

The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Lois Bunton Shults-Davis

Office Address: 111 Gay St., P. O. Box 129, Erwin, Unicoi County, Tennessee
37650
(including county)

Office Phone: 423-743-9179 Facsimile: 423-743-3924

INTRODUCTION

The State of Tennessee Executive Order No. 41 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application 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 Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

- State your present employment.

I am a partner in the law firm of Shults and Shults Law Offices, Erwin, Tennessee, practicing primarily civil law in the four counties of the First Judicial District of Tennessee as well as Greene County, Hamblen County and Sullivan County, Tennessee.

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

I was licensed to practice law in 1980. My Tennessee Board of Professional Responsibility number is 07193.

- 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.

State of Tennessee, 1980, TNBPR # 07193. Active.

United States District Court, Eastern District of Tennessee 1986.

- 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, I have never been denied admission to, suspended or placed on inactive status by the Bar of any State.

- 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).

March 1980 through March 1981, Associate: Jenkins and Jenkins Law Offices, Knoxville, Tennessee.

August 1982 through October 1985, Associate: R. O. Smith Law Offices, Erwin, Tennessee.

October 1985 to present, Partner: Shults and Shults Law Offices, Erwin, Tennessee.

Other occupations, business or professions are as follows: Floral assistant in family flower shop 1971; after school and evening childcare for owner/operators of a North Carolina orchard and market 1972; Summer worker, Carter County Chamber of Commerce, 1973; Research and office assistant Office of the Dean, East Tennessee State University College of Education 1974 to 1977; Desk Clerk, University of Tennessee College of Law Library 1977 to 1978; Clerk, Myers, Saylor and Johnson Law Firm, Johnson City, Tennessee, Summer 1978; Deputy Probate Clerk, Knox County Probate Court 1978; Clerk, Jenkins and Jenkins Law Firm, Knoxville, Tennessee, 1978 to March 1980; Tennessee Title agent (license now retired) from approximately 1986 to 1992; Certified Teacher Tennessee Department of Education with endorsements in History, Geography, Government, Economics and Sociology 1977; Rule 31 Listed Mediator 1996 to the present.

- 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.

March 1981 through August 1982, I continued to perform work for Jenkins and Jenkins Law Firm of Knoxville, Tennessee, finalizing appeals, briefs, oral arguments in appeals and other matters pending at the time I resigned from my position as an associate in the firm to move to Erwin, Tennessee, with David R. Shults, to whom I was married at that time. Mr. Shults went to Erwin to enter practice in the firm of Thomas J. Seeley, Jr., in Erwin, Tennessee. I also assisted my husband with pleading work and research as he began practicing law.

- 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 engage in a diverse civil practice consisting of :

Adoptions 3%	Boundary line cases – 2%	Business Associations – 5%
Conservatorships – 5%	Divorces with Minor Children – 10%	
Divorces without Minor Children – 8%		
Drafting and Execution of Powers of Attorney, Contracts and Living Wills - 5%		
Damages/Torts – 3%	General Civil – 5%	Interstate Support – 1%
Legitimation/Paternity - 2%	Municipal Law 12%	Mediation 15%
Orders of Protection – 3%	Probate/Trust/ Wills – 5%	
Real Estate and Real Property Litigation – 4%	Residential Parenting/Child Support - 12%	

- 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 Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

The firm in which I practice is a family firm consisting of my former spouse, David R. Shults, licensed in 1981, his brother, Douglas K. Shults, licensed in 1984, and his wife, Sarah R. Shults, licensed in 1985. By most standards we are a small firm. However, we are the largest firm in Erwin, Tennessee. We consider ourselves to be our community's "hometown" firm. We provide services in almost all areas of the law, excluding consumer bankruptcy (as we represent many businesses in town) and criminal law in Erwin as David Shults is the part time Judge of the General Sessions Court for Unicoi County, where most criminal matters are first brought before the Court.

I see clients who desire advice on a wide array of matters. Examples include business associations, contracts – drafting and litigation, domestic problems, child related matters – adoptions, custody, support, termination and otherwise, real property issues, deed drafting, trusts and estate planning. I supply services for these concerns such as research, document preparation,

execution and closings, and lawsuits as necessary to meet these needs.

I have served as Town Attorney for the Town of Unicoi, Tennessee since December of 1999. The Town was formed in 1994. I attend Town meetings, locally and in other locations, prepare documents, ordinances, resolutions, assist with planning services, condemn property for Town improvement projects, assist with budget planning, negotiate with other governmental and quasi-governmental agencies and advise the Mayor, Board of Aldermen, Planning Commission and Town Staff. The Town of Unicoi was awarded the Tennessee Municipal League's Municipal Achievement and Small Town Progressive City Award in Tennessee, June 15, 2010. The Town of Unicoi has been selected as one of six featured towns to present information at the Tennessee Municipal League meeting in June of this year. During the 15 years I have served as Town Attorney, the Town has acquired and developed two parks, including the restoration of a Colonial Era cabin originally owed by a Revolutionary War soldier, Brigadier General Evan Shelby. Further, during my period of my service as Town Attorney the Town has planned and completed three sewer extension projects, has acquired and developed and opened a Tourist Information Center just off Interstate 26, planned and acquired property for a regional cultural arts center, acquired property and grant funding for a community kitchen to allow individuals and groups to access certified kitchen facilities. These facilities are designed for use in preparing specialty food products to encourage start-up businesses. During my period of service, the Town has marked, opened and developed infrastructure and a trailhead in partnership with the U. S. Forest Service for the Pinnacle Tower Trail. This trail accesses a mountain top fire tower, which historically, served as a lookout for United States Forrest Service fire prevention and control. I have provided legal service for all these projects as described above and further including: title searches, bond counsel certifications, negotiation with citizens for easements, negotiation with other governmental entities and agencies and drafting of documents, resolutions and ordinances.

A typical workweek for me includes Court or mediation three to five days per week and preparation for hearings and trials in Chancery, Circuit and Juvenile Courts in Carter, Johnson, Unicoi and Washington Counties. Occasionally I attend General Sessions Court in counties outside Unicoi County. I also handle matters in the Chancery and Circuit Courts of the Second Judicial District in Sullivan County and the Third Judicial District in Greeneville, Tennessee. I regularly attend evening meetings of the Town of Unicoi and other agencies I represent. When not in Court or participating in mediation I see clients, prepare pleadings and accountings, draft transactional documents, prepare, file, process and close estates, file other lawsuits and research other projects.

I have filed, participated in and tried jury cases on condemnation, damages and personal injury matters.

I have represented, for many years, a woman whose husband murdered her mother. I have assisted her with termination of parental rights, adoption, estate planning, injunctive relief, parole hearings and defense of damage suits filed by the prisoner. Since his last parole hearing I have assisted her with researching governmental registries and internet information regarding a business/ministry he claims involvement with from prison.

I represented a young woman who was sued by her brother for damages for not bringing his young child, to see him in prison. She was sheltering and rearing the child, after the father was incarcerated. I later assisted her and her husband in adopting the child.

I have done many private adoptions.

I have assisted a young woman who bore three children to a convicted felon sentenced to ten year in Federal Prison for drug trafficking. After release from prison, claiming rehabilitation, the father married the mother and then abandoned her and the children repeatedly. Ultimately, when she divorced him, he tried to acquire custody of the children.

I have represented many parents and grandparents seeking custody due to drug abuse and abandonment by the other parent or parents.

I have served as Guardian ad Litem numerous times to represent interests of children or disabled persons in partition and distribution of assets in land sale or estate cases as well as contested custody matters.

I have been appointed to serve as Conservator or Guardian ad Litem of multiple disabled veterans without family, but with assets needing administration.

I have handled more than a dozen cases in the Tennessee Appellate Courts.

I am not well adapted to ignoring or referring out problems that are presented by persons who seek my advice. To me the important aspects of what I do everyday are respecting my clients, the facts and circumstance of their lives which has led them to my office, treating them as I would like to be treated and representing them to the best of my ability.

It is my belief that every client and person I come in contact with in the practice of law is entitled to be heard fairly and treated with dignity and respect. I value from other persons, and try to model calm and deliberate communication, an even temperament and an orientation toward solving problems.

My work history and my life experiences have taught me the value of a sound work ethic and practice.

My law practice has become wider in geographic area than the rural county in which I reside. I am therefore accustomed to traveling throughout the First Judicial District on a regular basis.

I am now in my 35th year of law practice at age 57. I have acquired in depth knowledge and experience in a wide range of legal issues. I have represented insurance companies, banking and financial institutions, individuals, families, churches, partnerships, businesses, corporations, non-profit organizations and quasi-governmental and governmental agencies. I have represented poor people and wealthy people. I have worked with people from most walks of life in East Tennessee.

All of these activities have required me to refine my communication, writing and speaking skills and to develop good research and legal analysis abilities. I value my reputation for honesty. I assist in community service in my community and the county in which I was raised. These are skills and experiences which should transfer well from the role of attorney to Circuit Court Judge if I am allowed that opportunity.

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

I have represented the Unicoi County School Board in protracted litigation regarding land use restrictions and the scope of the school boards' use of real property owned by the Board in a residential neighborhood. This case was appealed both to the Court of Appeals and the Supreme Court of Tennessee.

I have represented a widow whose rights of inheritance were challenged by her husband's step-children. The basis of the litigation was an alleged joint and mutual will with his prior spouse who predeceased him. This litigation was protracted, involved out of state and Memphis counsel, and was twice appealed to the Court of Appeals.

I have represented a woman who was never legitimated in establishing her right to inherit her Father's entire estate. At that time the rights of inheritance by heirs outside of wedlock were not widely understood in Tennessee. Her father died intestate. The case was appealed by the decedent's collateral relatives and her right of inheritance was sustained based in part on a photograph of her mother and father she had kept since she was a child. Several attorneys she consulted before seeing me indicated to her she could not inherit.

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

I have substituted for the General Sessions Court Judge for Unicoi County by special designation in the absence of the regular judge from 1991 to approximately 1998. This Court exercises small claims jurisdiction, probate jurisdiction, limited criminal jurisdiction and juvenile jurisdiction.

I regularly serve as mediator in domestic relations, custody and juvenile matters in the Chancery and Circuit Courts of the First Judicial District and the Juvenile Court of Carter County, Tennessee.

Further I have served a Court appointed Special Master in the following cases:

- 1. November 2008 through March 2010
 2. Chancery Court for Washington County
 3. Taking proof and making findings and recommendations concerning parenting conflicts, contempt and children's best interests.
 4. Resolution of lengthy litigation.
- 1. December 2011 through January 2012
 2. Chancery Court for Washington County
 3. Taking proof and making findings and recommendations concerning self employment income in a professional practice and calculation of child support and credits.
 4. Resolution of litigation.

- 1. January 2010 through February 2010
 2. Chancery Court for Washington County
 3. Taking proof and making findings as to proper shipping charges, box sizes necessary to shipping and amount of debt owed for shipping charges.
 4. Determination of contractual provisions regarding shipping contract.

- 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 have served as Conservator of my Father, now deceased and Co-Administratrix of his estate.
I have served as Trustee of small bank accounts for my children while they were minors.
I hold a Power of Attorney with my sister for my mother and my step-father.
I hold a Power of Attorney regarding litigation matters for my ex-husband.
I am trustee of funds for a community/family cemetery.
I have served as Treasurer and Treasurer Pro-tem for a civic organization of which I am a member.

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

Many years ago, I represented a young couple who were expecting a child. Their problem was that because the mother was underage, her parents wanted to force her to have an abortion. Under the authority of Roe v. Wade 410 U.S.Ct. 113 (1973), an injunction was obtained preventing the girl's parents from requiring her to undergo an involuntary abortion. Twelve years later I was privileged to meet and later coach the boy who was born to these parents on a high school mock trial team. This young man possessed an intelligence quotient in the genius range and was accelerated in school by three grade years. He received several awards for his performance in competition including placement as a best regional attorney.

On occasion the law achieves amazing results.

I mention this case because I believe it is an example of how the law is capable of and does improve the lives of individuals and society.

- List all prior occasions on which you have submitted an application for judgeship to the governor's Council for Judicial Appointments 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 nominee.

.May of 2013 I submitted an application for appointment to the office of Chancellor of the First Judicial District of the State of Tennessee to the Tennessee Judicial Nominating Commission. The date of the meeting was June 14, 2013. My name was not submitted as a nominee.

EDUCATION

- 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.

East Tennessee State University - August of 1974 to June of 1977, B. S. Social Sciences Area Concentration in Education – *Magna Cum Laude*.

University of Tennessee George C. Taylor College of Law - August of 1977 to March 1980, J. D. – Dean's List, Phi Delta Phi - Roosevelt Inn.

PERSONAL INFORMATION

- State your age and date of birth.

I am age 57. I was born September 29, 1957.

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

Other than ten months in the year of my birth and one year just after I started elementary school I have lived my entire life in Tennessee. I have lived in Tennessee continuously for fifty years.

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

I have lived in Unicoi County for thirty four years.

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

I am registered to vote in Unicoi County, Tennessee.

- 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.

- 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.

Overtime parking, Knoxville, Tennessee 1977, 1978 and 1979. Speeding 1980 Sullivan County, Tennessee. Speeding 1992 Carter County, Tennessee. Overtime parking 2011 Greeneville, Tennessee.

- 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, I am not to my knowledge, under any criminal or disciplinary investigation.

- Please state and provide relevant details regarding any formal complaints filed against you with any supervisory authority including, but not limited to, a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you.

2013 – E-mail to Judicial Nominating Commission and Board of Professional Responsibility of a complaint questioning fitness for judicial appointment filed eight (8) days before nominating commission meeting regarding my application to serve as Chancellor. No file was opened and this was dismissed as frivolous three (3) days before the commission meeting.

2012 – Board of Professional Responsibility complaint by a convicted murderer for my appearance representing his crime victim's family at a parole hearing. This complaint was dismissed.

1986 - Private admonition for appearance of impropriety in continued representation of a grandmother seeking custody of the grandchild she had raised from birth after the mother withdrew consent to the order of custody. I had never represented the mother, but my law partner had represented her in an uncontested divorce prior to the time we became partners. Custody of the child had been ordered to the mother even though she did not exercise the custody other than to leave him at the grandmother's and sometimes see or stay with him at the grandmother's home. The mother's name had changed such that our conflict file did not at initial review reveal the relationship of these matters. Thereafter we implemented an arrangement

to list custody matters by the child's name and age to avoid this in future.

1972 & 1974- Extensive travel in Eastern and Western Europe.

- 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, there are no tax liens or other collection procedures against me and there have been none at any time.

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

No, I have never filed bankruptcy in any form.

- 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.

Yes. 1. September 14, 1990, Unicoi County Circuit Court Case # 4682 I was divorced from David Reed Shults.

2. 1990 through 2005, Carter County Chancery Court Case # 19252. I petitioned for and was granted Conservatorship of my father, Asa G. Bunton.

3. January 2005, Johnson County Chancery Court Case # 1165. My sister and I petitioned for and were appointed Co-administrators of my father's estate.

4. 2007, Unicoi County Circuit Case # Ck-6980 I was representative party in a proceeding to approve a minor's settlement for my youngest son, now age 23, who was injured in an automobile collision while a juvenile.

- 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.

Centenary United Methodist Church, 2007 to present Chairman of Administrative Council

1992 to present adult Sunday School Team Teacher

2007 to 2010 Staff Pastor Parish Relations Committee

1982 to present Chancel Choir

Centenary United Methodist Church Circle of Friends

Julius Dugger Chapter of the Daughters of the American Revolution

2010 Regent

2010 through 2013 Treasurer

2013 Chaplain

Tennessee State Society of the Daughters of the American Revolution

1990 State Page Co-chairperson

Gideon's Auxiliary

Unicoi Elementary School PTO President

Unicoi County Middle School PTA President

- 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.

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

Yes. Female Attorney's of the Mountain Empire (FAME). a. The basis of the restriction is that the purpose of the organization, when founded 34 years ago, was to provide networking and socialization opportunity for women in the legal profession in the upper East Tennessee area. No men have ever sought inclusion in this organization, to my knowledge, although some have asked if they may be the "FAME Sweetheart". b. If required, upon nomination and selection for the position for which I am applying, I would withdraw this organization.

ACHIEVEMENTS

- 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.

Unicoi County Bar Association, 1982 through present, 1997 through 2010, Treasurer *Pro Tempore*.

Washington County Bar Association 2011 through present.

Female Attorney's of the Mountain Empire 1982 through present.
American Bar Association, 1981 and 2014.

- 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.

Unicoi County High School Mock Trial Coach Appreciation Awards.

I have coached high school mock trial teams from the inception of the program just after I graduated from law school in 1980 and for 22 additional years in Unicoi County. I have also assisted with judging the Greene County competition before Greene County became a part of the regional competition in which the Unicoi County team competes.

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

Not applicable.

- 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.

Not applicable.

- 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.

Town Attorney for Unicoi, Tennessee 1999 to present, appointive position.
Tennessee Supreme Court certified mentor attorney, 2013 to the present.

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

No, I have never been registered as a lobbyist.

- 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.

See attachments. These works are 100 % my own personal effort.

ESSAYS/PERSONAL STATEMENTS

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

I have been in law practice for more than 34 years, having begun my legal career at the age of 22. I have been blessed to earn a living in a successful law practice in upper East Tennessee and also raise my family in a wonderful community. I am flexible, hard working and have the inclination, ability, stamina and strength to enforce justice in this court and ensure that my rulings are fair as well as firm.

My three sons are successfully completing their education and beginning careers. Thus, I strongly feel that now is the time for me to give back to the citizens of the First District and the legal system in a judicial role.

I would find it personally and professionally rewarding to be able to adjudicate matters before the Court.

- 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)*

I participated in the University of Tennessee Legal Clinic while in law school. I have accepted several pro bono and low fee cases from Legal Aid of Upper East Tennessee. I have accepted and conducted many pro bono and low fee mediations involving Legal Aid and private practitioners who have indicated informally or by low fee or pro bone order that their clients could not afford to pay. I have accepted cases in my own practice in the past and currently involving extreme financial need or abuse wherein I knew the client would not be able to pay. I have been appointed at Court to assist with proceedings where the litigant was unable to pay for legal service. I have also attended the Washington County Bar Association Pro Bono Clinic Day at Court in Washington County and donated services for the day to *pro se* parties.

- 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)*

There are two Circuit Court Judges adjudicating civil matters in the five counties of the First Judicial District. The person filling this office may be the only judge particular litigants will ever see. In the 2013 through 2014 reporting year the two civil Circuit Courts had 2,070 case disposition; 1,168 of these dispositions were domestic relations cases, 887 of these dispositions were damages, tort, misc. civil and worker's compensation matters and the balance were appeals

and judicial hospitalizations.* Litigants should continue to receive professional and prompt judicial service with a balanced approach to the amount of court time devotes to other civil and domestic relations matters. I would hope to continue to so administer the Court and provide an additional measure of balanced, thorough, inquiring and reflective judicial process.

* Disposition statistics from the Administrative Office of the Courts Annual Report of the Tennessee Judiciary.

- 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 would hope to continue the community involvement I have participated in as set forth in questions 26 and 28 responses above. In addition, I have coached high school mock trial teams in the Young Lawyer's Conference of the Tennessee Bar Association's Mock Trial Program for most of the 33 years since I graduated from law school in 1980. I would like to continue service to that program either as a coach or a competition judge. I have also served on the Board of the Unicoi County Heritage Museum. I have served on the board of the Unicoi County Ambulance Authority. I have served as PTO/PTA President at the elementary and middle schools my children attended. Closing a busy law practice may enable me to participate on such boards again and join an additional organization such as Kiwanis or Rotary. Perhaps I could again be more regular in attending choir practice throughout the year. I would continue service to my church in several roles.

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

I am a daughter, wife, mother and grandmother. I care about people and their social, vocational and intellectual development. I care about this district and its business and development. I am honest. I work hard and energetically and for long hours. I listen and I am thoughtful about the solutions I suggest to people's problems. People's issues, conflict resolution and debate are interesting intellectual pursuits to me. Fun and a sense of humor are essential to me. I have known loss and personal problems in my life. I have been divorced. As a result, I am a better divorce attorney. My father became ill when I was very young and suffered from health problems for most of the remainder of his life. I am sympathetic to disability because of his experience. His father was Deputy Sheriff of Old Butler, Tennessee, (a town which now lies under the waters of Watauga Lake in Johnson County) and was killed in the line of duty during the Great Depression. I am acutely aware of the pain of a widow's loss and displaced children because of these events. I suspect that some connection between these factors is the reason I have been given the opportunity to do what I do everyday. Many of my vocational experiences are not the cases I would have chosen, but they are the matters some client needed me to pursue and that I had the chance to pursue. I would like to continue addressing such issues in the role of Circuit Court Judge of the First Judicial District of Tennessee.

- 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, regardless of whether or not I support the substance of particular precedent I would uphold the law. It is the duty of a judicial officer to follow the rule of law regardless of personal belief. It is a part of the oath of every judicial officer to administer justice without regard to the relative wealth, advantage or disadvantage of persons before the Court.

It has often been my experience in domestic relations matters, especially those involving children, that lengthy litigation and repetition of the same types of conflict adversely affect the lives and fortunes of those involved, especially children. Due process and the administration of justice require that every party have the opportunity for their issues to be heard regardless of these impacts. Fortunately, the advent of mediation has significantly reduced unnecessary conflict in resolution of these cases.

This is not a judicial office that makes the law. The responsibility of a Circuit Court Judge is to follow applicable case precedent and statute and administer the law as a neutral and objective judge. A trial court judge must follow the direction of the appellate courts regardless of agreement or disagreement with these precedents. If change in the law is needed this is the responsibility of the legislature and the higher courts unless a matter of first impression.

REFERENCES

- 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. Darren Shelton, Circuit Court Clerk for Unicoi County, Tennessee.

B. Dustin D. Jones, Attorney at Law, President - 2013, Washington County Bar Assoc.,

C. Luther McKeehan, Former Circuit Court Clerk for Carter County, Tennessee. Currently serves by appointment in Special Master functions in numerous courts.

D. Hulet Chaney, Former CEO Tennessee Farmers Insurance Company,

E. Carolyn Hawkins, Circuit Court Clerk for Johnson County, Tennessee, Ret. December 2014

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 Circuit Court, First Judicial District of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Council 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 Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: April 9, 2015.


Signature

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



**The Governor's Council for Judicial Appointments
Administrative Office of the Courts**

511 Union Street, Suite 600
Nashville City Center
Nashville, TN 37219

**Tennessee Board of Professional Responsibility
Tennessee Board of Judicial Conduct
and other licensing boards**

Waiver of Confidentiality

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

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

Tennessee Title Insurance Agent, Tennessee Department of Insurance, license retired, number
not available.

Lois B. Shults-Davis

Type or Print Name

Lois B. Shults-Davis

Signature

April 9, 2015
Date

07193
BPR #

IN THE SUPREME COURT FOR THE STATE OF TENNESSEE

T. A. GANN, ET AL.,
Plaintiffs/Appellees,

V.

BOARD OF EDUCATION OF UNICOI
COUNTY, TENNESSEE,

Defendant/Appellants.

§
§
§
§
§
§
§
§
§
§

UNICOI CHANCERY #4887
C.A. NO. 15

BRIEF OF DEFENDANT/APPELLANT

BOARD OF EDUCATION OF UNICOI COUNTY, TENNESSEE

LOIS B. SHULTS
SHULTS & SHULTS
111 Gay Street
Erwin, TN 37650
(615) 743-9179
Attorney for Defendant/Appellant

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
Statement of Issues	1
Statement of the Case	2
Statement of Facts	3
Argument	
I. Entry of Judgment should not have been directed prior to trial of the issues joined.	4
II. A public body possessing the power of eminent domain should not be ordered to initiate condemnation proceedings	5
III. Restrictions affecting real property may be removed by act of the developer and land owner where restrictions on the land were not a part of general plan of development.	6
IV. Construction of a parking lot does not violate residential use only restrictions or restrictions on types of buildings	7
Conclusion	10
Certificate of Service	11

TABLE OF AUTHORITIES

<u>Case Authority:</u>	<u>Page</u>
<u>Baker v. Milan</u> , 191, Tenn. 54, 231 S.W.2d 381 (TN 1950)	5
<u>Claiborne County v. Jennings</u> , 199 Tenn. 161, 285 S.W.2d 132 (1955)	5
<u>Hysinger v. Mullinex</u> , 319 S.W.2d 79 (Tenn. 1958)	8
<u>Lowe v. Wilson</u> , 250 S.W.2d 366 (Tenn. 1952)	7
<u>McDonald v. Chaffin</u> , 529 S.W.2d 54 (Tenn. 1975)	7
<u>Parks v. Richardson</u> , 567 S.W.2d 465 (Tn. App. 1977)	7
<u>Stewart v. Valenta</u> , 361 S.W.2d 910 (Tx. Ct. App. 1962).	7
<u>Weller v. Thomas</u> , 545 S.W.2d 745 (E. S. Ct. App. 1976)	8, 9

Statutory Authority:

Rule 56 of the Tennessee Rules of Appellate Procedure	4
T.C.A. §49-6-2001(A).	5
Zoning Ordinances of the Town of Erwin, Tennessee Article VII, §705.5	7

STATEMENT OF ISSUES

I. WHETHER THE COURT OF APPEALS PROPERLY DIRECTED ENTRY OF FINAL JUDGMENT WHERE NO TRIAL ON THE MERITS WAS EVER HAD AND THE COURT OF APPEALS REVIEWED ONLY THE RECORD OF A HEARING ON A MOTION TO DISMISS?

II. WHETHER THE COURT OF APPEALS PROPERLY DIRECTED A PUBLIC BODY POSSESSING THE POWER OF EMINENT DOMAIN TO INITIATE CONDEMNATION PROCEEDINGS?

III. WHETHER A DEVELOPER OF A SUBDIVISION MAY, BY AGREEMENT WITH A REMOTE GRANTEE, REMOVE RESIDENTIAL USE RESTRICTIONS ON LOTS NOT SUBJECT TO A GENERAL PLAN OF DEVELOPMENT?

IV. WHETHER "RESIDENTIAL USE ONLY" RESTRICTIONS PRESCRIBING THE TYPES OF "BUILDINGS" TO BE CONSTRUCTED, PREVENT CONSTRUCTION OF A PARKING LOT ADJOINING A LAWFULLY LOCATED PUBLIC SCHOOL?

STATEMENT OF THE CASE

Plaintiffs, T. A. Gann, et als., hereinafter referred to as "residents" or as Plaintiffs", filed suit to permanently enjoin construction of a parking lot on land located across Unaka Way from the Unicoi County High School which was built in 1922 on land owned by the Defendant, Board of Education of Unicoi County, Tennessee, hereinafter referred to as "School Board" or "Defendant". On the filing of their suit, the residents obtained a temporary injunction, ex-parte.

The School Board filed a Motion to Dismiss which was heard on March 17, 1989, upon stipulated documents, stipulated facts and arguments of counsel.

The trial court ruled that the residents could not maintain a suit for injunctive relief against the School Board and dismissed the lawsuit.

The Court of Appeals for the Eastern Section of Tennessee reversed the trial court and remanded for entry of judgment declaring the Plaintiff's interest in the School Board's lands and ordered the School Board to initiate condemnation proceedings to build the parking lot.

References hereinafter to the technical record will be designated as "T.R." and volume and page number. References to exhibits will be hereinafter designated as "ex." followed by the number.

STATEMENT OF FACTS

The real property on which the School Board seeks to build a parking lot for the use of Unicoi County High School students and faculty and to alleviate overcrowded parking at the adjoining Evans Elementary School is a part of the Holston Addition to the Town of Erwin, Tennessee, which was developed by the Holston Corporation as a residential neighborhood with provision for Churches and schools in 1917. (ex. 1).

A Declaration dated June 7, 1917, was filed by the Holston Corporation which restricted most lots in the development as follows:

"Fifth: The property shall be used for private residence purposes only, and no buildings shall be erected or maintained thereon except private dwelling houses . . ." (emphasis added) (ex. 1 and 2).

The property now owned by the Board, upon which it proposed to building the parking lot, Lots 3, 4, and 5 of Block 21 of the Holston Addition, were specifically excluded by the Declaration from the aforementioned restriction.

On March 26, 1926, the Holston Corporation conveyed Lots 3, 4 and 5 of Block 21 of the Holston Addition to Mrs. Ella Belle McNabb and subjected the property to the fifth restriction. (ex. 3).

Subsequent deeds in the chain of title and the School Board's deed do not include restrictions. (T.R. 2, p. 7).

On October 19, 1987, the Holston Corporation and the Board, by agreement, released Lots 3, 4 and 5 of Block 21 from application of all restrictions. (ex. 4).

ARGUMENT

I

ENTRY OF JUDGMENT SHOULD NOT HAVE NOT BEEN DIRECTED
PRIOR TO TRIAL OF THE ISSUES JOINED.

The . . . Court of Appeals . . . shall grant relief on the law and facts to which the party is entitled or the proceeding otherwise requires and may grant any relief, including the giving of any judgment and making of any order; provided, however, relief may not be granted in contravention of the province of the trier of fact . . . (emphasis added) Rule 36 of the Tennessee Rules of Appellate Procedure.

The action of the Court of Appeals in this case in remanding for entry of judgment prevents full litigation of the issues in this case and is therefore premature.

Need for the parking lot, the basis of the School Board's decision to build the parking lot and changes in use and character of neighborhood are all relevant issues of fact which have not been litigated in this case.

The decision of the Court of Appeals at page 4 cites the rule of law that changes in the character of the neighborhood can affect the enforcability of restrictions against use of real property, but then goes on to say "The record does not establish change sufficient to permit equitable intervention."

It is clearly in error under Rule 36, Supra, for the Court to hold that the record does not show the requisite

change when there has been no opportunity to develop the record on that issue.

The public's interest in full and fair hearing of all the issues in this cause require that the decision of the Court of Appeals be reversed.

II

A PUBLIC BODY POSSESSING THE POWER OF EMINENT DOMAIN SHOULD NOT BE ORDERED TO INITIATE CONDEMNATION PROCEEDINGS.

When a county acquires real property for school purposes it is acting with respect to the public duty generally and not affecting the corporate body only, and is thereby exercising its governmental powers or functions rather than proprietary ones. Education is a governmental function and in the exercise of that function a county acts in its governmental capacity. Baker v. Milan 191, Tenn. 54, 231 SW 2D 381 (TN 1950).

[Likewise,] counties act in their governmental capacity when they exercise the right of eminent domain pursuant to T.C.A. § 29-17-101 which provides that counties are empowered to condemn and take the property, buildings, privileges, rights, and Easements of individuals and private corporations for any county purpose. Claiborne County v. Jennings 199 Tenn. 161, 285 SW sd 132 (1955).

T.C.A. § 49-6-2001 (A) specifically provides that "County . . . Boards of Education are empowered to exercise the right of eminent domain and to take and use the property of individuals or private corporations for public school purposes as provided in this section."

The power to act under governmental authority and/or the power of eminent domain includes the authority not to act. The order of the Court of Appeals directing exercise

of this authority violates the separation of powers of the executive and judicial branches of government and is therefore in error.

III

RESTRICTIONS AFFECTING REAL PROPERTY MAY BE REMOVED BY ACT OF THE DEVELOPER AND LAND OWNER WHERE RESTRICTIONS ON THE LAND WERE NOT A PART OF GENERAL PLAN OF DEVELOPMENT.

The Declaration of Restrictions affecting the Holston Addition to the Town of Erwin, Tennessee, filed of record in 1917, specifically excepted Lots 3, 4, and 5 of Block 21, from residential use restrictions. This omission demonstrates that the plan of development originally did not envision residential use of these lots.

Nine years elapsed before further restrictions were imposed upon these lots by deed of conveyance. The passage of time and the use of a deed rather than amendment of the Declaration of Restrictions shows that no general plan of development requiring residential use of these lots was intended. The residential restrictions on these lots were a matter of contract to which only the grantor, Holston Corporation and the grantees, and their assigns, had privity.

A search of the title to Plaintiffs' land does not reveal this restriction as the deed to Ella Belle McNabb is not in Plaintiffs' chain of title. Accordingly, Plaintiffs' could not have relied upon the residential restrictions affecting the School Board's land. Removal of these restrictions by Holston Corporation and defendant's contract is effective.

See Stewart v. Valenta, 361 S.W.2d 910 (Tx. Ct. App. 1962).

IV

CONSTRUCTION OF A PARKING LOT DOES NOT VIOLATE RESIDENTIAL USE ONLY RESTRICTIONS OR RESTRICTIONS ON TYPES OF BUILDINGS.

Restrictive covenants are to be read without the drawing of any unnecessary implication and will not be taken to preclude that which is not plainly prohibited. McDonald v. Chaffin, 529 S.W.2d 54 (Tenn. 1975).

Covenants restricting the use of land and preventing its free and unrestricted enjoyment are not favored and will be strictly construed against the restriction. Lowe v. Wilson, 250 S.W.2d 366 (Tenn. 1952).

Any ambiguity in terms of restrictive covenants or the intent of the parties will be resolved against the restriction. Parks v. Richardson, 567 S.W.2d 465 (Tn. App. 1977).

The restriction at issue in this case provides that, "[t]he property shall be used for residential purposes only and no buildings shall be erected or maintained thereon except private dwelling houses . . ." (emphasis added).

No part of the restriction clearly or unambiguously prevents parking lots. By providing for residential use and defining the types of buildings which must be erected thereon, the restriction specifies that the neighborhood is to be residential in nature, as opposed to commercial, but does not prohibit a school parking lot.

Town of Erwin ordinances permit schools within residential

use zones. Zoning Ordinances of the Town of Erwin, Tennessee, Article VII, §705.5.

Restrictive covenants will not be strictly enforced where existing deviations from restrictions make enforcement inequitable. Hysinger v. Mullinex, 319 S.W.2d 79 (Tenn. 1958).

Unicoi County High School, which the proposed parking lot is to serve, was built within the Holston Addition in 1922. Other public uses and parking lots exist within the neighborhood, such that the Holston Addition is not purely a collection of residential houses. Interpreting the restriction to prohibit parking in this situation would be inequitable.

In Weller v. Thomas, 545 S.W.2d 745 (E. S. Ct. App. 1976), this Court addressed facts involving parking facilities in a restricted residential neighborhood in the context of a home business, and not only treated the parking as acceptable within the restricted area, but stated that it benefited the neighborhood by eliminating parking problems. This is exactly the situation in the present case.

The Board's primary motivation in building the parking lot is to protect the health and safety of children coming to and going from school. In addition, it is anticipated that the parking lot will alleviate or at least reduce hazardous conditions due to congestion on the roadways in the area of the schools. The benefit conferred by completion of the parking lot will accrue to the benefit of the students attending both the elementary school and the high school,

the parents of those students, the staff of both schools and travellers on the highways in the vicinity of the schools. Against these public interests, plaintiffs request the Court to interpret an ambiguous restriction, written at a time when automobiles were uncommon, to prohibit parking areas. Plaintiff's interpretation is not in conformity with Weller v. Thomas, supra, P. 8, and the Court of Appeals' adoption of this interpretation of the restrictions is in error.

CONCLUSION

By reason of the foregoing argument and authorities, Appellee respectfully requests that the Court of Appeals' action in this case be reversed and that the trial court's decision be reinstated.

UNICOI COUNTY BOARD OF EDUCATION

BY: 
LOIS B. SHULTS

and

BY: 
DAVID R. SHULTS

SHULTS & SHULTS
111 Gay Street
Erwin, TN 37650
Attorneys for Appellees

CERTIFICATE OF SERVICE

I, David R. Shults, hereby certify that I have served a true and exact copy of the foregoing Brief upon all counsel of record, either by hand delivery or by U.S. Mail, postage prepaid, this the 24th day of July, 1990.



DAVID R. SHULTS

(f) **Divided Argument.** — No more than two counsel or parties will be heard from each side requesting the same relief except by leave of the appellate court, which will be granted when there are parties on the same side with diverse interests. Divided arguments are not favored and care shall be taken to avoid duplication of arguments.

(g) **Nonappearance of Parties.** — If a party fails to appear for argument, the appellate court will hear argument on behalf of the parties present. If no party appears, the case will be decided upon the record and briefs unless the court shall otherwise order. If the party who requested oral argument fails to appear to present argument, the court may assess against him the reasonable costs incurred by the party who does appear for argument. In its discretion, the court may include a reasonable attorney's fee as a part of such costs.

(h) **When Oral Argument Not Requested.** — If no party requests oral argument, the clerk, when the briefs from all the parties are filed, shall submit the case for decision on the record and briefs. If no party has requested oral argument, the appellate court may nevertheless direct that the case be argued.

Advisory Commission Comment. This rule works a substantial change from existing Tennessee practice on oral argument in civil appeals. Under subdivision (a) a party to an appeal desiring oral argument must request argument. While this provision is consistent with current practice in the Court of Criminal Appeals, it alters the practice presently followed in civil appeals. If a party inadvertently fails to request oral argument, the appellate court may relieve him of his omission.

The rule allows 30 minutes for each side to argue a case on appeal. As the Advisory Committee note to Federal Rule of Appellate Procedure 35 points out, "[t]he term 'side' is used to indicate that the time allowed by the rule is afforded to opposing interests rather than to individual parties. Thus if multiple appellants or appellees have a common interest, they constitute only a single side. If counsel for multiple parties who constitute a single side feel that additional time is necessary, they may request it." It is in the spirit of this rule that the

appellate court grant additional time if there is a reasonable basis for the requested additional time.

Subdivision (g) of this rule also provides that a party who appears for oral argument shall be heard even if his opponent does not appear. Sanctions are provided for failure of a party to appear when he has requested oral argument. In the discretion of the appellate court, such a sanction may include the reasonable attorney's fees of the party who did appear.

Textbooks. Gibson's Suits in Chancery (6th ed., Inman), § 705.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

The Theoretical Foundations of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 45 Tenn. L. Rev. 161.

Collateral References. 5 Am. Jur. 2d Appeal and Error §§ 684-701.

Appeal and Error ⇐ 814-827, 1128.

I. DISPOSITION OF APPEALS

Rule 36. Relief; Effect of Error. — (a) **Relief To Be Granted; Relief Available.** — The Supreme Court, Court of Appeals, and Court of Criminal Appeals shall grant the relief on the law and facts to which the party is entitled or the proceeding otherwise requires and may grant any relief, including the giving of any judgment and making of any order; provided, however, relief may not be granted in contravention of the province of the trier of

fact.
party
reaso
(b)
othe
recor
judg

Ad
vision
the a
whate
quires
the a
which
this r
ple th
invite
what
cure
clear
relief
provi
Su

the
whet
The
sister
ful e
rule
First
forth
court
error
§§ 2
rule
than
diffe
reve
be p
this
tain
exar
assis
obvi
crim
C
rule
L
the
Proc
Rev
T
Ten
L. S

as will be held...
 f the appeal...
 same side...
 shall be tak...

argument...
 ent. If no p...
 nless the co...

ent fails to...
 the reason...
 its discre...
 of such co...
 uests oral a...
 hall submit...
 requested...
 he case be...

nal time if th...
 uested addi...

also provide...
 argument sh...
 does not...
 ailure of a p...
 ed oral argu...
 late court, s...
 onable attor...
 ear.

ederal Detai...
 iles of App...
 , Jr.), 46 Tenn...

ns of the Prop...
 e Procedure...
 Rev. 161.

Am. Jur. 2d...
 27, 1128.

granted; Re...
 rt of Crimi...
 n the part...
 any relief...
 provided;...
 e of the tri...

Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.

(b) Effect of Error. — A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.

Advisory Commission Comment. Subdivision (a). This subdivision makes clear that appellate courts are empowered to grant whatever relief an appellate proceeding requires. In addition, this subdivision states that an appellate court should grant the relief to which a party is entitled. The last sentence of this rule is a statement of the accepted principle that a party is not entitled to relief if he has waived an error, or failed to take whatever steps were reasonably available to prevent an error. This subdivision also makes clear that an appellate court should not grant relief if in so doing it would contravene the principle of the trier of fact.

Subdivision (b). This subdivision deals with the very difficult question of determining whether an error is harmless or prejudicial. The principal thrust of this subdivision is consistent with existing law insofar as the harmful effect of an error is measured by the effect the error had on the judgment entered. This rule differs from existing law in two respects. First, the statutes currently in effect do not set forth the degree of conviction an appellate court must possess before it determines that an error is prejudicial. See Tenn. Code Ann. §§ 27-116, 27-117 (1955) [repealed]. Under this rule an error is prejudicial if it "more probably than not" affected the judgment. This rule also differs from existing law insofar as it requires reversal of a judgment when affirmance would be prejudicial to the judicial process. Although this concept cannot be fully defined, it certainly would include situations in which, for example, an accused was denied the effective assistance of counsel, or the decisionmaker was grossly biased, or there was improper discrimination in jury selection.

Compiler's Notes. Subsection (b) of this rule may affect TCA § 40-19-101.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 161.
 The Theoretical Foundations of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 45 Tenn. L. Rev. 161.

Waiting for the Jury (George W. Jenkins III), 20 No. 4 Tenn. B.J. 31 (1984).

Cited: Farr v. State, 591 S.W.2d 449 (Tenn. Crim. App. 1979); Johnson v. State, 598 S.W.2d 803 (Tenn. Crim. App. 1979); Ivey v. State, 598 S.W.2d 806 (Tenn. Crim. App. 1979); State v. Burse, 600 S.W.2d 250 (Tenn. Crim. App. 1979); Cordell v. Ward School Bus Mfg., Inc., 597 S.W.2d 323 (Tenn. Ct. App. 1980); Johns v. Caldwell, 601 S.W.2d 37 (Tenn. Ct. App. 1980); State v. Braggs, 604 S.W.2d 883 (Tenn. Crim. App. 1980); State v. Sharp, 604 S.W.2d 886 (Tenn. Crim. App. 1980); State v. York, 605 S.W.2d 837 (Tenn. Crim. App. 1980); State v. McKinney, 605 S.W.2d 842 (Tenn. Crim. App. 1980); State v. Livingston, 607 S.W.2d 489 (Tenn. Crim. App. 1980); State v. Gilbert, 612 S.W.2d 188 (Tenn. Crim. App. 1980); State v. Barger, 612 S.W.2d 485 (Tenn. Crim. App. 1980); State v. Green, 613 S.W.2d 229 (Tenn. Crim. App. 1980); State v. Holtcamp, 614 S.W.2d 389 (Tenn. Crim. App. 1980); State v. Hamm, 611 S.W.2d 826 (Tenn. 1981); State v. Glebock, 616 S.W.2d 897 (Tenn. Crim. App. 1981); State v. Garland, 617 S.W.2d 176 (Tenn. Crim. App. 1981); State v. Wright, 618 S.W.2d 310 (Tenn. Crim. App. 1981); State v. Black, 618 S.W.2d 526 (Tenn. Crim. App. 1981); State v. Briley, 619 S.W.2d 149 (Tenn. Crim. App. 1981); State v. Shaw, 619 S.W.2d 546 (Tenn. Crim. App. 1981); State v. Crawford, 620 S.W.2d 543 (Tenn. Crim. App. 1981); State v. Jones, 623 S.W.2d 129 (Tenn. Crim. App. 1981); State v. Layne, 623 S.W.2d 629 (Tenn. Crim. App. 1981); State v. Barton, 626 S.W.2d 296 (Tenn. Crim. App. 1981); Cable Systems v. Gifford Co., 627 S.W.2d 359 (Tenn. Ct. App. 1981); State v. Shelley, 628 S.W.2d 436 (Tenn. Crim. App. 1981); State v. Hayes, 649 S.W.2d 2 (Tenn. Crim. App. 1981); American City Bank v. Western Auto Supply Co., 631 S.W.2d 410 (Tenn. Ct. App. 1981); State v. Mains, 634 S.W.2d 280 (Tenn. Crim. App. 1982); State v. Webb, 634 S.W.2d 667 (Tenn. Crim. App. 1982); State v. Johnson, 634 S.W.2d 670 (Tenn. Crim. App. 1982); State v. White, 635 S.W.2d 396 (Tenn. Crim. App. 1982); State v. Reece,

PARTS 13-19—[RESERVED]

PART 20—SCHOOL PROPERTY

49-6-2001. Eminent domain. — (a) County and city boards of education are empowered to exercise the right of eminent domain and to take and use the property of individuals or private corporations for public school purposes as provided in this section.

(b) The county executive or mayor of the city shall appoint not exceeding seven (7) freeholders who shall constitute a board of appraisers and whose duty it shall be to determine the cash value of the land as provided in subsection (c).

(c) In case the owner of such property and the board of education fail to agree on the price to be paid for such property, it shall be the duty of the board of appraisers, at the request of either the owner or the board of education, to go upon the land and, under oath, fix a fair cash valuation upon the land.

(d)(1) In case the owner or the board of education fail to concur in the findings of the board of appraisers, and appeal as they may to the circuit court, where the cause will be tried de novo, the board of education, upon deposit with the county trustee, of good and solvent bond to indemnify the owner, in double the amount of the value fixed for the land in question by the board of appraisers, may proceed with the construction of the schoolhouse or other necessary building.

(2) When a court of competent jurisdiction has passed upon the case, on payment to the owner of the amount decreed by the court, the decree of the court vesting title in the board of education and their successors in office shall be a muniment of title as in other eminent domain cases, and if necessary the court so rendering judgment is required to render judgment against the county or city and the judgment shall be paid out of the general fund of the county or city or any other fund available. [Acts 1925, ch. 115, § 35; Shan. Supp., §§ 1487a193-1487a196; mod. Code 1932, §§ 2516-2519; Acts 1959, ch. 269, § 1; T.C.A. (orig. ed.), §§ 49-801 — 49-804.]

Cross-References. Private property not to be taken for public use without just compensation, Tenn. Const., art. 1, § 21.

Law Reviews. Local Government Law — 1959 Tennessee Survey (A.E. Ryman, Jr.), 12 Vand. L. Rev. 1257.

Procedure and Evidence — 1959 Tennessee Survey (Edmund M. Morgan), 12 Vand. L. Rev. 1281.

Real Property — 1959 Tennessee Survey (Thomas G. Roady, Jr.), 12 Vand. L. Rev. 1318.

The Judicial System in Tennessee and Poten-

tialities for Reorganization — The Court System in Tennessee (Elvin E. Overton), 32 Tenn. L. Rev. 503.

The Legal Basis of School Property in Tennessee (Fred H. Barber), 7 Tenn. L. Rev. 262.

Comparative Legislation. School property:

Ga. O.C.G.A. § 20-2-520, et seq.

Ky. Rev. Stat. Ann. § 162.010 et seq.

Mo. Rev. Stat. § 177.011 et seq.

N.C. Gen. Stat. § 115C-517 et seq.

Va. Code § 22.1-125 et seq.

ARTICLE VII. PROVISIONS GOVERNING USE DISTRICTS

701. R-1 (Low Density) Residential District. It is the intent of this district to establish low density residential areas along with open areas which appear likely to develop in a similar manner. The requirements for the district are designed to protect essential characteristics of the district, to promote and encourage an environment for family life and to prohibit all business activities. In order to achieve the intent of the R-1 (Low Density) Residential District, as shown on the Zoning Map of the Town of Erwin, Tennessee, the following uses are permitted:

701.1. Single family dwellings excluding mobile homes.

701.2. Two family dwellings.

701.3. Customary general farming.

701.4. Customary home occupation provided that:

There is no external evidence of the occupation except on announcement sign not more than two (2) square feet in area; that only one person, not a resident of the dwelling is employed; and not more than 25 percent of the total floor area of the dwelling is used.

701.5. Public owned buildings and uses, public and private school offering general education, and churches provided that:

701.5.1. The location of these uses shall first be reviewed by the Erwin Planning Commission.

701.5.2. They meet any safeguards set forth in the review by the planning commission.

702. R-2 (Medium Density) Residential District. It is the intent of this district to provide for single family and multi-family dwellings; to encourage development and continued use of land for residential purposes; to prohibit land use for business and/or industrial activities and other land uses which would interfere with the residential character of the district. In order to achieve the intent of the R-2 (Medium Density) Residential District, as shown on the Zoning Map of the Town of Erwin, Tennessee, the following uses are permitted.

702.1. Any use permitted in the R-1 residential district, provided that the floor area used for the taking of boarders and tourists or the leasing of rooms by the family resident on the premises may not exceed sixty (60) percent of the total floor area of any dwelling.



IN THE COURT OF APPEALS
FOR THE EASTERN SECTION
AT KNOXVILLE, TENNESSEE

CONNIE JUNE TIPTON STOUT,
Plaintiff/Appellee,

v.

JACKIE HAROLD STOUT,
Defendant/Appellant.

♦
♦
♦
♦
♦
♦
♦

Case No E2013-00760-COA-R3-CV

Washington County Chancery Court
Jonesborough, Tennessee
Civil Action No.: 30901

BRIEF OF THE APPELLEE

CONNIE JUNE TIPTON STOUT

LOIS B. SHULTS-DAVIS
SHULTS & SHULTS
111 Gay Street
Erwin, TN 37601
(423) 743-9179
Attorney for Appellee

ORAL ARGUMENT
REQUESTED

TABLE OF CONTENTS

I.	Table Authorities.....	ii
II.	Statement of the Issues.....	iii
III.	Statement of the Case.....	1
IV.	Statement of the Facts.....	3
V.	Standard of Review.....	5
VI.	Argument.....	6
VII.	Conclusion.....	12

TABLE OF AUTHORITIES

STATUTORY LAW/RULES OF COURT

Tennessee Rules of Appellate Procedure, Rule 13(d)..... 5

Tennessee Rules of Civil Procedure, Rule 60.02..... 5, 6, 7, 8
& 9

CASE LAW

Archer v. Archer 907 S.W.2d 412, (Tenn. Ct. App. 1995)..... 6

Perry v. Perry 114 S.W.3rd 465 (Tenn. 2003)..... 6

Toney v. Mueller Co., 810 S.W.2d 145 (Tenn. 1991)..... 5 & 6

Tyler v. Tyler 671 S.W.2d 492 (Tenn. Ct. App. 1984)..... 9

STATEMENT OF THE ISSUES

Whether the Trial Court was correct in upholding Plaintiff, wife's award of marital pension benefits, granted to her under multiple orders in the case, in the presence of one order which inconsistently denied these benefits?

STATEMENT OF THE CASE

The parties to this cause of action were married in March of 1974. They were divorced after an almost 23 year marriage in February of 1997, by a decree not entered until April 13, 1998. Their Final Decree of divorce was based upon and approved the agreement of the parties as to resolution of the issues in the case. Technical Record, Volume I, Page 1, (hereinafter cited to as Tr., p.1).

Multiple orders were entered to effectuate agreed awards of benefits from husband's retirement plans unto wife. Tr., ps. 3, 5, 6, and 8. The period of time spanned by these orders, including announcement and entry was February 1997 through July of 1999. The Court retained jurisdiction to enter further orders regarding the retirement in the Final Decree. In the last of the series of orders, the Court retained jurisdiction to amend this order as might be necessary "to establish or maintain its status". Tr., p. 11.

In February of 2001 an agreed order was entered reciting that the specific sums of money awarded unto wife from the Thrift retirement had been paid and ordering that the "January 11, 1999", Qualified Domestic Relations Order, hereinafter "QDRO" was amended and modified to provide that wife would not receive "K-Third Plan and/or Kennametal Retirement Plan benefits". This order did not modify the Final Decree or the other orders entered January 11, 1999, and July 29, 1999, awarding benefits unto wife. Tr., ps. 12, 1, 5, 6 and 8.

The Domestic Relations Order, hereinafter "DRO", entered July 29, 1999, is the only order awarding benefits under the true name of the plan in issue: "Kennametal Inc. Retirement Income Plan". Tr.1, p. 8. The order modifying the January 1999, QDRO does not contain the

correct name of the Kennametal Inc. Retirement Income Plan. Tr., ps. 12 – 14.

On October 9, 2012, and November 15, 2012, wife filed pleadings requesting the Court to set aside, modify or reconcile the order entered February 1, 2001 as being inconsistent with the other orders of the Court, incorrect, an error, a mistake, a deprivation of wife's constitutional rights in her property, a denial of due process as to wife's rights in her property and a deprivation of wife's property rights without consideration or compensation. Tr., ps. 15-17 and 31-32.

Husband responded to wife's pleadings denying that Rule 60 relief was timely and otherwise denying that the January 2001 order should be modified or reconciled to the other orders in the case. Tr., ps. 91 – 23 and 33 – 34.

Husband had also filed a Rule 60 motion concerning an order that was entered in 2012 after husband indicated he did not receive a pleading and notice sent to an incorrect address. Tr., ps. 24-29. Wife agreed that this order from September 2012, should be set aside. Tr., p. 32.

STATEMENT OF THE FACTS

The husband and wife herein divorced after a lengthy marriage during which husband accrued retirement benefits in multiple plans at his employment through Kennametal. Tr., p.1.

The agreed Final Decree of divorce at order paragraph 5. provided that plaintiff, appellant (hereinfter "wife"), would receive two set amounts of distribution from defendant, appellee's, (hereinfter "husband's"), "Thrift retirement plan". The Final Decree further provided at order paragraph 6. that "the parties previously reached agreement regarding an award unto [wife] of certain further portions of husband's retirement benefits, however they have been unable to reduce said agreement to writing and accordingly, the question of the wording of an award of a portion of [husband's] retirement benefits" unto wife was reserved.

By an order and a QDRO entered January 11, 1999, wife was awarded 50% of any and all retirement that husband withdraws or receives from the Kennametal retirement plan. Tr., p. 5 & 6.

By an order denominated "Domestic Relations Order" the Kennametal retirement plan was specifically referred to as the "Kennametal Inc. Retirement Plan", and wife's entitlement to 50% of the distributions from this plan was ordered, adjudged and decreed. Tr., ps., 8 – 11. This order reserved jurisdiction to establish and maintain the status of the order.

Former counsel for husband had returned this order with a handwritten note indicating that the order had been reviewed with husband and a copy was provided unto him. Tr., ps, 10 and 18. This order was approved by husband's attorney. Tr., p. 11.

Upon provision of proof that the specific payment of thrift plan monies had been

paid an order was entered which purported to modify the Qualified Domestic Relations Order entered January 11, 2001, to eliminate wife's entitlement to any of husband's retirement benefits.

Tr., p. 12.

After learning that husband was receiving Kennametal Inc. Pension Benefits and that she was receiving none, wife filed pleadings requesting that the 2001 order be reconciled with all other orders or modified or set aside so that she would receive the benefits she was awarded under the other orders in this cause.

Husband has opposed this relief in the trial court and through this appeal.

STANDARD OF REVIEW

The Court having made findings of fact based upon the record the standard of review is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. Tennessee Rules of Appellate Procedure, Rule 13 (d).

To the extent relief was granted under Rule 60 the scope of review is whether the trial judge abused her discretion. *Toney v. Mueller Co.* 810 S.W.2d 145 (Tenn. 1991).

ARGUMENT

THE TRIAL COURT CORRECTLY FOUND THAT THE FEBRUARY 1, 2001, ORDER IN ISSUE IN THIS CAUSE, DENYING WIFE HER SHARE OF RETIREMENT BENEFITS PREVIOUSLY AWARDED UNTO HER, WAS INCORRECT, INCONSISTENT WITH OTHER ORDERS IN THE CAUSE, AND AMBIGUOUS ON ITS FACE. THEREFORE, THE FINAL DECREE, THE JANUARY 11, 1999, ORDER AND THE JULY 29, 1999, DRO AWARDED PENSION BENEFITS UNTO WIFE REMAIN IN EFFECT AS ORIGINALLY WRITTEN, AND HAVING NEVER BEEN MODIFIED, ARE FINAL AND VALID ORDERS DISPOSING OF THE RETIREMENT BENEFITS.

The standard of review in this case is set forth in Perry v. Perry, 114 S.W.3rd 465, (Tenn. 2003):

In reviewing the trial court's factual findings in a case addressing modification of an award of rehabilitative alimony, pursuant to T.R.A.P.13(d), an appeals court presumes the correctness of the trial court's factual finding as long as the evidence did not preponderate against those findings.

Perry, *infra*.

Husband argues that the trial court's order amounts to improper Rule 60 relief. Wife does not agree that the relief is entirely under Rule 60 or is in any manner improper. However, to the extent that any relief was granted under Rule 60 the standard of review regarding such relief is whether the trial court judge abused the court's discretion. Toney v. Mueller Co., 810 S.W.2d 145 (Tenn. 1991).

In the present case the trial court made its finding of fact from facts set forth in the remarks of counsel and from the record.

Husband argues that there can be no finding of fact under these circumstances as nothing was controverted about the facts, however, the husband himself controverts, against the wording of the order he relies on, whether the 2001 order modifies all or only one of the orders concerning retirement benefits. Husband further disputed that the 2001 order was inconsistent with the other orders, whether it was incorrect and whether it was ambiguous. These questions

are at least mixed issues of law and fact.

The determining factor concerning whether the presumption of correctness applies is set out in the case law as being whether the trial court made findings of fact, not whether there was controverted fact, or whether witness testimony was taken.

In Archer v. Archer a special master's report under review was a statement of legal conclusions and contained very few findings of fact. Review of the trial court's determinations ordinarily would be *de novo* with a presumption that the trial court's findings of fact were correct. The court stated that the standard of review would be *de novo* without the presumption of correctness, as is argued by husband in this case, only in the event the trial court **did not make any findings.**

Archer v. Archer 907 S.W.2d 412 (Tenn. Ct. App. 1995) emphasis added.

The trial court correctly found that the 2001 order, based upon statements of counsel setting forth the facts of the cause and as reflected in the orders in this cause and documents in the record, was incorrect, inconsistent and ambiguous on its face.

The 2001 Order sets out in the recitals of the predicate to the order, contained therein, that the two specific amounts of Thrift retirement monies awarded by paragraph number five (5) of the final decree have been paid. TR., P. 12.

There is no recital, supplying any reason or justification for taking away wife's entitlement of the Kennametal Pension. This was in no way, by the order justified, explained or shown to be upon valid consideration or reasoning.

The trial Court was absolutely correct in finding that the recitals of the Order do not support the Order purporting to take away wife's share of the pension benefits.

The February 1, 2001, Order is further ambiguous on its face in specifically referring to the January 11, 1999 QDRO and ordering that wife is not entitled to the benefits there under without reference to modifying, or changing the entitlement to the same benefits awarded in the Final Decree, the January 11, 1999, Order and July 29, 1999 DRO.

These orders all award the pension benefit to wife in one form or another, or one name or another. Specifically, the February 1, 2001, Order does not give any reference to these other outstanding orders or what is to happen to the awards of benefits unto wife set forth therein.

Husband argues that since the July 29, 1999, DRO recites that there are no other orders which report to dispose of the benefits described herein, which are inconsistent herewith, that therefore, the 2001 Order must set aside all other awards of the benefits as well.

This argument strains credulity since neither the July 29, 1999, DRO, nor the Final Decree, nor the January 11, 1999, Order are referred to in any regard in the February 1, 2001, Order in issue.

The July 29, 1999, DRO is the only order that correctly names the benefit plan: the "Kennametal, Inc. Retirement Income Plan".

The 2001 Order is by reason of all the foregoing incorrect and inconsistent.

Husband further argues that the wife is not entitled to the relief she seeks, as fraud must be specifically pled pursuant to Rule 60.02. Wife submits that the fraud is specifically pled in wife's pleadings, in that, she averred the absence of any issue requiring such order, alleges it was drafted and presented on the premise that it must be entered to prevent husband from paying the Thrift benefits twice. TR., P. 16.

Wife further pleads husband's intention not to pay her the retirement benefits at all as

being his true interest, and the basis of the fraud. Wife further avers that the July 29, 1999, DRO was reviewed by former counsel for husband, approved by counsel, and husband was provided a copy. TR. P. 16 & 18.

Fraud is further plead specifically in that wife was previously vested with her share of pension benefits at issue. Construing the February 1, 2001, Order to deny same to her without any compensation is a fraud upon her rights. TR. P. 31.

Husband's construction of the Order is without due process to wife in the presence of the obvious ambiguity of mistakes in the Order.

Husband's construction of the order is a divestiture of wife's vested property rights without any compensation as wife was cheated out of what she was entitled to receive in the Kennametal pension benefits.

By reason of all the foregoing, the inconsistency of the February 1, 2001, Order with the three other orders awarding wife Kennametal Pension benefits, including the July 29, 1999, DRO, which is the only order to properly identify by name the pension benefit granted wife, relief from the purported operation of the February 1, 2001, Order is appropriate pursuant to. T. R. C. P. 60.02(5) "Any other reason justifying relief from operation of the judgment".

The wife's motions were made within a reasonable time after wife learned that husband was drawing from the Kennametal, Inc. Retirement Income Plan without distribution to wife of her share.

Subsection 5 of Rule 60.02 is not subject to the one year limitation cited by husband.

Husband's reliance on Tyler V. Tyler, and 671 S. W. 2D 492 (Tenn. Ct. app. 1984) is misplaced in that in the Tyler case the husband chose to sign an order, creating and consenting to establishment of specific rights and obligation. Wife in the present case did not sign the order

entered in this cause, it was presented and entered on the false pretense that the 2001 Order was necessary to prevent husband from paying the same award twice. It does not specifically create or extend rights not yet created. It specifically purports to modify only one of four orders that award rights in the specific benefits at issue.

Nothing in this order changes the three remaining orders awarding benefits to wife, especially the July 29, 1999, DRO which awards benefits from the Kennametal Inc. Retirement Income Plan.

The one year time limitation for relief from judgment based on upon the first two subsections of Rule 60.02 is not applicable as the trial court retained jurisdiction in the Final Decree and the July 29, 1999, DRO for the entry for such orders.

The one year limitation on modification of judgments under the first two sections of Rule 60.02, that husband argues are determinative do not apply due to the retained jurisdiction. If they did apply they would equally deny the trial court jurisdiction to enter the February 1, 2001 order which husband relies upon. This order was entered more than one year after the January 11, 1999 QDRO if specifically references as modifying and more than one year after the July 29, 1999 DRO. No jurisdiction to modify the 1999 QDRO was retained in that order.

Husband cannot have the law he relies upon to deny jurisdiction of the Court to modify and reconcile the orders to restore wife's benefits without denying the same jurisdiction to the Court to enter the Order of February 1, 2001. He desires to interpret this order as setting aside all wife's and entitlements to benefits under all of the orders in this cause even those not specifically modified by the order upon which husband relies.

The trial court was absolutely correct in finding and ordering that these orders remain outstanding and unaffected and continue to award (wife) fifty percent (50%) of the Kennametal

Inc. Retirement Income Plan, and that the last DRO entered July 29, 1999, makes the final valid order concerning an award of a portion of the Kennametal Inc. Retirement Income Plan benefits unto wife. TR. P. 36. To the extent that any relief was actually granted under Rule 60 in this matter, the trial Court did not abuse its discretion in any regard.

CONCLUSION

By reason of the foregoing it is respectfully submitted that the order of the trial court announced December 2, 2012, and entered February 2, 2013 should be affirmed and costs should be taxed unto Appellant, husband.

Respectfully submitted:

By: L. B. Shults-D.
LOIS B. SHULTS DAVIS
Attorney for Connie June Tipton Stout
SHULTS & SHULTS
111 Gay Street
P.O. Box 129
Erwin, TN 37650
(423) 743-9179
TNBPR# 07193

CERTIFICATE OF SERVICE

I do hereby certify that I have this 8th day of August, 2013, served a true and perfect copy of the foregoing upon counsel for petitioner, Mr. John S. Taylor, at his usual office address of 508 Princeton Road, Ste. 203, Johnson City, Tennessee 37601, by U. S. Mail postage prepaid.


LOIS B. SHULTS-DAVIS