determine whether a position falls under Category Two. *Hager v. Pike County Board of Education*, 286 F.3d 366, 376-77 (6th Cir. 2002). While the inherent duties of the county administrator of elections are otherwise well-stated in Tenn. Code Ann. § 2-12-201, there is no clearly defined extent to which the administrator is delegated discretionary policymaking authority regarding budgetary matters, particularly as the statute requires the budget to be approved by the county election commission. Whether a county election commission has delegated [or intends to delegate] responsibility to make such discretionary decisions

to the administrator of elections, such that political affiliation is an appropriate requirement for the position, will therefore depend upon the particular practices and circumstances of each individual county election commission.

We would note that at least one court has addressed the issue of whether political party affiliation is necessary to perform a county general registrar's duties effectively.¹ See *McConnell v. Adams*, 829 F.2d 1319 (4th Cir. 1987); *Sales v. Grant*, 158 F.3d 768 (4th Cir. 1998). In *McConnell*, the incumbent Republican governor was replaced by a Democrat in the 1982 election. As a result of this change, Virginia state law required a Democratic majority on the three-member county electoral board. When the terms of the general registrars for Scott and Lee Counties, both of whom were Republicans, expired, the county electoral boards did not reappoint them as general registrars. The two registrars filed suit under 42 U.S.C. § 1983 against the electoral boards alleging that they were not reappointed solely because they were Republicans. *McConnell*, 829 F.2d at 1322. In defense, the electoral boards argued that the Virginia General Assembly had created a statutory scheme requiring political patronage in the composition of electoral boards, which in turn fostered patronage in the appointment of registrars and, therefore, the General Assembly had determined that political party affiliation was an appropriate requirement for the effective job performance of a registrar or assistant registrar. *Id.* at 1324.

*5 The Fourth Circuit Court of Appeals rejected this argument, noting that while the state statutes required certain political party affiliations for members of the electoral boards, they did not also require that the registrars be members of the majority political party. The court further stated:

While the Virginia statutory scheme may facilitate political patronage in the appointment of registrars, this alone does not satisfy the *Branti* standard. Party affiliation must be more than a matter of convenience; it must be an appropriate requirement for the position.

Id. The court found that the county electoral boards had failed to demonstrate that party affiliation was a requirement for the position of registrar, particularly in light of the testimony of the Secretary of the State Board of Elections that political party affiliation would detract from, rather than enhance, a registrar's job performance. *Id.*

Tennessee's statutory scheme is similar to the Virginia scheme at issue in *McConnell* in that it requires political party affiliations for members of the county election commissions. See Tenn. Code Ann. § 2-12-103 (requires three members to be members of the majority party and two members to be members of the minority party). It does not require that the county administrators of elections be members of the majority party, but instead specifically requires that the county election commissions consider a prospective appointee's knowledge and experience in the areas of administrative, managerial, instructional, communication, budgetarial, purchasing, promotional, legal and general office skills and other related skills necessary to fulfill the statutory requirements of administrator. Tenn. Code Ann. § 2-12-116(a)(1). In contrast, Tenn. Code Ann. § 2-12-202 provides that the majority party members of the county election commission shall appoint one precinct registrar for each polling place and the minority party members shall also appoint one precinct registrar for each polling place.

Thus, in light of the all the relevant authority, we think that a court could find that the dismissal of a county administrator of elections solely upon the basis of political party affiliation constitutes a violation of that individual's First and Fourteenth Amendment rights under the United States Constitution. If, however, a county election commission can demonstrate that it has delegated broad discretionary policymaking authority regarding budgetary matters and/or the implementation of its goals and programs to the administrator of elections, then under those circumstances a court could find that political affiliation is an appropriate requirement for the effective performance of that particular administrator's position.

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Footnotes

- 1 The position of county general register under Virginia state law is similar to that of county administrator of elections under Tennessee law.

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