The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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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

1. State your present employment.

I am engaged in the active practice of law as a self-employed lawyer and Rule 31 Family Mediator. My husband and I also own and manage a small, multi-suite office building where my office is located.

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

1984. BPR Number 010970

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.

Georgia – Identifying Number 086610- 1984 – I obtained this license by taking the Georgia Bar Exam while I was living in Georgia where I attended law school. I was not sure at the time I took this bar exam where I was going to be practicing. License is currently inactive at my request because I do not have a practice there.

North Carolina – Identifying Number 18014 - 1991 –I obtained this license by reciprocity when we lived for a year in Asheville, N.C. License is currently inactive at my request because I do not have a practice there.

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. [I requested to be put on inactive status in Georgia and North Carolina because I do not have a practice in those jurisdictions.]

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).

1984 – 1989 – Associate Attorney, Boone, Wellford, Clark, Langschmidt & Apperson, Memphis, Tennessee.

The firm's philosophy encouraged independence of thought and action and hard work. I assisted the partners in their trials and handled many matters independently, including preparing cases for trial and trying cases. I represented landlords in Forcible Entry and Detainer cases and other clients in collection cases in General Sessions Court. I defended workers' compensation cases in Circuit Courts throughout West Tennessee and pursued claims on behalf of Plaintiffs. I represented parties in labor disputes, filed and defended suits by employees and employers under the E.E.O.C. right to sue letters, represented parties in divorce cases, represented national companies as bankruptcy creditors, pursued and defended claims for breach of contract, breach of covenant not to compete and participated in securities and construction litigation.

In addition to litigation, my practice also involved transactional and trust and estate work. I drafted agreements for our shopping center developer clients, negotiated terms and easements, and closed the transactions. I worked on zoning and planning matters with the City of Memphis, appearing on behalf of clients before the Land Use Control Board and City Council. I also closed residential real estate transactions during that time.

I had a unique case as a result of a close relationship with one of the original residents of the McKinney-Truse neighborhood in Memphis. I worked with the lead counsel on guiding the neighbors to band together to collectively sell the entire neighborhood for a much bigger profit than they would have realized selling separately. The site is now developed with a Home Depot and Kroger as anchor tenants.

I argued, solo, the appeal in Manning v. Fort Deposit Bank, 849 F.2d 222 (6th Cir. 1988), before a panel of the Sixth Circuit Court of Appeals. The case (opinion attached) concerned conflicts of interest and the issue of the "Chinese Wall" that was necessary for a law firm to construct when a different lawyer in the firm sought to represent a party adverse to that of a former client of the firm.

I tried cases in Shelby County General Sessions Court, Civil Division; Shelby County Probate Court; Circuit and Chancery Courts of Shelby and other west Tennessee Counties; U.S. Bankruptcy Court for the Western District at Memphis; U.S. District Court for the Western District of Tennessee at Memphis and Jackson, and in the U.S. Court of Appeals for the Sixth Circuit.

Looking back on these years, I am amazed and humbled by the responsibility and faith my mentors gave me and the level of experience I gained in just five short years. I worked hard and worked long hours to justify their faith in me. I am surely one of the luckiest people ever to have had that opportunity.

1989 – 1990

The details of our overseas travel year and brief relocation to Asheville N.C. in 1989 and 1990 are contained in my response to question number 6.

1991 – 1993 – Associate Attorney, Picard and Caywood, Memphis, Tennessee.

I had tried several divorce cases at my first firm. In the best cases, we, as family lawyers, are afforded a unique opportunity to help and sometimes effectuate profound and positive changes for families experiencing divorce and its aftermath. Having a call to work in this area, my goal was to work in the best family law firm I could find to obtain some "post graduate" schooling in the nuanced practice of family law. I found that schooling in the firm of Picard and Caywood. While there, I tried many divorce cases on my own and with David Caywood, learning and honing my trial skills. Among many other things, I became experienced in valuing a closely held business and reading and interpreting forensic psychological examinations. In addition to earning what I considered to be a "Ph.D." in family law, I was given significant administrative and managerial responsibility in running a law office, from negotiating a lease for office space, to hiring staff and associates and assessing various office systems as to their efficacy. Again, I was tremendously fortunate to have these opportunities to hone my craft among top-notch trial lawyers.

1993-1996 Space Sharing ~ Causey, Caywood, Taylor and McManus, Memphis, Tennessee

After my oldest child was born in November 1993, in order to have needed flexibility to accommodate the needs of our child while still maintaining a full time law practice, I resigned as an associate attorney employed by the firm and, instead, began a space-sharing arrangement with Mr. Caywood and the above association of lawyers we had joined. We continued to work together on cases. I had a fair number of my own clients that I brought to the firm. Once I began my independent practice sharing space, I began to build up my clientele in earnest. As my practice developed, I found that I was often conflicted out of representations due to the conflict of the other firm lawyers having been consulted with or retained by my potential client's soon-to-be ex-spouse. In 1996, in order to continue the development of my practice and experience, I relocated to other space-sharing offices.

1996 – 2007 Independent practice of law Morgan Keegan Tower~ Various space-sharing arrangements under name of Merrill & Mullins, later Merrill, Mullins & Spears and then Law Office of Kimbrough B. Mullins (sole proprietorship), Memphis, Tennessee

I moved to the Morgan Keegan tower in 1996 to a space-sharing arrangement with Irma Merrill and her father, Erich Merrill. Later, we were joined by Diane Spears. I shared space also in the same location with lawyer Harris P. Quinn, who was a member of the Memphis office of a Nashville firm, Williams & Prochaska, now named Prochaska, Quinn and Ferraro P.C. Irma and Erich Merrill relocated their practice in 2002. In December, 2007, I relocated my practice to be closer to my client base.

During these years, I continued to expand my experience and use the experience and knowledge I had gained in the preceding years in my family and adoption practices. In my adoption work, I represented biological parents and adoptive parents alike in the formation of adoptive families. This work was challenging and rewarding.

I also became one of the first Rule 31 Family Mediators in Shelby County in 1997. The building of a mediation practice was different than the building of the representation of clients in litigation matters. My litigation client base grew almost 100% by word of mouth referrals by former or current clients and from other lawyers and accountants. Gratefully, I was always in the circumstance of having enough clients to keep me busy and engaged. My mediation practice developed quickly for several reasons. I was one of the first doing it in Shelby County, but also I regularly received referrals from my colleagues in the Family Law Bar and from the Circuit and Chancery Court judges. Mediating a divorce case requires significant stamina and determination in order to help parties resolve conflicts. In fact, many times, so much conflict has already occurred that the only person in the room that will push for settlement is the mediator. It also requires the ability to actively listen, provide structure and order to the process of resolving the dispute, while protecting the balance and fairness of the process. It demands management of contentious parties and, unfortunately, sometimes contentious counsel. People skills are an absolute must. I have received a lot of positive feedback about the leadership that I provide in mediations from the bench, bar and participants in the process. All that aside, I make it a practice to start each mediation with a consciously expressed attitude to myself that I owe the parties my very best efforts in assisting them. I would bring this same daily commitment of my very best effort to each case that I managed, if selected as Judge.

2007 – present - Law Offices of Kimbrough B. Mullins and in 2012, Mullins Thomas, PLLC, Memphis, Tennessee.

In 2007, I relocated my practice away from the downtown area, bought an office building in east Memphis. and moved my practice to its current location at 668 Colonial Road, Suite 1, Memphis, Tennessee. In 2012, attorney Jessica M. Thomas joined me in a space-sharing arrangement. During these years, I have continued to develop my mediation and litigation practice focused primarily on family law, adoption, divorce and custody and child support matters. These recent years have provided me the opportunities to refine and improve my mediation skills, and have challenged me to take on litigation cases that demand the highest level of responsibility, skill and accountability to my clients. In doing so, I have come to understand that I am able to bring the skillset that I have attained and apply it to be the kind of judge that I aspire to be: a professional who helps people and entities resolve conflict with respect, dignity and efficiency. For me, there would be no nobler undertaking.

Employment before and during legal education.

In high school, college and law school I worked in the restaurant business at various restaurants and pubs in Memphis and Atlanta. In college I was also employed as a campus tour guide. I was responsible for most of my expenses and most of the cost of law school.

I took a year to work and save money between graduation from college and starting law school. As I had developed an interest in preservation of historically significant sites, I obtained an interesting (but very low paying) job as a researcher for a company called "The History Group." We consulted with and assisted persons or businesses who needed assistance with historical

research of their structures or preparation of applications for placing their properties on the National Register of Historic Places. That year, I also worked part time for the Georgia Department of Natural Services, Historic Preservation Section that administered the historic preservation efforts for the State of Georgia. Finally, during that same year, I worked as a server and bartender at Gladstone's Restaurant in Atlanta. It is no longer in business, but there I developed the invaluable qualities of having a thick skin and being able to bring order to disorder!

In law school, I was employed as a research assistant to University of Georgia Law Professor and Head Law Librarian, Erwin C. Surrency, while also maintaining employment at a restaurant in Atlanta on the weekends. During summers after my 1st and 2nd year of law school, I clerked for a firm in Atlanta named Jones, Ludwick and Malone. This firm did general civil and criminal litigation. There, I focused on writing memos and drafting pleadings and on judgment collections.

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.

July, 1989 – April, 1990 - My husband and I backpacked around the world. We had planned and saved for a trip around the world early in our marriage. We had no mortgage and no children at the time. We traveled frugally, camping across the American West. Driving down the Pacific Coast highway, to Los Angeles, we sold our car and launched off for New Zealand and points beyond. We camped where permitted and, otherwise, stayed in local inns and hostels. A majority of our time was in Asia because my husband grew up there as the son of medical missionaries from Johnson City, Tennessee. In addition to New Zealand, we were in Australia, Indonesia (Timor, Bali, Java and Sumatra), Singapore, Thailand, Nepal and Seychelles. For our last three months, we ended our travels in Europe, visiting England, Ireland, Scotland, France, Spain, Italy and Switzerland. Our time abroad, often in quite rustic conditions, was the learning experience of a lifetime. It tested our mettle more than once, such as the physical challenge of hiking in the Himalayas. There were cultural differences and language challenges in each place we went. In all, this time was astounding, expanding, inspirational and engaged all our resources.

In April 1990, after our epic world odyssey, we returned to the United States. We moved to Asheville, North Carolina for a year, where my husband pursued an opportunity to practice internal medicine. I participated in the lengthy process of obtaining my North Carolina law license by reciprocity but I did not find legal work there before we decided to return to Memphis.

In June 1991, we left Asheville and returned to Memphis. I was anxious to return to the active practice of law. My husband pursued his Board Certification as an Oncologist and Hematologist and obtained more training at University of Tennessee Medical School, while also teaching

there.

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.

- Family Mediation [about 35%]
- Family Law litigation(antenuptual agreements, divorces, child custody and child support modifications; enforcement of judgments including civil and criminal contempt petitions) [60%]
- Adoptions and Termination of Parental Rights matters [2.5%]
- Personal injury plaintiff's claims in association with personal injury practitioners [2.5%]
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8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

With the exception of my time abroad and in Asheville, I have been in the full-time practice of law since my swearing in in October 1984. This coming October 2015 will be my 31st anniversary in the practice of law in the State of Tennessee. I have experience representing clients in, and trying cases in, contract disputes, personal injury cases, workers' compensation, social security, unemployment benefits, divorces, adoptions, custody matters, will probates and conservatorships. For many years I was on the pro bono panel in Shelby County Probate Court to represent mentally ill persons subject to commitment proceedings. I have also represented clients in zoning matters before the Land Use Control Board and City Council and have closed transactions of sale of parcels in shopping centers to national companies such as Wendy's, McDonalds and Walmart. In the course of closing such deals, I have negotiated contract terms and easements for the properties. I have closed numerous residential real estate sales and was a

title examiner for area title companies. I have closed numerous corporate and business financings, worked on sales of privately held companies, and have assisted in UCC -3 bulk sales. I have represented creditors in bankruptcy and in one case was able to find extra money in the bankruptcy estate allowing my client to be paid all interest owed. I also represented clients in Title VII discrimination matters in hearings before the EEOC and in Federal Court suits. Other than traffic tickets and contempt petitions on family cases, I have very little experience in criminal matters.

I have argued cases in front of the U.S Court of Appeals for the Sixth Circuit (en banc panel), the Tennessee Supreme Court, the Tennessee Court of Appeals for the Western District at Jackson, the U.S. District Court for the Western District at Memphis and at Jackson, the Social Security Administration, all divisions of the Circuit Court of Shelby County, all divisions of the Chancery Court of Shelby County and the Chancery Courts of Madison and Fayette Counties, Shelby County Probate Court, and Shelby County Juvenile Court.

I have extensive experience in Shelby County Circuit Court, having served as trial counsel, special master, guardian ad litem, arbitrator and mediator in many cases in Circuit Court over the past 31 years.

In addition to having concurrent jurisdiction with Chancery Court in certain types of cases(fn1), Circuit Court is a court of general jurisdiction (fn2) which hears matters including breach of contract cases, appeals from lower courts, personal injury, wrongful death and medical malpractice tort actions, condemnations, workers compensation cases, and minor settlements.

I am knowledgeable and experienced in handling trials relating to each of these types of actions from both my early experience as a general civil litigator and as a trial lawyer in the family law arena.

For the five years of my practice, while employed with Boone, Wellford, Clark, Langschmidt and Apperson, I handled most, if not all of the firm's worker's compensation defense cases. Since I left there, I have represented Plaintiffs in worker's compensation cases as well. One notable workers compensation case in which I represented the Plaintiff involved a worker on the construction of the Nonconnah Parkway who received frontal lobe injury that was settled with his employer's carrier for 100 percent to the body as a whole and all future medicals. I also represented (with James Lockard as co counsel) parties in in lawsuit regarding a multi truck accident which crashed into my clients and seriously hurt their 3 year old daughter and a wrongful death action for a client whose son was killed by a drunk driver in a car accident1

My primary practice area is currently family law and family mediation. The successful practice of family law is an extremely challenging multi-specialty pursuit. It also requires a solid

1 For example, some types of cases in which Circuit Court has concurrent jurisdiction with Chancery Court are adoptions, divorces, declaratory judgments, enforcement of arbitration awards, delinquent tax sales, habeus corpus, mandamus, public nuisances, removal of public officers, replevins, usury, workers compensation. Likewise, Chancery has concurrent jurisdiction with Probate Court, for example in the establishment of conservatorships.

2 T.C.A. §16-10-101

grounding in the fundamental principles of other legal disciplines. When a couple divorces, business relationships with each other and extended family members often break up as well. Dealing effectively with this mandates strong understanding of corporate and partnership structure, application of contractual terms of shareholder and partnership agreements, understanding financial statements, corporate balance sheets, contractual agreements and how they apply to the financial vitality and value of the company, understanding the methodologies used to attain an appraisal of the fair market value of a business. Quite often, there is need for accounting as a result of allegation of fraud or dissipation. Determining whether property is "marital" or "separate" under the equitable division of property provisions of T.C.A § 36-4-121 requires understanding of estate and trust law, and commercial law. It requires the ability to interpret the terms of trusts and wills and apply that knowledge to whether property is appropriately characterized as "separate" property.

Structuring the division of various retirement assets requires familiarity with the Employees Retirement Income Security Act ("ERISA"). Further, a lawyer's understanding of benefits such as social security disability and retirement income can be vital to a divorce client. Dealing appropriately with parties' special needs children requires the ability to understand conservatorship law and special needs trusts. Being knowledgeable about real estate covenants and title, mortgage law, bankruptcy and creditor's law is essential to dealing with the parties' real estate interests and debts. Finally, in divorce litigation, injunctive relief is regularly sought to protect the children as well as to protect the "status quo" of the family's financial resources. These are all areas that relate directly to the type of cases of general original jurisdiction that are heard in Circuit Court, regardless of the subject matter. I have extensive experience in each example given above.

For the five years of my practice, while employed with Boone, Wellford, Clark, Langschmidt and Apperson, I handled most, if not all of the firms worker's compensation defense cases. Since I left there, I have represented Plaintiffs in worker's compensation cases as well. One notable workers compensation case in which I represented the Plaintiff involved a worker on the construction of the Nonconnah Parkway who received frontal lobe injury which was settled with the carrier for 100 percent to the body as a whole and all future medicals. I also represented (with James Lockard as co-counsel) parties in in lawsuit regarding a multi truck accident which crashed into my clients and seriously hurt their 3 year old daughter and a wrongful death action for a client whose son was killed by in a car accident by a drunk driver.

If given the chance to serve, I would be able to successfully apply this experience to fair, reasoned decision-making on the bench.

My experience is detailed in my response to question 5.

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

Manning v. *Waring, Cox, James, Sklar & Allen*, 849 F.2d 222 (6th Cir. 1988)

As a fourth year associate, under the mentorship of Carl H. Langschmidt, Jr., I argued the case for the third party plaintiff, Fort Deposit Bank, before the Federal Sixth Circuit Court of Appeals. [I was unmarried at the time and was listed as C. Kimbrough Brown as a lawyer in the case.] The case was precedent-setting at the time. The Court held that (1) presumption that confidences in possession of attorney will be shared with other members of firm is rebuttable, and thus "Chinese Wall" screening devices may rebut a presumption of shared knowledge among members of a firm in a conflict involving a former client, and (2) remand was necessary to determine whether the law firm representing third-party defendants should be disqualified because one of its attorneys previously had represented third-party plaintiff in related state court litigation.

In re Adoption of A.M.H., 215 S.W.3d 793 (Tenn. 2007)

Chancellor D.J. Alissandratos appointed me *Guardian Ad Litem* to a 2-year-old Chinese girl, A.M.H., in a dispute relating to the termination of the parental rights of A.M.H.'s biological parents to make way for her long-time custodial parents to adopt her. The custodial parents, Mr. and Mrs. Baker, had cared for A.M.H. since her birth. The biological parents, Mr. and Mrs. He, were Chinese nationals who were in the U.S.A. on Mr. He's student visa. For reasons set out in the trial, the He's gave custody of A.M.H. to the Bakers while she was an infant.

By the time of trial A.M.H was over five years old. The legal questions centered around whether the He's had abandoned A.M.H. pursuant to T.C.A. 36-1-113(g)(1) (termination of parental rights statute). The credibility of the witnesses was a paramount consideration in the case. The factual findings concerned whether the Hes had knowingly and voluntarily surrendered custody of A.M.H. to the Bakers, whether the He's failure to visit or support A.M.H. constituted abandonment and whether A.M.H. was at risk of substantial harm if returned to her biological parents.

Ultimately, as *Guardian Ad Litem*, my conclusion concurred with that of the Court-ordered psychologist who testified and concluded that A.M.H.'s family bond with the Bakers was so strong that disruption and hurt to the child would not be in her best interests and would constitute substantial harm to her. I was called upon to testify in the case for more than 7 hours.

The proceedings were lengthy, dramatic and contentious. The case became a media event and a cause for groups that advocated immigrant rights. The very nature of termination of parental rights proceedings are highly personal. What would otherwise be private information about both sets of parents became public record in the litigation. The Trial Court weighed facts and weighed the credibility of the parties. The Trial Court issued a 74 page written opinion ruling in favor of the Bakers and that the parental rights of the He's should be terminated. The Western Division of the Court of Appeals ruled in favor of the Bakers. The Tennessee Supreme Court ruled that the facts were different than those found by the Trial Court and overturned on the Court's decision. The Supreme Court held that A.M.H be returned to her biological parents and sent

back to China.

As *Guardian Ad Litem*, I assisted the *Attorney Ad Litem* in all trial preparation and appellate argument.

In re the Unborn Heirs of Contingent Remaindermen, Shelby County Chancery Court

This Chancery Court matter arose in about 1985 or 1986. I cannot now remember the names of the parties. Litigation was filed involving a quieting of title on real estate that was being sold. The Court appointed me as *Guardian Ad Litem* for the unborn heirs of the contingent remaindermen in the chain of title. The legal questions involved future interests, the doctrine of merger and the interests of the remaindermen.

As a matter of law, the case was unique and extremely interesting, a real bar exam question. The issues involved are seldom seen today.

Woolsey v. McPherson, 1998 WL 760950 (Tenn. App. 1998)

J.M was born out of wedlock to Miss Woolsey and Mr. McPherson. Miss Woolsey retained custody of J.M. Mr. McPherson visited with J.M. and contributed to her support. As time went on, Miss Woolsey's actions as a parent and resistance to Mr. McPherson's role in J.M.'s life became troubling. Mr. McPherson eventually sought sole custody of J.M. Mr. David Caywood and I represented Mr. McPherson. I was the lead counsel and was responsible for 95% of the appellate work on the case.

Mr. David Caywood and I tried the matter in Shelby County Juvenile Court over a time period beginning August 1997 and ending December 1997. Custody was awarded to Mr. McPherson. Miss Woolsey appealed.

The case was unique and the issues raised would be disturbing to any parent. Miss Woolsey was enmeshed with the child so that she could not maintain healthy boundaries to permit J.M. to grow as an individual. Miss Woolsey treated J.M. as an extension of Miss Woolsey's personality and individuality. Miss Woolsey actively discouraged J.M. from forming any bond with Mr. McPherson as her father. Litigation of the matter included the expert testimony of numerous psychological experts on the issues of child well-being and child abuse.

The Court of Appeals affirmed the ruling of the Juvenile Court awarding custody to Mr. McPherson.

Farnsworth v. Farnsworth, 2004 WL 239764 (Tenn.App. 2004)

This was divorce litigation heard in Shelby County Chancery Court. The issue on appeal pertained to the division of the marital debt and the award to wife of attorney fees. The Court of Appeals, in an unreported decision, remanded the case to the Trial Court to make findings of fact to meet the 4 factors enumerated in the case of Alford v. Alford, 2003 Tenn. LEXIS 1046, to determine how the allocation of debt was made in the marital estate, and to consider the issue

of the award of Wife's attorney's fee after the issue of marital debt was properly considered and Alford findings made. I had co-counsel at trial in this case. I was responsible for 95% of the appellate work.

SDR v. MFR,
Circuit Court of Shelby County, Tennessee
for the Thirtieth Judicial District at Memphis,
CT-001847-11
(Case under seal)

[Note to Council: This case has been pending since April, 2011. This file of this case has been under seal in the trial court since approximately January, 2015. This application specifically describes the events in the case that occurred in the appellate court before the case was under seal. The matter was never, and is not now, under seal in the Court of Appeals.

Nevertheless, in the interest of accommodating privacy interests of the parties beyond that which the Court(s) have ordered, I have redacted names of parties and identifying information from my application proper, on writing samples pertaining to this case attached to Exhibit 34, and on the Court of Appeals Order on Mother's Application for Rule 10 Interlocutory Appeal and Ruling of Rule 10b Recusal Appeal attached as part of Collective Exhibit 9 to this Application.]

I currently represent former Husband/ Father in protracted, contentious divorce and custody litigation in Circuit Court to obtain a divorce from Former Wife/Mother and to protect his interests as the custodial parent of the parties' 12-year-old child. My co-counsel is Mr. Charles McGhee. I am the lead counsel. Over 315 motions, pleadings and other court filings have been filed and over forty five (45) Court appearances have been required in this one case.

Between November, 2012 and January, 2013, there was a 15-day custody hearing in Shelby County Circuit Court. The trial transcript was 4,000 pages. 157 exhibits were proffered or introduced into evidence.

Under the Tennessee Rules of Appellate Procedure, Rule 10, Mother filed an Application for a Rule 10 Interlocutory Appeal of the ruling granting custody to Father. An interlocutory appeal is a special remedy for litigants to appeal a ruling of a trial court before all the issues have been decided. Rule 10 Interlocutory Appeals are based on the contention that "the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review."

The Court of Appeals required both parties to brief the issues. Mother's appeal was denied.

During the pendency of her application for Rule 10 interlocutory appeal in the Court of Appeals, Mother filed motions to disqualify (recuse) the trial judge and the *Guardian Ad Litem* for the child for misconduct, including *ex parte* communication, bias, prejudice, violation of Constitutional rights, the failure to maintain integrity and insinuated in her motion that the Trial Judge and the *Guardian Ad Litem* had been bribed. The issues were fully briefed in the Trial Court that is under seal in the case pending in the Circuit Court of Shelby County Clerks Office.

The Trial Court denied Mother's motion to disqualify the Trial Judge.

Mother appealed the Trial Court's denial of the Motion to Disqualify the Trial Judge under Tennessee Supreme Court Rule 10B. When an appeal of a motion to disqualify the judge is filed, the litigation is stayed and does not move forward. The issues were briefed, again, on the facts and the points of law governing recusal. On March 31, 2014, the Western Division of the Tennessee Court of Appeals denied Mother's appeal and affirmed the denial of the recusal motion by the Trial Court.

In February 2015 there was a financial trial in which agreement was made between the parties after five days of trial.

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Please see copies of the opinions/ruling in the above cases are attached as Collective Exhibit 9 herewith.

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.

Since September 1997, I have served as a family mediator under Rule 31 of the Rules of the Tennessee Supreme Court. As a Rule 31 neutral, one must maintain a balanced and fair environment that will foster the generating of goals and options for goal of reaching of a resolution of the disputes. A key responsibility of a good mediator is to carefully and actively listen and keep the parties and their counsel on track to a settlement. I am very glad to have had this opportunity. I believe that the process of mediation works and often creates a marked positive change in the present and future relationships of the parties and their children.

Maintaining visible and open neutrality is an important part of the mediation process. In some ways, it is like hearing a case, albeit without the rules of procedure, evidence or the necessity of ruling on the matter as the resolution is always purely consensual between the parties. The mediator must develop meaningful rapport with each party to find out the facts, weigh the credibility of the voices in the process, be aware of alternative resolutions that are within the law and promote respect for the legal process with the parties.

I estimate that I have mediated over 475 disputes since I received my Rule 31 Mediator listing in September, 1997. Given the requirements for confidentiality in the mediation process, I can only

state generally that these disputes pertain to valuation, classification and division of property, the classification, valuation and division of marital debt, determination of child support, classification, term and amount of alimony and child support, and determination of parental rights and responsibilities (custody and visitation). In some cases we work to resolve all the issues in the divorce case, and in others we effectuate post-divorce modifications of parenting plans and enforcements of the Final Decree of Divorce and Permanent Parenting Plans. Mediation has been a big part of my law practice. I believe I am known to be an effective mediator who is sensitive to the issues and the interests of all the parties and efficient and focused in securing a mediated agreement among the parties.

As an active member of the MBA, ADR and Family Law Sections, I am proud of my part in producing and participating as a speaker in many CLE offerings throughout the years. I am particularly proud of a program I organized, marketed and served as facilitator for the Memphis Bar Association in Fall, 2012 called "Neuroscience and Negotiation." We were able to bring a national expert on the subject, Dr. Richard Birke to Memphis from Willamette University Law School to speak for the day.

Also, prior to the finding by the Supreme Court in Tuetken v. Tuetkin, 320 S.W.3d 262 (Tenn. 2010), I was named in a number of different families' parenting plans as the "Parenting Arbitrator" or Arbitrator of post-divorce issues that arose between the former spouses. I conducted hearings under the terms of the Tennessee Uniform Arbitration Act on issues pertaining to the post-decree parenting issues, or for implementation of the Final Decree. I decided issues with substantial financial impact for the parties as well as issues not so commercially significant but important to the family's daily lives. For example, I had to determine the length to which a child's bangs should be cut, whether her baptism should take place at mother's or father's church, and where and when the child would visit the out-of-town parent during Christmas time. Again, in all arbitrations that I conducted, my role was to decide the issues, to maintain integrity and neutrality, to weigh credibility and to observe the law in the determination. Promoting respect for the legal process with the participants was an important part of the process.

I have acted as a judicial officer by appointment as special judge. During the first 15 years of my career, I sat as special judge periodically. As a special judge, I heard collection cases in Shelby County General Sessions Civil Division, and heard uncontested divorces and workers' compensation settlements in Circuit Court. I served as called at the request of the court. I have no records or recollection of the names of the parties or the specific dates. In recent years, the Circuit and Chancery Courts have stopped appointing lawyers to serve as special judges.

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 have been appointed many times by the Courts, including Circuit Court, as a *Guardian Ad*

Litem for children whose parents were divorcing and in contested adoptions.

I also am a trustee for a trust created for his family by my deceased uncle, called the C.P. Brown Family Trust. I am compensated as trustee for sums that are usually less than $500 per year. The work necessary as trustee on this matter is mainly making investment decisions, managing preparation and filing of trust tax returns, and distributing funds to the beneficiary as her needs require and as allowed by the terms of the trust instrument.

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

I volunteered to assist in coaching the University of Memphis Law School Advocacy in Mediation Team in 2012. The team placed first in the regional competition in their first year. I have also assisted the mediation professors at the University of Memphis Law School by coming to their classes and holding a mock mediation with the students to help demonstrate the principles they are learning in class. I have done this an estimated seven to eight times since the class began a number of years ago.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor 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.

I submitted an application for Shelby County Chancery Court , Part III Chancellor position on August 22, 2014. The Governor's Commission on Judicial Appointments considered my application at its meeting on September 20, 2015. My name was not submitted to the Governor as a nominee.

I also submitted an application on May 11, 2015 for the same Shelby County Chancery Court, Part III Chancellor position which became vacant as a result of the death of Chancellor Oscar "Bo" Carr. The Governor's Commission on Judicial Appointments considered my application at its meeting on June 17, 2015 and honored me as one of its three nominees to Governor Haslam.

EDUCATION

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

- Emory University, Atlanta, Georgia: 1976 – 1980, B.A. History
- University of Georgia, School of Law: 1981 – 1984, J.D.

PERSONAL INFORMATION

15. State your age and date of birth.

Age 57, born February 13, 1958

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

I have lived in Tennessee my entire life, excluding my 7 years in college and law school in Georgia (1976 – 1984) our world travels (1989-1990) and one year's residence in Asheville, North Carolina (1990 – 1991).

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

I have lived in Shelby County, Tennessee my entire life, excluding my 7 years in college and law school in Georgia (1976 – 1984), our world travels (1989-1990) and one year's residence in Asheville, North Carolina (1990 – 1991).

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

Shelby County, Tennessee

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 other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No.

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

No.

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

One. The complaint was brought by adversary counsel in a contested litigation and was dismissed by Board of Professional Responsibility of Tennessee Supreme Court.

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.

In 2013, Mullins Colonial Partners, L.L.C., a family limited partnership owned by my husband and myself, was sued, in error, by the Shelby County Trustee for property taxes as a result of a mistake made by Shelby County Assessor's office. Mullins Colonial Partners, L.L.C was dismissed from this lawsuit this year because the taxes had been timely and correctly paid in full.

The resolution is reflected in the attested copy of the Chancery Court Order Dismissing Defendant Mullins Colonial Partners, L.L.C., a copy of which is attached as Exhibit 23.

For any additional confirmation please contact Shelby County Trustee Delinquent Tax Attorney Greg Gallagher, (901) 327-4243.

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.

I have not other than that described in Question 23.

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

I have been a member of St. John's Episcopal Church in Memphis since birth. I love my church and express my faith by putting much of my spare time into activities there. I have held almost every position of leadership within my parish including serving as a member and junior and senior warden of the elected vestry, teaching Sunday School to adults and children, acting as leader of the children's choir and director of the children's musical productions when my children were younger, being a chalice bearer, a lector, verger, a current member of the chancel choir, a current member of task force developing programs for parish wide spiritual renewal and participant in weekly Bible study.

I am an alto singer in the auditioned Memphis Chamber Choir.

I am an active alumna of St. Mary's Episcopal School for Girls and currently serve on the Outstanding Alumna Selection Committee and the Alumnae Advisory Board to the Board of Trustees. I am the head lawyer coach for the St. Mary's Mock Trial team this year and have been involved as an assistant last year. I greatly enjoyed working with the students. They won the 2015 Shelby County Regionals and placed second in the T.B.A. Y.L.D. Tennessee State High School Mock Trial Tournament in Nashville in March 2015.

I have been involved in the Parents Association for the schools attended by my children including Grace St. Luke's Episcopal School, St. Mary's and Memphis University School for Boys. I have volunteered as Class parent, chair of Teacher Appreciation, and for Hospitality on Visiting Student days.

I am the street captain for my street in the Belle Meade Neighborhood Association, responsible for communicating neighborhood information to the neighbors on my street.

I have worked for the American Cancer Society in various ways. The biggest responsibility I had was being on the executive committee that planned and implemented the Cancer Society's Gala, its biggest fundraiser.

I am currently member of the Board of Directors for two great organizations: Concerts International, Inc. which produces classical music events and of Theatre Memphis, Inc., one of Memphis' preeminent regional theaters.

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

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

b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

None, other than my college sorority Delta Delta Delta which limits membership to women.

ACHIEVEMENTS

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

- Member, American Bar Association, 1984 – present
- Member, Tennessee Bar Association, 1984 – present
- Member, Family Law Section, ADR Section and Litigation Section
- TBA 2012 Pro Bono Honor Roll
- Member, Memphis Bar Association, 1984 – present
  Alternative Dispute Resolution Committee 1988-9, Chair
  Alternative Dispute Resolution Section
  2009-2013 Executive Committee
  2012 Chair
  Fee Dispute Panel Member
  Access to Justice Committee Member
  Family Law Section CLE Chair,
  Outstanding judge selection committee

- Member, Association of Women Attorneys, approx. 2005 – present
- Member, Tennessee Association of Women Attorneys, intermittently from 2000 to present
  CLE Coordinator for 2000 Annual Convention of TLAW, Tennessee Trial Lawyers Association and Tennessee Judicial Conference.

- Fellow, Memphis Bar Foundation, 2012 – present

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

In 1991-2, as chair of the Memphis Bar Association Alternative Dispute Resolution Committee, we undertook a study to gauge the degree of interest in the Shelby County Bar in starting to utilize certain Alternate Dispute Resolution (ADR) methods. We believed that ADR methods would assist litigants in reaching resolution of their dispute prior to the financial, emotional and opportunity costs of pursuing the full litigation gambit of trial and appeal. According to our study, during that time period, there was some ambivalence about putting a court ordered mediation program into place. There were fears that such would add an additional level of expense without adding concurrent efficacy in the resolution of disputes. As a result of this initiative, I was appointed for a six-year term to the Supreme Court Alternative Dispute Resolution Commission and served from 1996 to 2002. This Commission drafted the original proposed Supreme Court Rule 31.

The Commission worked to provide information and education to the Bar and the "litigation marketplace" about mediation, which, in turn, helped create demand for mediation services from the potential users, lawyers and their clients. The demand for mediation services remains strong in 2014 as a flexible and durable alternative to litigation. Although I focus on family law mediations, mediation and other forms of ADR are used in all types of civil cases.

I was selected as a member of the Memphis Bar Foundation in 2012 for my service to our profession. I also enjoy an "AV" rating by my peers in Martindale Hubbell.

I have actively sought the experiences I needed to allow me to qualify to be a judge. My late father taught me that much good work could get done if one put aside need for aggrandizement. I admire that quality of humility and practicality and have tried to emulate that attitude in my life as well.

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

None.

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

Note: This list is not all-inclusive.

- April 15, 2015 Memphis Bar Association Family Law Section Master's Series talk on legal basis for attorneys' fee awards, and attorney's liens.
- November 2012 - Produced and Facilitated Memphis Bar Association, Alternative Dispute Resolution Section Annual Seminar "Neuroscience and Negotiation" with

Professor Richard Birke

- November 2012 - Presenter at Annual John Dice Wellness Seminar
- August 2012 - Presenter at Tennessee Supreme Court Rule 38: How to Use it in your Mediation Practice
- July 2012 - Presenter at You be the Judge: Child Support Negotiations (with Judge Robert Childers)
- April 2012 - Presenter at You be the Judge: Child Support Negotiations (with Judge Robert Childers)
- December 2011 - Presenter at Memphis Bar Association, Alternative Dispute Resolution Section Annual Seminar: Ethical Considerations of the Mediator Drafting Agreements in Family and Other Cases
- October 2011 - Presenter at Annual John Dice Seminar
- May 2011 - Presenter at High Conflict Parenting after Tuetkin v. Tuetkin, 320 S.W.3d 262 (Tenn. 2010) Memphis Bar Association Bench Bar Conference 2011
- October 2010 - Presenter at Memphis Bar Association, Alternative Dispute Resolution Section Annual Seminar, Issues in Ethics: Tuetken v. Tuetkin, 320 S.W.3d 262 (Tenn. 2010)
- December 2009 - Memphis Bar Association, Alternative Dispute Resolution Memphis Bar Association, Alternative Dispute Resolution Section Annual Seminar Case Law Update: Enforcement of Mediated Agreements
- September, 2009 - Presenter at Disaster Relief for Your Marital Dissolution Agreement and Permanent Parenting Plan
- March, 2009 - Presenter at Roundtable Presentation and Discussion of Practice Tips for Mediators in a Bad Economy
- January 1997 - How to become a Rule 31 Mediator (with Emmett Marston)

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

None.

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

No.

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

Attached are two briefs prepared by me to the Court of Appeals in the divorce case of SDR v. MFR as Exhibit 34. The first is Father's Response to the Application made by the Wife for a Rule 10 Interlocutory Appeal. The Application for Interlocutory Appeal was denied by the Court of Appeals on September 6, 2013. The second brief attached is Father's Response to Mother's Rule 10b Interlocutory Appeal of the trial court's denial of her Motion to Recuse the judge. This appeal was, likewise, denied by the Court of Appeals on March 31, 2014. The names of the parties and children are redacted for reasons set forth in my Note to Council, p. 12 in Question #9

I have co-counsel in SDR v. MFR case, but the briefs submitted were 98% my own personal effort. Co-counsel assisted in reviewing and proofreading the completed briefs.

Also, the Court's rulings in these two matters are included in Exhibit 9 to this Application.

ESSAYS/PERSONAL STATEMENTS

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

Guiding clients through trials and mediations, helping them have a voice and receiving their trust in return has been a great honor. A judge's work in resolving conflict, listening to litigants, and instilling trust in our system of justice functions comprehensively to resolve disputes. This opportunity greatly appeals to me.

I respectfully submit that I have the professional credentials, skill sets and strength of character needed to be an effective judge. I aspire to be a jurist who understands and follows the law, maintains control and fairness over the proceedings, problem-solves on a high level with a practical approach, and issues decisive, prompt and well-reasoned decisions.

My family's example of public service inspires me to pursue this opportunity to serve the citizens of Shelby County. Personally, these changes in my responsibilities and the interesting attendant challenges would be a natural and exciting "Chapter 2" for my life's work.

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

I feel strongly about helping those in economic or other need. We can be mindful in improving access to justice without dismantling our system. Making mediation available to more people is a strong way we may facilitate such access. I helped set up the pro bono Mediator of the Day program in General Sessions Court, Civil Division. I worked on a similar program for the Shelby County Divorce Referee. I drafted all the forms used in the programs. I regularly volunteer to take cases from the Community Legal Center and the Memphis Area Legal Services and take pro bono and reduced rate mediations for people unable to afford mediation. I have taken pro bono *Guardian Ad Litem* appointments to help the child. I was on the TBA 2012 Pro Bono Honor Roll.

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)***

Division III of the Circuit Court of Shelby County Tennessee is a court of general jurisdiction. There are nine Circuit Court Judges in Shelby County who hear civil cases as outlined more in my answer to question 8, page 8 above.

As a circuit court judge, I would bring all my experience as a both a litigator and a mediator to the Court, and would approach all decisions with fairness, balance, and intelligence.

I greatly respect the other circuit court judges and have worked with them in the courtroom and in Bar activities for the last 31 years. I would welcome working closely and collaboratively with the other Judges and the Clerk to serve the public well. Finally, I enjoy respectful relationships with my colleagues at the bar and would work to maintain the highest level of professionalism in the courtroom and beyond.

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)***

The men and women who serve the citizens of Shelby County as Judges and Chancellors are vital servants of our community. This service aspect of the job of Judge is the single most compelling reason that I apply for this position.

With respect to community service outside of that provided by our system of justice, as II have been involved over the years in various organizations, as described above in my answer to Question 26 above. I have looked forward to becoming more involved in our community since our youngest child left home for the College of William & Mary this past Fall. I would continue this plan to the extent permitted by judicial ethical rules and to the extent that time permits

If possible, I would also like to continue mentoring in the Juvenile Court Youth Court program, be more involved in the outreach projects of my parish church, continue working for St. Mary's School for Girls, and serving on the Boards of Theatre Memphis and Concerts International, Inc. I have greatly enjoyed my time as a high school mock trial coach and judge and would plan to continue my involvement in those programs, as my time and judicial responsibilities might permit.

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

I come from people who serve. My great grandmother worked for suffrage and the ratification of the 19th Amendment of the U.S. Constitution. My late father was a physician who served as Commissioner of Mental Health under Governor Alexander. My husband, Brent Mullins, is an oncologist who serves his patients with intelligence, fortitude and great care. Our two children, Carson, age 22, and Jack, age 18, have been raised to be useful citizens and to serve others with their talents and strengths. They have each influenced me for good as much or more than I have influenced them. I want my children to understand that with hard work, intelligence and perseverance, they can make a difference in this world. The place that I would like to make that difference is on the Circuit Court bench.

I am an experienced trial lawyer and possess courage to face difficult times and make difficult decisions. Conducting hundreds of mediations, I am called to maintain balance and fairness to the process. I am honored by long relationships of mutual respect with my colleagues, many of whom have encouraged me in pursuit of this position. My decisions would be rendered in a fair process and in as reasoned and informed manner as I am able. I have a strong work ethic. I work hard to build rapport with those around me. I am a clear thinker. I am decisive. I am determined that every litigant receive my very best effort, every day.

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, I will do so. I believe that a judge's job is to interpret and apply the law that is on the books. I deeply respect our system of law and believe that, without it, our society would be one of chaos. There have been times when I disagreed with the Court's decisions of a case, as a differing interpretation of the law from my own, but still supported it and respected it as the Court's decision.

There have been times that I thought the proper application of a statute or rule had unfair result. For example, sometimes, application of the Tennessee Child Support Guidelines (regarding support for the benefit of the children) might affect one parent or the other in a seemingly unfair way. Further, often in the divorce and custody cases that I handle the Court has to decide what is fair, appropriate and protective for the children over the interests of my client or the other parent. Nevertheless, the protection of children is one of the most important functions of our judiciary and as such must be upheld and respected.

As a judge, I would apply statutes, rules and applicable case law. Further, I would exercise discretion only where it was clear that such exercise was reasonable and within my authority to do so.

REFERENCES

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

A. Gordon Thompson
(Tax and Financial Consultant, C.P.A. and Business Litigation Consultant]
Managing Director)
CBIZ MHM (formerly Thompson Dunavant PLLC)

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B. Janet Morris McGehee (friend and former client)

C. Charles McGhee (co-counsel in major litigation)
Partner, Shea, Moskovitz & McGhee

D. Linda Warren Seely (worked on access to justice and mediation projects together)
Memphis Area Legal Services, Inc.
Director of Pro Bono Projects and Campaign for Equal Justice

E. W. Hamilton Smythe, IV (lifelong friend)
President, Premier Transportation, Inc. (Yellow Cab Memphis)

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 of Shelby County, Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended 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: November 30, 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.

Kimbrough B. Mullins

Signature

November 30, 2015
Date

0010917
BPR #

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

Georgia No. 086610

North Carolina No. 18014

The Governor's Council for Judicial Appointments

State of Tennessee

Exhibits to Application of Kimbrough Brown Mullins

Exhibit to Question No. 9

849 F.2d 222, 56 USLW 2721
(Cite as: 849 F.2d 222)

United States Court of Appeals,
Sixth Circuit.
J. Frank MANNING, an individual, suing on his own behalf and on behalf of all other persons similarly situated, Plaintiff,
Fort Deposit Bank, a corporation, Defendant and Third–Party Plaintiff–Appellee,
v.
WARING, COX, JAMES, SKLAR AND ALLEN, a partnership composed of Allen Cox, Jr., Roane Waring, Jr., Erick William James, Robert Lee Cox, H. Sklar, Louis F. Allen, and Rodger D. Fish as general partners, Third–Party Defendants–Appellants.

No. 86–6239.
Argued Nov. 13, 1987.
Decided June 9, 1988.

Third-party plaintiff brought motion to disqualify counsel for third-party defendants, in action brought by third-party defendants seeking contribution for third-party defendants' alleged violation of state security laws. The United States District Court for the Western District of Tennessee, James Dale Todd, J., 619 F.Supp. 1327, granted motion, and third-party defendants appealed. The Court of Appeals, Alan E. Norris, Circuit Judge, held that: (1) presumption that confidences in possession of attorney will be shared with other members of firm is rebuttable, and thus "Chinese wall" screening devices may rebut presumption of shared knowledge among members of firm in conflict involving former client, and (2) remand was necessary to determine whether law firm representing third-party defendants should be disqualified because one of its attorneys previously had represented third-party plaintiff in related state court litigation.

Remanded.

Merritt, Circuit Judge, concurred in part, dissented in part, and filed opinion.

West Headnotes

[1] Attorney and Client 45 ⚿21.20

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k21.20 k. Disqualification proceedings; standing. Most Cited Cases

Presumption that confidences in possession of attorney will be shared with other members of firm is rebuttable, and thus existence of "Chinese wall" screening devices may rebut presumption of shared knowledge among members of firm in conflict involving former client.

[2] Attorney and Client 45 ⚿21.20

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k21.20 k. Disqualification proceedings; standing. Most Cited Cases

Where it has been demonstrated that disqualification of attorney and his law firm on grounds that attorney previously represented opposing party of client will work hardship, it is clear that attorney, whom law firm "quarantined," was privy to confidential information received from former client now seeking disqualification, and there is substantial relationship between subject matter of prior and present

849 F.2d 222, 56 USLW 2721
(Cite as: 849 F.2d 222)

representations, then court must determine whether presumption of shared confidences has been rebutted; one method of rebutting presumption is by demonstrating that specific institutional screening mechanisms have been implemented to effectively insulate against any flow of confidential information from quarantined attorney to other members of law firm.

[3] Attorney and Client 45 ⚿21.15

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k20 Representing Adverse Interests
45k21.15 k. Partners and associates. Most Cited Cases

In determining whether law firm representing client should be disqualified because one of its attorneys previously represented opposing party of client, factors appropriate for consideration by trial court include but are not limited to size and structural divisions of law firm involved, likelihood of contact between "infected" attorney and specific attorneys responsible for present representation, existence of rules which prevent "infected" attorney from access to relevant files or access to information pertaining to present litigation, and existence of rules which prevent attorney from sharing in fees derived from such litigation.

[4] Federal Courts 170B ⚿3785

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(L) Determination and Disposition of Cause
170Bk3779 Directing New Trial or Other Proceedings Below; Remand
170Bk3785 k. Need for further evidence, findings, or conclusions. Most Cited Cases
(Formerly 170Bk922)

Remand was necessary to determine whether law firm representing third-party defendant should be disqualified because one of its attorneys previously had represented third-party plaintiff in related state court litigation; law firm had argued that "Chinese wall" screening devices had prevented disclosure of any confidential information by attorney, and presumption that confidences in possession of attorney will be shared with other members of firm is rebuttable.

***223** James S. Cox, Memphis, Tenn., for third-party defendants-appellants.

Carl H. Langschmidt, Jr., C. Kimbrough Brown (argued), Memphis, Tenn., for defendant and third-party plaintiff-appellee.

Before MERRITT and NORRIS, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

ALAN E. NORRIS, Circuit Judge.

The law firm of Waring, Cox, James, Sklar & Allen ("Waring, Cox"), third-party defendant, appeals from an order of the district court granting the motion of defendant and third-party plaintiff, Fort Deposit Bank, to disqualify the law firm of Heiskell, Donelson, Bearman, Adams, Williams & Kirsch ("Heiskell, Donelson") from serving as counsel for Waring, Cox in the claim brought against it by the bank. 619 F.Supp. 1327. Pursuant to 28 U.S.C. § 1292(b), the district court certified the order for immediate appeal, and appeal was permitted by a panel of this court.

In 1972, the town of Grand Junction, Tennessee issued industrial revenue bonds to finance the construction of a manufacturing plant. Waring, Cox served as bond counsel to the town. The bonds were to be repaid through rents received by the town; payment was guaranteed by the two individuals who proposed to operate the manufacturing plant. These guarantors

submitted financial statements which were circulated as an attachment to the prospectus.

An Oklahoma bank served as trustee for the bond issue. The bonds were marketed through underwriters, one of which was Fort Deposit Bank, of Fort Deposit, Alabama. In other words, Fort Deposit bought bonds from the Oklahoma bank and sold them to investors.

By October 1974, payment on the bonds was in default. In February 1975, the Oklahoma bank and Grand Junction filed a complaint in state court against the guarantors. An amended complaint added the bondholders as defendants (as a class), and sought a declaratory judgment that the Oklahoma bank had properly administered the bond issue. The bondholders counterclaimed against the Oklahoma bank and added Waring, Cox as a third-party defendant, alleging malpractice. Waring, Cox retained Memphis attorney Leo Bearman, Jr., of the Heiskell, Donelson firm, as counsel.

In February 1977, while the state court action was pending, this action against Fort Deposit Bank was filed in the same state court, as a class action by the bondholders who had purchased their bonds from Fort Deposit. The complaint alleged violations of state securities laws, including misrepresentation of the net worth of the guarantors. Fort Deposit removed the action to federal district court. Attorney Daniel Hatzenbuehler, of the law firm of Boone, Wellford, Clark, Langschmidt & Pemberton ("Boone, Wellford"), undertook Fort Deposit's representation. Action on this federal lawsuit was informally stayed pending the outcome of the state court action.

In the state court action, all claims were either settled or dismissed, with the exception of the one by the bondholders against Waring, Cox. The trial court awarded judgment to the bondholders, but the state court of appeals reversed on the ground that the claim against Waring, Cox had not been filed timely under the applicable statute of limitations. The Supreme Court of Tennessee affirmed. *See Security Bank & Trust Co. v. Fabricating, Inc.*, 673 S.W.2d 860 (Tenn.1983), *cert. denied sub nom. Podrog v. Waring, Cox, James, Sklar & Allen*, 469 U.S. 1038, 105 S.Ct. 515, 83 L.Ed.2d 405 (1984).

In April 1984, with Fort Deposit's knowledge, Hatzenbuehler joined Heiskell, Donelson, and the bank continued his employment as its counsel in this action. In October 1984, Fort Deposit decided it should join Waring, Cox as a third-party defendant,***224** and Hatzenbuehler terminated his relationship with the bank. Boone, Wellford then undertook Fort Deposit's defense and, in December 1984, filed a third-party complaint alleging that Waring, Cox was liable to the bank for contribution should plaintiffs prevail against it, since Waring, Cox had served as bond counsel. Waring, Cox again retained Heiskell, Donelson. The bank then sought to disqualify Heiskell, Donelson as counsel for Waring, Cox, due to Hatzenbuehler's prior involvement with the case. Although the bank alleged that Hatzenbuehler was privy to its confidences and secrets as the result of his representation, it did not suggest that he had disclosed them.

Waring, Cox conceded that Hatzenbuehler's prior representation of the bank mandated his disqualification, but argued that the harsh remedy of disqualifying the entire law firm of Heiskell, Donelson was not warranted. Waring, Cox pointed out that Heiskell, Donelson was uniquely qualified to represent its interests in this lawsuit, in view of its representation throughout the prolonged state litigation, and, that to deny Waring, Cox that firm's services would result in substantial hardship. It also contended that as soon as Hatzenbuehler joined Heiskell, Donelson, efforts were undertaken to prevent disclosure of confidential information. The result, Waring, Cox contended, was that Hatzenbuehler was "screened" from Heiskell, Donelson's efforts on behalf of Waring, Cox, even before the bank asserted a claim against Waring, Cox,

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since Heiskell, Donelson was sensitive to the potential for future conflict between the two. Cited as factors which assured the success of the screening devices were the size of Heiskell, Donelson (at fifty lawyers, the largest in Tennessee); division of the firm into six departments with Hatzenbuehler serving in a different department than the attorney handling Waring, Cox's defense; a prohibition against communication between Hatzenbuehler and other members of the firm about the litigation; and segregation of Hatzenbuehler's files from other law firm files.

In its memorandum opinion, the district court thoroughly discussed the issues raised by the bank's motion, and noted that the bank was entitled to the benefit of a well-recognized presumption that the confidences in Hatzenbuehler's possession would be shared with other members of the firm. The court concluded that "Chinese wall" screening devices cannot rebut the presumption of shared confidences when the confidences were obtained by the "quarantined" lawyer from the former client while representing him in the same proceedings in which other members of the firm are now representing an opposing party. The district court also considered that disqualification of Heiskell, Donelson would not unduly prejudice Waring, Cox, since the litigation was in its early stages and Waring, Cox had ample resources to retain new counsel and prepare for trial.

[1] This court has not been confronted previously with the precise issue raised by this appeal.[FN1] We conclude that the district court erred in holding that screening devices can never be effective to protect confidences under the circumstances presented above.

> FN1. In an earlier decision, we affirmed, without opinion, a decision of the District Court for the Northern District of Ohio which included *dictum* to the effect that the presumption of shared confidences should be rebuttable. *City of Cleveland v. Cleveland Elec. Illuminating,* 440 F.Supp. 193, 209–10 (N.D. Ohio 1976), *aff'd without opinion,* 573 F.2d 1310 (6th Cir.1977), *cert. denied,* 435 U.S. 996, 98 S.Ct. 1648, 56 L.Ed.2d 85 (1978).

If the case reports are any indication, a motion to vicariously disqualify the law firm of an attorney who is himself disqualified as the result of his possession of the confidences of a former client, is becoming an increasingly popular litigation technique. Unquestionably, the ability to deny one's opponent the services of capable counsel, is a potent weapon. Confronted with such a motion, courts must be sensitive to the competing public policy interests of preserving client confidences and of permitting a party to retain counsel of his choice.

Perhaps these motions have become more numerous simply because the changing***225** nature of the manner in which legal services are delivered may present a greater number of potential conflicts. Certainly, the advent of law firms employing hundreds of lawyers engaging in a plethora of specialties contrasts starkly with the former preponderance of single practitioners and small firms engaging in only a few practice specialties. In addition, lawyers seem to be moving more freely from one association to another, and law firm mergers have become commonplace. At the same time that the potential for conflicts of interest has increased as the result of these phenomena, the availability of competent legal specialists has been concentrated under fewer roofs.

Consequently, these new realities must be at the core of the balancing of interests necessarily undertaken when courts consider motions for vicarious disqualification of counsel.

A reading of the cases would lead one to believe that the maintenance of confidentiality has been accorded paramount effect. And this is understandable, given the traditional concerns of the legal profession

that client confidences be protected [FN2] and that appearances of professional impropriety be avoided.[FN3] In addition, courts have frequently pointed to the prohibition against other lawyers in a firm accepting or continuing employment when a member of the firm has been required by ethical considerations to decline or withdraw from that employment.[FN4]

> FN2. *See* Model Code of Professional Responsibility Canon 4 (1981).
>
> FN3. *See* Model Code of Professional Responsibility Canon 9 (1981).
>
> FN4. DR 5–105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.
>
> ....
>
> (D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment.
>
> Model Code of Professional Responsibility DR 5–105 (1981).

[2][3] In our view, the Court of Appeals for the Seventh Circuit has taken the most realistic view of the methodology to be followed in resolving competing interests raised by such a disqualification motion.[FN5] Where, as here, it has been demonstrated that disqualification will work a hardship, it is clear that the quarantined lawyer was privy to confidential information received from the former client now seeking disqualification of the lawyer's present firm, and there is a substantial relationship between the subject matter of the prior and present representations, then the district court must determine whether the presumption of shared confidences has been rebutted. Specifically, under the circumstances of this case as presented by the parties on appeal, it must be determined whether the confidences which Hatzenbuehler acquired from the bank in the course of his prior representation and brought with him to Heiskell, Donelson, have been passed on, or are likely to be passed on, to members of the firm. *Schiessle v. Stephens,* 717 F.2d 417, 421 (7th Cir.1983). One method of rebutting the presumption is by demonstrating that specific institutional screening mechanisms have been implemented to effectively insulate against any flow of confidential information from the quarantined attorney to other members of his present firm. *LaSalle Nat'l Bank v. County of Lake,* 703 F.2d 252 (7th Cir.1983).

> FN5. For examples of opinions from other circuits approving the potential for use of screening devices to rebut the presumption of shared confidences, *see Armstrong v. McAlpin,* 625 F.2d 433 (2d Cir.1980) (en banc); *Ez Paintr Corp. v. Padco, Inc.,* 746 F.2d 1459 (Fed.Cir.1984). *See also* Note, *Federal Courts and Attorney Disqualification Motions: A Realistic Approach to Conflicts of Interest,* 62 Wash.L.Rev. 863 (1987); Peterson, *Rebuttable Presumptions and Intra–Firm Screening: The New Seventh Circuit Approach to Vicarious Disqualification of Litigation Counsel,* 59 Notre Dame L.Rev. 399 (1984); Note, *The Future of the Chinese Wall Defense to Vicarious Disqualification of a Former Government Attorney's Law Firm,* 38 Wash. & Lee L.Rev. 151 (1981).

Such a determination can be based on objective and verifiable evidence presented to the trial court and must be made on ***226** a case-by-case basis. Factors appropriate for consideration by the trial court might include, but are not limited to, the size and structural divisions of the law firm involved, the likelihood of contact between the "infected" attor-

> ney and the specific attorneys responsible for the present representation, the existence of rules which prevent the "infected" attorney from access to relevant files or other information pertaining to the present litigation, or which prevent him from sharing in the fees derived from such litigation.
> 717 F.2d at 421 (citation omitted).

The efficacy of screening devices, under appropriate circumstances, has been recognized by the American Bar Association in the instance of lawyers who leave government service to enter private practice. Model Rules of Professional Conduct Rule 1.11 comment (1983); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975). In view of the changing nature of the availability of legal services which we have noted above, we see no reason why the considerations which led the American Bar Association to approve appropriate screening for former government attorneys, should not apply in the case of private attorneys who change their association.

The issue of disqualification was presented to the district court by the bank predicated upon a factual context in which no actual conflict in duties of legal representation arose until after Hatzenbuehler had joined Heiskell, Donelson and the bondholders' reactivation of the federal court action indicated to Hatzenbuehler that Fort Deposit should file a third-party claim against Waring, Cox. He then resigned as counsel for the bank, which then retained Boone, Wellford to file the third-party claim. In essence, these facts presented the classic question of whether the entire law firm should be disqualified by a conflict of interest presented by the fact that a member of the firm had represented a certain client prior to his joining the firm. These were the assumed facts then, when the district court held that the presumption of shared confidences was irrebuttable, and the asumed facts under which we conclude that the presumption is rebuttable, upon sufficient proof.

However, we are troubled by an indication in the record that these may not have been the actual facts; that a conflict may have arisen long before Hatzenbuehler joined Heiskell, Donelson. According to the "Memorandum in Opposition to Motion to Disqualify" submitted by Waring, Cox to the district court:

> With this Federal Court action effectively stayed, Mr. Hatzenbuehler became somewhat involved in the [state court action] on behalf of Fort Deposit Bank, not yet a party to that suit. As such, he and Mr. Boone travelled to Fort Deposit, Alabama in September of 1977 and met with Bank officers and local counsel in order to determine whether Fort Deposit Bank, as a former bondholder, should opt into the class that counsel for the bondholders sought to have certified. Mr. Hatzenbuehler was informed by local counsel at that meeting for the first of many times that Fort Deposit was not interested in pursuing any third-party actions against any potential defendants, including bond counsel, Waring, Cox.
>
> Following a meeting with Frank Bird, counsel for the bondholder class, Mr. Hatzenbuehler advised Fort Deposit to opt into the class and thus became more directly involved in the Hardeman County suit. From that point, Mr. Hatzenbuehler participated in some discovery depositions and received and reviewed all pleadings filed in the [state court] suit. He had discussions with Frank Bird and local counsel of Fort Deposit, and, to a much more limited extent, its President. He also prepared responses to interrogatories propounded to Fort Deposit and in doing so reviewed all documentation the Bank had on file in this matter.

The quoted material is confusing, because the same memorandum, when referring to Hatzenbuehler's joining Heiskell, Donelson in 1984, states that "[s]ince at that time Fort Deposit again indicated that they had no interest in pursuing possible claims against Waring, Cox, it was concluded***227** that no conflict of interest would result." However, assuming

that during 1977 or 1978 Fort Deposit did join the bondholders in the state lawsuit in pursuing their claim against Waring, Cox, then Fort Deposit and Waring, Cox became opposing litigants at that time. If this were the case, then the fact that Fort Deposit waited until December 1984 to pursue a third-party claim against Waring, Cox in the federal suit, would be largely irrelevant to resolving Heiskell, Donelson's disqualification. Hatzenbuehler's continued representation of Fort Deposit against Waring, Cox in the state action while a member of Heiskell, Donelson, would have conflicted with another firm member's representation of Waring, Cox.

At the time Hatzenbuehler moved to Heiskell, Donelson, the state court action, in which Heiskell, Donelson was defending Waring, Cox against the bondholders, had been decided in Waring, Cox's favor by the Tennessee Supreme Court, but the matter was not yet concluded. A petition for rehearing was pending before the Tennessee Supreme Court, which was not denied until July 9, 1984. A petition for certiorari was filed with the United States Supreme Court, and not denied until November 1984. *See Security Bank & Trust Co. v. Fabricating, Inc.*, 673 S.W.2d 860 (Tenn.1983), *cert. denied sub nom. Podrog v. Waring, Cox, James, Sklar & Allen*, 469 U.S. 1038, 105 S.Ct. 515, 83 L.Ed.2d 405 (1984).

If Hatzenbuehler represented Fort Deposit in a claim against Waring, Cox in the state court action, and he continued to represent the bank after he joined Heiskell, Donelson, then two attorneys in the same law firm were representing opposing parties in the state action, and an actual conflict of interests existed. It was conceded that Bearman and Hatzenbuehler, as members of the same firm, could not represent both Waring, Cox and Fort Deposit Bank once they became opposing litigants in the federal action.

[4] Accordingly, upon remand, the district court should first determine whether Hatzenbuehler did in fact represent Fort Deposit in the state action in a claim against Waring, Cox. If that be the case, and an actual conflict existed, then the order of the district court disqualifying Heiskell, Donelson will stand affirmed, in the absence of a finding by the district court that Fort Deposit knowingly consented to the level of conflict then presented by the state court action [FN6] when it agreed to continue Hatzenbuehler's employment after he joined Heiskell, Donelson. Should the district court conclude that a conflict existed in the state court action, but that Fort Deposit consented, then that consent should serve as a waiver of any objections that arose before Fort Deposit filed its third-party complaint against Waring, Cox.

FN6. *See* Model Code of Professional Responsibility, Canon 5 (1981).

On the other hand, should the facts be found to be as represented by the bank before the district court and by the parties on appeal—that Hatzenbuehler did not represent Fort Deposit in the state action in a claim against Waring, Cox—then the district court should determine whether Waring, Cox can rebut the presumption of shared confidences. It first must be demonstrated by Waring, Cox that Hatzenbuehler, in fact, has not shared the bank's confidences with others at Heiskell, Donelson. If the court concludes that confidences have not been disclosed, then, pursuing the inquiry suggested by the Seventh Circuit, Waring, Cox must demonstrate that Hatzenbuehler and Heiskell, Donelson, in a timely fashion, implemented screening procedures which will be effective in preventing any disclosure of these confidences. Should Waring, Cox succeed in this demonstration, then the presumption of shared confidences will have been overcome and the motion for disqualification should be overruled. It should be noted that under this methodology the law's traditional concern for the sanctity of client confidences is maintained, since the former client is accorded a presumption of shared confidences which, if unrebutted, will dictate disqualification.

Should the district court later be made aware of legitimate concerns that confidences*228 have been breached, it should conduct an appropriate inquiry to determine whether such a breach of confidence has in fact occurred.

This cause is remanded to the district court for further proceedings consistent with this opinion.

MERRITT, Circuit Judge, concurring in part and dissenting in part.

The majority opinion highlights the troubling factual inconsistencies that confront us in this case. I agree with the majority that the case must be remanded to the District Court for further factual inquiry. I also agree with the majority that if Heiskell, Donelson lawyers represented opposing parties in the state court action, the presumption that confidences have been shared should be irrebuttable.

I cannot agree, however, with the majority's resolution of the factual problem. The majority has essentially made alternative decisions—if the District Court finds one set of facts to be true, we affirm; if the District Court finds another set of facts to be true, we reverse and remand. These decisions are premature. While the legal rationale for both decisions may be sound, I do not think it is good judicial practice to decide an appeal when we do not know what the facts are. The problem with this case is that we do not have enough facts to make a concrete, principled decision. Until more facts are on the record, we should not decide the issue whether Heiskell, Donelson will be allowed to rebut the presumption that confidences have been shared. We should decline at this point to adopt the rebuttable presumption test of the Seventh Circuit in a case in which we may not be confronted with the issue.

C.A.6 (Tenn.),1988.
Manning v. Waring, Cox, James, Sklar and Allen
849 F.2d 222, 56 USLW 2721

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215 S.W.3d 793
(Cite as: 215 S.W.3d 793)

Supreme Court of Tennessee,
at Jackson.
In re Adoption of A.M.H.

No. W2004–01225–SC–R11–PT.
Oct. 4, 2006 Session Heard at Nashville.
Jan. 23, 2007.
Petition to Rehear Denied Feb. 9, 2007.

Background: Foster parents sought termination of biological parents' parental rights to child and sought to adopt child. The Chancery Court, Shelby County, Robert L. Childers, Chancellor by Designation, terminated parental rights. Parents appealed. The Court of Appeals, 2005 WL 3132353, affirmed. Parents appealed.

Holdings: The Supreme Court, William M. Barker, C.J., held that:
(1) statute of repose did not require dismissal of biological parents' appeal of order affirming termination of their parental rights;
(2) evidence was insufficient to establish that biological parents willfully abandoned child; and
(3) biological parents did not voluntarily transfer custody and guardianship of child to foster parents with knowledge of the consequences of their actions.

Reversed and remanded; petition to rehear denied.

West Headnotes

[1] Infants 211 ⚿2387

211 Infants
211XIV Dependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(K) Appeal and Review
211k2385 Perfection; Notice and Effect of Appeal
211k2387 k. Time for proceedings. Most Cited Cases
(Formerly 211k244.1)

Infants 211 ⚿2402

211 Infants
211XIV Dependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(K) Appeal and Review
211k2402 k. Dismissal and mootness. Most Cited Cases
(Formerly 211k244.1)

Statute of repose did not require dismissal of biological parents' appeal of order affirming termination of their parental rights, even though appeal of the matter was not completed within one year of the entry of the Chancery Court order terminating parental rights; statute stated that the termination order could not be challenged "except upon a timely appeal of the termination order as may be allowed by law," biological parents timely appealed the termination order, and the one-year limitation in the statute of repose did not begin to run until the entry of a final order, which had not yet occurred since biological parents were appealing order. West's T.C.A. § 36–1–113(q).

[2] Statutes 361 ⚿1076

361 Statutes
361III Construction
361III(A) In General
361k1074 Purpose
361k1076 k. Purpose and intent. Most

Cited Cases
(Formerly 361k184, 361k181(1))

The primary rule in construing statutes is to ascertain and give effect to the intention or purpose of the legislature as expressed in the statute.

[3] Statutes 361 ⚿1092

361 Statutes
361III Construction
361III(B) Plain Language; Plain, Ordinary, or Common Meaning
361k1092 k. Natural, obvious, or accepted meaning. Most Cited Cases
(Formerly 361k188)

Statutes 361 ⚿1104

361 Statutes
361III Construction
361III(C) Clarity and Ambiguity; Multiple Meanings
361k1103 Resolution of Ambiguity; Construction of Unclear or Ambiguous Statute or Language
361k1104 k. In general; factors considered. Most Cited Cases
(Formerly 361k188)

Statutes 361 ⚿1153

361 Statutes
361III Construction
361III(E) Statute as a Whole; Relation of Parts to Whole and to One Another
361k1153 k. Context. Most Cited Cases
(Formerly 361k208)

Unless the statute is ambiguous, legislative intent is determined from the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning.

[4] Statutes 361 ⚿1102

361 Statutes
361III Construction
361III(C) Clarity and Ambiguity; Multiple Meanings
361k1102 k. What constitutes ambiguity; how determined. Most Cited Cases
(Formerly 361k190)

A statute is ambiguous if the natural and ordinary meaning of the language used may be interpreted to reach contrary results, requiring resort elsewhere to ascertain legislative intent.

[5] Statutes 361 ⚿1111

361 Statutes
361III Construction
361III(C) Clarity and Ambiguity; Multiple Meanings
361k1107 Absence of Ambiguity; Application of Clear or Unambiguous Statute or Language
361k1111 k. Plain language; plain, ordinary, common, or literal meaning. Most Cited Cases
(Formerly 361k188)

For the purpose of statutory interpretation, where the statutory language is not ambiguous, the plain and ordinary meaning of the statute must be given effect.

[6] Appeal and Error 30 ⚿817

30 Appeal and Error
30XV Hearing
30XV(A) In General
30k817 k. Time for hearing. Most Cited

Cases

Appeal and Error 30 ⚿1181

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(E) Rendition, Form, and Entry of Judgment
30k1181 k. Time and mode of rendition. Most Cited Cases

Limitation of Actions 241 ⚿1

241 Limitation of Actions
241I Statutes of Limitation
241I(A) Nature, Validity, and Construction in General
241k1 k. Nature of statutory limitation. Most Cited Cases

A statute of repose does not limit the time for appellate courts to hear and rule on a case that has been appealed timely; a statute of repose limits the time within which an action may be filed.

[7] Appeal and Error 30 ⚿1008.1(4)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1008 Conclusiveness in General
30k1008.1 In General
30k1008.1(4) k. Credibility of witnesses; trial court's superior opportunity. Most Cited Cases

Appeal and Error 30 ⚿1012.1(4)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1012 Against Weight of Evidence
30k1012.1 In General
30k1012.1(4) k. Clearly, plainly, or palpably contrary. Most Cited Cases

In weighing the preponderance of the evidence, great weight is afforded to the trial court's determinations of witness credibility, which shall not be reversed absent clear and convincing evidence to the contrary.

[8] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In general. Most Cited Cases

Appeal and Error 30 ⚿895(2)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k895 Scope of Inquiry
30k895(2) k. Effect of findings below. Most Cited Cases

Questions of law are reviewed de novo with no presumption of correctness.

[9] Infants 211 ⚿2011

211 Infants
211XIV Dependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(D) Dependency, Permanency, and Termination Factors; Children in Need of Aid
211XIV(D)5 Abandonment, Absence, and Nonsupport
211k2011 k. Failure to communicate or visit. Most Cited Cases
(Formerly 211k157)

Evidence was insufficient to establish that biological parents willfully abandoned child by failing to visit child for four months before foster parents filed petition to adopt child, for purposes of termination of parental rights; parents visited child until foster parents refused to allow parents to take child for a family portrait, parents refused to leave until police officers arrived and told them to leave, parents then sought help in regaining custody of child and contacted the juvenile court and the local media, and parents initiated two juvenile court hearings on a petition to regain custody of child before foster parents filed an adoption petition. West's T.C.A. §§ 36–1–102(1), 36–1–113(g)(1).

[10] Infants 211 ⚿1881

211 Infants
211XIV Dependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(D) Dependency, Permanency, and Termination Factors; Children in Need of Aid
211XIV(D)1 In General
211k1881 k. In general. Most Cited Cases
(Formerly 211k155)

Infants 211 ⚿1911

211 Infants
211XIV Dependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(D) Dependency, Permanency, and Termination Factors; Children in Need of Aid
211XIV(D)2 Unfitness or Incompetence of Parent or Person in Position Thereof
211k1911 k. In general. Most Cited Cases
(Formerly 211k155)

Before a parent's rights to a child may be terminated by a court, there must be a showing that the parent is unfit or that substantial harm to the child will result if parental rights are not terminated.

[11] Infants 211 ⚿2011

211 Infants
211XIV Dependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(D) Dependency, Permanency, and Termination Factors; Children in Need of Aid
211XIV(D)5 Abandonment, Absence, and Nonsupport
211k2011 k. Failure to communicate or visit. Most Cited Cases
(Formerly 211k157)

A parent who has abandoned a child by willfully failing to visit is "unfit" under constitutional standards, for purposes of termination of parental rights. West's T.C.A. §§ 36–1–102(1), 36–1–113(g)(1).

[12] Infants 211 ⚿2011

211 Infants
211XIV Dependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(D) Dependency, Permanency, and Termination Factors; Children in Need of Aid
211XIV(D)5 Abandonment, Absence, and Nonsupport
211k2011 k. Failure to communicate or

visit. Most Cited Cases
(Formerly 211k157)

Where the parent's failure to visit is not willful, a failure to visit a child for four months does not constitute abandonment, for purposes of termination of parental rights. West's T.C.A. §§ 36–1–102(1), 36–1–113(g)(1).

[13] Infants 211 ⚿2071

211 Infants
211XIV Dependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(E) Proceedings
211k2071 k. Plea or admission. Most Cited Cases
(Formerly 211k199)

Juvenile court consent order transferring custody and guardianship of child to foster parents was unenforceable, and thus biological parents were entitled to superior rights to custody in foster parents' action for termination of parental rights and adoption based upon abandonment of child by parents, where evidence established that the parents were misled as to the consequences of a change in custody and uninformed about the guardianship provision; juvenile officer who drafted order stated that mother was told that the custody transfer would be temporary and that mother asked several times for verification that the transfer would be temporary before she would sign the order, translator testified that mother understood the agreement to be temporary and for the purpose of obtaining medical insurance for child, and attorney testified that he told father that if foster parents did not consent to return child the court might not return custody to parents if they engaged in drug or alcohol abuse or did not have a place for child to live. West's T.C.A. Const. Art. 1, § 8.

[14] Infants 211 ⚿2283

211 Infants
211XIV Dependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(G) Judgment, Order, and Disposition
211XIV(G)4 Amendment, Extension, or Modification; Periodic Review
211k2283 k. Return to subject parent or parent figure; reinstatement of parental rights. Most Cited Cases
(Formerly 211k230.1)

Absent extraordinary circumstances, parents are not entitled to superior rights when seeking to modify a valid order placing custody with a non-parent even when that order resulted from the parent's voluntary relinquishment of custody to the non-parent. West's T.C.A. Const. Art. 1, § 8.

[15] Infants 211 ⚿2129

211 Infants
211XIV Dependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(F) Evidence
211k2124 Presumptions, Inferences, and Burden of Proof; Prima Facie Rights
211k2129 k. Care, custody, and control by parent. Most Cited Cases
(Formerly 211k172)

Four circumstances in which a natural parent, who has placed custody of a child with a non-parent, continues to enjoy a presumption of superior rights to custody are: (1) when no order exists that transfers custody from the natural parent; (2) when the order transferring custody from the natural parent is accomplished by fraud or without notice to the parent; (3) when the order transferring custody from the natural parent is invalid on its face; and (4) when the natural parent cedes only temporary and informal custody to the non-parents.

[16] Child Custody 76D 552

76D Child Custody
76DIX Modification
76DIX(B) Grounds and Factors
76Dk552 k. In general. Most Cited Cases

Where a natural parent voluntarily relinquishes custody without knowledge of the effect of that act, then it cannot be said that rights to the care and custody of one's child were accorded the protection demanded by the Constitution; as such, application of the superior rights doctrine in a subsequent modification proceeding would be justified.

[17] Child Custody 76D 42

76D Child Custody
76DII Grounds and Factors in General
76DII(B) Factors Relating to Parties Seeking Custody
76Dk42 k. Right of biological parent as to third persons in general. Most Cited Cases

Under the superior rights doctrine, a natural parent may only be deprived of custody of a child upon a showing of substantial harm to the child.

[18] Child Custody 76D 42

76D Child Custody
76DII Grounds and Factors in General
76DII(B) Factors Relating to Parties Seeking Custody
76Dk42 k. Right of biological parent as to third persons in general. Most Cited Cases

The determination of a custodial dispute between a parent and a non-parent rests on a determination of whether there is substantial harm threatening a child's welfare if the child returns to the parents.

[19] Infants 211 2283

211 Infants
211XIV Dependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(G) Judgment, Order, and Disposition
211XIV(G)4 Amendment, Extension, or Modification; Periodic Review
211k2283 k. Return to subject parent or parent figure; reinstatement of parental rights. Most Cited Cases
(Formerly 211k230.1)

Biological parents were entitled to physical custody of child, in termination of parental rights proceeding in which foster parents sought to adopt child; evidence that child had bonded with foster parents during her lengthy stay and would be harmed by a change in custody did not establish substantial harm that would prevent the change of custody, and evidence concerning the general conditions in China, where biological parents were from, was not relevant to a finding of substantial harm.

[20] Child Custody 76D 42

76D Child Custody
76DII Grounds and Factors in General
76DII(B) Factors Relating to Parties Seeking Custody
76Dk42 k. Right of biological parent as to third persons in general. Most Cited Cases

Financial advantage and affluent surroundings simply may not be a consideration in determining a custody dispute between a parent and a non-parent.

[21] Infants 211 2407

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211 Infants
211XIV Dependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(K) Appeal and Review
211k2407 k. Trial or review de novo. Most Cited Cases
(Formerly 211k249)

Infants 211 ⚿2409

211 Infants
211XIV Dependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(K) Appeal and Review
211k2409 k. Presumptions, inferences, and burden of proof. Most Cited Cases
(Formerly 211k250)

Infants 211 ⚿2415(1)

211 Infants
211XIV Dependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(K) Appeal and Review
211k2411 Questions of Fact and Findings
211k2415 Dependency, Permanency, and Rights Termination
211k2415(1) k. In general. Most Cited Cases
(Formerly 211k248.1)

On biological parents' appeal from decision of the Court of Appeals affirming chancery court's termination of their parental rights, the Supreme Court was not bound, under the "concurrent findings doctrine," by those factual determinations made by the chancery court in which the Court of Appeals concurred, and thus chancery court's findings of fact would be reviewed de novo accompanied by a presumption of correctness unless the preponderance of the evidence was otherwise, where the Court of Appeals did not reduce its findings of fact to writing and did not provide a reasonable opportunity for the parties to examine the findings and to request different or additional findings. West's T.C.A. § 27–1–113; Rules App.Proc., Rule 13(d).

***796** David A. Siegel, Memphis, Tennessee, for the appellant, Shao–Qiang ("Jack") He.

Richard A. Gordon, Memphis, Tennessee, for the appellant, Qin ("Casey") Luo.

Larry E. Parrish, Memphis, Tennessee, for the appellees, Jerry L. Baker and Louise K. Baker.

Paul G. Summers, Attorney General and Reporter; Michael Moore, Solicitor General; and Douglas Earl Dimond, Senior Counsel, Nashville, Tennessee, for the appellee, State of Tennessee.

Christina A. Zawisza, Memphis, Tennessee, for the amici curiae, University of Memphis Child Advocacy Clinic, Loyola University Childlaw Center, Vanderbilt University Legal Clinic, and Tennessee Alliance for Legal Services.

Linda L. Holmes, Memphis, Tennessee, for guardian ad litem, Kimbrough Mullins.

WILLIAM M. BARKER, C.J., delivered the opinion of the court, in which JANICE M. HOLDER, CORNELIA A. CLARK, and GARY R. WADE, JJ., and ADOLPHO A. BIRCH, JR., Sp.J., joined.

OPINION

WILLIAM M. BARKER, Chief Justice.

This case concerns the termination of parental rights. The appellants, who are the parents, seek reversal of the termination of their parental rights to the care and custody of their daughter, A.M.H. The trial court predicated the termination on the ground that the parents abandoned A.M.H. by willfully failing to visit her for four months. First, we hold that the statute of

repose under section 36–1–113(q) of the Tennessee Code Annotated does not deprive this Court of jurisdiction to review the termination of parental rights. Second, because the undisputed evidence shows that there was animosity between the parties and that the parents were actively pursuing custody of A.M.H. through legal proceedings during the four-month period immediately preceding the filing of the petition for termination of parental rights, we hold that the trial court erred in finding a willful failure to visit. Finally, we conclude that the parents' consent to transfer custody and guardianship of A.M.H. to the appellees was not made with knowledge of the consequences of the transfer. Therefore, according the parents those superior rights to the custody of their child that constitutional law mandates, only a showing of substantial harm that threatens the child's welfare may deprive the parents of the care and custody of A.M.H. Although A.M.H. has now been with the appellees for more than seven years, six of those years elapsed after the ***797** parents' first unsuccessful legal filing to regain custody. Evidence that A.M.H. will be harmed from a change in custody because she has lived and bonded with the Bakers during the pendency of the litigation does not constitute the substantial harm required to prevent the parents from regaining custody. For the reasons discussed below, the judgment of the Court of Appeals is reversed, and this case is remanded to the chancery court to be expeditiously transferred to the Juvenile Court of Shelby County for the entry of an order that implements a plan to reunite A.M.H. with her natural parents.

Facts and Procedural History

The parents of A.M.H. are citizens of China. Prior to the child's birth, her father, Shao–Qiang ("Jack") He, was a tenured college professor in China. He moved to the United States on a student visa in 1995 to attend Arizona State University. In 1997, he enrolled in an economics doctorate program at the University of Memphis and was awarded a scholarship and a graduate assistant position with a stipend. The mother of A.M.H., Qin ("Casey") Luo, although unmarried, obtained a visa as the father's wife. The mother arrived in the United States on June 30, 1998; the parents did not marry immediately. The mother speaks little English and has used an interpreter throughout these proceedings.

The mother became pregnant in July of 1998. Soon after, a student at the University of Memphis filed a complaint with the university alleging that the father had attempted to rape her. Although the father consistently denied the allegations and was eventually acquitted by a jury, this charge had severe consequences. Because of the charge, the father was terminated from his graduate assistant position in October of 1998. With no job or stipend, the parents had very little income and no health insurance; in late 1998, they decided to meet with a birth-parent counselor at Mid–South Christian Services (hereinafter "Mid–South"). At the trial of this termination petition, the birth-parent counselor from Mid–South testified that the parents initially expressed a desire that their unborn child be adopted by a financially stable family. The father testified that the parents were seeking social services when they went to Mid–South and did not ask to place their child for adoption. This is consistent with the testimony of the Mid–South counselor, who testified that she discussed with the parents placing A.M.H. in foster care through the Tennessee Department of Children's Services but advised against this option because of the potential "risks" and "difficulties." The Mid–South counselor testified that she told the parents, "once the child went into the care of the State, the child could be there for a long time" because "there are certain things that have to be in place before [the Department of Children's Services] returns the child to the biological parents." The father further testified that the parents agreed to consider adoption as an option at the counselor's suggestion. On December 1, 1998, the parents met with a couple interested in adopting a child through Mid–South.

On January 28, 1999, A.M.H. was born. Shortly after the birth, the mother told the Mid–South coun-

selor that A.M.H. was not to be placed for adoption. The hospital records verify that A.M.H. was not to be placed for adoption. Instead, the parents desired help with the care of their child for six to twelve months while they tried to regain financial stability. Consequently, on February 24, 1999, when A.M.H. was four weeks old, the parents went to juvenile court and explained that they could not afford to care for A.M.H. and wanted temporary foster care. Rather than contacting***798** the Department of Children's Services, the juvenile court officer telephoned Mid–South, which agreed to provide three months of foster care for A.M.H. That same day, the parents entered into an "interim care agreement" with Mid–South that specifically stated that the agreement did not terminate parental rights. A.M.H. was placed in the foster care home of the appellees, Jerry L. Baker and Louise K. Baker, the couple now seeking the termination of parental rights and the adoption of A.M.H. The parents of A.M.H. and the Bakers orally agreed that the parents could visit A.M.H. once a week. The father of A.M.H. testified to the following:

> I was thinking that at that time, you know, we did not have health insurance for our child, and we had the darkest time—hardship. So I would think that for the benefit of the child, maybe it's a good idea to stay with the Bakers for three months because the Bakers told me—Mr. Baker told me very clearly that they are Christian families generation after generation. We are just like brothers and sisters, and that's God's will, for him to get to know me. So I was very moved to tears by Mr. Baker's remarks.

After placing A.M.H. with the Bakers, the parents visited her regularly in the Bakers' home, consistently bringing food and gifts and taking photographs at every visit. On one occasion, the parents were allowed to take A.M.H. out of the Bakers' home for the day. The father had obtained a part-time job with the University of Memphis, and, despite the absence of an order requiring the parents to provide child support to Mid–South or the Bakers, the parents attempted to give the Bakers $300 in cash for the care of A.M.H.; the Bakers would not accept the money. In April of 1999, the father was arrested on the attempted rape charge. Although the father was released the next day, he was fired from his part-time job with the university, which he had obtained after losing his graduate assistant position. After the father's firing, the parents were living on the approximate $400 a month that the mother earned as a waitress.

Because their financial condition was not improving, the parents decided to send A.M.H. to China to have relatives care for her temporarily. The father testified that in May of 1999, Mr. Baker told the father that it was a bad idea to send A.M.H. to China and that the Bakers would keep A.M.H. until the father graduated from the university. The Bakers testified that the father asked them to adopt A.M.H., but the mother opposed the adoption. In a meeting at the Bakers' home, the Bakers told the father that they were unwilling to keep A.M.H. as long-term foster parents but wanted to adopt her. According to the Bakers' testimony, because the parents of A.M.H. would not agree to an adoption, they entered into an oral agreement after the father of A.M.H. led them in prayer and the parties discussed the issue. Under the oral agreement, the Bakers would raise A.M.H. until she was eighteen, and the parents of A.M.H. would retain their parental rights. The Mid–South counselor testified that, in a meeting with Mid–South's attorney and the Bakers on May 19, 1999, the father of A.M.H. stated that the mother and he wanted to continue the custody arrangement but maintain their parental rights. The Bakers then pursued a legal change of custody.

On June 2, 1999, the father of A.M.H., the Bakers, the Mid–South counselor, and Mid–South's attorney met to explain to the father the legal effect of granting the Bakers temporary custody. According to Mrs. Baker's testimony, the father was told by the attorney "that this could go for one year or it could go for 18 years." Mid–***799** South's attorney testified that he informed the parents that by giving up custody,

"unless everybody consents to give the custody back ... anybody that gives up even temporary custody takes a risk that ... the court may not give custody back." He further testified:

> And I'm sure I would have given some hypotheticals about what some of those reasons [for not returning custody to the parents] might be; you know, that if the couple that wanted custody back [engaged in] drug use or alcohol use or some kind of abuse or not having a place for the child to live or not—you know, those sort of things could prevent you from getting custody back.

On June 4, 1999, Mid–South's attorney went with the Bakers and the parents of A.M.H. to the Juvenile Court of Shelby County to obtain a consent order transferring custody of A.M.H. to the Bakers. A juvenile court officer drafted the "Petition for Custody" and a "Consent Order Awarding Custody." The consent order does not mention child support or visitation. A juvenile court interpreter, the juvenile court officer, and Mid–South's attorney spoke with the mother privately before she signed the order; the mother was told that the order would enable the Bakers to obtain health insurance for A.M.H. The juvenile court officer who drafted the consent order testified that the mother was very concerned that the arrangement be temporary and that the parents would continue to have "open visitation" with A.M.H. through the duration of the Bakers' custody.

Despite the mother's concerns that the arrangement be temporary, the juvenile court officer added a guardianship provision to the consent order so that the Bakers could obtain medical insurance for A.M.H. Mrs. Baker stated that there was no discussion of guardianship during the meeting between the Bakers and the parents of A.M.H. prior to the execution of the consent order in juvenile court.

The Bakers testified that as part of the custody agreement, the parents agreed that the Bakers would raise A.M.H. until she was eighteen years old and that the child would refer to the Bakers as "mommy" and "daddy." Contrary to the Bakers' testimony, the juvenile court officer testified that the parents were not agreeing that the Bakers could raise A.M.H. until she was eighteen years old. Indeed, the juvenile court officer testified that the mother "was fairly adamant that at some point she wanted her child back." The mother testified as follows: "I was told I can get my daughter back at any time. I asked him three or four times about that." Finally, the juvenile court interpreter, Pastor Kenny Yao, testified that the mother understood the agreement to be temporary and for the purpose of obtaining medical insurance for A.M.H. An order transferring custody and awarding guardianship was entered by consent; there was no court hearing on the matter.

After the consent order was signed on June 4, 1999, Mrs. Baker began keeping notes after each weekly visit by the parents. Her first entry was on June 5, 1999, when she wrote, "Gained custody on June 4th, 1999." She documented the date, the exact time of arrival, and the time of departure of the parents after every visit. She documented the gifts the parents brought (such as food, formula, diapers, and books) and the acts of the parents, noting if they were attentive to A.M.H. or engaged in what she considered misconduct (such as giving the baby "inappropriate" things like a small necklace). Although the notes written by Mrs. Baker characterize the father as "pushy" and the mother as emotional, the notes generally portray the parents striving in the face of ***800** fairly adverse conditions to maintain a relationship with their child, familiarize her with their Chinese culture, and ensure her health and safety.

On September 20, 1999, the University of Memphis suspended the father from taking further classes for the remainder of the academic year and required him to complete sexual abuse counseling. Because of the suspension, the father lost his status as

a student and was subject to deportation. A university representative testified that after the suspension ended, the father returned to school in the fall of 2000 and completed his degree requirements; however, because he owed the university money, the father had not been awarded his degree at the time of trial.

On October 3, 1999, the parents asked the Bakers if they could take A.M.H. out for the day on the next Sunday. The Bakers refused, and the mother began crying. Mrs. Baker's notes for that visit include the following:

> We would like to get visits to every other week. We felt like they would wean away, but the last 2 visits we could see Casey [the mother] is wanting to come more. If Jack [the father] confronts us with the visit we are going to tell him this is the way its going to be and set rules for him. He is very pushy and overbearing.

The mother, through an interpreter at the trial, described her impressions during this time period as follows:

> At [the time of the custody hearing, the Bakers] pretend to be really nice. I didn't know it was a trap, but after I signed the documents, they tear their pretended face.... In the first three months when we went and visit our daughter, they were really nice to us.... When they tricked us to sign the temporary custody order, they immediately tear their pretend face, and they picked the most inconvenient time for us [to visit] and they tried to shrink the time [of the visits] as short as they can.

Mrs. Baker testified that she told the parents that A.M.H. could go out with the parents when she was old enough to make a decision on whether she wanted to go out with the parents or not. The juvenile court officer testified that during this time period, the parents contacted her several times complaining about their visitation arrangement and expressing their desire to regain custody of A.M.H.

In November of 1999, when A.M.H. was ten months old, the father of A.M.H. asked Mr. Baker to return A.M.H. to the parents' custody. Mr. Baker responded that he and Mrs. Baker did not want to return A.M.H. and told the father not to mention his request to Mrs. Baker because she was pregnant. Mr. Baker also stated that he would hold the father responsible if Mrs. Baker had a miscarriage because she was worried about the custody situation. The father testified that he felt threatened and intimidated. The parents decided to wait for the Bakers' child to be born before pursuing the return of their daughter. The relationship between the parties continued to deteriorate; nevertheless, the parents continued to visit consistently and bring gifts. On February 21, 2000, the Bakers' child was born. Also, during this time period, the mother of A.M.H. became pregnant with her second child, and the father was contacted by immigration officials.

On May 3, 2000, the parents went to the Juvenile Court of Shelby County and signed a petition alleging a change in circumstances and seeking custody of A.M.H. Mr. Baker contacted the father and requested a meeting; they met but could not reach an agreement as to custody or visitation. The Bakers contacted Mid–South's attorney to represent them at the custody ***801** hearing and to pursue the termination of the parents' rights to A.M.H. The parents, who were still having financial difficulties, did not have an attorney at the hearing to regain custody. At the hearing on June 28, 2000, the Court Appointed Special Advocate submitted a report recommending that the Bakers retain custody and the parents be allowed supervised visitation twice a week for four hours each visit. The father told the referee that they planned to send their daughter to China to live with relatives. After briefly questioning the father, the referee denied the petition. Upon Mid–South's attorney's advice, the Bakers did not file a petition to terminate parental rights at this time.

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The parents did not appeal the custody order. However, they continued to visit their daughter at the Bakers' home despite the increase in animosity between the parties. During that period, the father began working in Georgia and could not attend all of the visits with A.M.H. On August 1, 2000, after the mother refused Mrs. Baker's request that she leave one of these visits by a certain time, the police were called. After this incident, the father quit his job in Georgia because he feared their visitation with A.M.H. was in jeopardy. The parents asked the Bakers for a visit with A.M.H. at a restaurant rather than at the Bakers' home; the Bakers refused. However, after the mother of A.M.H. gave birth to her second child on October 28, 2000, the Bakers were very helpful to the parents of A.M.H., providing transportation and food and facilitating the parents' care of their baby boy.

Prior to January 28, 2001, A.M.H.'s second birthday, the parents requested to take their daughter for a family picture; they invited the Bakers to go with them and made an appointment at a photography studio. When the parents arrived with their son at the Bakers' home, they were told A.M.H. could not go because she was sick. The father testified to the following:

> Number one, that was our child—our first daughter's birthday—second birthday. That was a special day. Number two, according to Chinese culture, on birthday, family picture together is of much significance—whole family.... That was such a special day for us. We made appointment. If she was sick or if you had a doctor's appointment, why didn't you call me and tell me in advance, one day or two days, so that we made a rescheduled appointment.... They knew my phone number. So I was upset. I said, "Okay, today, we could not accept any more excuse." That's what I said to them.... Jerry Baker was so—he was, oh, so upset. He was not very happy.... I said, "Today, we cannot accept any more excuses. We want the—we want to take our daughter to the studio for family to get a picture made, period." That's what I said, "Period," and he noticed that I was very pushy, very insistent, and he said, "you've got to leave here. You've got to leave here." I said, "I won't—not today, I won't leave here. Until we have picture made, I won't leave here." And then he said, "I'm going to call the police." I said, "Call the police. I won't leave here."

The police were called, and the officer told the parents not to return to the Bakers' house or they would be arrested. The Bakers' answers to interrogatories state that the parents were instructed by the police "not to return to the home of the Bakers." The police officer testified at trial that, even though it was late afternoon when he arrived at the Bakers' home, he would have told the parents not to return "that day." There were no further visits. On June 20, 2001, four months and five days later, the Bakers filed a petition ***802** to terminate parental rights to A.M.H. This four-month lapse in visitation is the ground upon which the chancery court found abandonment of A.M.H. and terminated the parents' rights to their daughter.

Although the parents no longer pursued a relationship with A.M.H. through visits in the Bakers' home, they soon contacted the juvenile court and asked for assistance in regaining custody of A.M.H. On February 15, 2001, eighteen days after their last visit with A.M.H., the parents sent a letter to the juvenile court and to the media setting forth the history of the case and stating that they wanted A.M.H. returned so that they could return to China. The father testified that they went to juvenile court twice between February and April. On April 9, 2001, the parents again went to juvenile court; the mother was sobbing. The parents told the juvenile court officer that they did not understand what they were doing when they signed the consent order. The court officer prepared a petition to regain custody for the parents. The Bakers were notified of the petition on May 4, 2001.[FN1] Mr. Baker telephoned the father, and they met. In the meeting, the father said that he wanted his daughter to

be returned and that she could visit with the Bakers twice a week. Mr. Baker told the father that he would not agree to returning A.M.H. The father then offered to leave custody with the Bakers if he and the mother could bring A.M.H. home one day every other week. Ultimately, no agreement was reached.

FN1. The petition to regain custody was not stamped as filed until May 29, 2001.

In May of 2001, the parents of A.M.H. sent their seven-month-old son to China to live with relatives because they feared that if the father was convicted of attempted rape, their son would be taken from them. The parents, both of whom now worked in restaurants, sent the relatives money every few months for their son's care. (On December 1, 2003, the son returned from China to live with the parents.)

On June 6, 2001, the parents appeared in juvenile court for the hearing on their custody petition. Had the matter been heard that day as scheduled, the four-month period required for statutory abandonment would not have run. The hearing was rescheduled, however, to accommodate the Bakers' attorney; understandably, the parents were very sad and disappointed. The parents appeared for the rescheduled hearing on June 22, 2001. The father testified, "We went there on time—actually, we went there before eight o'clock, my wife and I. We were very eager. We went there. We were ready to have the hearing, and we thought we could have our child back that day." However, two days previously (which was four months and five days after the parents' last visit with A.M.H.), the Bakers had filed a petition for adoption and termination of parental rights in chancery court. Consequently, rather than hear the modification of the custody petition, the juvenile court transferred the custody case to chancery court; the father testified, "Of course, my heart was broken." The chancery court did not rule on this custody petition until its final order terminating parental rights.[FN2]

FN2. A third petition for modification of the consent order awarding custody was filed by the parents on September 12, 2003; it was denied by the chancery court on May 12, 2004.

The filing of the petition for adoption and termination of parental rights by the Bakers began chancery court proceedings that would span thirty-two months and generate a technical record containing eleven volumes of motions, responses, and orders. The procedural history recounted ***803** in this opinion omits much of the actual litigation. The grounds alleged in the original petition seeking termination of the parents' rights were the parents' abandonment of A.M.H. by willfully failing to visit and the parents' abandonment of A.M.H. by willfully failing to support the child financially. The petition was later amended to assert grounds of termination based on the father's lack of legal status as a parent, the parents' mental incompetence, and the persistence of conditions preventing the child's reunification with the parents. The parents hired an attorney, and the Bakers continued to be represented by Mid–South's attorney until they hired a separate attorney in September of 2001. A guardian ad litem was appointed; she recommended that the parents not be allowed to visit with A.M.H. until the adoption proceedings were completed.[FN3] Around October of 2001, the guardian ad litem contacted Dr. David B. Goldstein, a clinical psychologist, and requested that he perform an evaluation of A.M.H. Dr. Goldstein testified that the guardian ad litem asked him to evaluate A.M.H. in order to address "the effects of removing a child from a well-bonded family situation and the effects of removing a child from their culture and placing them in a different culture." The court then appointed Dr. Goldstein to evaluate A.M.H. and the parties.

FN3. Her recommendation was based on the fact that the parents had not seen A.M.H. for six months.

On January 7, 2002, the parents of A.M.H. married. The father took a DNA test that established that he was A.M.H.'s father. And during this time, the mother became pregnant with a third child. On February 7, 2002, upon the guardian ad litem's motion, the chancery court ordered the parents to surrender A.M.H.'s passport to the court and, upon the Bakers' motion, ordered the parents to pay $15,000 to the court for the guardian ad litem's fees, the DNA test, and the costs of the psychological evaluations. The father testified that it was impossible for the parents to pay the ordered $15,000 in fees, "especially after [the Bakers' attorney] subpoenaed us and all the local Chinese restaurants, and my wife lost her job as a waitress." The parents did not produce the passport. On February 8, 2002, the court entered an order (drafted by the Bakers' attorney) to show cause why the parents should not be found in contempt for refusing to surrender the passport. The order also appointed the Bakers as A.M.H.'s guardians as defined in section 36–1–102(24) and (25) of the Tennessee Code Annotated and ordered that the parents have no contact with their daughter.

None of the witnesses could explain why the court ordered that the parents have no contact with their daughter. It may have been intended as a means of forcing the parents to surrender A.M.H.'s passport; however, it is also possible that the court ordered no contact upon the advice of the guardian ad litem. The guardian ad litem testified that she did not recommend visitation because "the status quo was that the child had not seen her biological parents in a number of months, I didn't believe that throwing the child into something different than the status quo was necessarily in her best interest." The guardian ad litem continued to oppose visitation and reunification with the parents throughout the proceedings. She believed that A.M.H. was attached to the Bakers and considered them to be her parents, although the guardian ad litem had never seen A.M.H. with her biological parents. She further stated that she had read a book about ***804** Chinese girls being placed in orphanages and consequently was concerned that the parents wanted to return to China:

> From the very beginning of the case, it was very clear to me that [the parents'] intention was that if the child were returned to them, they wanted to go back to China. They have never said anything different than that. They have always said that when this case is over they would like to take her back.... I honestly can't tell the Court today I know to an absolute certainty what kind of life she would have there. This book that I read caused me some concerns.

The parents ultimately paid the $15,000. On February 20, 2002, the parents filed a motion for visitation. On February 22, the court ordered the parents incarcerated for failing to surrender A.M.H.'s passport; the parents surrendered the passport. Although there was a preliminary hearing on the matter in March 2002, the court did not rule on the motion for visitation, stating that it assumed there must have been a reason for the no contact order and that it was unable to decide the issue without more evidence. At the hearing, the court expressed concern about the parents' interest in press coverage. The father testified:

> You asked me why [we contacted the press]. Because at that time, I knew very clearly that I could not get justice from [the judge]. I could not get it, and I was in a desperate situation. All I could turn to for help was the media. I was trying to get the media's attention in order to help me to get my daughter back.

In July of 2002, Dr. Goldstein submitted a report that found that A.M.H., who by this time was three years old and had not seen her parents in over a year, considered the Bakers her psychological parents and concluded that a child who experiences loss in early childhood is at a greater risk of developing serious

psychological disorders. On September 9, 2002, the parents of A.M.H. had their third child, a daughter.

In February of 2003, the father of A.M.H. was acquitted by a jury of the charges stemming from the student's complaint of attempted rape. Several motions were filed during this time period, and this Court specially designated a chancellor to preside over the case. On September 23, 2003, the parents were allowed a visit with A.M.H., which was monitored by Dr. Goldstein. The video of this session, in which the parents see their child for the first time in two-and-a-half years, shows the love the parents have for their child; understandably, A.M.H. does not react to them as parental figures. On September 29, 2003, the parents filed another motion for visitation. On November 7, 2003, the parents filed a renewed motion for visitation. On December 1, 2003, the parents saw their daughter with the Bakers' children at a Wal–Mart. The mother said to the children, "That's my daughter. Give me my daughter." The oldest Baker child grabbed A.M.H. and screamed for help; the police were called. On January 27, 2004, the designated chancellor ruled on the motions for visitation and ordered that the parents were to have no contact with A.M.H. until after the trial.

On February 23, 2004, almost three years after the parents filed their petition to regain custody in juvenile court, the trial on the petition to modify the custody order and the petition for adoption and termination of parental rights began. At the time of trial, because Mr. Baker had lost his prior job, the Bakers were $374,829 in debt, paid $1,795 per month for rent, were liable for loan payments on three cars, and had approximately $1,000 in their checking account. Mr. Baker testified***805** that he currently was earning $110,000 per year. The father of A.M.H. was earning $2,300 per month as the manager of a restaurant; the mother of A.M.H. was staying at home with their youngest daughter; and their son was in day care so that he could learn English.

Several psychologists testified at the trial. None of these witnesses opined that harm would result from continued contact between A.M.H. and her parents or from expanded visitation. Dr. Goldstein, the court-appointed expert, testified that he did not conduct evaluations of the child or the parties (even though evaluations were ordered) and that he did not investigate the attachment between A.M.H. and her parents prior to writing his report. On September 23, 2003, he did monitor the videotaped session with the parents and A.M.H. Dr. Goldstein testified, "I did assume that there was very little attachment to the [parents] based upon the information that I had and based also on my knowledge of psychological development." Dr. Goldstein did not bring all of his notes to the trial. He testified that he was unable to say whether visitation should take place and unable to give any opinion as to custody. Dr. Goldstein limited his opinion to the best interest of the child, and even as to that topic, he would not render an opinion on whether having no further contact with her parents would be in A.M.H.'s best interest. The chancery court found Dr. Goldstein to be "highly qualified, highly respected.... Very knowledgeable, honest and a forthright witness."

At the trial, the parents of A.M.H. introduced evidence from three psychologists and a Chinese culture expert to refute the inference that the parents intended for the Bakers to raise A.M.H., to refute the opinion that A.M.H. had no attachment to her parents, and to show that the parents presented no abnormal psychological traits. The psychological experts offered by the parents pointed out what they perceived to be flaws in Dr. Goldstein's process and report. Dr. John Robert Hutson testified that he had reviewed Dr. Goldstein's deposition and report and that Dr. Goldstein did no evaluations of the parties. Dr. Hutson opined that there should be ongoing contact between the parents and A.M.H. Both Dr. Hutson and another psychologist, Dr. John Victor Ciocca, reviewed the video of the parents visiting with A.M.H. and found that the child responded favorably to the parents and the parents acted appropriately. The testimony offered

by the parents was critical of the court's prevention of visitation with the child and of Dr. Goldstein's failure to perform certain evaluations. However, the court found this testimony to be "of little assistance to the court" because Drs. Hutson and Ciocca had never personally interviewed A.M.H.

The Chinese culture expert testified to the importance of "family" to the Chinese and the practice among Chinese students of allowing family members to care for their children temporarily. The chancery court found that the Chinese expert lacked credibility, despite similar testimony given by Pastor Kenny Yao, who the court found to be honest and without bias. Pastor Yao, who served as the mother's interpreter on several occasions (including in juvenile court when the petition to transfer temporary custody to the Bakers was drafted) testified as follows: "There is substantial difference between temporary custody and adoption in the Chinese culture. Adoption is you're giving the parental rights of the baby ... to someone else.... But temporary custody is someone is helping to take care of the baby while you are unable to take care of the baby." He also testified that when the consent order was signed by the mother in juvenile court, he understood and translated the term "temporary***806** custody" to the parents as follows: "[C]ustody means taking care. Temporary means not permanent."

Additionally, the parents introduced expert testimony from Dr. Yih–Jia Chang, who spoke fluent Mandarin Chinese. Dr. Chang performed a psychological evaluation (based on Chinese norms) on A.M.H.'s parents. She testified that they were both within the normal range. Dr. Chang testified that the father "may have a tendency to please others," "tends to go along with society," has a tendency to "seldom show dissatisfaction with authority," and appreciates various forms of artistic expression. She testified that the mother's impulse control was within the normal range and that she had a "high energy level." Dr. Chang's report also states that it is a common practice in China for a child to be placed temporarily in the care of extended family. Dr. Chang testified that she believed the evaluations were valid because the answers were consistent with her determinations while meeting with each parent. Dr. Chang testified that the evaluations were valid even though each parent was left alone in the room to fill out the evaluation questions while she met with the other parent and even though the answer sheets of both parents were left in the room. The chancery court ruled that "the underlying facts or data relied upon by Dr. Chang in forming her opinion" regarding the parents' mental health "indicate a lack of trustworthiness"; accordingly, the court excluded Dr. Chang's testimony.

Finally, the parents introduced several witnesses to counter the Bakers' portrayal of the father as manipulative and the mother as unreasonable and overly emotional. One of these witnesses, who had previously adopted two Chinese children through Mid–South and for whom the mother had worked as a babysitter, testified that the mother was very good with children and a nice person. On cross-examination, after establishing that this witness thought highly of Mid–South, financially supported Mid–South through donations, and knew that the Bakers would be a good placement for a child if they had been approved by Mid–South, the Bakers' attorney asked for the witness's opinion on what the outcome of the case should be. The witness stated:

> I believe that [the parents] should have [A.M.H.]. I know it will cause hurt and pain no matter what happens, and I feel for all concerned, but I do think that [the parents] deserve to have their child back.... [K]nowing [the parents] from their relationship with my children and myself, I just would find it in the child's best interest to go back to her birth parents.

After considering this evidence, the chancery court concluded that the parents are manipulative and dishonest people who appeared to have no intent to raise A.M.H. but have used the child from birth for financial gain and to avoid deportation. The chancery

court found that the parents willfully abandoned A.M.H. by failing to visit or provide support for the four months immediately preceding the filing of the Bakers' petition to terminate parental rights. The court concluded that it would be in A.M.H.'s best interest to terminate parental rights and allow her to remain with the Bakers. The chancery court also concluded that the father was not the legal father of A.M.H. at the time that the petition to terminate parental rights was filed and terminated his parental rights under five of the six grounds under section 36–1–113(g)(9)(A) of the Tennessee Code Annotated.[FN4] The chancery court rejected all of ***807** the other grounds for termination raised by the Bakers. Further, the chancery court ruled that the petition to modify custody filed in the juvenile court on May 29, 2001, "is not well taken and should be denied and dismissed." The petition for adoption was held in abeyance.

FN4. Subsection 36–1–113(g)(9)(A) provides as follows:

> The parental rights of any person who ... is not the legal parent or guardian of a child or who is described in § 36–1–117(b) or (c) may also be terminated based upon any one (1) or more of the following additional grounds:
>
> (I) The person has failed, without good cause or excuse, to pay a reasonable share of prenatal, natal, and postnatal expenses involving the birth of the child in accordance with the person's financial means promptly upon the person's receipt of notice of the child's impending birth;
>
> (ii) The person has failed, without good cause or excuse, to make reasonable and consistent payments for the support of the child in accordance with the child support guidelines promulgated by the department pursuant to § 36–5–101;
>
> (iii) The person has failed to seek reasonable visitation with the child, and if visitation has been granted, has failed to visit altogether, or has engaged in only token visitation, as defined in § 36–1–102(1)(C);
>
> (iv) The person has failed to manifest an ability and willingness to assume legal and physical custody of the child;
>
> (v) Placing custody of the child in the person's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child; or
>
> (vi) The person has failed to file a petition to establish paternity of the child within thirty (30) days after notice of alleged paternity by the child's mother, or as required in § 36–2–318(j), or after making a claim of paternity pursuant to § 36–1–117(c)(3).
>
> Tenn.Code Ann. § 36–1–113 (2005).

The Court of Appeals reversed the chancery court's ruling that the parents had abandoned A.M.H. in willfully failing to support her; it also reversed the chancery court's ruling that the father was not the legal parent of A.M.H. when the termination petition was filed. However, the Court of Appeals affirmed the termination based on the parents' willful failure to visit their daughter for four months and held that termination was in the best interest of A.M.H. Judge Holly M. Kirby dissented, stating that she would reverse the termination of the parents' rights to A.M.H. because the failure to visit was not willful. The Bakers do not appeal the lower courts' rulings on the unsuccessful grounds for termination. Consequently, the sole ground for termination presented in this Court is

abandonment grounded on the parents' willful failure to visit A.M.H. for a period of four consecutive months immediately preceding the filing of the petition to terminate parental rights.

Analysis

1. Jurisdiction

[1] The Bakers argue that this appeal should be dismissed under section 36–1–113(q) of the Tennessee Code Annotated, a statute of repose. The statute provides as follows:

> After the entry of the order terminating parental rights, no party to the proceeding, nor anyone claiming under such party, may later question the validity of the termination proceeding by reason of any defect or irregularity therein, jurisdictional or otherwise, but shall be fully bound thereby, except based upon a timely appeal of the termination order as may be allowed by law; and in no event, for any reason, shall a termination of parental rights be overturned by any court or collaterally attacked by any person or entity after one (1) year from the date of the entry of the final order of termination. This provision is intended as a statute of repose.

Tenn.Code Ann. § 36–1–113(q) (2005). The Bakers argue that this Court does not have jurisdiction because the appeal of this matter has not been completed within one ***808** year of the entry of the chancery court's order terminating parental rights.

[2][3][4][5] The primary rule in construing statutes is to ascertain and give effect to the intention or purpose of the legislature as expressed in the statute. *State ex rel. Rector v. Wilkes*, 222 Tenn. 384, 436 S.W.2d 425, 427 (1968). Unless the statute is ambiguous, legislative intent is determined "from the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning." *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn.2000); *see also Sallee v. Barrett*, 171 S.W.3d 822, 828 (Tenn.2005); *Austin v. Memphis Publ'g Co.*, 655 S.W.2d 146, 148–49 (Tenn.1983). A statute is ambiguous if the natural and ordinary meaning of the language used may be interpreted to reach contrary results, "requir[ing] resort elsewhere to ascertain legislative intent." *Austin*, 655 S.W.2d at 148; *LeTellier v. LeTellier*, 40 S.W.3d 490, 498 (Tenn.2001). Where the statutory language is not ambiguous, however, the plain and ordinary meaning of the statute must be given effect. *Calaway ex rel. Calaway v. Schucker*, 193 S.W.3d 509, 516 (Tenn.2005).

Subsection 36–1–113(q) of the Tennessee Code Annotated is not ambiguous. The statute plainly states that the trial court's "order" terminating parental rights may not be challenged by a party to the proceeding "*except based upon a timely appeal* of the termination order as may be allowed by law." Tenn.Code Ann. § 36–1–113(q) (emphasis added). Here, the parents of A.M.H. timely appealed the order of termination; therefore, they are allowed to question the validity of the termination proceedings. Subsection 36–1–113(q) further states that a termination order may not be overturned or collaterally attacked after one year from the date of the entry of "the final order." A judgment does not become final until "all direct appeals have been exhausted including an application for appeal or for certiorari to the Tennessee or United States supreme court." *Cf.* Tenn.Code Ann. § 39–17–901(5) (2003). Because the one-year limitation under subsection 36–1–113(q) does not begin to run until the entry of a final order, we conclude the language used in the statute does not indicate an intent to affect a parent's ability to timely pursue a direct appeal.

[6] Moreover, the legislature specifies that the "provision is intended as a statute of repose." *Id.* § 36–1–113(q). A statute of repose does not limit the time for appellate courts to hear and rule on a case that has been appealed timely; [FN5] a statute of repose limits the time within which an action may be filed. *Cala-*

way, 193 S.W.3d at 515; *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 184 (Tenn.2000). Therefore, by designating subsection 36–1–113(q) "a statute of repose," the legislature demonstrated an intent that the statute serve as an absolute limit on the time in which a challenge to a final order of termination may be filed, not a limit on the time for a direct appeal.

> FN5. Although the legislature has the power to enact statutes of limitation barring relief on complaints filed beyond the limitations period, *see Maestas v. Sofamor Danek Group, Inc.*, 33 S.W.3d 805, 809 (Tenn.2000), it does not have the authority to enact legislation affecting the courts' ability to process a timely filed cause of action. Because we find the statute does not limit judicial review of a timely appeal, we do not need to address whether limiting judicial review of a timely filed appeal would violate due process or " 'constitute an impermissible encroachment upon the judicial branch of government.' " *See Lynch v. City of Jellico*, 205 S.W.3d 384, 393 (Tenn.2006) (quotations omitted).

2. Standard of Review

Parties seeking to terminate parental rights must prove two elements. First, ***809** they have the burden of proving that there exists a statutory ground for termination. Tenn.Code Ann. § 36–1–113(c)(1) (2005); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn.2002). Second, they must prove that termination of parental rights is in the child's best interest. Tenn.Code Ann. § 36–1–113(c)(2) (2005); *In re F.R.R., III.* 193 S.W.3d 528, 530 (Tenn.2006). Both of these elements must be established by clear and convincing evidence. *See* Tenn.Code Ann. § 36–1–113(c)(1) (2005); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn.2002).

[7][8] On appeal, the trial court's findings of fact are reviewed de novo upon the record accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R.App. P. 13(d); *In re F.R.R.*, 193 S.W.3d at 530. In weighing the preponderance of the evidence, great weight is afforded to the trial court's determinations of witness credibility, which shall not be reversed absent clear and convincing evidence to the contrary. *See Jones*, 92 S.W.3d at 838. Questions of law, however, are reviewed de novo with no presumption of correctness. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 744–45 (Tenn.2002).

3. Termination of Parental Rights

[9][10][11][12] The sole ground for termination presented in this appeal is the parents' willful abandonment of A.M.H. by failing to visit her for four months preceding the filing of the termination petition. It is well established that both the United States and Tennessee Constitutions protect parents' rights to the custody and care of their children. *See Hawk v. Hawk*, 855 S.W.2d 573, 578–79 (Tenn.1993) ("[P]arental rights constitute a fundamental liberty interest."). Therefore, before a parent's rights to a child may be terminated by a court, "there must be a showing that the parent is unfit or that substantial harm to the child will result if parental rights are not terminated." *In re Swanson*, 2 S.W.3d 180, 188 (Tenn.1999). By statute, the legislature has designated "abandonment" as a valid ground for the termination of parental rights. Tenn.Code Ann. § 36–1–113(g)(1) (2005). The applicable definition of "abandonment" is found in section 36–1–102(1) of the Tennessee Code Annotated, which provides as follows:

> (A) "Abandonment" means, for purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, that:
>
> (I) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the

> subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or make reasonable payments toward the support of the child;
>
> ....
>
> (E) For purposes of this subdivision (1), "willfully failed to visit" means the willful failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation;
>
> ....
>
> (G) "Abandonment" and "abandonment of an infant" do not have any other definition except that which is set forth in this section, it being the intent of the general assembly to establish the only grounds for abandonment by statutory definition. Specifically, it shall not be required that a parent be shown to have evinced a settled purpose to forego all parental rights and responsibilities in order for a determination of abandonment***810** to be made. Decisions of any court to the contrary are hereby legislatively overruled.

Tenn.Code Ann. § 36–1–102(1)(A) (2001). A parent who has abandoned a child by "willfully" failing to visit is "unfit" under constitutional standards. *In re Swanson,* 2 S.W.3d at 188. Therefore, under those circumstances, termination of parental rights is appropriate. *See, e.g., In re F.R.R.,* 193 S.W.3d at 530. Where the failure to visit is not willful, however, a failure to visit a child for four months does not constitute abandonment. We have held that a parent who attempted to visit and maintain relations with his child, but was thwarted by the acts of others and circumstances beyond his control, did not willfully abandon his child. *See In re Swanson,* 2 S.W.3d at 189.

Here, we are presented with a situation in which the parents of A.M.H. actively pursued legal proceedings to regain custody of A.M.H. during the "abandonment" period but failed to visit for a period of four consecutive months immediately prior to the filing of a petition for termination of parental rights. As a question of law, the trial court's ruling that the facts of this case sufficiently support the termination ground of willful abandonment are reviewed de novo with no presumption of correctness. *Cf. In re Valentine,* 79 S.W.3d at 548 (concluding that "[s]ubstantial noncompliance is a question of law which we review de novo with no presumption of correctness."). We hold that the evidence in this case does not support a finding that the parents intentionally abandoned A.M.H.

Disregarding the witnesses that the trial court found to lack credibility, the record clearly shows the following undisputed facts:

(1) On January 28, 2001, the parents visited A.M.H. in the home of the Bakers;

(2) The parents became upset when they could not take A.M.H. with them to sit for a family portrait;

(3) The parents refused to leave A.M.H. until a police officer arrived and told them to leave;

(4) During the subsequent four months and five days prior to the filing of the petition for termination, the parents pursued help in regaining the custody of their child by contacting the juvenile court and the local media;

(5) During this time, the parents initiated two juvenile court hearings on a petition to regain custody of A.M.H.;

(6) The first hearing was thwarted by the Bakers' request for a continuance; and

(7) The second hearing was thwarted by the Bakers' initiation of proceedings in chancery court.

This undisputed evidence does not support a finding that the parents' failure to visit A.M.H. was willful. Where, as here, the parents' visits with their child have resulted in enmity between the parties and where the parents redirect their efforts at maintaining a parent-child relationship to the courts the evidence does not support a "willful failure to visit" as a ground for abandonment.[FN6] Therefore, we hold that ***811** there has been no willful abandonment and reverse the termination of parental rights. Accordingly, the Petition for Adoption and Termination of Parental Rights is dismissed.[FN7]

FN6. Citing section 27-1-113 of the Tennessee Code Annotated, the Bakers argue that this Court must find abandonment because it is bound by the concurrent findings of fact of the trial court and the Court of Appeals. We conclude, however, that the statute is inapplicable to the dispositive question in this case—whether the parents' failure to visit constituted a willful abandonment—because that question is a question of law, not a question of fact.

Because we conclude that there are no grounds for terminating parental rights, it is unnecessary to reach the best interest of the child analysis. *See In re D.L.B.*, 118 S.W.3d 360, 368 (Tenn.2003); Tenn.Code Ann. § 36-1-113(c) (2005).

FN7. In addition to the question of whether the evidence supports termination under the statute, the parents of A.M.H. present several constitutional grounds for reversal. Because this case is fully resolved on statutory grounds, we decline to address these issues. *See Owens v. State*, 908 S.W.2d 923, 926 (Tenn.1995) ("[U]nder Tennessee law, courts do not decide constitutional questions unless resolution is absolutely necessary for determination of the case and the rights of the parties.").

4. Custody

[13] When this Court reverses a lower court's termination of parental rights in a contest between parents and non-parents for custody, we usually remand the case to the trial court for the preparation and implementation of a plan to return custody of the child to the parent. In this case, however, we must first address the consent order entered by the juvenile court in June of 1999 that transferred the custody and guardianship of A.M.H. to the Bakers. Unless we conclude that the consent order is unenforceable, the parents of A.M.H. have no superior rights to the custody of A.M.H. The parents argue that the consent order is unenforceable and ask that they be granted custody.

[14][15] In an initial proceeding, natural parents have superior rights in relation to non-parents who seeking custody under article I, section 8 of the Tennessee Constitution. *Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn.2002). But "absent extraordinary circumstances," parents are not entitled to superior rights when seeking to *modify* a valid order placing custody with a non-parent "even when that order resulted from the parent's voluntary relinquishment of custody to the non-parent." *Id.* at 143. Despite this rule, we have recognized four circumstances in which a natural parent continues to enjoy a presumption of superior rights to custody:

(1) When no order exists that transfers custody from the natural parent;

(2) When the order transferring custody from the natural parent is accomplished by fraud or without

notice to the parent;

(3) When the order transferring custody from the natural parent is invalid on its face; and

(4) When the natural parent cedes only temporary and informal custody to the non-parents.

Id. Recognizing the possibility that in the informal setting of juvenile court unrepresented parents could enter into a formal order without understanding the actual effect of transferring custody, we have explained that it is only a parent's "voluntary transfer of custody to a non-parent, *with knowledge of the consequences of that transfer,*" that will defeat a parent's claim to superior rights of custody. *Id.* at 147 (emphasis added).

The evidence establishes that the parents were misled as to the consequences of a change in custody and uninformed about the guardianship provision and, therefore, did not enter into the agreement with knowledge of the consequences of the transfer of custody and guardianship. Even if we only consider the testimony from witnesses that the chancery court found to be credible, the evidence shows that the parents were instructed that the transfer of custody was temporary and that barring inappropriate conduct by the parents, custody would be returned to the ***812** parents. Mrs. Baker testified that, the parents were informed that the custody arrangement "could go for one year or it could go for eighteen years." Mid–South's attorney testified that, he informed the father of A.M.H. that if the Bakers did not consent to return A.M.H. to the parents' custody, the court might not return custody in situations such as where "the couple that wanted custody back [engaged in] drug use or alcohol use or some kind of abuse or [did] not [have] a place for the child to live." The juvenile court officer who drafted the consent order testified that, the mother was told that the custody transfer would be temporary and that the parents would have "open visitation." The juvenile court officer also testified that the mother asked several times for verification that the transfer would be temporary before she would sign the consent order. The translator for the parties, Pastor Yao, testified that the mother understood the agreement to be temporary and for the purpose of obtaining medical insurance for A.M.H.

[16] This evidence overwhelmingly shows that the parents' voluntary relinquishment of custody was entered as a temporary measure to provide health insurance for A.M.H. with the full intent that custody would be returned. Therefore, we hold that the parents of A.M.H. did not voluntarily transfer custody and guardianship of A.M.H. to the Bakers with knowledge of the consequences and, therefore, are entitled to superior rights to custody. As we stated in *Blair:*

> Where a natural parent voluntarily relinquishes custody without knowledge of the effect of that act, then it cannot be said that these rights [to the care and custody of one's child] were accorded the protection demanded by the Constitution. As such, application of the superior rights doctrine in a subsequent modification proceeding would be justified.

Blair, 77 S.W.3d at 148 n. 3. Accordingly, we hereby revoke the parental consent to the change of custody and guardianship, and consider the competing claims of the parties, giving due deference to the parents' superior rights to the care and custody of A.M.H.

[17][18] Under the superior rights doctrine, "a natural parent may only be deprived of custody of a child upon a showing of substantial harm to the child." *In re Askew,* 993 S.W.2d 1, 4 (Tenn.1999). Therefore, the determination of a custodial dispute between a parent and a non-parent rests on a determination of whether there is substantial harm threatening a child's welfare if the child returns to the parents. Only then may a court find a sufficiently compelling justification

for the infringement of the parents' fundamental right to raise a child as they see fit. *See id.* at 3.

[19] Here, the only evidence of substantial harm arises from the delay caused by the protracted litigation and the failure of the court system to protect the parent-child relationship throughout the proceedings. Evidence that A.M.H. will be harmed from a change in custody because she has lived and bonded with the Bakers cannot constitute the substantial harm required to prevent the parents from regaining custody.[FN8] We have previously rejected the contention that when a child has been in the custody of a non-parent for a significant period of time, a lesser standard may be applied in determining whether parental rights may be terminated. *In re Swanson*, 2 S.W.3d at 188 n. 13. "Such a ***813** standard would increase the likelihood for delaying cases in order that the child remain" in the custody of the non-parent. *Id.* The same reasoning applies in this situation.

> FN8. However, we recognize that such evidence may be relevant to the manner of implementing the transition in custody from the Bakers to the parents and to the possible allowance of visitation with the Bakers.

[20] Additionally, we note that the testimony concerning the general conditions in China is not relevant to a finding of substantial harm. Financial advantage and affluent surroundings simply may not be a consideration in determining a custody dispute between a parent and a non-parent. *See Hawk*, 855 S.W.2d at 582 ("[M]ere improvement in quality of life is not a compelling state interest and is insufficient to justify invasion of Constitutional rights.") (internal quotation marks and citation omitted). The evidence at trial showed that the parents have overcome many obstacles to achieve financial stability and are ably taking care of their other two children. Given the lack of evidence of a threat of substantial harm to A.M.H. if she is returned to her parents, we conclude that physical custody of A.M.H. must be returned to the parents.

Conclusion

Having found that the trial court erred in terminating Shao–Qiang ("Jack") He's and Qin ("Casey") Luo's parental rights, we dismiss the Petition for Adoption and Termination of Parental Rights and reinstate the parental rights of Shao–Qiang ("Jack") He and Qin ("Casey") Luo. Further, we revoke the parental consent to the change in custody and guardianship, vacate the juvenile court and chancery court orders concerning visitation, and designate the current custody and guardianship orders as temporary in nature.

The judgment of the Court of Appeals is reversed. As the reinstatement of parental rights resolves the issues presented by the Bakers in chancery court, we remand this case to the chancery court for the transfer of jurisdiction over the remaining issues to the Juvenile Court of Shelby County where the modification of custody hearing originated. We direct the chancery court to complete this transfer within twelve days of the entry of this judgment. *Cf.* Tenn.Code Ann. § 36–1–118(e)(4)(A) (2005). The Juvenile Court of Shelby County is directed to consider, prepare, and implement a plan to resolve the pending custody matter with a view toward reunification of A.M.H. with her natural parents, Shao–Qiang ("Jack") He and Qin ("Casey") Luo, in a manner that minimizes trauma to the child.

The attorney ad litem and guardian ad litem are hereby ordered relieved of any further participation in proceedings concerning A.M.H.

The costs of this appeal are taxed to the appellees, Jerry L. Baker and Louise K. Baker, for which execution may issue if necessary. The Clerk of this Court is directed to send a copy of this opinion and judgment to the Juvenile Court of Shelby County.

215 S.W.3d 793
(Cite as: 215 S.W.3d 793)

ORDER

PER CURIAM.

The Bakers have filed a Petition to Rehear under Rule 39 of the Tennessee Rules of Appellate Procedure. While we decline to grant the petition, we take this opportunity to clarify two issues in this case: the applicability of the concurrent findings doctrine and the continued participation of the guardian ad litem and the attorney ad litem.

[21] The first of these issues concerns the "concurrent findings doctrine." The Bakers, relying upon Tennessee Code Annotated section 27–1–113, contend that the trial court made certain findings of fact and that we are bound by those factual ***814** determinations in which the Court of Appeals has concurred. The Tennessee Code Annotated section 27–1–113 provides in pertinent part as follows:

> In all cases tried on the facts in a chancery court and afterwards brought for review to the court of appeals, the court of appeals shall, to the extent that the facts are not stipulated or are not concluded by the findings of the jury, make and file written findings of fact, which thereupon shall become a part of the record. *Before any such findings [of fact] shall become final, reasonable opportunity shall be afforded the parties to examine the findings and to ask for different or additional findings.... To the extent that the findings of the chancery court and the court of appeals concur, they shall, if there be any evidence to support them, be conclusive upon any review of the facts in the supreme court; to the extent that they do not concur, they shall be open to examination in that court.*
>
> (Emphasis added).

The terms of the statute are instructive. First, the court of appeals must reduce its findings of fact to writing. The intermediate appellate court must then provide a reasonable opportunity for the parties to examine the findings and to request different or additional findings. The record does not reflect that the Court of Appeals in this case complied with the statute. We therefore conclude that Tennessee Code Annotated section 27–1–113 has no application to this case. Because the statute's requirements were not met, Rule 13(d) of the Tennessee Rules of Appellate Procedure governs the standard of review upon appeal. To the extent that this Court has interpreted Tennessee Code Annotated section 27–1–113 more broadly, those cases are overruled as inconsistent with Rule 13(d) of the Tennessee Rules of Appellate Procedure.

Furthermore, while the trial court made findings of fact in this case, many of those findings are not necessary to the determination of whether the He's abandoned A.M.H. by failing to visit her during a four-month period. The material facts surrounding the alleged abandonment are largely undisputed. To the extent that such facts are capable of dispute, Rule 13(d) of the Tennessee Rules of Appellate Procedure governs our standard of review upon appeal. Rule 13(d) states in pertinent part, "[R]eview of findings of fact by the trial court in civil actions shall be 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." The facts in our opinion concerning the issue of abandonment reflect the preponderance of the evidence in this case.

The Bakers also assert that we have left A.M.H. "lawyerless" by relieving the prior guardian ad litem and attorney ad litem from "any further participation in proceedings concerning A.M.H." The Bakers misapprehend the procedural posture of this case. Upon remand, the chancery court has twelve days to transfer this case to the Juvenile Court of Shelby County. The juvenile court is vested with such authority as is necessary to "consider, prepare, and implement a plan to resolve the pending custody matter with a view towards reunification of A.M.H. with her natural parents." We have not limited the juvenile court's au-

thority to consider reasonable requests for representation by a guardian ad litem or an attorney ad litem on behalf of A.M.H. This Court, however, is not the proper forum for such requests.

Accordingly, the Bakers' Petition to Rehear is denied. Costs are taxed to the petitioners, Jerry L. Baker and Louise K. ***815** Baker, and their sureties, for which execution may issue if necessary.

Tenn.,2007.
In re Adoption of A.M.H.
215 S.W.3d 793

END OF DOCUMENT

Not Reported in S.W.2d, 1998 WL 760950 (Tenn.Ct.App.)
(Cite as: 1998 WL 760950 (Tenn.Ct.App.))

Court of Appeals of Tennessee.
Virginia Lynn WOOLSEY, Plaintiff/Appellant,
v.
Douglas Harmon McPHERSON, Defendant/Appellee.

No. 02A01-9706-JV-00125.
Nov. 2, 1998.

From the Juvenile Court of Shelby County at Memphis, Honorable A.V. McDowell, Special Judge.
Wilburt J. Chiapella, Memphis, Tennessee, Attorney for Plaintiff/Appellant.

Kimbrough B. Mullins, Memphis, Tennessee, David E. Caywood, Memphis, Tennessee, Attorneys for Defendant/Appellee.

FARMER, J.

***1** Plaintiff Virginia Lynn Woolsey appeals the trial court's order removing Jennifer McPherson from her custody and placing the child in the custody of Defendant Douglas Harmon McPherson. McPherson appeals the trial court's order requiring him to pay the $15,000 fee of the Guardian ad Litem. We affirm in all respects.

I. Procedural History

Jennifer McPherson, the nonmarital child of Woolsey and McPherson, was born on November 13, 1991. On May 20, 1992, Woolsey brought an action to establish Jennifer's paternity. The matter was heard by a juvenile court referee who found that McPherson was Jennifer's father and issued recommendations under which McPherson would have visitation with Jennifer. Woolsey then requested that the matter be reheard by a judge. After a rehearing, the trial judge issued an order consistent with the recommendations of the referee.[FN1] On April 16, 1993, McPherson filed a petition for a change of custody. After hearing the petition for a change of custody on October 12, 1993, the trial court took the matter under advisement and issued a temporary order providing that custody of Jennifer should remain with Woolsey. A final order was entered on August 2, 1994 voluntarily dismissing McPherson's petition for a change of custody. McPherson filed a second petition for a change of custody on April 30, 1996. After hearing twenty-two days of testimony from twenty-six witnesses and examining ninety-seven trial exhibits, the court granted McPherson's petition to change custody and ordered McPherson to pay the fee of the Guardian ad Litem. Woolsey appeals the trial court's ruling with respect to the change of custody and McPherson appeals the trial court's ruling regarding the payment of the Guardian ad Litem's fee. Both Woolsey and McPherson request reimbursement from the other party for attorney fees and other expenses associated with this appeal.

FN1. The custody and visitation arrangement ordered by the trial court has been frustrated by ongoing conflict and a general lack of cooperation between Woolsey and McPherson. This is evidenced by numerous petitions and motions filed by the parties in this cause. They include as follows: "Petition For Citation For Contempt," "Motion For Protective Order," "Petition For Immediate Injunctive Relief," "Petition To Cite Virginia Lynn Woolsey In Contempt," "Amended Petition For Contempt And Petition For Change Of Custody," "Motion To Compel Discovery And For Sanctions," "Petition To Modify

> Christmas Vacation And Extend Visitation To Allow Visitation With Paternal Grandparents," "Motion For Temporary Modification Of Visitation Order," "Petition To Cite Respondent In Contempt," "Petition For Citation For Contempt Of Court," "Petition To Appoint Guardian Ad Litem And To Enforce Court Orders With Respect To Psychological Evaluations And Joint Counseling," "Petition For Christmas Vacation And Makeup Wednesday Night Visitation," "Amendment To Petition Regarding Christmas Visitation And Wednesday Makeup Visitation," and "Petition For Contempt And For Specific Visitation."

II. Change of Custody

As an initial matter, we note that trial courts have wide discretion in cases involving child custody. *See, e.g., Gaskill v. Gaskill,* 936 S.W.2d 626, 631 (Tenn.App.1996); Tenn.Code Ann. § 36-6-101(a)(2) (Supp.1997)(providing that the trial court "shall have the widest discretion to order a custody arrangement that is in the best interest of the child"). Consistent with this general principle, our review of the instant case is *de novo* on the record, accompanied by a presumption of correctness of the findings below. *See, e.g., Gaskill,* 936 S.W.2d at 631. We may not reverse the judgment of the trial court unless it is contrary to the preponderance of the evidence. *See Haas v. Knighton,* 676 S.W.2d 554, 555 (Tenn.1984); T.R.A.P. 13(d).

In matters of initial child custody, the trial court seeks to determine what would be in the best interest of the child. *See, e.g., Varley v. Varley,* 934 S.W.2d 659, 665 (Tenn.App.1996)(citing *Koch v. Koch,* 874 S.W.2d 571, 575 (Tenn.App.1993)); Tenn.Code Ann. § 36-6-106 (1996). This determination is based on the court's assessment of the comparative fitness of the parties seeking custody in light of the particular circumstances of the case. *See Ruyle v. Ruyle,* 928 S.W.2d 439, 442 (Tenn.App.1996); *Matter of Parsons,* 914 S.W.2d 889, 893 (Tenn.App.1995). When making this assessment, the court will consider all relevant factors, including the following:

***2** (1) The love, affection and emotional ties existing between the parents and child;

(2) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;

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

(4) The stability of the family unit of the parents;

(5) The mental and physical health of the parents;

(6) The home, school and community record of the child;

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

(8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; and

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

Tenn.Code Ann. § 36-6-106 (1996). *See also Gaskill,* 936 S.W.2d at 630 (listing additional factors that may be considered when making a child custody determination).

Once the trial court has made an initial determination with respect to child custody, it may not entertain a subsequent petition to modify custody absent a material change in circumstances such that the welfare of the child demands a redetermination. *See, e.g., Massengale v. Massengale,* 915 S.W.2d 818, 819 (Tenn.App.1995). A material change in circumstances justifying modification of a child custody order may include factors arising subsequent to the initial determination or changed conditions that could not be anticipated at the time of the original order. *See Blair v. Badenhope,* 940 S.W.2d 575, 576 (Tenn.App.1996)(citing *Dalton v. Dalton,* 858 S.W.2d 324, 326 (Tenn.App.1993)). If the trial court finds that there has, in fact, been a material change in circumstances, it will then consider the petition to modify custody using a best interests standard.

In the instant case, the trial court originally determined that it was in Jennifer's best interest for her to be in the custody of Woolsey. Thus, in order for the trial court to consider McPherson's petition to remove Jennifer from Woolsey's custody and place the child in his own custody, it must first find that there has been a material change of circumstances.

McPherson's petition for a change of custody alleges, among other things, that Woolsey 1) dresses Jennifer in dirty clothing and subjects the child to dirty living conditions, 2) fails to provide Jennifer with necessary medical care, 3) fails to place Jennifer in a child safety seat while riding in the car, 4) uses foul and abusive language toward McPherson in Jennifer's presence, 5) attempts to prevent Jennifer from maintaining a relationship with McPherson and his family, and 6) makes inappropriate comments in front of Jennifer regarding "who McPherson is sleeping with." At this stage of our inquiry, we do not speculate as to the truth or falsity of these allegations. We note, however, that these incidents of misconduct allegedly occurred subsequent to the trial court's initial custody determination and, if proven, would constitute a serious threat to Jennifer's physical and psychological well being. We thus conclude that McPherson's petition alleged a material change of circumstances affecting the welfare of Jennifer. Accordingly, we find that the trial court did not err in considering McPherson's petition to change custody.

***3** We next consider whether the trial court erred in finding that it is in Jennifer's best interest to remove her from the custody of Woolsey and place her in the custody of McPherson. The proof presented regarding the parental fitness of Woolsey and McPherson is voluminous. Because we are of the opinion that the most probative pieces of evidence in the instant case are those elicited from disinterested parties, our discussion of the proof focuses on the evidence contained in reports submitted by the Department of Human Services, the Center for Children in Crisis, and the Guardian ad Litem.

In April of 1995, the Department of Human Services (DHS) [FN2] became involved in this matter after receiving a report of suspected neglect and physical abuse of Jennifer on the part of Woolsey. A DHS counselor investigated the allegations and determined that they were unfounded, stating the Woolsey and Jennifer appeared to share a close bond with one another. In February of 1996, the DHS received a report of possible sexual abuse of Jennifer by McPherson. Jennifer was physically examined at the Sexual Assault Resource Center but the findings of this examination were inconclusive. A counselor from the DHS spoke with Woolsey, McPherson, Jennifer, and B.J. Garner, who allegedly witnessed sexual abuse on the part of McPherson against one of his female acquaintances. The DHS then referred this matter to the Le Bonheur Center for Children in Crisis (CCC) for an evaluation.

> FN2. In 1996, the Department of Human Services was replaced by the Department of Children's Services. *See* Tenn.Code Ann. § 37-5-101 (1996). For purposes of this opinion, we will refer to this entity as the De-

partment of Human Services or DHS.

A five member team from the CCC interviewed Woolsey, McPherson, and Jennifer and conducted psychological evaluations of both Woolsey and McPherson.[FN3] McPherson's psychological evaluation was inconclusive regarding whether he had ever engaged in child abuse. Woolsey's psychological evaluation, however, suggested "serious problems in her parenting practices, as well as in her own psychological functioning." The CCC report noted behaviors on the part of Woolsey demonstrating impaired insight and judgment with respect to Jennifer's healthy development as follows:

> FN3. This team consisted of a social worker, a psychological examiner, two psychologists, and a psychiatrist. The social worker, Joanna E. Morat, interviewed Woolsey, McPherson, Jennifer, and Woolsey's father. Earle Donelson, the psychological examiner, interviewed Woolsey and evaluated her performance on a variety of psychological tests. Dr. Koranek, a psychologist, interviewed McPherson and evaluated his performance on a variety of psychological tests. Dr. Gentry, also a psychologist, reviewed the test data obtained by Earle Donelson and participated in the writing of Donelson's report. Dr. Holman, the psychiatrist, interviewed Jennifer. After these individual interviews were concluded, the five team members met to assess the case and make recommendations regarding Jennifer's welfare. These findings and recommendations are contained in a final "Multidisciplinary Team Report" dated May 22, 1996.

[T]he child's mental status examination at CCC reveals that she is experiencing coaching from her mother, and that Ms. Woolsey rebuffs the child for expressing positive feelings about Mr. McPherson. Of further concern is Ms. Woolsey's exploitation of Jennifer by encouraging developmentally inappropriate behavior, e.g., consistently referring to her as 'the baby', reportedly allowing the child to suck Ms. Woolsey's thumb, and sleeping and bathing with Jennifer; exploitation also has occurred with Ms. Woolsey photographing Jennifer's genital and buttocks areas. Finally, Jennifer apparently is denied healthy independent peer interaction; contact with the extended paternal family is disapproved by Ms. Woolsey. All these concerns support the conclusion of emotional child abuse by Ms. Woolsey toward Jennifer.

The final recommendation of the CCC team was that Jennifer be removed from Woolsey's custody and that Woolsey's visitation with Jennifer be supervised by a neutral third party.

***4** After receiving the final report of the CCC, the DHS issued its own report and recommendations. These recommendations were based on the findings of the CCC evaluation as well as DHS's own independent investigation. The DHS found that Woolsey and Jennifer appear to have a "strange and somewhat abnormal relationship." This conclusion was based on several disclosures by Woolsey to a DHS counselor indicating that 1) Woolsey and Jennifer take daily baths together, 2) Woolsey has taken numerous photographs of Jennifer's private parts in an effort to substantiate her allegations of sexual abuse on the part of McPherson, 3) Woolsey uses highly sexualized language, 4) Jennifer is reared in a highly restricted or isolated environment, and 5) Woolsey has a "belligerent, hostile and revengeful attitude" toward McPherson. The final recommendation of the DHS was that Jennifer be removed from the custody of Woolsey and placed in the custody of McPherson.

On November 29, 1995, the trial court appointed a guardian ad litem to act on behalf of Jennifer in matters coming before the court. The Guardian ad Litem conducted a thorough investigation. She interviewed both Woolsey and McPherson and visited with Jennifer on two occasions, once at Woolsey's home

and once at the home of McPherson. The Guardian ad Litem also interviewed numerous persons at the request of the parties, interviewed all of the attorneys previously involved in this matter, and attended a meeting of the five members of the CCC team. In her report, the Guardian ad Litem expressed concern regarding the CCC investigation. She alleged that, during the CCC meeting she attended, three of the participants acted in an unprofessional manner and another participant left the meeting before its conclusion. Additionally, the Guardian ad Litem noted that the original recommendation of the social worker from the CCC was that Jennifer be placed in a foster home rather than in the custody of McPherson. The final recommendation of the Guardian ad Litem was that Jennifer remain in the custody of Woolsey but that McPherson be allowed visitation.

We have no doubt that both Woolsey and McPherson love Jennifer and are willing and able to provide her with the basic necessities of life. As we noted in *Varley v. Varley*, 934 S.W.2d 659 (Tenn.App.1996), "[w]hen loved by both parents, children should be taught to love and respect each parent equally." *Id.* at 667. The evidence in the instant case suggests that Woolsey discourages Jennifer from developing a loving and respectful relationship with McPherson. Woolsey apparently does not want McPherson to have visitation with Jennifer or to be involved in Jennifer's education, religion, or upbringing. Woolsey allegedly makes disparaging remarks about McPherson in Jennifer's presence and punishes Jennifer for expressing affection for or a desire to visit McPherson. Woolsey reportedly encourages Jennifer to refer to McPherson as "Doug" rather than "Dad" or "Daddy." Finally, Woolsey has openly defied the orders of the trial court with respect to visitation by McPherson and his extended family. We are extremely concerned that these attempts on the part of Woolsey to alienate Jennifer from McPherson may result in serious consequences to the child's psychological well being.

***5** The trial court determined that it is in the best interest of Jennifer to remove her from the custody of Woolsey and place the child in the custody of McPherson. Based on our review of the record, we cannot say that the evidence preponderates against this finding. We therefore uphold the order of the trial court granting McPherson's petition to change custody.

III. Guardian Ad Litem Fee

The trial court ordered McPherson to pay the $15,000 fee of the Guardian ad Litem. In child custody cases, the trial court is given wide discretion with respect to the awarding of fees. *See Salisbury v. Salisbury*, 657 S.W.2d 761, 770 (Tenn.App.1983). We will not interfere with the trial court's decision regarding the proper assessment of fees unless there has been a clear abuse of discretion. *See id.* at 770. We recognize that ability to pay is not a controlling consideration when determining fee awards in custody cases. *See Sherrod v. Wix*, 849 S.W.2d 780, 785 (Tenn.App.1992). The relative wealth of the parties, however, is one factor to be considered. In the instant case, it appears that McPherson's resources are far more extensive than those of Woolsey. We do not find that the trial court abused its discretion in charging the fee of the Guardian ad Litem to McPherson.

IV. Attorney's Fees and Expenses on Appeal

Both Woolsey and McPherson have asked to be awarded attorney fees and expenses incurred in connection with this appeal. We do not find any basis upon which to award attorney fees or expenses in this matter. The requests of both Woolsey and McPherson are therefore denied.

V. Conclusion

The order of the trial court granting McPherson's petition to change custody and charging the fee of the Guardian ad Litem to McPherson is affirmed. Issues were raised on appeal by both parties. In our discretion, we tax costs of this appeal to McPherson, for which execution may issue if necessary.

CRAWFORD, P.J., and TOMLIN, Sp.J., concurs.

Tenn.App.,1998.
Woolsey v. McPherson
Not Reported in S.W.2d, 1998 WL 760950 (Tenn.Ct.App.)

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Not Reported in S.W.3d, 2004 WL 239764 (Tenn.Ct.App.)
(Cite as: 2004 WL 239764 (Tenn.Ct.App.))

Court of Appeals of Tennessee.
Page J. FARNSWORTH
v.
Sidney W. FARNSWORTH, III.

No. W2002-01536-COA-R3-CV.
Oct. 17, 2003 Session.
Feb. 9, 2004.

Direct Appeal from the Chancery Court for Shelby County, No. D30748-III; D.J. Alissandratos, Chancellor.
Aubrey L. Brown. Jr., Memphis, TN, for Appellant.

Kimbrough B. Mullins, Kay Farese Turner, Memphis, TN, for Appellee.

ALAN E. HIGHERS, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and DAVID R. FARMER, J., joined.

OPINION

ALAN E. HIGHERS, J.

***1** This case involves the property of a divorced couple and the award of attorney's fees to the former wife. For the following reasons, we vacate the decision of the trial court and remand for further proceedings consistent with this opinion.

Facts and Procedural History

Sidney W. Farnsworth, III ("Husband") and Page J. Farnsworth ("Wife") were married in 1983. The two lived in a house ("the Humes residence") in Memphis in which Husband held equity and owned before the marriage. At the time, Husband worked as an insurance company underwriter, and Wife was, and continues to be, a speech pathologist. As an underwriter, Husband's income was approximately $30,000 per year. Subsequently, Husband decided he wished to change vocations and chose to attend law school to become an attorney, a decision Wife supported. In 1985, Husband and Wife moved to Nashville so that Husband could attend Vanderbilt University to earn his law degree.

While Husband attended law school, the parties rented their house in Memphis, a task for which Wife assumed most of the responsibility. In addition, Wife also handled the renting of the parties' upstairs as an apartment in their Nashville home in order to pay for part of the Nashville home's rent. Wife performed the household chores, providing Husband with time and energy for his studies. Wife also worked two jobs in the speech pathology field to ensure the parties had enough income to support themselves. While in law school, Husband worked as a law clerk one summer and another summer worked for an insurance firm. Husband completed law school at Vanderbilt and graduated in 1988. Upon graduating, the parties moved back to Memphis and resumed living in the Humes residence where they continued to reside until separating in 1999.

The parties returned to Memphis where each worked in their respective fields, with Wife working as a speech pathologist and Husband attaining employment at the law firm, Armstrong, Allen, PLC, and eventually became a member of that firm. Aside from periodic increases, Wife's maximum earning capacity is approximately $47,000 per annum, and Husband's current earning capacity is approximately $100,000 per annum.[FN1]

FN1. Armstrong, Allen, PLC, utilizes a point

> system for determining how much income each member receives. Although there was testimony that Husband's income was about to be reduced by Armstrong Allen due to Husband's diminished productivity, the trial court below found, and this Court has no reason to disagree, that Husband's earning capacity per annum is $100,000.

As for the parties' separate property, the evidence at trial showed a sizable disparity. While Wife testified she held separate property mostly in the form of jewelry valued at approximately $20,000, Husband admitted to holding an account in Salomon Smith Barney of assets worth almost $300,000, which he received as a gift from his mother. The parties agreed that the Humes residence held a fair market value of $90,000. In addition, the parties had accumulated over $300,000 in marital property. Finally, the parties had incurred debts from credit cards, a second mortgage on their home, and various fees for attorneys and the guardian ad litem for this cause.

In July 1999, Wife commenced this divorce action alleging grounds of irreconcilable differences and later amending her complaint to include fault grounds of inappropriate marital conduct. Husband answered and filed a counter-complaint for divorce in October 2000. A three-day trial was held in the Shelby County Chancery Court in February 2002, after which the trial court granted the parties a divorce,[FN2] ordered a division of the marital property in a 60/40 split for the Wife and Husband respectively,[FN3] and allocated most of the parties' marital debt to the Husband.[FN4] Additionally, the trial court prorated the guardian ad litem's fees and ordered Husband to pay all of Wife's attorney's fees. Because Wife had not received any payments for her attorney's fees, she moved the court to set payments on this award, and the court below set the amount of Husband's monthly payments, adjusting the amount to account for the interest and additional fees accrued since the final divorce decree. Husband timely appealed from the final divorce decree and presents the following issues for our review:

> FN2. The parties stipulated the grounds of divorce.
>
> FN3. The Court below specified that a sum of $10,000 of Wife's marital property was to be used to purchase a more modern, safer car in the interests of the parties' minor child, and that Wife was to use her portion of the equity of the Humes residence towards the purchase of a new home.
>
> FN4. The trial court also addressed issues concerning the parties' minor child, however, those issues are not presented to this Court on appeal.

***2** I. The trial court erred in its property division because, as a result of the allocation of marital debt, the de facto result of the property division resulted in an inequitable disparity;

II. The trial court abused its discretion when it awarded Wife all of her attorney's fees; and

III. In the alternative, the trial court erred when it modified the amount of attorney's fees owed to Wife in its order to set payments when such modification was not pursuant to the procedure of Rules 59 or 60 of the Tennessee Rules of Civil Procedure.

Wife presents the following additional issue for this Court's review:
IV. Husband should be ordered to pay Wife's attorney's fees from this appeal.

For the following reasons, this Court vacates the decision of the trial court and remands this cause for further proceedings consistent with this opinion.

Not Reported in S.W.3d, 2004 WL 239764 (Tenn.Ct.App.)
(Cite as: 2004 WL 239764 (Tenn.Ct.App.))

Standard of Review

Our review of a trial court's marital property division is *de novo* upon the record with a presumption of correctness accorded to the trial court's findings of fact. Tenn. R. Civ. P. 13(d); *Dellinger v. Dellinger*, 958 S.W.2d 778, 780 (Tenn.Ct.App.1997) (citing *Haas v. Knighton*, 676 S.W.2d 554, 555 (Tenn.1984); *Dalton v. Dalton*, 858 S.W.2d 324, 327 (Tenn.Ct.App.1993)). We are mindful that trial courts are given wide discretion by appellate courts for the manner in which they divide marital property, and, therefore, such divisions are given great weight by appellate courts on appeal. *Dellinger*, 958 S.W.2d at 780 (citing *Wade v. Wade*, 897 S.W.2d 702, 715 (Tenn.Ct.App.1994); *Wallace v. Wallace*, 733 S.W.2d 102, 106 (Tenn.Ct.App.1987)). Additionally, the award of attorney's fees in a divorce action is within the discretion of the trial court and appellate courts will not interfere with such awards unless there is a clear showing of an abuse of that discretion. *Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn.1995) (citing *Storey v. Storey*, 835 S.W.2d 593, 597 (Tenn.Ct.App.1992); *Crouch v. Crouch*, 385 S.W.2d 288, 293 (Tenn.Ct.App.1964)). Finally, all questions of law warrant a *de novo* review by this Court with no presumption of correctness given to the trial court. *Alford v. Alford*, No. E2001-02361-SC-R11-CV, 2003 Tenn. LEXIS 1046, at *5. (Tenn. Nov. 6, 2003) (citing *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn.1993)).

Property and Debt Division

Husband first argues that the trial court erred when it divided the marital estate, awarding Wife 60% and Husband 40% of the property. Specifically, Husband argues that the trial court created an inequitable disparity in this division when the allocation of the marital debt is considered. When a trial court divides the marital property of a former husband and wife, it must consider certain factors in making its division as required by Tenn.Code Ann. § 36-4-121(c) (2003).

In making equitable division of marital property, the court shall consider all relevant factors including:

***3** (1) The duration of the marriage;

(2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;

(3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;

(4) The relative ability of each party for future acquisitions of capital assets and income;

(5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;

(6) The value of the separate property of each party;

(7) The estate of each party at the time of the marriage;

(8) The economic circumstances of each party at the time the division of property is to become effective;

(9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;

(10) The amount of social security benefits to each spouse; and

(11) Such other factors as are necessary to consider the equities between the parties.

Tenn.Code Ann. § 36-4-121(c) (2003)

"Marital debts" have been defined by our Supreme Court as "all debts incurred by either or both spouses during the course of the marriage up to the date of the final divorce hearing." *Alford,* 2003 Tenn. LEXIS 1046, at *8. "Unless a court has made provisions for the distribution of property in a decree of legal separation, a period of separation before divorce has no effect on the classification of debt as marital or separate." *Id.* at *9-10 (footnote omitted). Once it is determined that a debt is marital, a trial court should consider the following four factors in allocating such debt: (1) the debt's purpose; (2) who incurred the debt; (3) which party benefitted from incurring the debt; and (4) which party is best able to repay the debt. *Id.* at *2.

In the case at bar, the trial court heard evidence of credit card debts, bank loans, loans from family, and a second mortgage on the Humes residence. The Husband challenges the allocation of the debt by the trial court, which essentially burdened the Husband with 90% of the parties' debt. Though there is little dispute as to which party incurred each debt, the record lacks evidence regarding who benefitted from the debt or the debt's purpose. In addition, the trial court made no findings concerning the four factors from *Alford.* Instead the trial court simply divided the various debts and, in the case of the second mortgage incurred by Husband, the court below did not find that it was "acquired properly as a marital debt." Because it considered the second mortgage a non-marital debt, the court below appeared not to consider any of the factors except for who had incurred that mortgage. Therefore, this Court must remand this case to the trial court for a determination of the proper allocation of the marital debts and marital property in accordance with the *Alford* decision.

Attorney's Fees as Alimony *in Solido*

***4** Because an award of attorney's fees is considered alimony *in solido,* the trial court must consider the relevant factors enumerated in Tenn.Code Ann. § 36-5-101(d)(1)(E) (2003). *Koja v. Koja,* 42 S.W.3d 94, 98 (Tenn.Ct.App.2000) (citing *Herrera v. Herrera,* 944 S.W.2d 379, 390 (Tenn.Ct.App.1996); *Cranford v. Cranford,* 772 S.W.2d 48, 52 (Tenn.Ct.App.1989)). Because one of those factors to consider is "[t]he provisions made with regard to the marital property as defined in § 36-4-121" and this Court has remanded this cause for further findings on the issue of the parties' marital debts, we are unable to determine the propriety of an award of attorney's fees. Therefore, this Court vacates the trial court's award of attorney's fees and remands this cause for a determination of whether an award of attorney's fees is proper in light of the trial court's revised property division.

Attorney's Fees on Appeal

Wife argues that she should be awarded her attorney's fees incurred on this appeal. The Tennessee Supreme Court has enumerated a number of factors to consider for determining whether to award a party his or her attorney's fees on appeal. These factors include the ability of the requesting party to pay the accrued fees, the requesting party's success in the appeal, whether the requesting party sought the appeal in good faith, and any other equitable factor that need be considered. *See Folk v. Folk,* 357 S.W.2d 828, 829 (Tenn.1962). Given our disposition of this appeal, we hold that it would be improper and inequitable to award attorney's fees from this appeal to Wife. *See Seaton v. Seaton,* 516 S.W.2d 91, 93-94 (Tenn.1974).

Conclusion

For the foregoing reasons, we vacate the decision of the trial court and remand this cause for further proceedings consistent with this opinion. Costs of this appeal are taxed equally to Appellant, Sidney W.

Farnsworth, III, and his surety, and Appellee, Page J. Farnsworth, for which execution may issue if necessary.

Tenn.Ct.App.,2004.
Farnsworth v. Farnsworth
Not Reported in S.W.3d, 2004 WL 239764 (Tenn.Ct.App.)

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IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

SDR [redacted] v. [redacted] MFR

Circuit Court for Shelby County
No. CT00184711

FILED
SEP 0 6 2013
Clerk of the Courts
Rec'd By

No. W2013-01586-COA-R10-CV

ORDER

Now pending before the Court is the Rule 10 application for extraordinary appeal filed in this matter by Applicant [redacted] MFR on July 12, 2013. By Order entered on July 15, 2013, the Court directed Respondent [redacted] SDR to file an answer to the pending Rule 10 application within ten (10) days from the date of the filing of that order, pursuant to Rule 10(d) of the Tennessee Rules of Appellate Procedure. Also, in our Order of July 25, 2013, the Court declined to stay the operation of the "Findings of Fact and Conclusions of Law" as requested in the application.

On July 18, 2013, Respondent filed a motion requesting an extension of time to file an answer. The Court granted by the motion by Order entered on July 19, 2013, and directed that Respondent's answer would be due on or before Thursday, August 15, 2013. Respondent filed his answer on August 15, 2013.

Upon due consideration, the application is respectfully denied. Costs are assessed to Applicant [redacted] and her surety for which execution may issue, if necessary. **It is SO ORDERED.** MFR

PER CURIAM

Slip Copy, 2014 WL 1285729 (Tenn.Ct.App.)
(Cite as: 2014 WL 1285729 (Tenn.Ct.App.))

Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

[redacted] SDR

v.

[redacted] MFR

No. W2013-02651-COA-T10B.
Assigned on Jan. 10, 2014.
March 31, 2014.

An Accelerated Interlocutory Appeal from the Circuit Court for Shelby County, No. CT-001847-11; Donna M. Fields, Judge.

Larry Rice and Mary L. Wagner, Memphis, Tennessee, for the Defendant/Appellant, [redacted] MFR

Kimbrough B. Mullins and Charles M. McGhee, Memphis, Tennessee, for the Plaintiff/Appellee, [redacted] SDR

Daniel Loyd Taylor, Memphis, Tennessee, for the Guardian ad Litem, Lisa Zacharias.

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which DAVID R. FARMER, J., and ROGER A. PAGE, J., joined.

OPINION

HOLLY M. KIRBY, J.

***1** This is a Rule 10B appeal of the denial of a petition for recusal. In this divorce case, the trial court bifurcated the issues and conducted a 15-day evidentiary hearing solely on the parties' parenting arrangement. Months later, the trial court entered an order designating the father as the primary residential parent and giving the mother supervised parenting time. The mother was denied permission for an interlocutory appeal from the parenting order. Several months after that, the mother discovered that, in the course of drafting the parenting order, the trial judge's office had an *ex parte* exchange with the guardian ad litem to confirm a minor factual matter. The mother alleged that the trial judge had violated ethical rules against such *ex parte* communications and filed a motion asking the trial judge to recuse herself. The trial court denied the motion to recuse. The mother filed this accelerated interlocutory appeal of the denial of her recusal motion pursuant to Rule 10B of the Tennessee Supreme Court Rules. We decline to adjudicate whether there was a breach of any ethical rules. As to the trial judge's denial of the motion for recusal, we affirm.

Background

On April 18, 2011, Plaintiff/Appellee [redacted] SDR ("Father") filed a petition for divorce against Defendant/Appellant [redacted] MFR ("Mother") in the Circuit Court for Shelby County, Tennessee. Three children were born of their marriage, two sons and a daughter ("Daughter"). Only Daughter, born in July 2003, was still a minor at the time of the proceedings that led to this appeal.[FN1] The divorce case was assigned to Judge Donna Fields.

FN1. At the time of the parenting hearing below, one of the parties' sons lived with Father and the other lived with Mother.

On January 6, 2012, the trial court appointed attorney Lisa Zacharias as the guardian ad litem ("GAL") for Daughter. Pending the divorce trial, largely by agreement of the parties, Daughter had roughly equal parenting time with both parents on a week-on/week-off schedule.[FN2] In May 2012, the trial court entered a consent order in which the parties

agreed to the trial court's appointment of Fred A. Steinberg, Ph.D., to perform a forensic psychological custody evaluation and assessment as to all parenting issues. The trial court bifurcated the parenting issues and the property issues for trial.

> FN2. According to Mother, prior to Summer 2012, she was the primary caregiver for Daughter.

The first phase was the trial of the parenting issues, held over a period of 15 nonconsecutive days between November 16, 2012, and January 17, 2013. The transcript of this hearing is over 4,000 pages long with 157 exhibits, and the docket sheet for this phase alone is 48 pages.[FN3] At the conclusion of this hearing, the trial court gave the parties one week to file motions and submit proposed orders .[FN4] Despite the trial court's directive, the parties debated the proposed findings of fact and conclusions of law on the parenting issues until after March 1, 2013.

> FN3. Only selected portions of the trial transcript were submitted by the parties in this appeal.

> FN4. The trial court cautioned counsel that the trial judge had a three-week medical malpractice trial and then a scheduled absence of several weeks for surgery.

In March 2013, in the absence of a final order on the parenting issues, the parties sought guidance from the trial court on the allocation of parenting time for Daughter's upcoming spring break from school.[FN5] In a hearing held on March 6, 2012, the trial court determined that Daughter would spend her 2013 spring break with Father, and thereafter Daughter would alternate her spring break with the parties each year. On April 3, 2013, the trial court entered a written order consistent with its oral ruling. The order specified that, after Daughter's 2013 spring break, the parties would resume the "week on, week off parenting time" arrangement. The trial court commented at that time, "It is the intent of the Court that neither party have three consecutive weeks of parenting time" with Daughter.

> FN5. It appears that no formal written motion was filed regarding spring break; instead, the issue was raised to the trial court in a conference call in which all necessary parties participated.

***2** On approximately April 5, 2013, before the trial court entered its written order on parenting time, Father filed a motion asking the trial court to require Mother to take Daughter to see a particular tutor. On April 10, 2013, before Mother filed her response to Father's motion on tutoring, the trial court had a telephonic hearing on the motion with counsel for the parties and the GAL; the parents were not given advance notice of the telephone hearing. Counsel for Mother had two employees take notes on what transpired in the April 10, 2013 teleconference call; those employees later executed affidavits based on their notes of the hearing. At the hearing, it appears that Mother would not agree to the tutoring but was willing to accede if Daughter's physicians said that it would do the child no harm. Two weeks later, on April 24, 2013, the trial court entered a written order granting Father's motion and directing the continuation of Daughter's tutoring with the specified tutor during the child's summer break. The order stated that the holding was based on the argument of counsel and emails on the opinions of Daughter's treating medical professionals regarding the tutoring.

Less than a month later, on May 17, 2013, the trial court issued a 30–page order adjudicating the parties' parenting issues. In the order, the trial court credited the testimony of both Father and Dr. Steinberg, the court-appointed psychologist. In his evaluation submitted to the trial court, Dr. Steinberg diagnosed Mother with "Narcissistic Personality Disorder with Borderline Personality Disorder Features" and deter-

mined that Mother's psychological problems had negatively affected the parties' children.[FN6] The parenting order recited the trial court's concern that, if Daughter were permitted to reside primarily with Mother, Mother's influence would eventually cause Daughter to become alienated from Father. Consequently, the trial court designated Father as Daughter's primary residential parent and granted Mother only two hours per week of supervised parenting time at the Exchange Club. The trial court ordered the restrictions on Mother's parenting time to continue until Mother produced evidence that she "has corrected her destructive behavior and inability to put the children before her disdain for her Husband," and also "[u]ntil the Court sees evidence from psychologists that [Daughter] will be positively parented." [FN7] The order indicated that the trial court intended to review the parenting arrangement every six months.

> FN6. Dr. Steinberg reportedly found Mother to be "a manipulative person who uses anger, threats and bullying to control whatever situation she is in, or whomever she is attempting to manipulate."

> FN7. The trial court found that Mother's "behavior in front of others, particularly people known to the couple, and in front of their children, is both bizarre and unacceptable behavior in civilized society."

Mother filed a timely motion for interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. After a hearing, on May 31, 2013, the trial court entered an order denying Mother's motion.

On June 10, 2013, the trial court issued a brief oral addendum to its May 31, 2013 ruling. The addendum was apparently in response to Mother's contention that the trial court's finding that Mother's influence was harmful to Daughter was inconsistent with the trial court's failure to remove the child from Mother's care until several months after the hearing. In its addendum, the trial court explained it did not immediately remove Daughter because the danger to the child was not immediate or imminent; rather, Mother's "destructive influence and emotional abuse was of long-standing etiology and insidious in nature." The trial judge stated affirmatively that she "has no bias, no sympathies in this Court's decision and I am constrained by the law and I follow the law."

***3** Dissatisfied with the parenting order, Mother filed an application with this Court for permission for extraordinary appeal pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure. On September 6, 2013, this Court entered an order denying Mother's application for extraordinary appeal.

Meanwhile, on or about August 21, 2013, the GAL sent an invoice for her fees to Mother.[FN8] The invoice included entries indicating that, on April 16, 2013, a staff member from Judge Fields' office contacted the GAL to request information about Mother's residence, referred to as the "[redacted]property." The relevant entries read:

> FN8. The GAL fees were to be divided equally between the parties, but the submissions to this Court do not indicate whether the GAL's invoice was also sent to Father.

4/16/13 Telephone call from Judge Fields' office requesting information regarding [redacted] property;

4/16/13 Receipt of message from Judge Fields' office; telephone conference with Runyon re: [redacted]property;

4/16/13 Telephone conference with Judge Fields' office with response regarding [redacted] property—no pool, but has 2 acre pond.

Thus, the invoice entries indicated possible *ex parte* contact between the GAL and the trial judge's office, and possible *ex parte* contact between the GAL and Father as well. Each entry was billed for .05 hours, for a total of nine minutes billable time for all three entries.

On August 26, 2013, counsel for Mother called the GAL to inquire about the invoice entries.[FN9] According to affidavits signed by witnesses to the conversation, the GAL told counsel for Mother that Judge Fields asked the GAL whether there was a pool on the [redacted] property and the GAL's response was, "No, but there is a pond ." The GAL allegedly told Mother's counsel that she probably called Father for the answer to the trial court's question, adding that, if this were so, she did not know why she called Father instead of Mother. The GAL also indicated that the first two of the three entries in question may have been duplicates. The GAL insisted that the existence of a pool on the property was all that the GAL discussed, and she maintained that it was not inappropriate for her to respond to Judge Fields' question.

FN9. The submissions to this Court do not reveal whether counsel for Father was notified of this phone call or invited to participate in the conversation with the GAL.

The next day, the GAL sent an email to counsel for Mother. The email said that the GAL "felt ambushed" by the phone call from Mother's attorney and was "not thinking clearly and was trying to answer you despite not being able to recall the day in question." Upon further reflection and discussions with her secretary, the GAL said, she realized that she had been unable to clearly recall the events because she "did NOT talk to anyone in the Judges [sic] office," her secretary did. The GAL explained in her email that her secretary left her a note with the trial court's question, the GAL obtained the answer, and then the GAL's secretary called Judge Fields' office with the answer. The GAL's email stated, "I had no contact with the Judge."

On August 29, 2013, based on this information, Mother filed a motion asking Judge Fields to recuse herself from the case. Mother also filed a separate motion to excuse the GAL and a motion to set aside the judgment in the May 17, 2013 parenting order.

***4** In the motion to recuse, Mother argued that Judge Fields was disqualified from presiding over the matter for violation of several provisions of Rule 10 of the Tennessee Supreme Court Rules, Rules of Judicial Conduct ("RJC"), specifically Sections 2.09 and 2.11.[FN10] She argued that, by engaging in *ex parte* communications with the GAL and making independent inquiries into Mother's property situation, Judge Fields created "a convincing appearance of impropriety." Mother pointed to the fact that, early in the parenting hearing, Judge Fields commented that it was not her "intent for the parties to have supervised visitation unless there is some major concern that I can be convinced of. These children need their parents. They need both their parents." In the same way, Mother claimed, the trial court's March 2013 ruling on spring break indicated the trial court's intent at that time to maintain the week-on/week-off visitation, and also that neither party have three consecutive weeks of parenting time. Mother's parenting time with Daughter had no significant restrictions, Mother pointed out, until after the April 16 *ex parte* communication between the trial court and the GAL. To bolster her argument, Mother cited other actions by Judge Fields that allegedly indicated lack of impartiality. Mother pointed to the impromptu April 10, 2013 telephonic hearing on Father's motion for tutoring, in which the trial court denied Mother an opportunity to respond to Father's motion, Mother's request to have a court reporter present, and Mother's request for an evidentiary hearing; the trial court then granted Father's motion. Mother also noted that, at the parenting hearing, Judge Fields reviewed certain psychological records of the

parties' son *in camera* and may have relied on those documents in making her ruling, but nevertheless denied Mother's request to examine the same records.

> FN10. The original motion to recuse was not submitted with Mother's petition for appeal, but Mother indicates that the amended petition includes the same arguments as in the original petition, with a few additions.

The motion to recuse was set for hearing on September 6, 2013. Father filed a motion for a continuance, which was heard on September 4, 2013. The trial court granted the continuance but did not set a new hearing date at that time. [FN11]

> FN11. Not long after that, Judge Fields was absent for several weeks on medical leave.

On October 11, 2013, Mother filed an amended motion to recuse. The amended motion included the same arguments as the original motion. Mother submitted 22 exhibits and unpublished authorities in support of the motion.

The amended motion to recuse also included the results of an anonymous survey commissioned by Mother for purposes of her motion to recuse, supposedly showing that the sampling of the general public in the survey perceived the trial court's actions as inappropriate.[FN12] Father filed a response to the Mother's amended motion to recuse, and the GAL filed a response to Mother's motion to excuse the GAL from the case. Mother filed a reply and an amended reply to the responses.

> FN12. The survey posed a hypothetical scenario purporting to be the facts in this case, and asked the survey participants whether the judge's actions were appropriate and whether the judge should continue to preside over the case in question. According to the survey, 89.3% of those surveyed concluded that the trial judge "made improper communications," and that "another judge should hear the rest of the case."

On November 12, 2013, the GAL filed documents in support of her response to Mother's motion to excuse the GAL from the case. The GAL filed her own affidavit averring that the April 16, 2013 communications between her office and Judge Fields' office were "administrative in nature" and that "the topic had been presented to the Court in testimony of the parties." The GAL said that she had "not witnessed anything that would make me question Judge Fields' impartiality," and that granting the motion to recuse would cause further undue delay in resolution of the case. Attached to the GAL's affidavit were (1) an affidavit of the GAL's secretary, Theresa Lamb; (2) pre-bills indicating Ms. Lamb's entry for time spent addressing the court's question; (3) a handwritten note from Ms. Lamb to the GAL; and (4) a copy of a text message between the GAL and Ms. Lamb. The attachments were submitted to support the GAL's assertion that the communications between Judge Fields' office and Ms. Lamb were only about the existence of a pool at the Three Doves property, and that the communications were merely administrative because the parties had testified to the relevant facts at the hearing.

***5** Also on November 12, 2013, the parties appeared for a hearing on Mother's Amended Motion to Recuse. Judge Fields declined to hear oral argument and told the parties that she intended to promptly issue a written ruling.

On November 19, 2013, Judge Fields entered a written order denying Mother's motion to recuse. In the order, Judge Fields first noted that the subject of whether there was a pool at either of the parties' homes was explored in the testimony presented at the parenting hearing. Judge Fields then explained that she could not locate notations on the testimony about that

issue in her notes on the evidence presented at the hearing:

> Included in the proof at trial was the fact that Mother disapproved of Father's purchase of a houseboat. Her reason was that two of their children could not swim. Mother's anger at Father's purchase of a boat because it endangered the children raised in the Court's mind the question of whether either parent's home had a pool as the Court recalled some testimony about a pool but could not find a reference in her notes. As previously stated, the testimony in this case required fifteen days of trial and eventually generated a 4,000 page transcript.
>
> The question of a pool at the parents' homes had been addressed at least once in the proof at trial. (Transcript p. 2261, l. 4, hearing on January 9, 2013), but the Court could not find a reference in her trial notes to the testimony concerning whether either parent's home had a pool. The Court had her courtroom clerk call the Guardian ad Litem's office solely concerning whether there was a pool at the Mother's home, and then a call to see if there was a pool at the Father's home. The answer came back that neither home had a pool, but there was a pond at the Mother's home.

Thus, Judge Fields acknowledged telephone calls between her staff and the GAL, but said that they were simply to "double check" Judge Fields' recollection of the testimony on the existence of a pool.

In the order denying Mother's motion to recuse, Judge Fields also observed, "Regardless of which counsel the Court had contacted, the answer would have been exactly the same—that there was no pool at Mother's house (but there is a pond), and that there is no pool at Father's house." She indicated that the GAL's response to her questions merely confirmed Judge Fields' recollection of the testimony on the existence of a pool and "added no new fact to this matter." Judge Fields asserted that the telephone calls "did not concern anything that had any substantive bearing on the custody ruling" and "gave no party any advantage."

Judge Fields' order concluded that the facts did not impugn her impartiality and did not require recusal. To require recusal, Judge Fields reasoned, "[t]he alleged bias or prejudice must come from something other than the facts the judge has learned during the case under consideration," and the judge's conduct must demonstrate bias or prejudice when viewed under an objective standard. Judge Fields explained:

> ***6** The Court's clerk made phone calls to the Guardian ad Litem to help the Court administratively marshal the Court's notes while working on a ruling. Tennessee Supreme Court Rule 10, Rule 2.9, recognizes that ex parte contact is permitted for such administrative matters, when the judge reasonably believes that no party will gain procedural, substantive, or tactical advantage as a result of the ex parte communication. That is the case here. Rule 2.9 further requires that the judge promptly notify all other parties of the substance of the ex parte communication and give the parties the opportunity to respond. No substance was discussed. Since the topic was irrelevant to the Court's ruling, there was nothing for any party to respond to, nor would any response be any different at all on the fact reported by the Guardian ad Litem. The phone calls did not touch on the merits of the case. The phone calls are no evidence of any bias or pre-judging of the case.

Judge Fields commented that Mother's motion for recusal could be read to insinuate that Judge Fields may have elicited a bribe during the *ex parte* phone calls, and she pointed out that Mother offered no evidence to support this insinuation. Judge Fields held that Mother's due process rights were not violated, and she rejected Mother's other arguments in support of her claims of bias. Judge Fields commented: "Adverse

rulings ... are not usually sufficient grounds for recusal."

Mother filed this interlocutory appeal as of right from the trial court's order denying the motion to recuse pursuant to Rule 10B of the Tennessee Supreme Court Rules. Tenn. S.Ct. R. 10B ("Rule 10B"), § 2.01. On December 16, 2013, Judge Fields entered an order *sua sponte* to stay the trial court proceedings pending the outcome of this appeal. *See id.* § 2.04.

APPEALS UNDER RULE 10B

Rule 10B authorizes an aggrieved party to file "an accelerated interlocutory appeal as of right" from an order denying a motion to recuse or to disqualify the trial court judge.[FN13] *Id* § 2.01. Under Rule 10B, the appellant must file, along with the petition, "copies of any order or opinion and any other parts of the record necessary for determination of the appeal." *Id.* § 2.03. The appellate court may order the other parties to answer the appellant's petition and file any necessary documents, but it is also authorized to adjudicate the appeal summarily, without an answer from other parties. *Id.* § 2.05. In this case, Father responded to Mother's appeal and filed copies of additional documents from the trial court proceedings in support of his position that the trial court correctly denied the motion to recuse. We emphasize that the only issue before the Court in this appeal is whether the trial judge erred in denying Mother's motion to recuse. *See McKenzie v. McKenzie*, No. M2014–00010–COA–T10B–CV, 2014 WL 575908, at *1 (Tenn.Ct.App. Feb.11, 2014); *In re Bridgestone Corp.*, No. M2013–00637–COA–10B–CV, 2013 WL 1804084, at *1 (Tenn.Ct.App. Apr.26, 2013), *perm. app. denied* (Tenn. June 11, 2013). In accordance with Rule 10B, we review the trial court's recusal decision "upon a *de novo* standard of review."[FN14] Rule 10B, § 2.06. The party seeking recusal bears the burden of proof, and "any alleged bias must arise from extrajudicial sources and not from events or observations during litigation of a case." *McKenzie*, 2014 WL 575908, at *3. "If the bias is alleged to stem from events occur[r]ing in the course of the litigation of the case, the party seeking recusal has a greater burden to show bias that would require recusal, *i.e.*, that the bias is so pervasive that it is sufficient to deny the litigant a fair trial." *Id.*

FN13. Section 2.01 provides:

> If the trial court judge enters an order denying a motion for the judge's disqualification or recusal, or for determination of constitutional or statutory incompetence, an accelerated interlocutory appeal as of right lies from the order. The failure to pursue an accelerated interlocutory appeal, however, does not constitute a waiver of the right to raise any issue concerning the trial court's ruling on the motion in an appeal as of right at the conclusion of the case. The accelerated interlocutory appeal or an appeal as of right at the conclusion of the case shall be the exclusive methods for seeking appellate review of any issue concerning the trial court's denial of a motion filed pursuant to this Rule.
>
> Rule 10B, § 2.01.

FN14. Prior to the adoption of Rule 10B, which became effective July 1, 2012, our standard of review for all recusal orders was the abuse of discretion standard. *See State v. Hines*, 919 S.W.2d 573, 578 (Tenn.1995). Under Section 2.06 of Rule 10B, we apply a *de novo* standard of review in Rule 10B appeals.

ANALYSIS

***7** In general, Mother argues that Judge Fields erred in refusing to recuse herself after she initiated *ex parte* communications with the GAL to seek out prejudicial information against Mother. Mother also contends that, both before and after the *ex parte*

communications, Judge Fields allegedly demonstrated "a continued display of bias and hostility toward Mother and her counsel." [FN15]

FN15. On January 24, 2014, Father filed a motion with this Court to strike Mother's reply brief in this appeal. He argues that a reply brief is not permitted under Rule 10B. We agree that Rule 10B does not specifically authorize the appellant in a Rule 10B to file a reply brief, so Mother should have sought leave from this Court before filing her reply brief. Nevertheless, we exercise our discretion to allow the reply brief and have considered the arguments in Mother's reply brief in this appeal. Accordingly, Father's motion to strike is hereby denied.

We briefly review the Rules of Judicial Conduct on which Mother relies. RJC 2.11 requires recusal "in any proceeding in which the judge's impartiality might reasonably be questioned," including any situation in which "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding." This is consistent with the more general RJC 1.2, which directs judges to "act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary" and to "avoid impropriety and the appearance of impropriety." RJC 2.9 governs any *ex parte* communications that may take place between a judge and the parties to the litigation or their attorneys.[FN16]

FN16. The Rule provides:

> (A) A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:
>
> (1) When circumstances require it, *ex parte* communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
>
> (a) the judge reasonably believes that no party will gain procedural, substantive, or tactical advantage as a result of the *ex parte* communication; and
>
> (b) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication, and gives the parties an opportunity to respond.
>
> (2) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties a reasonable opportunity to respond to the advice received.
>
> (3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.
>
> (4) [Intentionally omitted]
>
> (5) A judge may initiate, permit, or consider any *ex parte* communication when expressly authorized by law to do so.

> (B) If a judge receives an unauthorized *ex parte* communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.
>
> (C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.
>
> (D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.
>
> RJC 2.9.

***Ex Parte* Communications With the GAL**

The facts surrounding Mother's claims are largely undisputed.[FN17] The documents submitted by the parties on the *ex parte* communications are: (1) the April 16, 2013 entries in the GAL's fee bill; (2) the two affidavits filed by Mother describing the GAL's August 27, 2013 teleconference with counsel for Mother; (3) the GAL's email to counsel for Mother correcting her recollection of the April 16, 2013 communications; and (4) the GAL's affidavit filed on November 12, 2013, with attachments, indicating that the discussions were only on the existence of a pool at Mother's home and that this was an administrative task of confirming for Judge Fields facts already introduced into evidence at the parenting hearing. Excerpts from the transcript of the parenting hearing reveal that Judge Fields asked Mother directly at the hearing whether she had a pool, and Mother responded that she did not.

> FN17. Mother refers in her argument to "changing versions" of the *ex parte* communications. While there are a few variations on the facts, the variations are *de minimus* and make little difference to the analysis.

Overall, the documents submitted establish the following facts—that Judge Fields or a member of her staff called the GAL, the call was received by either the GAL or her secretary, Judge Fields or her staff member inquired about whether Mother had a pool at her residence, and the existence of a pool at Mother's residence was a fact about which Mother testified at the parenting hearing.[FN18] After that, either the GAL or the GAL's secretary contacted Father, but did not contact Mother, and the GAL or her secretary reported back to Judge Fields or her staff member that Mother's residence did not have a pool, but did have a pond.

> FN18. Judge Fields stated in her recusal order that she called the GAL to inquire about the pool situation at the homes of both Mother and Father. In contrast, the documents submitted with Mother's recusal petition indicated that the GAL described the inquiry as only about the "Three Doves property," Mother's home. We assume *arguendo* that Judge Fields' question for the GAL related to a pool only at Mother's home.

Mother argues vigorously that the trial court's *ex parte* investigation of Mother but not Father made it appear that Judge Fields was "seeking prejudicial information against Mother." The statement by Judge Fields in her recusal order that she sought information on the existence of a pool at the homes of *both* Mother and Father was an attempt to avoid the appearance of impropriety, Mother argues, and she notes that the GAL recalled that the trial court's question was as to Mother only. On these facts, Mother claims, Judge Fields' impartiality could reasonably be questioned, particularly given the timing of the *ex parte* communications. Prior to the communications, Mother claims, Judge Fields was predisposed to continue the

parties' unsupervised week-on/week-off parenting arrangement. After the *ex parte* communications, Judge Fields severely restricted Mother's parenting time. The timing of Judge Fields' decision, Mother argues, makes it appear as if the improper *ex parte* communications were "the basis for a radical change in the Trial Court's position, and did prejudice Mother." Petition at p. 11. Mother contends that "seeking prejudicial information against Mother, then departing from her prior parenting orders of week-to-week parenting time by placing Mother under restricted supervised visitation," created an appearance of impropriety and partiality toward Father that required the trial court to grant Mother's motion for recusal.

***8** Mother disputes Judge Fields' characterization of the communications with the GAL as "administrative" within the meaning of RJC § 2.9. But even if the communications were administrative, Mother points out, RJC § 2.9 says they are permitted only if the parties are given an opportunity to respond, which was not done in this case. Under all of these circumstances, Mother urges this Court to conclude that Judge Fields violated several Rules of Judicial Conduct, that her actions created an appearance of impropriety and partiality toward Father, and that Judge Fields erred in declining to recuse herself from this case.

In deciding whether to recuse from a matter based on partiality, the Tennessee Supreme Court has explained that a judge must apply both a subjective test and an objective test:

> Motions for recusal call into question the integrity of the judicial process and require serious and careful consideration. Persons appearing in Tennessee's courts have a fundamental right to have their cases heard and decided by fair and impartial judges. *Bean v. Bailey,* 280 S.W.3d 798, 803 (Tenn.2009); *Chumbley v. People's Bank & Trust Co.,* 165 Tenn. 655, 659, 57 S.W.2d 787, 788 (1933). This right "guard[s] against the prejudgment of the rights of litigants and [assists in] avoid[ing] situations in which the litigants might have cause to conclude that the court ... reached a prejudiced conclusion because of interest, partiality, or favor." *State v. Austin,* 87 S.W.3d 447, 470 (Tenn.2002) (appendix).
>
> To protect this right, Article VI, Section 11 of the Constitution of Tennessee states that judges should not preside over trials in which they "may be interested." Likewise, Tenn. Sup.Ct. R. 10, Canon 2(A) states that judges "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Accordingly, Tenn. Sup.Ct. R. 10, Canon 3(E)(1) admonishes that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."
>
> *In re Hooker,* 340 S.W.3d 389, 394–95 (Tenn.2011), *quoted in Camp v. Camp,* 361 S.W.3d 539, 547 (Tenn.Ct.App.2011). In *Bean v. Bailey,* cited in *In re Hooker,* the Court emphasized the objective standard:
>
> > We have held that a recusal motion should be granted when "the judge has any doubt as to his or her ability to preside impartially in the case" or " 'when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality.' " *Davis,* 38 S.W.3d at 564–65 (quoting *Alley v. State,* 882 S.W.2d 810, 820 (Tenn.Crim.App.1994)). Even if a judge believes he can be fair and impartial, the judge should disqualify himself when " 'the judge's impartiality might be reasonably questioned' " because "the appearance of bias is as injurious to the integrity of the judicial system as actual bias." *Id.* (quoting Tenn. Sup.Ct. R. 10, Canon 3(E)(1)).

***9** *Bean v. Bailey,* 280 S.W.3d 798, 805 (Tenn.2009). Thus, to preserve the integrity of the judicial system, if a person of ordinary prudence in the judge's position, knowing all of the facts known to the

judge, might reasonably question the partiality of the judge, then the judge must recuse himself.

While the words "bias" and "prejudice" are central to a determination on recusal, neither term is defined in Tennessee caselaw as it relates to recusal. *Alley v. State,* 882 S.W.2d 810, 821 (Tenn.Crim.App.1994). The terms generally refer to an attitude or state of mind that predisposes a judge for or against a party. *Id.* (citing 46 Am.Jur.2d "Judges" § 167 (1969)); *see also McKenzie,* 2014 WL 575908, at *3. Not every bias, partiality, or prejudice requires recusal: "To disqualify, prejudice must be of a personal character, directed at the litigant, 'must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from ... participation in the case.' " *Alley,* 882 S.W.2d at 821 (quoting *State ex rel. Wesolich v. Goeke,* 794 S.W.2d 692, 697 (Mo.App.1990)).

The sole issue in this appeal is recusal. We need not determine whether the *ex parte* communications constitute a violation of RJC 2.9, only whether they mandate Judge Fields' recusal in this case.[FN19] Generally, an *ex parte* communication requires recusal only where it creates an appearance of partiality or prejudice against a party so as to call into question the integrity of the judicial process. *See Johnson v. Johnson,* No. M2002–00354–COA–R3–CV, 2003 WL 61249, at *4–5 (Tenn.Ct.App. Jan.9, 2003) (although notice was not given to mother's counsel about administrative consultation between trial judge and father's counsel, the overriding issue was whether the judge's conduct created appearance of partiality); *Malmquist v. Malmquist,* 415 S.W.3d 826, 839–40 (Tenn.Ct.App.2011) (upholding trial judge's denial of motion to recuse because "the record does not indicate any bias on the part of" the trial judge); *see also Powhatan Cemetery, Inc. v. Colbert,* 104 Ark. App. 290, 292 S.W.3d 302, 309–10 (Ark.Ct.App.2009) (holding that trial court's *ex parte* discussions with counsel for appellees was not grounds for recusal because movant did not demonstrate bias); *Comiskey v. District Ct. In and for County of Pueblo,* 926 P.2d 539, 544 (Colo.1996) (*en banc,* noting that "the mere allegation that a judge engaged in an *ex parte* communication is not enough to require recusal" and that "[t]he petitioner must also allege facts sufficient to infer that the judge is or appears to be biased"); *State v. Lotter,* 255 Neb. 456, 586 N.W.2d 591, 610 (Neb.1998) (holding that "not all *ex parte* communications subject a judge to recusal" and "a trial judge must recuse himself or herself only when the *ex parte* communication poses a threat to the judge's impartiality").

> FN19. On February 18, 2014, Mother filed a motion to supplement her Rule 10B recusal appeal and to consider postjudgment facts, asking this Court to consider the documents filed and circumstances surrounding Mother's complaint to the Tennessee Board of Judicial Conduct. As this information is not pertinent to the issue in this appeal, Mother's motion is hereby denied.

In the case *sub judice,* despite a surfeit of innuendo, we find no *facts* in the record to support Mother's argument that the *ex parte* communications mandate Judge Fields' recusal. The transcript of the parties' parenting hearing was indeed voluminous. The facts indicate that Judge Fields was unable to locate her notes on the parties' testimony on a minor fact, tangential to the primary issue before the trial court, so she or her office contacted the GAL's office to clarify Judge Fields' recollection of the testimony.[FN20] That is all. Mother has presented no facts indicating that the subject of the communications was anything other than what Judge Fields said it was. A claim of bias or prejudice must be based on facts, not speculation or innuendo; Mother "must come forward with some evidence" to support her assertions of bias or partiality. *Eldridge v. Eldridge,* 137 S.W.3d 1, 7 (Tenn.Ct.App.2002) (quoting *Davis v. Tenn. Dep't of Employment Sec.,* 23 S.W.3d 304, 313 (Tenn.Ct.App.1999)); *see Todd v. Jackson,* 213

S.W.3d 277, 282 (Tenn.Ct.App.2006); *see also Walker v. People*, 126 Colo. 135, 248 P.2d 287, 295 (Colo.1952) (*en banc*, holding that "[s]uspicion, surmise, speculation, rationalization, conjecture, innuendo, and statements of mere conclusions of the pleader may not be substituted for a statement of facts"). Mother has failed to do so.[FN21]

FN20. The GAL's decision to contact Father's counsel on whether Mother had a pool at her residence has no bearing on whether Judge Fields erred in denying Mother's motion for recusal. Mother's motion to excuse the GAL is not at issue in this Rule 10B appeal.

FN21. Respectfully, the survey commissioned by Mother's counsel for this appeal has no probative value. Mother seeks to submit what is essentially evidence in the form of an opinion poll of anonymous members of the public on application of the "person of ordinary prudence" standard to the issue in this case. In recusal matters, the trial judge, and the appellate court on appeal, are to determine whether a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality. *Bean v. Bailey*, 280 S.W.3d 798, 805 (Tenn.2009). This is not done by opinion poll. Therefore, we decline to consider either the survey or its results.

***10** Mother argues that the timing of the *ex parte* communications gives the impression that they influenced Judge Fields' decision on parenting issues. There is a difference, however, between an inference from facts on one hand, and insinuation based on mere speculation on the other. Mother's argument falls into the latter category. Again, all of the evidence in this record shows that the *ex parte* communications were only about whether Mother had a pool at her residence. Mother has presented no evidence to support any other conclusion. In the context of this case, whether Mother had a pool is inconsequential. The trial court's comprehensive parenting order states clearly that the trial court's decision was based on evidence that Mother had engaged in long-standing, insidious, emotional abuse of Daughter; not whether Mother had a pool or a pond.[FN22] *See Clinard v. Blackwood*, 46 S.W.3d 177, 187 (Tenn.2001) (with respect to disqualification of an attorney, suspicion of impropriety cannot be fanciful or unrealistic, the appearance of impropriety must be real; it is the "objective perception rather than the subjective and 'anxious' perceptions of the litigants that govern").

FN22. In a Rule 10B appeal such as this, we do not evaluate whether the trial court's parenting order was erroneous. As discussed below, that issue is for an appeal on the merits.

For these reasons, we must reject Mother's argument that the *ex parte* communications between Judge Fields and the GAL created an appearance that Judge Fields is biased, prejudiced, or partial to Father.

Continued Display of Bias and Hostility

Mother also claims that, when combined with the improper *ex parte* communications, Judge Fields' "continued display of bias and hostility toward Mother and her counsel" mandated her recusal. In support, Mother contends that Judge Fields engaged in the following allegedly biased and hostile acts:

- conducted a "surprise" hearing on April 10, 2013, on Father's motion to require tutoring and denied Mother's request for a court reporter and an evidentiary hearing;

- used Mother's statements at the April 10, 2013 hearing to severely restrict Mother's parenting time;

- refused Mother's request to review the GAL's offer of proof, which consisted of a son's psychological records, and then relied on those records to restrict Mother's parenting time with Daughter;

- misstated facts and issues in the recusal order that were not germane to Mother's motion for recusal.

We dispatch with this argument. Consistent adverse rulings against a party may provide the impetus for the maligned party to wish for another trial judge. They do not, however, provide a basis for requiring the trial judge's recusal from the case. Adverse rulings, "even if erroneous, numerous and continuous, do not, without more, justify disqualification." *Duke v. Duke,* 398 S.W.3d 665, 671 (Tenn.Ct.App.2012) (quoting *Alley,* 882 S.W.2d at 821). "If the rule were otherwise, recusal would be required as a matter of course since trial courts necessarily rule against parties and witnesses in every case, and litigants could manipulate the impartiality issue for strategic advantage, which the courts frown upon." *Id.* (quoting *Davis v. Liberty Mut. Ins. Co.,* 38 S.W.3d 560, 565 (Tenn.2001)); *see also State v. Cannon,* 254 S.W.3d 287, 308 (Tenn.2008); *Owens v. State,* 13 S.W.3d 742, 757–58 (Tenn.Crim.App.1999). In a case not unlike this one, the appellate court observed:

> ***11** No doubt [the mother] would like to have a different judge take over this case, since she has seen her court-mandated time with her daughter steadily reduced. But adverse rulings by a trial court are not in themselves sufficient grounds to establish bias. *Herrera v. Herrera,* 944 S.W.2d 379 (Tenn.Ct.App.1996). Also, where a court has been involved in a case for a very long time, recusal is not favored because of the expense and difficulty of starting over. *Dunlap v. Dunlap,* 996 S.W.2d 803 (Tenn.Ct.App.1998).

Johnson, 2003 WL 61249, at *5.

It is not lost on this Court that, in the face of adverse rulings, Mother twice unsuccessfully sought permission for interlocutory appeal and then seized upon a relatively minor transgression to insist that Judge Fields was obliged to recuse herself. The pleadings and documents submitted in support of this appeal are voluminous.[FN23] After the Court sifted through the mountain of paper, it appears that most of Mother's argument centers on matters that are more appropriate for the eventual appeal on the merits, not a Rule 10B appeal. This Court will not permit parties to litigate an appeal of the merits under the guise of a Rule 10B appeal on recusal.

> FN23. The volume of materials filed with respect to this appeal undermines the intent under Rule 10B for an accelerated appeal only on the limited issue of recusal.

Accordingly, we affirm the trial court's denial of Mother's Amended Motion to Recuse.

Attorney Fees

vOn appeal, Father asks this Court for an award of attorney fees for his defense against Mother's motion to recuse in the trial court and also for his defense in this appeal.

Father cites no authority for his request that this Court award him attorney fees for the trial court proceedings on recusal. Father should direct any such request to the trial court; we decline to consider it.

As to Father's attorney fees for this appeal, "[a]n award of appellate attorney's fees is a matter within this Court's sound discretion." *Chaffin v. Ellis,* 211 S.W.3d 264, 294 (Tenn.Ct.App.2006) (citing *Archer v. Archer,* 907 S.W.2d 412, 419 (Tenn.Ct.App.1995)). In adjudicating a request for attorney fees incurred on appeal, we consider the requesting party's ability to pay such fees, the party's success on appeal, whether the appeal was sought in good faith, and any other relevant equitable factors. *Id.* (citing *Darvarmanesh*

v. Gharacholou. No. M2004–00262–COA–R3–CV, 2005 WL 1684050, at * 16 (Tenn.Ct.App. July 19, 2005)). Exercising our discretion, we decline to award Father his attorney fees incurred in this appeal.

CONCLUSION

The decision of the trial court is affirmed and the cause is remanded for further proceedings consistent with this Opinion. Costs on appeal are to be taxed to Appellant [redacted] and her surety, for which execution may issue if necessary.

Tenn.Ct.App.,2014.

[redacted]

Slip Copy, 2014 WL 1285729 (Tenn.Ct.App.)

END OF DOCUMENT

The Governor's Council for Judicial Appointments

State of Tennessee

Exhibits to Application of Kimbrough Brown Mullins

Exhibit to Question No. 23

IN THE CHANCERY COURT OF TENNESSEE FOR THE
THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

THE STATE OF TENNESSEE in its
own behalf and for the use and benefit
of SHELBY COUNTY and if applicable,
THE CITY OF MEMPHIS, TENNESSEE,
THE INCORPORATED MUNICIPALITIES OF
OF ARLINGTON, BARTLETT, COLLIERVILLE,
GERMANTOWN, LAKELAND,
AND MILLINGTON, TENNESSEE,

Plaintiffs,

vs.

T.R.D. No. 9492-1
Parcel 065-0370-0-00022-0

DELINQUENT TAXPAYERS as shown on the
2011 Real Property Delinquent Tax Records of
the Shelby County Trustee,

Defendants.

ORDER SETTING ASIDE JUDGMENT AND DISMISSING
AS TO DEFENDANT, MULLINS COLONIAL PARTNERS, LLC FOR PARCEL
065-0370-0-00022-0

This cause came on to be heard before the Honorable Walter L. Evans, Chancellor of Part I of the Chancery Court of Tennessee for the Thirtieth Judicial District at Memphis, upon the statement of Gregory S. Gallagher, Shelby County Delinquent Tax Attorney, it satisfactorily appearing to the Court that the Plaintiffs in this cause desire to dismiss with prejudice this specific cause of action against Mullins Colonial Partners, LLC as to parcel number 065-0370-0-00022-0.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1.. That this specific cause of action for parcel 065-0370-0-00022-0 as to the Defendant, Mullins Colonial Partners, LLC , is dismissed with prejudice.

WALTER L. EVANS

CHANCELLOR WALTER L. EVANS

Date: 8/21/2014

Approved:

Gregory S. Gallagher 007274
Shelby County Delinquent Tax Attorney
659 Freeman
Memphis, Tennessee 38122
901-327-4243

A TRUE COPY-ATTEST
Donna L. Russell, Clerk & Master
By _____ D.C. & M.

CERTIFICATE OF SERVICE

I, Gregory S. Gallagher, do hereby certify that a copy of this document was mailed postage prepaid U. S. mail to Mullins Colonial Partners, LLC at its mailing address 668 Colonial Road, Suite 1 Memphis, Tennessee 38117 this 22 day of August 2014.

Gregory S. Gallagher

The Governor's Council for Judicial Appointments

State of Tennessee

Exhibits to Application of Kimbrough Brown Mullins

Exhibit to Question No. 34

IN THE COURT OF APPEALS OF TENNESSEE
FOR THE WESTERN DISTRICT AT JACKSON

(S.D.R.),	)	
Plaintiff/Appellee,	)	
VS.	)	**No. W 2013-01586-COA-R10-CV**
(M.F.R.),	)	
Defendant/Appellant.	)	

ANSWER OF APPELLEE (S.D.R.) IN OPPOSITION TO APPLICATION OF APPELLANT (M.F.R.) FOR EXTRAORDINARY APPEAL BY PERMISSION PURSUANT TO TENN. R. APP. P. 10 AND MOTION FOR STAY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

THE NAMES OF THE PARTIES AND THEIR CHILDREN ARE REDACTED BECAUSE THE CASE IN THE TRIAL COURT IS UNDER SEAL.

Kimbrough B. Mullins
668 Colonial Road, Suite 1
Memphis, Tennessee 38117
(901) 527-2000

Charles M. McGhee
530 Oak Court Drive, Suite 355
Memphis, Tennessee 38117
(901) 821-0044

Counsel for Appellee, (S.D.R.)

TABLE OF CONTENTS

INTRODUCTION

Comes now the Appellee, (S.D.R.) ("Father") and hereby responds to, and answers, in opposition to the Application for Extraordinary Appeal and Motion for Stay filed in this cause by Appellant, (M.F.R.) ("Mother"), as follows. Appellant Mother seeks extraordinary review of the Trial Court's Ruling requiring supervision of her parenting time with the parties' minor daughter. The Trial Court's Ruling[1], in part, stated the following:

> "An ordinary, happy childhood for this child, "Child", is in question at this point. However, this Court believes that the only hope for this child to have a normal life, will occur by being placed in the custody of her father with her mother having limited supervised visitation until significant psychological assistance can be completed. The Court is aware that problems may arise in "Child"'s behavior as a result of this Court's ruling. However, this Court is called upon to do what is in the best interest of this child and to determine the comparative fitness of each parent.
>
> The mother shall have visitation supervised at the Exchange Club Family Center for up to two hours per week until Dr. Catherine Collins and mother's psychologist of choice report to the Court that mother recognizes and has corrected her destructive behavior. Until the Court sees evidence that "Child" will be positively parented, the visitation shall occur at the Exchange Club Family Center in the presence of a psychologist or social worker. (R. 30)
>
> ...This matter will be reviewed every six (6) months." (R. 29)

Also, in the Court's June 10, 2013 Ruling Addendum it stated:

> "I found, from all the proof, that the destructive influence and emotional abuse (i.e. by Mother of the children) was of long standing etiology and insidious in nature....this was a long-standing and continuing danger of the former psychological and emotional abuse by Ms. (M.F.R.) toward her children, specifically "Child"...This Court determined that "Child" needed to be removed from the destructive behavior that was harming her. This Court found that "Child"'s best interests required such removal. (Ruling Addendum, pp.3, l. 17-21; 4, l. 13-17)

[1] The Trial Court's Ruling which is entitled "Findings of Fact and Conclusions of Law" is found at Exhibit 7 to Appellant's "Appendix to Application of (M.F.R.) for Extraordinary Appeal by Permission Pursuant to Tenn. R. App. P 10 and Motion for Stay of Findings of Fact and Conclusion of Law" (hereinafter "Appellant's Appendix) and shall be referred to herein as "R." followed by a page number. In addition, the court made an addendum to its decision in an oral ruling from the bench on June 10, 2013, the transcript of which is Exhibit 9 to the Appellant's Appendix and shall be referred to herein as "Ruling Addendum."

Mother seeks to have this Honorable Court grant an extraordinary appeal because, she argues, that the Trial Court's Ruling departs from the accepted and usual course of judicial proceedings so as to require immediate review under T. R. App. P. Rule 10[2]. Appellee Father respectfully disagrees and submits that the Trial Court's ruling in this matter was issued with absolute clarity, complied with the Trial Court's responsibilities under the law of this State, followed the accepted and usual course in the application of the law in hearing and ruling on this matte and that Mother's Application for Extraordinary Appeal and Stay should be denied.

ISSUES IN OPPOSITION TO MOTHER'S REQUEST FOR EXTRAORDINARY APPEAL

1. Issue: Is the subject matter of Mother's Application for T.R. App. P Rule 10 Appeal Appropriate for Extraordinary Review?

> Appellee's Response: No. A case involving an interim order on visitation is not the type of subject matter which is contemplated by T.R. App. P. Rule 10 as it does not affect a right or interest that may never be recaptured.

2. Issue: Does the detailed 33 page Ruling of the Trial Court which set forth the Trial Court's numerous reasons for its order of supervision of Mother's visitation with the minor child constitute a "failure to proceed according to the essential requirements of the law" or constitute "plain and palpable abuse of discretion" justifying extraordinary appeal?

> Appellee's Response. No. The Trial Court's Rulings shows on its face that it was made by the Trial Court with consideration of all relevant legal authority, and with application of clear and definite factual evidence. Evidence was adduced in a fifteen (15) day trial that consisted of the testimony of numerous fact witnesses, including testimony of the child's treating psychologist, an expert witness and the agreed upon, Court Appointed forensic psychologist who prepared a Child Custody and Parental Access Evaluation and whose opinion and conclusions, after extensive investigation of the matter, were that Mother's

[2] Mother filed a Motion in the Trial Court requesting a T. R. App. P Rule 9 interlocutory appeal which was denied. The Court's Ruling was given on May 17, 2013 and Mother's Motion for Rule 9 Interlocutory Appeal was filed on the same day and was argued and ruled on by the Trial Court on May 22, 2013. In her Application, Mother in appropriately states that at the hearing of the Motion for Rule 9 Interlocutory Appeal that " counsel for Mother attempted to present an affidavit ...and The Trial Court refused to accept the affidavit." (Application p. 6) No affidavit was tendered to Father's counsel at that hearing nor tendered as any sort of offer of proof. Appellee objects to Mother's Counsel's reference thereto when same is not part of any record in this cause and Appellee's counsel has never seen same.

emotional abuse of the children had caused, and continued to cause, significant and serious psychological harm to them.

3. Issue: Is Mothers argument valid that the Trial Court's decision to bifurcate the children's issues from the financial issues in this cause disadvantaged her in depriving her of her right to be heard in this Court sooner, when such bifurcation was not only completely within the sound discretion of the Trial Court to order same, but also, which bifurcation was never objected to by Mother's Counsel?

Appellee's Response: No. Mother's objection to the bifurcation cannot be raised for the first time on Application to this Court. Mother's argument that she has been denied a Rule 3 Appeal is not accurate. The remaining issues in this divorce case are set to be tried on November 4, 2013. Thereafter, Mother may have an appeal of any and all issues that she cares to raise before this Court pursuant to Rule 3 of the T. R. App. P. Mother is not being "deprived of time with her daughter that will never be recaptured" as she is currently visiting her daughter at the Exchange Club Family Center and has visited with her on July 13, 24, 27, August 3 and 10, with future weekly visits scheduled.

4. Issue: What practical considerations would affect this cause if a Rule 10 appeal were granted?

Appellee's Response: The remainder of the trial is set on November 4, 2013 and the 6 month review of Mother's progress on parenting issues is eligible as early as October 17, 2013. This appeal cannot be effectively expedited due to the size of the record, without significant sacrifice of the flavor and nuance of the proof heard by the Trial Court. Further, counsel for the parties must direct attention to completing this trial as scheduled in November, 2013 as the matter will have been pending two and one half years at that time. Rule 3 appeal of the Court's Final Decree of Divorce can be available to Mother within the next 3-4 months if the remainder of the trial proceeds as currently scheduled by the Trial Court.

5. Issue: Should this Court impose a Stay on the operation of the Ruling as to supervised visitation when such Trial Court ruling was made with the express finding that such was necessary to protect the child from Mother's ongoing, insidious emotional abuse?

Appellee's Response: No. It is respectfully submitted that from a clear reading of the Trial Court's Findings of Fact and Conclusions of Law and the Oral Addendum to the above, it is patently clear that the Trial Court who observed the credibility of all evidence found that the supervision of Mother's interaction with the child was tantamount in protecting the child from Mother's emotional abuse.

Accordingly, it is respectfully submitted that staying the supervision of Mother's visitation would be harmful to the best interests of the child, "Child".

STATEMENT OF THE CASE AND OF THE FACTS NECESSARY TO UNDERSTAND WHY EXTRAORDINARY APPEAL SHOULD *NOT* LIE IN THIS CAUSE

STATEMENT OF THE CASE

The Complaint for Divorce was filed in this cause on April 18, 2011. As stated by Mother in her Application, the parties have three children. Father is the Primary Residential Parent and custodian of the two minor children, [Son Z] (17) and "Child" (just recently 10). At the time of the parent's separation, [Son Z] decided to live with Father with no objection from Mother. The parties also have an additional child, [Son B], age 18, who has recently graduated from high school and has aged out of the Trial Court's jurisdiction. [Son B] was found by the Trial Court to have been alienated from Father by the actions of Mother over the course of many years. (R. 5). Accordingly, "Child" was the subject of the proceedings in the Trial Court from which Mother asks for Extraordinary Appeal.

This child custody matter was heard over the course of 15 days.[3] 157 trial exhibits were marked, and 152 were admitted into evidence. The pretrial motions, order and other pleadings number more than 100. The witnesses were Mr. (S.D.R.), (hereinafter "(S.D.R.)" or "Father"); Mother, (hereinafter "(M.F.R.)" or "Mother"); Dr. Fred Steinberg (hereinafter "Dr. Steinberg") the court-appointed forensic psychologist (selected by consent of the parties) who conducted the "Child Custody and Parental Access Evaluation" (hereinafter called the "Evaluation") for the

[3] The trial of the matter started November 16, 2012 and occurred on November 16, all day on December 3, 4, 5, 6, all day on December 17 and 18, all day on January 7, 8, 9, 10, 14, 15, 16 and part of the day on January 17, 2013. The transcript is close to 4000 pages long.

family;[4] Dr. Catherine Collins (hereinafter "Dr. Collins") the treating psychologist for the minor children, "Child", then age 9 and [Son Z], age 17. Generally, Dr. Steinberg reported and testified for more than three days about Mother's emotional abuse of her family, her maladaptive, pathological personality disorder and the psychological damage which was occurring, and likely would continue to occur, to the children if Mother's behaviors were left unchecked. Dr. Collins also testified about observations from sessions with Reagan and her parents and family, and about concerns that were similar to those of Dr. Steinberg.

In addition, Mother called Dr. John Ciocca, the psychologist hired by Mother to try to discredit Dr. Steinberg's Evaluation, and Dr. John Leite, Mother's treating psychologist. There were two other fact witnesses. Mr. John Prince was a broker who assists (S.D.R.) Industries, Inc.[5] in buying its raw material and selling its finished product, and who observed Mother's bizarre and rage-filled conduct which occurred in front of the children.[6]

The other fact witness was rebuttal witness, Nikki Cochran (hereinafter "Ms. Cochran"), an employee of (S.D.R.) Industries who testified about an interchange that she had with Mother in late November 2012 while the trial of the matter was in progress.[7]

Prior to the trial there were numerous pretrial motions including the Father's request for a Guardian Ad Litem and Petition for Temporary Parenting Plan that were required to resolve parenting issues as they arose which are further discussed in later parts of this Answer.

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[4] For purposes of this Answer and for simplicity's sake, Dr. Steinberg's Evaluation contained in Appellant's Appendix No. 3 will be referred to as the "Steinberg Evaluation" with a page number as contained in that document without repeatedly noting that such is contained in Appellant's Appendix.

[5] (S.D.R.) Industries, Inc. is the company founded by Father and operated by him.

[6] Mr. Prince testified about Mother's excessive profanity, hostility and anger toward him and his family, specifically including an incident which occurred at the dock where Mr. Prince's and the [family]'s houseboats were located. During this incident Mother went into a rage that included telling Mr. Prince's children to leave the [family] boat, and throwing their shoes off the [family] boat in a way that the shoes fell in the water. (R. 8) See, infra, pp. 8, 35 of the Appellee's Answer for the details of John Prince's testimony.

[7] Ms. Cochran testified that, within seeing and hearing distance from "Child" and "Son B", Mother disparaged and mocked Father, criticized him as a parent, danced a "happy dance" that they would soon be divorced.

The remainder of the divorce matter is set for trial, by consent, on November 4, 2013.[8] The six month time period to return to the Trial Court for review of the visitation order falls in October, 2013.

STATEMENT OF THE FACTS

As set forth in Appellee's Introduction, the Trial Court based its Finding that Mother had inflicted emotional abuse and a destructive influence on her children. (Addendum to Ruling, p.3) and indeed, Mother's actions in this regard were found to be of a "insidious nature" and of "long standing etiology." (Addendum to Ruling, p. 3) The Trial Court noted that it was impracticable to "recount all of the incidents in the 4000 pages of the record." (R.13) Some, *but not all*, examples of findings made by the Court which support these conclusions were as follows:

1. The dramatic and devastating alienation of [Son B] from (S.D.R.) by Mother. (R.5)

2. Mother's use of her anger and bullying to create fear in "Child" and the rest of the family (R.12), including the vivid recording referred to by the Trial Court as the "rage tape" demonstrating Mother's irrational, seething rage and profane anger when she did not get her way. (R.8) Also, Mother's embarrassing and bizarre display of anger toward Father and his business associate, John Prince and Mr. Princes' young sons during an incident at the dock of the [family]'s houseboat. (R.8) The Trial Court found Mother "exhibited an explosive, excessively angry demeanor toward anyone with whom she disagreed" (R.14) Mother "cursed and yelled at her husband, her children, friends of the family, workers at the family plant, and others- often in the presence of her children;" and withdrawing "Child" from extracurricular

[8] The November 4, 2013 trial date is not exceptional pressure to Appellant as she claims, as this case will have been filed 2 ½ years as of November 4, 2013.

activities when she disagreed with the instructor (R. 14) (e.g. "Child"'s riding instructor, Poppy Doyle and dance instructor)

3. Mother's inappropriate degrading and disparaging Father to one of Father's employees right in front of "Child" and [Son B] while the trial was in progress (R.8-9) Mother's degrading Father and trying to instill baseless fear in the children about Father in the presence of both Dr. Steinberg and Dr. Collins. (R.9)

4. Mother's harsh discipline of the children by inappropriate and humiliating methods such as hog tying preschooler [Son Z] with belts, duct tape and other restraints and leaving him on the floor in such state, and making [Son Z] wear a hair bow on his head in public more than once because he was "a prideful child."(R.14)

5. Mother's stalking, intimidation and "omnipresence" For example, when "Child" was with Father, Mother came to Dr. Collins waiting room while "Child" had an appointment and sat taking pictures of Father (R.9), Mother driving 140 miles round trip to a horse auction venue the next day after "Child" and Father had gone there (R.15); Mother being so constantly present at the children's schools that she was asked (by the school) to curb her coming to have lunch with the children(R.14) and "appearing in places in which she was not expected." (R.15)

6. Mother's isolation of the children. For example, the Court stated that the proof "is very clear that Mother, until the trial in this matter in December of 2012 had kept her family isolated." (R.16) Other examples included keeping them needy and dependent and discouraging the children's social development. For instance, "Child" was not allowed to ride with other children to activities and "Child" never hosted nor attended a sleepover or had a play date prior to the trial. (R.16)

7. Mother's demonstrated lack of boundaries, and attempted enmeshment with "Child" by sleeping and bathing with the child. (R.7)

8. Mother's limiting and interfering with Father's parenting time with Reagan, for example, Mother's arbitrary interference with Father's Thanksgiving 2011 holiday plans with the children that had been discussed and agreed to by the parents in session with Dr. Collins prior to the holiday.[9] (R. 13) In another instance, Mother took "Child" out of town on Father's weekend anyway, even after Father had explicitly told her that he did not agree that he miss his parenting time or that "Child" go out of town because "Child" had important commitments to her basketball team that weekend and that she couldn't go.(R.12-13). The Court noted that this was "poor role modeling (by Mother) for a child in her developmental stage when she is hopefully learning responsibility and dependability." (R.13)

9. Mother's allowing excessive time to expire without helping "Child" get the educational assistance that she desperately needed (R.12), and Mother's failure to get "Child" appropriate tutoring, both prior to trial and after same (R.11)

10. Mother's trying to stop "Child"'s therapy with Dr. Collins when Dr. Collins suggested that "Child" needed to spend more time with Father. (R.11)[10]

It is fair to say that from the beginning of this divorce, Mother has been energetically manipulative and interfered in any way possible to prevent a close, loving relationship between "Child" and Father. By the time the parties separated and continuing during the time between

[9] See Father's Motion for Appointment Guardian Ad Litem Pursuant to Rule 40A of the Rules of the Tennessee Supreme Court, , Appellee's Appendix No. 1.

[10] After Mother was no longer scheduling the child with Dr. Collins, Father arranged to take Reagan to see Dr. Collins during his then Tuesday after school parenting time.

separation and the hearing, Mother had already accomplished the same thing in Father's relationship with [Son B].

Father requested the appointment of a Guardian Ad Litem, Attorney Lisa A. Zacharias was suggested by Mother's Counsel and appointed on January 6, 2012 by consent of the parties. By April, 2012, due to difficulties being experienced by the children, repeated episodes of interference by Mother with Father's parenting time and acts by Mother of alienation, stalking, omnipresence and other maladaptive behavior, Father filed a "Petition for Temporary Parenting Plan and for a T.R.C.P. Rule 35 Mental Evaluation.[11]" As a result of Father's filing of that Petition, Mother's counsel suggested, and the parties agreed, that instead of a Rule 35 mental status evaluation, a forensic psychological custodial evaluation should take place; and that Dr. Fred Steinberg should perform the evaluation. The parties entered into a Consent Order on May 14, 2012 appointing Dr. Fred Steinberg as the Court-Appointed Expert to perform such custodial evaluation. (See, Appellee's Appendix, No. 10, Affidavit of Dr. Fred Steinberg.)

Dr. Steinberg's "Child Custody and Parental Access Evaluation" dated August 23, 2012 was disseminated to the parties' counsel by agreement, with a court-ordered directive that the parties could read the Evaluation under the supervision of their respective counsel or their staff, but that the parties were not to have a copy of the Evaluation. Dr. Steinberg's Evaluation consisted of 43 pages of data he collected including, but not limited to, background history, a description of the conflict, notations of who was evaluated, what procedures were undertaken, what other data sources Dr. Steinberg used or interviewed, his interpretation of the psychological testing of the parents, and his summary and discussion of findings from his

[11] See Father's Petition for Temporary Parenting Plan and for a T.R.C.P. Rule 35 Mental Evaluation included in Appellee's Appendix No. 2.

interviews, behavioral observations, psychological testing data, pertinent observations and documentations divided into subsections that correlated with the statutory best interests of the child standards contained in T.C.A. §36-6-106, and sections entitled "Risk Factors" and "Recommendations." It should be noted that Dr. Steinberg's "Recommendations" were not those of specific provisions to be incorporated verbatim into a Permanent Parenting Plan or Court Order. Rather, they were psychological opinions, risk factors and considerations for the Trial Court to take in account in fashioning its Ruling.

Mother distorts Dr. Steinberg's Evaluation and testimony at trial in asserting that Dr. Steinberg did not recommend supervised visitation in the trial. The Court's attention is respectfully directed to the Affidavit of Fred Steinberg, Ph.D., included in Appellee's Appendix, No. 10. Therein, Dr. Steinberg indicates that he purposely did not set out specific terms to be incorporated into a Permanent Parenting Plan or Custody or Visitation Order, such as designating whether there should be supervised or unsupervised visitation because "such decision is sole that of the Court in this matter and in so specifying, I believe I would have exceeded the scope of my assignment by the Court." Id. He further indicates his data and opinions (including the observations he made by listening to the testimony of all the witnesses at trial) concur with the Judge's opinion that supervised visitation for Mother with the obtaining by her of "significant psychological work" to "correct her destructive behavior and inability to put her children before her disdain for her Husband" concurs with his data and opinions in this matter. Id.

For the year and a half before the hearing in this matter, Father made numerous efforts to have meaningful parenting time with the parties' minor child, "Child". These efforts were

thwarted at every turn by Mother. After getting the Guardian Ad Litem and Dr. Steinberg involved in the case, in May 2012, Father and Mother attended mediation for two days from which the only agreement obtained was an agreed Order with Mother to allow Father to have time with "Child" for a two-month period in the summer of 2012[12]. Mother's cooperation with Father in parenting together was all talk and posturing, but no meaningful action.[13]

As a result of a Pretrial Conference which occurred in May, 2012 the Trial Court set the divorce case for trial on November 5, 2012, by consent of counsel. However, in September, 2012 (after their receipt of Dr. Steinberg's Evaluation) Mother's counsel moved for a continuance of the trial date. At this point in the pretrial proceedings Father and the Guardian Ad Litem were both increasingly concerned about "Child"'s emotional status, school problems experienced by [Son B] and "Child", an inability to get "Child"'s Attention Deficit Disorder medications stabilized due to Mother's repeated trips to the pediatrician claiming "Child" was having side effects causing "Child"'s medications to be changed numerous times in the Late Fall 2011 and early winter 2012 the distance being created between "Child" and Father by Mother and Mother's interference with Father having parenting time significant enough to get these issues resolved for "Child". Having had no success at alternative ways of resolution, Father was desirous of the issues of custody and the continuing, pervasive emotional harm that "Child" was

[12] Appellant states in her Application for Rule 10 Appeal that alternating week parenting time began in Summer of 2012 and continued through trial suggesting that such was the agreed upon status quo that the parents thought was best for Reagan. Such statement is not accurate and its implication is distorted. The Consent Order on Summer Parenting Schedule entered into after 2 days of mediation dealt solely with the 85 day time period between May 24, and August 9, 2012 and during such time Mother had 47 overnights, or more than half. The aforesaid multipage consent order provided: "**Both parties agree and stipulate that their decision to enter into this agreement as to the summer parenting schedule shall not create any presumption for or against either party as to an appropriate regular parenting schedule during the school year.**" [Emphasis Supplied.] See, Consent Order on Summer Parenting Schedule, Para.V, p.5 at Appellant's Appendix No. 1. Further, at trial Collective Exhibit 36 was entered into evidence which consisted of an email from Father to Mother suggesting they continue weekly alternating parenting time until the matter could be resolved by mediation or the Court. Mother refused this by email and Mother's counsel forwarded a Proposed Permanent Parenting Plan proposing Mr. (S.D.R.) have "Child" on alternating weekend from Friday at 3 p.m. to Sunday at 3 p.m. (See Collective Trial Exhibit 36 contained in Appellee's Appendix, No. 5).

[13] The Trial Court found that Mother "is unable to co-parent the parties' daughter." (R. 13, R. 15)

experiencing from Mother to be heard by the Court at the soonest possible opportunity. The Court indicated that it did not wish to hear the same proof twice and set the issues pertaining to the children for November 16, 2012.

Since the issuance of the Trial Court's Ruling, Mother has already filed a Petition to Modify Visitation. In this Petition, Mother complains of the ineptitude of the Exchange Club when the beginning of the visits between Mother and "Child" were delayed primarily by the inaction of Mother in taking the steps necessary to get them started. In other words, immediately after the Ruling, instead of trying to see "Child" as soon as she could, Mother wasted several weeks of time trying to circumvent the Court's Ruling that the Supervision take place at the Exchange Club. Mother's allegations that the Court's Ruling prejudices her by virtue of the Exchange Club giving reasonable opportunities to visit with "Child" is a pure distortion of the real situation.

The supervised visits began on July 13, 2013. Mother has also visited with "Child" at the Exchange Club through the date of the filing of this Answer on July 24, 27, August 3 and 10. Currently pending in the Trial Court is Mother's "Petition to Modify Visitation" filed on July 10, 2013 in which she seeks removal of Dr. Collins, and shifting of the visitation supervision from the Exchange Club to another psychologist of Mother's selection, who is incidentally in the office of her treating psychologist, Dr. John Leite. (See, Appellee's Appendix No. 8 and 9: Mother's post trial Petition to Modify Visitation and Father's Response to Same.)

It is notable that other than Mother's own testimony regarding such behavior, Mother called no fact witnesses to countervail the testimony describing her misconduct by Father, Dr. Steinberg, Dr. Collins, Mr. Prince, Ms. Cochran, or any of the number of persons interviewed by

Dr. Steinberg as additional data sources for his Evaluation referred to in his Evaluation as the "Collateral Interviews." There was much testimony from Dr. Steinberg and Dr. Collins about "Child"'s "diagnosable anxiety" and it was not unreasonable for the Trial Court to conclude that "Child" is "afraid of her Mother's anger" (R. 10) and is made to feel "responsible for her Mother's emotional equilibrium, by telling her things that will satisfy her and prevent intense emotional displays [by Mother] (R. 28, citing Steinberg Evaluation p. 40)

Acknowledging that matters that come up after the proof was closed are not generally subject of appellate argument, Mother has brought post trial matters up in her Application[14], and Father must necessarily respond to same. Mother continues to work to circumvent the Rulings of the Trial Court and to fail at collaborating in the child's interests since the proof closed in this cause. During this time period, Mother has claimed that she was entitled to Spring Break 2013 even when the Trial Court stated during the trial that Father was to have same, requiring appearance before the Court for the Court to reiterate to her Counsel that Father was to have Spring Break 2013. In addition before the Trial Court's Findings of Fact and Conclusions of Law were issued, Father was required to file a Motion to Require Mother to Take "Child" to tutoring. Despite a large volume of proof at trial[15] about the significant difficulty that "Child" had in school during the 2012/2013 school year and the struggle Father experienced in trying to get Mother to cooperate with tutoring for the child, Mother requested that the Court have an evidentiary hearing to determine if this struggling student needed help by tutoring or not. (The Trial Court denied the request.) As noted above, at this time, there is also pending

[14] Application, p. 7; Appellant's Appendix No. 10, Affidavit of Mother

[15] The history of struggle by Father in trying to help Reagan with her educational issues is noted by the Trial Court in the Ruling at R. 11-12. Also, see, Father's Motion to Require Mother to take Child to Tutoring and Order on Same, Appellee's Appendix No. 6.

Mother's Petition to Modify Visitation pending in the trial Court and Father's Motion to Disqualify Mother's Therapist, Dr. Leite as a result of Dr. Leite's seeing [Son Z] in June 2013 without communication with or permission from Father for him to do so. [16]

The great weight of proof in this matter clearly demonstrates that Mother continues to have no insight into or care of the psychological damage she has done and is doing to "Child". Mother gave, and gives, the Trial Court no alternative but to supervise her access to the child.

Dr. Steinberg and the Evaluation

The court –appointed expert, Dr. Fred Steinberg, found that Mother has a mental disorder, that the effect of Mother's behaviors on the children was tantamount to "emotional abuse", [17] and indicated that the efforts occurring in Mother's home to create stability (for the children) was "pathological"[18] Dr. Steinberg's Evaluation was 43 pages of carefully gathered and carefully considered data on the family, with data collected from the parties and collaterally from 17 other individuals whose names were provided by Mother and by Father. The Trial Court didn't simply rely on the written evaluation report, declining to read the evaluation until Dr. Steinberg was on the witness stand, but heard lengthy testimony from Dr. Steinberg.[19]

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[16] See, Father's "Petition to Disqualify Dr. John Leite as Mother's Treating Psychologist for the Purpose of Reporting to the Court on Mother's Progress pursuant to the Court's Ruling of May 17, 2013" (Appellee's Appendix No. 7)
[17] Steinberg Evaluation p. 38
[18] Steinberg Evaluation p.31
[19] It should be noted that Dr. Steinberg, the court -appointed forensic custody evaluator, and Dr. Collins, the child's treating psychologist, were not Father's hired experts.

Dr. Steinberg found Mother's mental disorder is that of "Narcissistic Personality Disorder with Borderline Features." According to Dr. Steinberg and the DSM-IV –TR the characteristics of narcissistic personality disorder present in Ms. (M.F.R.) are: "characterized by "a pervasive pattern of grandiosity (in fantasy or behavior), need for admiration, and lack of empathy beginning in early adulthood and present in a variety of contexts as indicated by the following symptoms:

1. Requires excessive admiration;
2. Has a sense of entitlement, i.e. unreasonable expectations of especially favorable treatment or automatic compliance with her expectations;
3. is interpersonally exploitative, i.e. takes advantage of others to achieve her own ends;
4. lacks empathy: is unwilling to recognize or identify with the feelings or needs of others;
5. shows arrogant, haughty behaviors. (R. 19, citing Steinberg Evaluation p. 35)

The Court found that in addition to Mother's Narcissistic Personality Disorder,

"Dr. Steinberg determined that Mother also had *Borderline Personality Features* indicating that she exhibits 3 of the 5 features necessary to qualify such as a full personality disorder. The characteristics present in Mother found by Dr. Steinberg were

1. Frantic efforts to avoid real or imagined abandonment;
2. A pattern of unstable and intense interpersonal relationships characterized by alternating extremes of idealization and devaluation affective instability due to a marked reactivity of mode (e.g. intense episodic dysphoria, irritability or anxiety usually lasting a few hours and only rarely more than a few days; and
3. Inappropriate, intense anger or difficulty controlling anger (e.g. frequent displays of temper, constant anger, recurrent physical fights."

(R. 19, citing Steinberg Evaluation p. 36.)

The Court found "Dr. Steinberg further describes Mother:

'The above dynamics indicate that (M.F.R.) attempts to maintain a primary, controlling position within the family that excessively demands family members' appreciation and allegiance toward her. The excessiveness and pervasiveness are diagnostically typical of a personality disorder." (R. 18-19, citing Steinberg Evaluation, p.35)

The Trial Court further noted the footnote in Dr. Steinberg's Evaluation (supported by his trial testimony on same) that Mother's particular form of Narcissistic Personality Disorder fit within the subtype of the Disorder described as Grandiose Malignant Narcissism. The footnote provides:

> "The DSM-IV-TR additionally describes associated features of Narcissistic Personality Disorder by stating, '...Vulnerability in self-esteem makes individuals with Narcissistic Personality Disorder very sensitive to "injury" from criticism or defeat. Although they may not show it outwardly, criticism may haunt these individuals and may leave them feeling humiliated, degraded, hollow, and empty. They may react with disdain, rage, or defiant counterattack.' Russ et al. (2008) identified a subtype of Narcissistic Personality Disorder they called **Grandiose/malignant narcissism, which is characterized by "seething anger, interpersonal manipulativeness, pursuit of interpersonal power and control, lack of remorse, exaggerated self-importance, and feelings of privilege." Corroborated data sources describe (M.F.R.) as exhibiting most of these features.** (R. 19-20, citing Steinberg Evaluation, pp. 35-36) (emphasis supplied)

In its Ruling, the Trial Court outlined the psychological damage from Mother's emotional abuse of the children which had occurred, and was continuing to occur, to "Child" even after warnings about the behavior had been given by Dr. Steinberg and Dr. Collins to Mother. The Trial Court:

- shared Dr. Steinberg's concern and found that that Mother's angry and alienating parenting behaviors toward "Child" and [Son B] had significantly contributed to [Son B] and "Child"'s psychological problems (R. 27-28, subparagraph numbered (5));

- shared Dr. Steinberg's concern and made finding about the "Child"'s anxious, tense and constricted affect around Mother as described by Dr. Steinberg and "Child"'s regular Counselor, Dr. Collins (R. 28, subparagraph numbered (6));

- shared Dr. Steinberg's concern and found that "by continuing the present (unsupervised) parenting arrangement, "Child" is at risk to be alienated from Father" particularly since the same strategies had been employed by Mother toward [Son B] and such alienation had indeed occurred (R. 28, subparagraph numbered (7); R. 5 (regarding [Son B]));

- shared Dr. Steinberg's concern and found that ""Child" appears to be a conduit of information, particularly about her father, to her mother" and of "Child" being at risk for develop chronic anxiety or depressive disorders, partially from being in the position being made to feel "responsible for her Mother's emotional equilibrium, by telling her thing that satisfy her and prevent intense emotional displays (R. 28, subparagraph numbered (8))

- shared Dr. Steinberg's concern and found that by continuing in her present arrangement, "Child" would be "at risk to miss important developmental needs, in terms of developing peer relationships and mastering social and personal challenges...due to social isolation and enmeshment with her mother;" (R. 28, subparagraph numbered (10))

- shared Dr. Steinberg's concern and found that if she stayed in her then current relationship that she was "at high risk for continued academic underachievement." (R. 28, subparagraph numbered (10))[20]

Further, the Court relied on and found Dr. Steinberg's Evaluation and testimony to be credible and supported by the testimony (R. 4), stating:

> "All of Dr. Steinberg's diagnoses were confirmed by Mr. (S.D.R.), non-family witnesses (including work, school, psychologists[21] and friends) and by Mother's actions prior to, and at trial. (R. 20, Emphasis Supplied.)

The Court noted that Dr. Steinberg's findings, closely tracked the evidence presented at trial (R. 20; 4) and stated that it "was persuaded by the findings of [court-appointed expert] Dr. Fred Steinberg Ph.D.[22]". (R. 27, subparagraph numbered (2))

REASONS WHY MOTHER'S APPLICATION SHOULD NOT BE GRANTED

[20] The Trial Court gave numerous examples of the evidence presented that justified these concerns in its Findings of Fact and Conclusions of Law. See, eg. Ruling and Addendum to Ruling, generally.

[21] Including Reagan's treating psychologist, Dr. Catherine Collins.

[22] The Court noted that "Much time, energy and expense was expended by Mrs. (M.F.R.) attempting to overcome Dr. Steinberg's findings. The Court finds that effort was unsuccessful." (R. 3) The Court noted that Mother's Expert, Dr. John Ciocca testified that he was not in a position to dispute the findings of Dr. Steinberg (R. 27, subparagraph numbered (3))and noted in detail the efforts made by Wife's treating psychologist, Dr. John Leite, to discredit Dr. Steinberg and call him unethical despite Dr. Leite's admitted lack of knowledge of the data that had been collected. The Court found that "neither Dr. Ciocca nor Dr. Leite successfully discredited Dr. Fred Steinberg's investigation or report. This Court finds Dr. Steinberg's investigation and testimony to be credible and supported by testimony and other evidence adduced in this matter, including the testimony of Dr. Catherine Collins, Nikki Cochran and John Prince." (R. 4; 20)

I. THE SUBJECT MATTER IS NOT APPROPRIATE FOR RULE 10 EXTRAORDINARY REVIEW

As The Advisory Commission Comments of May 17, 2005, for Tenn. R. App. P. 10 state:

> "The circumstances in which review is available under this rule, however, are very narrowly circumscribed to those situations in which the trial court or the intermediate appellate court has acted in an arbitrary fashion."

It is respectfully submitted that the Trial Court's Ruling as it relates to supervised visitation is not appropriate for Tenn. R. App. P. 10 extraordinary review; and, Appellant's Application should be denied.

Not only has the Trial Court acted appropriately, and not arbitrarily, but, also, the rights involved in this matter and its posture before the Trial Court are not the sort of issues customarily reviewed on an extraordinary basis. Rule 10 review has involved questions where the trial court's order is final and dispositive on the issue for which review is sought and the order is not subject to further modification by the trial court; in other words, the trial court's order that was reviewed under Tenn. R. App. P. 10 was not temporary in nature. It is submitted that for an order to be appropriate for a Tenn. R. App. P. 10 review, it must at least be final as to the issue for which review is sought, even though it need not be final as to all the issues in a case. Indeed, an order that adjudicates an issue preliminarily is a temporary, interim or "interlocutory order." To constitute a final order, the order must fully and completely define the parties' rights with regard to all of the issues, leaving nothing else for the trial court to decide. Hoalcraft v. Smithson, 19 S.W.3d 822, 827 (Tenn.Ct.App.1999)

The Tennessee Supreme Court in State v. Willoughby, 594 S.W.2d 388 (Tenn. 1980) has ruled that an extraordinary appeal will lie only

a.) Where the ruling of the court below represents a fundamental illegality;

b.) Where the ruling constitutes a failure to proceed according to the essential requirements of the law;

c.) Where the ruling is tantamount to the denial of either party of a day in court;

d.) Where the action of the trial judge was without legal authority;

e.) Where the action of the trial judge constituted a plain and palpable abuse of discretion;

f.) Where either party has lost a right or interest that may never be recaptured.

Id. at 392 (extraordinary appeal was granted because question was one of first impression regarding the applicability of certain rules at the preliminary hearing stage in a criminal proceeding; appeal denied on its merits) (citations omitted); Dean v. Nelson, 169 S.W.3d 648, 649 (Ct. App. Tenn. 2005) (City's failure to give statutory notice of a Temporary Restraining Order ("TRO") to abate a public nuisance and the continuation of the TRO until trial was a departure from the accepted and usual course of judicial proceedings); Heatherly v. Merrimack Mutual Fire Ins. Co., 43 S.W.3d 911, 913 (Tenn. App. 2000)(homeowners who suffered an insured loss disputed the amounts of insurance; they sued the adjusting companies hired by their insurer for, among other claims, breach of contract; adjusting companies' motion to dismiss was denied by trial court; adjusting companies appealed under T. R. App. P. 10 because there was no contract with the insured homeowners, only the insurer.); Gordon v. Draughn, 2009 WL 1704470, at *2-3 (Tenn. App. 2009) (alignment of parties in a medical malpractice case brought by a debtor in bankruptcy; limitation of claims and summary judgment disposition of claims)

Here, the Ruling is not permanent, by its terms, regarding visitation as it is to be reviewed no less than every six (6) months by the Trial Court as to the very same issues about which Mother currently seeks extraordinary review. (R. 29) The Trial Court deferred approving a Permanent Parenting Plan (R. 29). Thus, the Ruling is neither final nor fully dispositive as to issue of Mother's visitation.[23]

It is conceivable that, by the time any ruling can be made by this Court of Appeals, the Trial Court may have issued a different interim order, which Mother will wish to appeal, resulting in multiplying proceedings and costs of the matter.

There is no aspect of Mother's Application that merits review on an extraordinary basis. There is no evidence of an error of law or an abuse of discretion.

Mother has not established that any rights she may hold will be irretrievably lost. Mother's argument regarding her "lost time" with the child is not a "right or interest that may never be recaptured" as contemplated under T. R. App. P. Rule 10. T. R. App. P. Rule 10's extraordinary appeal has been applied to rights and interests that are irrevocably lost in the course of trial proceedings, never to be regained. Mother need only demonstrate that Mother is complying with the Trial Court's Ruling to see immediate results in the Trial Court. State v. McKim, 215 S.W.3d 781, 791-792 (Tenn. 2007) (Pretrial diversion was denied on improper grounds; District Attorney General's abuse of discretion in the evaluative process; consideration of pretrial diversion is an essential stage in a criminal proceeding)

[23] Indeed, an order that adjudicates an issue preliminarily is a temporary, interim or "interlocutory order." To constitute a final order, the order must fully and completely define the parties' rights with regard to all of the issues, leaving nothing else for the trial court to decide. Hoalcraft v. Smithson, 19 S.W.3d 822, 827 (Tenn.Ct.App.1999)

II. THE TRIAL COURT PROCEEDED ACCORDING TO THE ESSENTIAL REQUIREMENTS OF THE LAW AND EXERCISED ITS DISCRETION PROPERLY.

Tennessee law clearly allows for limitations to be placed on visitation by the Trial Court. The limitation placed on Mother's parenting time with "Child" does not even begin to "depart from the accepted and usual course of judicial proceedings" so as to justify Extraordinary Appeal. "The child's welfare is paramount in matters of custody and visitation. Tenn. Code Ann. sec. 36-6-301 and Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001) As stated in numerous cases by the Tennessee courts, "The details of custody and visitation with children are peculiarly within the broad discretion of the trial judge." Bueno v. Todd, 2006 WL 2106006 at *5-6 (Tenn. Ct. App. 2006) (contained in Appellant's Appendix, No. 15). Supervision stems from the

> "delicate balancing of protection of the child with preservation of the child's relationship with her parent...[and] ... such decisions hinge on the trial court's assessment of credibility, specifically, whether a parent can be trusted to spend time alone with the child without violating the necessary boundaries." B.M.M. v. P.R.M., 2004 WL 1853418 at *18 – 19 (Tenn. App. 2004) (contained in Appellant's Appendix, No. 13)

This is particularly true, as in this case, when the evidence is that the mother fails to understand how her conduct deprives the child of a normal relationship with both her father and her mother. Id. at *23.

Father's request to the Court that Mother's parenting time be supervised was contained in Father's Proposed Permanent Parenting Plan filed on November 16, 2012 and was addressed in the opening statement made by Father's counsel and throughout the trial. This request was a result of Father's concern about the emotional and psychological abuse that the children were

experiencing at the hand of Mother, and about Mother's lack of empathy, insight or acceptance of responsibility for the consequences and effects of behaviors on the lives of her minor children.[24]

Of course, the principal consideration in the visitation plan devised by this Court is whether or not it is in "Child"'s best interest. Clearly, such is the case here. Even so, Mother's complaint that by the Ruling she is "losing time she can never make up" with "Child" does not accurately reflect the true long term trajectory of the Trial Court's Ruling and respectfully, misses the big picture of how the Trial Court's Ruling gives assistance to "Child" and Mother. It is respectfully submitted that the Trial Court's decision that Mother's parenting time be supervised and that she participate in therapy encourages Mother to enjoy a lifetime of healthy parental relations with "Child" and encouraging Mother to gain true understanding and to adapt her behavior to that of a positive, and not negative, role model for her children. The Trial Court addressed the very significant, if not extreme, risks that are posed to "Child" if Mother does not accomplish this, and be allowed to continue to parent "Child" in the same style unabated. Further, the Court stated great concerns that Mother's behavior was and would continue, insidious and damaging to "Child". (Ruling Addendum, pp.3, ll 14-22)

Mother doesn't appear to appreciate the irony of her statement when taking into account the "time that can't be recaptured" by Father as a result of her complete alienation of [Son B] from Father, or the attempted alienation of "Child" caused by Mother's arbitrary interference, and manipulations.

[24] Steinberg Evaluation pp.31,38

The natural conclusion from all the proof in this cause was that "Child" needed to be protected from such parenting. Mother's implied suggestion that some alternative unsupervised parenting schedule, other than a week on/ week off should have been considered by the Court is incredible. It is respectfully submitted that there is not an unsupervised schedule in this case that is adequate to protect the child from the mother's relentless efforts to alienate her from her father, and to control, dominate and keep the child weak and constricted through fear, anxiety and being dominated by and dependent to a unhealthy degree on a mentally ill mother.

The focus of the entire 15 day trial in this case was whether the Court found that the child was being emotionally abused, and the Trial Court did find a long standing, insidious pattern of such abuse. The Trial Court directly cited in its Ruling all of the statutory provisions which control the restriction or suspension by a court of parental access or visitation. As outlined herein in more detail hereafter, Tennessee law is crystal clear that upon a finding of emotional abuse, the Court may require the visitation to be supervised or prohibited.

With the Trial Court's finding of long standing abuse it cannot be implied that Mother's supervision is the most restrictive method the Court had available to protect the child, especially when the Trial Court has called for review of the matter in six months is in the Mother's control over the lifting of the supervision by following of the Court's Ruling. The Trial Court could have ordered supervision of the mother without a therapeutic component or a review component which would have been a more restrictive result. Moreover, the Trial Court had the authority under the above statute to order complete prohibition of Mother's access to

the child pending psychological help, which would have been a significantly more restrictive than that which was ordered in this case.

Mother has already had the "lesser restrictive" alternative of unsupervised parenting time with "Child" in almost 2 years that elapsed between the parties' separation and the issuance of the Trial Court's Findings of Fact and Conclusions of Law in May 2013. During that time, she has not accepted responsibility for her behavior and has recklessly continued such behavior. This is the case despite the fact that according to Mother's own proof, Mother has been availed of the opportunity of regular visits with the psychologist of her choice, Dr. John Leite.

Mother also had available to her the help of Dr. Catherine Collins, "Child"'s treating psychologist who testified that she clearly told and encouraged Mother that it was her job as "Child"'s parent to foster and encourage "Child"'s relationship with Father. After this discussion with Mother, Dr. Collins scheduled a session with "Child" and Mother to give Mother and Dr. Collins the ability to clear up "Child"'s fears of Father as a unified front. Instead, in the session, Mother continued to affirm "Child"'s baseless fears of Father. [25]

Mother also had the opportunity to thoroughly review Dr. Steinberg's evaluation, but had no wakeup call as to the damage she was doing as a result and continued the damaging behavior in session with Dr. Steinberg and the children where she relentlessly continued her

[25] By way of background, Dr. Collins testified that Reagan had brought up fears about being with Father at a number of her sessions with Dr. Collins and each time, Dr. Collins queried Reagan about the factual basis of the fears and Reagan was never able to relate any reasons for her fears. Further, Dr. Collins testified that Reagan appeared to reporting these alleged fears to Dr. Collins as a rote checklist each time. It was after some time of sessions of this nature that Dr. Collins set up the joint session with Reagan and Mother to try to set these fears to rest for good. (Appellee's Appendix No. 4, Excerpt from Trial Transcript of Testimony of Dr. Catherine Collins, of December 6, 2012, pp.1024-1026 and 1032-1035)

disparagement and vendetta against Father, at the expense of the children and particularly "Child".

In this case, the Trial Court clearly found that "Child"'s emotional health, development and educational achievement have been, and continue to be, in danger by continued exposure to Mother's maladaptive harmful behavior and emotional abuse. Mother's argues that the least restrictive reasonable alternative must be utilized in establishing her parenting time; that her visitation should not be supervised and that, before the court can limit or supervise her parenting time, the court must make a special set of findings tailored to her visitation issues. In this case, in the light of this record and the Trial Court's unambiguous findings, Mother's assertions are not consistent with the law. The law is clear about the alternatives if emotional abuse is determined to have occurred, to wit, to limit or supervise, or both, the parent's access to the child or to prohibit access completely.[26]

The Trial Court noted that T.C.A. §36-4-406(d) (1-8) which, consistently with T.C.A. §36-6-301, sets out guidelines for the prohibition or limitation of parental access to a child, noted that the court may restrict, suspend or terminate visitation upon clear and definite evidence that continued visitation will jeopardize the child emotionally or morally (or that there is probable cause that the child would be placed at risk) and that the best interests of child may require restrictions on visitation. (R. 25 – 27, paragraphs 14 – 18, and the cases cited in the Ruling)

[26] Tenn. Code Ann. sec. 36-6-404; Tenn. Code Ann. sec. 36-4-406(d) (1-8); Tenn. Code Ann. sec. 36-6- 106; Tenn. Code Ann. sec. 36-6-301; and the numerous cases cited in the Ruling.

This case is similar to a recent case decided by this Honorable Court in Winkler v. Winkler, 2011 WL 5115543 (Tenn. App. 2011). In Winkler, father had a history of behavioral problems, including crude and inappropriate behavior (and, also, physical abuse), demeaning conduct toward the mother and the son, irrational behavior (he did not believe he should have to pay to attend the athletic events in which his son participated, for example) and extremely angry reactions to situations within the family. Father attended anger management courses, but, did not demonstrate to the court that he had gained any insights in his destructive behavior patterns ("Sadly, Father demonstrated no insight or self-awareness of the damage resulting from his demeanor and conduct toward son and mother" Id. at *10). As a result, father's contact with the son was suspended until father completed a 26 week anger management course. Upon completion, Father would be permitted to communicate with the son by letter. After a year, father could return to court to seek parenting time. Because of the pattern of abusive conduct by father as there is in this case by Mother, there was no parenting plan. Id. at *7.

In Winkler, this Honorable Court found that there had been no abuse of discretion in determining the scope of father's visitation or in the court's findings of harm and risk of harm to the child. The appellate court also noted, with approval, that the trial court's order included an avenue to allow father and son to rehabilitate their relationship. Id. at *10.

The Trial Court relied upon Dr. Steinberg's Evaluation and extensive testimony to adopt as its own, Dr. Steinberg's findings 1.)that Mother was a continuing danger to the emotional well-being of the child in being exposed to Mother's behaviors (attempted enmeshment

behavior via fostering a sense of omnipresence (R.18); 2.) that Mother used anger displays, intimidation, and communication devices to foster the children's allegiance toward her (R. 27 - 28, subparagraph (5), quoting from Dr. Steinberg's Evaluation, p. 34); 3.) that Mother did not allowing or foster the children to form any relationships with other people; 4.) that Mother displays anger and discontentment with most who begin to build relationships with her children... ; and 5.) that [Mother] additionally engages in parental alienation behavior with [Son B] and "Child" by discouraging a relationship with their father.

The Court further noted Dr. Steinberg's finding that

> "These are narcissistic features and marked emotional reactivity to [Mother's] personality, as she demands Ben and "Child"'s allegiance to an unhealthy degree. This has significantly contributed toward [the older brother's] and "Child"'s psychological problems. (R. 27, subparagraph (4), quoting from Steinberg Evaluation, p. 34 [Emphasis Supplied.]
>
> and
> The Trial Court found that the two children [i.e. "Child" and [Son B]] over whom Mother had the most influence were shown to be the most harmed by Mother's behaviors. The minor child's older brother has been diagnosed for depression and is completely alienated from his father." (R. 5-6) [Emphasis Supplied.]

The Court found in accordance with Dr. Steinberg's opinion that absent change in the environment, "Child" was at risk for to be alienated from her father." (R. 28, subparagraph (7), quoting from Steinberg Evaluation, p. 39.)

Contrary to Mother's assertions, these are specific findings and are not inferences. (Appellant's Application, p. 9)

Contrary to Mother's assertions, the Trial Court did not "impose a new standard of restricted and supervised parenting time unless a parent is proved, by experts, to be 'positively

parenting.'" (Application, p. 10) In fact, the Ruling reflects that the Trial Court found that Mother's behaviors, mental disorder, excessive anger, attempted enmeshment and alienation of her children from their father were all demonstrated, with no evidence of their remission. In requiring Mother's parenting time to be supervised for "Child"'s protection, the Trial Court created just the sort of avenue, or appropriate boundaries needed for "Child" to safely maintain a parent-child relationship with Mother in a positive fashion.[27]

Mother argues that no testimony was presented at trial that Mother should have supervised parenting time stating that the "Trial Court's Order did not include a finding that Father demonstrated that supervised parenting time was necessary by clear and definite evidence" citing Rudd v. Rudd, 2009 WL 4642582 (Tenn. App. 2009) (contained in Appellant's Appendix No. 11). Father's request for supervised visitation was no surprise to Mother. It was addressed throughout the trial, from the submission of his Proposed Permanent Parenting Plan, through his Counsel's opening statement to Father's Proposed Finding of Fact and Conclusions of Law filed in this cause on February 4, 2013. Indeed, the entire 15-day trial and the lion's share of the Trial Court's Ruling centered on abusive effect on the children of Mother's marked failures in her parental obligations toward the children and the psychological damage that it did to them, as well as, Mother's lack of accountability and insight into the wrongs she has committed.

Mother has misapplied this honorable Court's ruling in Rudd v. Rudd, supra, p. 30. Mother asserts that Rudd requires the trial court to make specific findings that the visitation plan is the least restrictive plan that avoids harm to the child. (Application, p. 10). The clear and

[27] The Tennessee legislature has described the sorts of affirming behaviors that it requires of parents in Tenn. Code Ann. §36-6-402(2), which is headed for convenience as "Parenting Responsibly."

definite evidence of harm to the child upon which the Trial Court relied has been set out here and in the Ruling. The clear and definite need for "Child"'s protection makes supervision inherently exclusive as a remedy. In the Ruling, the Trial Court made clear that it was observing the law in order to maintain the parent-child relationship. (R. 26, paragraph 15; R. 26-27, paragraph 18)

The case at bar is readily distinguishable from Rudd, supra, p. 30. In Rudd, the father was ultimately denied all visitation with either of his children – a disabled teenage son and a teenage daughter. The trial court found that the father was guilty of sexual abuse of the daughter. Although the father had successfully visited with the teenage son under the mother's supervision, all visitation with him was denied, as well. The only evidence heard by the trial court was the uncorroborated testimony of the parents and some testimony from the teenage daughter. There were no counselors for the father or daughter, even after several years. There was no testimony from psychologists or experts. This Court noted that the trial court did not provide for any conditions that might facilitate the parent-child relationship or move the children toward having safe, appropriate visitation with Father. This Court noted that it would have been appropriate to develop a plan of counseling to facilitate visitation; to allow a child to be in touch with their psychologist during visitation; to require supervision. Rudd, Id. at *7. Unlike the Trial Court in this matter, the trial court in Rudd had ended its analysis with a determination of the best interests of the child, without any further consideration.

As discussed previously, here, Mother had almost exclusive control over "Child" until May, 2012. From May, 2012 until May, 2013, Mother and Father had week on – week off parenting time. During that time period, numerous incidents of harm to "Child" were found to

have occurred, the full effect of Mother's mental disorder and behaviors were exposed, and the Evaluation by a qualified psychological evaluator was completed, which warned of the risk of a likelihood of further and more extensive harm unless the patterns and dynamics were changed.

What the law requires is actual proof which is clear and definite that the restriction on the visitation is necessary, but it does not require, as Mother argues to this Court, that in addition to the actual evidence presented that the Court to utter a magical incantation of the words "clear and definite proof exist here." Such is a pure exaltation of form over substance. Father respectfully submits that the Trial Court in this matter would have been in error had it ruled any differently than it did.

Mother states in her Application filed with this Honorable Court that "Dr. Steinberg "never testified that the risks discussed had ever materialized or even would materialize or occur in the future". (Application p. 4**).** This is a complete mischaracterization of his Evaluation and trial testimony. Dr. Steinberg testified at great length about how Mother's diagnosed personality disorder fueled her abusive behaviors toward her children and about how such behaviors, which he characterized as "emotional abuse" on Mother's part were causing "Child"'s [and [Son B]'s] psychological problems, that such could be considered "emotional abuse," that Mother's abusive behavior had occurred regularly in the past and was continuing to occur in the present, and that there was no indication that the behavior would stop without substantial psychological help, from which Dr. Steinberg feared Mother would flee, as was her long time pattern when confronted with responsibility for her actions. (R. 18)
Indeed, Dr. Steinberg's Evaluation presented a section pertaining to the psychological risk factors he stated

" The court might consider that, by continuing the present parenting arrangement, "Child" is at risk to be alienated from her father. Unless (M.F.R.) engages in meaningful therapy, in which she assumes responsibility for her alienating behavior, she will continue to discourage "Child" from having a relationship with her Father." ....and

"(M.F.R.) is at **high risk** to resist, if not flee, from future therapeutic efforts in which she may become involved if the therapist offers interpretations or pursues strategies that are not consistent with ((M.F.R.)'s) fixed agenda. This has been her trend in the past. This creates a high risk that her behavior remains the same with regard to self and interactions with family members." Steinberg Evaluation, pp. 39 and 41.

With this expert evidence, it was not an illogical leap for the Court to determine that its merely ordering Mother to stop the behavior would not provide adequate or meaningful protection for the child from her Mother's abuse and that supervision of her access to the child was necessary for the child's protection.

Mother incorrectly claimed in her opening statement at trial, as she has done again in the instant Application for Extraordinary Appeal, that that Dr. Steinberg's opinions ignored objective findings on the parties' mental states. This is not a true statement and was so found by the Court.[28] In fact, Dr. Steinberg did not ignore the findings on the mental states of the parties but incorporated them into his 43 page evaluation. He testified at great length on direct and cross examination about why the MMPI scores of the parties were not controlling in either his diagnosis of Mother's Narcissistic Personality Disorder with Borderline Tendencies or his

[28] In a similar vein, Mother argued that Dr. Steinberg ignored the elevation of Mr. (S.D.R.)'s "paranoia" scale in his MMPI results. The Trial Court found "Much was made by counsel for Mother of Mr. (S.D.R.)'s "paranoid scale" elevation on his M.M.P.I. Dr. Steinberg opined that Mr. (S.D.R.)'s fears were apparently well founded, considering Mrs. (M.F.R.) just appearing at places where Mr. (S.D.R.) was, hiring a private investigator and travelling to Scott's Hill, Tennessee the morning after Mr. (S.D.R.) and "Child" had been there at a horse auction, just to look at and photograph the place. (R. 15). Also, Mother also took issue of the finding of "narcissistic personality disorder with Borderline features" by Dr. Steinberg when the scales on Mrs. (M.F.R.)'s MMPI results were described as "within normal limits." Dr. Steinberg testified about a study which noted that a large percentage of persons in psychiatric facilities and with documented mental illness were able to score "within normal limits" for purposes of the MMPI and that such "within normal limits" result from the MMPI was not sufficient to dismiss the clinical observations and collateral data that was collected with respect to Mrs. (M.F.R.)'s mental state.

opinion was that Mr. (S.D.R.) did not suffer from paranoia. (R. 15) The Trial Court found that Dr. Steinberg's interpretations of the data were persuasive (R. 15; 17 – 20);

Mother argues in her Application that the Judge has departed from the recommendations of Dr. Steinberg, making statements and implication that Dr. Steinberg's findings were recommendations as to *"an appropriate parenting plan, mirrored the recommendations of his report"* (Application, p. 4) implying that Dr. Steinberg did not favor the impositions of restrictions on Mother's time. This is a distortion of the testimony and Evaluation of Dr. Steinberg. In support of this, Appellee refers this Honorable Court to the Affidavit of Dr. Fred Steinberg in Appellee's Appendix No. 10.

The Trial Court properly utilized the expert evaluation and testimony, in accordance with the law and the conditions inherent in the Evaluation. Mother asserts that the Trial Court disregarded Dr. Steinberg's recommendations:

> "While the Court discussed at length the findings and risk factors addressed in Dr. Steinberg's report, it did not address the parenting time recommendations made by Dr. Steinberg. Dr. Steinberg never recommended supervised parenting time for Mother in either his report or his testimony." (Application, p. 4)

Mother provided no citations to the Evaluation in support of her contentions. However, a simple reading of the Evaluation clarifies the issue – recommendations are not made by the forensic evaluator:

> "Tippins and Wittman (2005) assert that there is a paucity of relevant research on how specific custody (or visitation) recommendations, that limit personal liberties, affect the trajectory of a child's life. Therefore, to make such recommendations is scientifically unsound. The forensic psychologist can ethically assess what has happened and what is happening. Recommendations about what *should* happen with custody arrangements should be avoided. These authors, however, qualify, *'The simple listing for the court of psychological risk factors associated with various access plans can also be done in an ethical manner as long as it is carefully grounded in case specific data and the*

specialized knowledge base of the mental health professional.'" (Steinberg Evaluation, p. 39)

As required by law, the Trial Court carefully assessed the credibility of all of the witnesses in accord with its responsibility under the "accepted and usual course of judicial proceedings." As noted above, the Trial Court found Dr. Steinberg's Evaluation and testimony credible in all ways. In fact, the Trial Court's Findings of Fact and Conclusions of Law are replete with multiple findings pertaining to the credibility of the other witnesses based on the Court's direct observation of them. For example, with respect to the credibility of Father's testimony the Trial Court found:

> "It is impossible for this Court to recount all of the incidents and arguments brought up in the four-thousand page transcript of the custody hearing. There are, however, several incidents which led this Court to believe that Mr. (S.D.R.) is the more credible witness[29]...." (Emphasis Supplied. R. 7)

In contrast, with respect to Mother, the Trial Court found:

> "Mother's versions of incidents changed from discovery to trial, and some reports were simply incredible." (Emphasis Supplied. R. 7)

The court noted that during the incident at the houseboat:

> Mother's behavior in front of others, particularly people known to the couple, and in front of their children, is both bizarre and unacceptable behavior in civilized society. The incident of throwing the children's shoes at a boat two slips down, in public, and losing some of these shoes of the children because these children were Mr. Prince's, the family broker, whom Mother did not trust is an example of her inability to control her anger. Mr. Prince heard this yelling outside of the boat and apparently everyone at the boat dock heard the scene that Mrs. (M.F.R.) made. Mrs. (M.F.R.)'s explanation of the incidents were not credible and the Court so finds." (Emphasis Supplied. R. 10)

[29] Notably, Dr. Steinberg also found in his investigation that Mr. (S.D.R.) was a "reliable historian" in giving him data for the evaluation and that Mrs. (M.F.R.) was not a reliable historian. (Steinberg Evaluation, Footnote 3, pp. 4-7 at p. 7 and Footnote 5, p.20)

In several significant instances where Mother's testimony conflicted directly with Dr. Collins and the Trial Court found Dr. Collins to be the more credible. For example, the Court noted:

> "Mrs. (M.F.R.) also testified that Dr. Collins gave her permission to sit in the waiting room while Mr. (S.D.R.) and "Child" were in session. It is noted that Mrs. (M.F.R.) glared at Mr. (S.D.R.) as he and his daughter entered for the session. Dr. Collins testified that she thought Mrs. (M.F.R.) was there for a session herself and had not discussed her sitting in the waiting room while Mr. (S.D.R.) and their daughter were in session. Mrs. (M.F.R.)'s testimony on this and several other issues was directly contrary to the testimony of Dr. Collins. The Court finds Dr. Collins to be the more credible of the two women." (R.9) [Emphasis Supplied.]

III. MOTHER DID NOT OBJECT TO THE BIFURCATION OF THIS MATTER AND BIFURCATION WAS APPROPRIATE UNDER THE LAW

On September 21, 2012, when Mother asked the Court for a continuance of the November 5, 2012 trial date, the circumstances included Father and the Guardian Ad Litem's above described sense of urgency that the Mother was not acting consistently with the children's wellbeing[30] and with Dr. Steinberg's investigation complete, Father moved the Court to set his Petition for Temporary Parenting Plan for hearing on November 5, 2012.[31] The Mother's Motion for a Continuance and Father's Motion to Set the Petition for Temporary Parenting Plan were both argued on September 21, 2012.[32] The parties agreed that the financial issues would not likely be ready for trial in November 2012. The Trial Court made the statement that it did not wish to hear the custody issues twice, but that it agreed with Father

[30] See pp. 11, 13 of Appellee's Answer, supra.

[31] Father's Petition for Temporary Parenting Plan had been filed back in April, 2012.

[32] See, Appellee's Appendix No. 3: Transcript of September 21, 2012 hearing of Mother's Motion for a Continuance and Father's Motion to Set Temporary Parenting Plan Petition for hearing.

that the issues needed prompt resolution.[33] Neither counsel made objection to the custody matter being heard separately from that of the rest of the divorce.[34] In fact, the argument made to the Court on September 21, 2012, with respect to the trial date of November 5, 2012 was not that the custody case should not be heard separately, but, rather, that Mother's counsel could not be ready for the custody hearing to take place on November 5, 2012.[35] In response to Mother's counsel's argument that they could not be prepared on November 5, 2012 for a custody hearing on Father's Petition (which had been filed in April, 2012), the Judge granted Mother's counsel an extension of time from the previously agreed-to trial date of November 5, 2012 to November 16, 2012.[36]

The fact that no objection to the bifurcation was ever made is evident from Appellant's Appendix Exhibit No. 4. Appellant relies upon statements of Appellant's counsel in a hearing on September 21, 2012 (Appellant's Appendix Exhibit No. 4) as evidence of Appellant's objection to the bifurcation of the parenting issues and the financial issues. (Application, p. 3). Appellant springboards this bifurcation to a denial of Mother's "day in court" because Mother must await the outcome of the entirety of the issues to bring her appeal as of right regarding her supervised visitation. (Application, p. 11) (Appellee has discussed elsewhere the interim nature of the Ruling as it relates to supervised visitation.) Issues or questions that are not raised in the trial court cannot be raised on appeal, and this specifically includes questions of bifurcation. Pierce v. Pierce, 2008 WL 2557363 at *2 (Tenn. App. 2008).

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[33] See, Appellee's Appendix No. 3: Transcript of September 21, 2012 hearing, p.99.
[34] No objection to this bifurcation was made by Mother, either at the time of the argument of these motions, on her opening statement in the custody trial or any time during the trial.
[35] See Appellee's Appendix No. 3: Transcript of September 21, 2012 Hearing, p. 97-99
[36] See Appellee's Appendix No. 3: Transcript of September 21, 2012 Hearing, p. 100

Further, it is respectfully submitted that the Trial Court was well within its discretion to bifurcate the proceedings in a non-jury matter that are distinct and separable issues. See, Tennessee Rules of Civil Procedure, Rule 42.02 and Lamar Advertising Co. v. By-Pass Partners, 313 S.W.3d 779, 790 (Ct. App. Tenn. 2009). In this case the bifurcation of the custody matters was not an abuse of discretion. The many problems being experienced by the [parties'] children benefitted by having the Court's full attention on those matters. Further, the bifurcation was appropriate under this Court's power to best manage its cases and proceedings among the parties before it. Andrews v.Bible, 812 S.W.2d 284, 291 (Tenn. 1991)

IV. ADDITIONAL CONSIDERATIONS SUPPORTING DENIAL OF EXTRAORDINARY APPEAL

As stated heretofore, the trial of the remainder of this matter is set for November 4, 2013 by consent of the parties. Under the circumstances, it is respectfully submitted that an Extraordinary Appeal would be unduly burdensome, would delay the remainder of the trial and would add significant expense to the already astronomical cost of this trial. The 4000 page record, 152 trial exhibits and more than 140 pleadings and orders is not of a size that it can be transmitted to this court, nor could this matter be briefed in an expedited manner. The size of this record can't accommodate any expediting of an appeal without preventing the court from getting the same flavor and nuances of the proof adduced which the Trial Court had the opportunity to experience. The realistic time necessary to prepare the record, brief of both parties and reply briefs and have oral argument would put this matter into after the New Year for resolution. Hearing this matter on an extraordinary appeal would likely put significant hardship on counsel for the parties to be prepared to try the remainder of the case as scheduled on November 4, 2013 and which trial is anticipated to take less than 2 weeks. By

denying the Rule 10 Extraordinary Appeal, it is entirely reasonable to assume that Mother would be eligible to have her day before this Honorable Court on all issues in this case almost as soon as the case would be before the Court if this extraordinary appeal were granted. By granting this appeal, it is not unlikely that this Honorable Court would have to hear this appeal twice.

Further, Mother does not allege that any harm has or will be occurring to the child [37]by the application of the Court's Ruling because there is only benefit and not harm to the child as a result of the Court's Ruling. "Child" is doing extremely well in Father's care, and is not anxious at all about the frequency or quality of her visits with Mother. Since July 13, 2013, Mother has had 5 visits with "Child" and more are regularly scheduled in the future.

Mother continues to aggressively pursue litigation alternatives[38] rather than focusing on the "significant psychological work" that is needed to have the supervision of the parenting time released. Mother, and no other, is completely in charge of her own parenting destiny under the terms of the Trial Court's Ruling. Mother would have the opportunity as early in October, 2013 (6 months after the Court's Ruling and three months from now) to demonstrate to the Court that she understands the consequences of her behavior and has sincerely worked to ameliorate it, and that most importantly, having regular parenting time back on track will not be a danger to "Child".

[37] See Affidavit of Dr. Catherine Collins attached to Fathers' Response to Mother's Petition to Modify Visitation pertaining to the superior adjustment being made by Reagan to the Supervised visitation. (Appellee's Appendix No. 9, Exhibit A)

[38] For instance, Mother's post-trial, pending "Petition to Modify Visitation" discussed on p. 14, supra, of Appellee's Answer.

V. APPELLEE'S MOTION FOR STAY OF THE TRIAL COURT'S RULING SHOULD BE DENIED

Appellant's Motion for Stay as contained in her Application does not conform to the requirements of Tenn. R. App. P. 7. The Motion for Stay does not include a copy of the motion filed in the trial court or a copy of any answer filed in opposition.

More importantly, for all of the reasons set forth above, staying the Trial Court's Ruling and not requiring supervised visitation puts "Child" at risk for further harm.

There is no basis for the relief Mother seeks.

CONCLUSION

It is not the case here that the Trial Court "so departed from the accepted and usual course of judicial proceedings so as to require immediate review" of its completely appropriate process of making its findings and conclusions that Father should have custody and Mother should have supervised visits (as opposed to prohibiting visits altogether until Mother sought help to correct her behaviors, an arguably justifiable result in this cause.) In this case, the Trial Court clearly based its decision on its careful observation of the testimony of all witnesses through 15 days of trial testimony, its study of the Evaluation of Dr. Steinberg, hearing his extensive testimony, reviewing all of the data collected by Dr. Steinberg in formulating his evaluation and the Court's careful review of the 152 admitted trial exhibits in the record.

It is respectfully submitted that the Trial Court has not acted in any arbitrary fashion such as to "so far depart from the accepted and usual course of judicial proceedings as to

require immediate review" in the matter and that Appellant (M.F.R.)'s Application for Extraordinary Appeal pursuant to T. R. App. P Rule 10 be denied at Appellant's costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on opposing counsel, Larry Rice, 275 Jefferson Avenue, Memphis, TN 38103, and Lisa Zacharias, Guardian ad Litem, 200 Jefferson Avenue, Suite 725, via hand delivery, this the 15th day of August, 2013.

KIMBROUGH B. MULLINS

IN THE COURT OF APPEALS OF TENNESSEE
FOR THE WESTERN SECTION AT JACKSON

(S.D.R.),	)	
Respondent/Appellee,	)	
vs.	)	**No. W2013-02651-COA-T10B-CV**
(M.F.R.),	)	
Petitioner/Appellant.	)	

THE NAMES OF THE PARTIES AND THEIR CHILDREN ARE REDACTED BECAUSE THE CASE IN THE TRIAL COURT IS UNDER SEAL.

RESPONSE OF (S.D.R.) TO
(M.F.R.)'S PETITION FOR RECUSAL APPEAL
PURSUANT TO TENNESSEE SUPREME COURT RULE 10B

Comes now the Respondent/Appellee, (S.D.R.), ("Father"), and Responds in opposition to Petitioner/Appellant (M.F.R.)'s ("Mother") Petition for Recusal Appeal pursuant to Tennessee Supreme Court Rule 10B as follows:

I. INTRODUCTION

Appellant Mother seeks extraordinary review of the Trial Court's Order denying her Amended Motion to Recuse the Trial Court (hereinafter referred to as "Order Denying Recusal"). This is Mother's third attempt at interlocutory appeal in this matter. The first was an application to the Trial Court to allow a T.R.App.P. Rule 9 Interlocutory Appeal which was denied by Order of the Trial Court on May 31, 2013 and such order being attached as Exhibit 17 to the Appendix to Response of Appellee, (S.D.R.) (hereinafter called "Appellee's Appendix"). The second attempt was Mother's Application for Permission for Extraordinary Appeal pursuant to T.R. App. P. Rule 10

(hereinafter referred to as "Mother's TRAP 10 Application") for an extraordinary appeal of the Trial Court's requirement of supervision of Mother's parenting time with the parties' minor daughter which application was denied by this Honorable Court by Order dated September 6, 2013 in Cause No. W2013-01586-COA-R10-CV. Finally, Mother's third attempt is the instant extraordinary appeal of the denial of her Amended Motion Requesting the Trial Court to recuse itself from further involvement in this matter.

In Mother's TRAP 10 Application, Mother claimed and made certain allegations that actions and inactions by the Trial Court constituted errors that departed from the accepted and usual course of judicial proceedings. Father extensively briefed and responded to these allegations in his Answer to Mother's TRAP 10 Application which Answer is included as Exhibit 15 in Father's Appendix submitted herewith for this Honorable Court's convenience.

Now, here in Round Three, in her Petition for Recusal Appeal under Tennessee Supreme Court Rule 10B, Appellant Mother takes the same allegations and stirs them up with a communication between the Court's staff and the Guardian Ad Litem's staff, stipulated by all as irrelevant, and characterized by the Trial Court as "administrative". Then, by some fantastical alchemy of Mother's invention turns the same meaningless claims of alleged error into "evidence" of prejudice and bias that justifies the recusal of the Trial Court from this matter. There is no evidence of prejudice and bias in the Trial Court's conduct of this matter.

Mother, in fact, has one, and only one, problem with the Trial Court. Mother's problem is that the Court made a ruling adverse to her; and, because the case was bifurcated and the second half of the trial is pending, Mother has a vested interest in

trying to eliminate this Trial Judge. There is absolutely no reason that the Trial Court cannot continue to hear this matter in a fair and prompt manner. The recusal of the Trial Judge would cause great harm, delay and expense to this family, particularly "Child" (age 10), who is the person who will pay the highest price. The Trial Court noted in its Order on Amended Motion to Recuse that the Custody Trial pertaining to the parties' minor child, "Child", took 15 days, consisted of a 4000 page transcript, 157 trial exhibits and a 48 page docket entry sheet, noting that the "case has drawn on the Court's resources and time disproportionately." Order on Amended Motion to Recuse, Exhibit #7 to Appellant's Appendix, p. 1. To be sure that there is a proper context, in addition to the long custody trial, the parties have had more than 36 appearances before the Court since it was filed two years and eight months ago and more than 39 Orders have been entered since the matter was filed. See Exhibit 24 to Appellee's Appendix, Affidavit of Kimbrough B. Mullins. This is a case that would take another Court an inordinate amount of time to review and become familiar.

In the ruling on "Child"'s custody issued on May 17, 2013, (hereinafter referred to as the Trial Court's "Ruling"[1]) the Trial Court, in part, stated the following:

> "An ordinary, happy childhood for this child, "Child", is in question at this point. However, this Court believes that the only hope for this child to have a normal life, will occur by being placed in the custody of her father with her mother having limited supervised visitation until significant psychological assistance can be completed. The Court is aware that problems may arise in "Child"'s behavior as a result of this Court's ruling. However, this Court is called upon to do what is in the best interest of this child and to determine the comparative fitness of each parent.

[1] The Trial Court's Ruling which is entitled "Findings of Fact and Conclusions of Law" is found at Exhibit 7 to Appellant's "Appendix to Petition for Recusal Appeal" Pursuant to Tenn. Sup. Ct. R. 10B (hereinafter "Appellant's Appendix). The Trial Court's Ruling shall be referred to herein as "R." followed by a page number. In addition, the Trial Court made an addendum to its decision in an oral ruling from the bench on June 10, 2013, the transcript of which is Exhibit 14 to the Appellant's Appendix and shall be referred to herein as "Ruling Addendum."

> The mother shall have visitation supervised at the Exchange Club Family Center for up to two hours per week until Dr. Catherine Collins and mother's psychologist of choice report to the Court that mother recognizes and has corrected her destructive behavior. Until the Court sees evidence that "Child" will be positively parented, the visitation shall occur at the Exchange Club Family Center in the presence of a psychologist or social worker. (R. 30)
>
> ...This matter will be reviewed every six (6) months." (R. 29)

Also, in the Trial Court's June 10, 2013 Ruling Addendum it stated:

> "I found, from all the proof, that the destructive influence and emotional abuse (i.e. by Mother of the children) was of long standing etiology and insidious in nature....this was a long-standing and continuing danger of the former psychological and emotional abuse by Ms. (M.F.R.) toward her children, specifically "Child"...This Court determined that "Child" needed to be removed from the destructive behavior that was harming her. This Court found that "Child"'s best interests required such removal. (Ruling Addendum, Exhibit 14 to Appellee's Appendix, pp.3, l. 17-21; 4, l. 13-17).

It is respectfully submitted that Appellant's Petition for Recusal Appeal should be denied, (S.D.R.) should be awarded his attorney fees and costs on appeal, and the matter should be remanded to the Trial Court for determination of such fees and costs and for all remaining matters required in the cause.

II. STATEMENT OF THE ISSUES PRESENTED

Did the Trial Court appropriately exercise its discretion in not recusing itself in this cause when: (1) there is abundant and appropriately introduced evidence which supports the Trial Court's decisions in this matter; (2) the Court has stated its intention to remain fair and impartial in this case and has shown no inappropriate bias toward one party or the other and (3) an ordinary prudent person, knowing everything that the Judge knew about this matter, would have no reason to doubt the impartiality of the Court?

Answer: Yes. The denial of Mother's Motion to Recuse was an appropriate exercise of the Trial Court's discretion in this case.

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY, GENERALLY

On May 17, 2013, the Trial Court issued its 32 page Ruling in the fifteen (15) day Custody Trial, as supplemented by the Trial Court's bench ruling (the "Ruling Addendum") on June 10, 2013[2] in which Mr. (S.D.R.) was granted sole custody of "Child" and Mrs. (M.F.R.) was ordered to see "Child" on a supervised basis at the Exchange Club Family Center while she obtained significant psychological assistance to become an appropriate and non-abusive parent.

Since then, Mother has filed, *inter alia*, a Motion for Rule 9 Interlocutory Appeal and to Set Aside Judgment in these proceedings, which was denied by this Court and a T.R.App.P. 10 Application for Extraordinary Appeal, which was denied by this Honorable Court of Appeals.[3] On August 29, 2013, Mother filed a Motion to Recuse, a Motion to Excuse the Guardian Ad Litem and a Motion to Set Aside Judgment. Later, these Motions were amended by an Amended Motion to Recuse, an Amended Motion to Excuse the Guardian Ad Litem and an Amended Motion to Set Aside Judgment filed by Mother on October 11, 2013.[4] The above machinations by Mother have all been to the same end, to lift the supervision restriction from her parenting time with "Child" without having to comply with the therapeutic aspects of the Trial Court's Ruling.

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[2] Mother attached the Ruling of the Court specifically called the Court's Findings of Fact and Conclusions of Law as Exhibit 11 to Volume 1 of Appellant's Appendix filed in this cause but omitted including the Court's Ruling Addendum which is included as Exhibit 14 to Appellee's Appendix

[3] Bearing Docket No. W2013-01586-COA-R10-CV.

[4] On August 30, 2013, Mother filed a motion in the Court of Appeals to supplement her Application for Extraordinary Appeal with materials from her Motion to Recuse. Mother's Application for Extraordinary Appeal was denied by Order of the Court of Appeals dated September 6, 2013.

In arguing for the recusal of the Trial Court in this cause in her Petition for Recusal Appeal filed with this Honorable Court, Mother generally asserts some, but not all of, the same arguments as in Mother's Petition for Recusal Appeal. The arguments are relative to the alleged bias and prejudice of the Trial Judge toward Mrs. (M.F.R.). Mother asserts that the occurrence of the April 16, 2013 communication about the pool constituted an impropriety, and, as such, in turn, gives rise to Mother's assertion that the Trial Court's impartiality might reasonably be questioned. (Amended Motion to Recuse, para. 7–11, Exhibit 2 to Volume 1 of Appellant's Appendix).

In support of Mother's contention that the Trial Court is lacking in impartiality and is biased, Mother relies upon certain prior occurrences[5] as well as continuing occurrences in these proceedings. The alleged "continuing occurrences" primarily consist of nothing but Mother claiming more bias and lack of impartiality against the Trial Court because she did not immediately prevail in her Amended Motion to Recuse.[6]

The prior occurrences (i.e., occurring before the Motion to Recuse was filed) that Mother relies on, or has relied on, in arguing bias were as follows:

a. The Court's comment in the middle of the hearing on the Custody Trial on December 17, 2012 that it "was not the Court's intent to have supervised visitation, unless there is a major concern of which the Court would have to be convinced." (See,

[5] It should be noted that Mother's complaints about the aforementioned prior occurrences only arise now that she accuses the Court of a lack of impartiality.

[6] Mother resisted any accommodation to allow Father to reply, or develop evidence regarding, Mother's Motion to recuse and resisted any comments from the Trial Judge regarding the facts of the communication on which Mother had based her Motion to Recuse. Mother declined to preserve electronic evidence upon which she relied. Mother asserted that the Trial Court must rule based upon Mother's Motion to recuse and the affidavits attached thereto provided by staff members of Mother's law firm. Mother objected to any evidentiary hearing. Mother refused to produce the affiants who were properly noticed for deposition and made no appearance to record her objection pursuant to the Tennessee Rules of Civil Procedure. Transcript of Proceedings on September 4, 2013, p. 20, lines 4-24 – p.24, lines 1-18; p. 36, lines 21-24 – p. 41, lines 1-6, Exhibit 16 to Appellee's Appendix.

Amended Motion to Recuse, para. 15, Exhibit 2 to Volume 2 of Appellant's Appendix: Amended Motion to Recuse, para. 15);

b. The events surrounding a March 6, 2013 phone conference between the Trial Court and Counsel for the parties, and the Court's subsequent order on the issue of Spring Break parenting time. (See, Amended Motion to Recuse, para. 100; Exhibit 2 to Volume 1 of Appellant's Appendix; Order on Spring Break attached as Exhibit 4 to the Amended Motion to Recuse; Exhibit 2 to Volume 1 of Appellant's Appendix and Mother's Petition for Recusal Appeal p. 2 and p. 9);

c. The events surrounding an April 10, 2013 phone conference between the Trial Judge and all Counsel, primarily regarding "Child"'s need for tutoring, and the Court's subsequent order on the issue of ordering Mother to take the child to tutoring (See, Exhibit 2 to Appellant's Appendix: Amended Motion to Recuse, para. 16 and Mother's Petition to Recuse Appeal pp. 13-14);

d. The events surrounding materials submitted by the Guardian Ad Litem to the Court for *in camera* review on December 18, 2012 during the Custody Trial. (See, Exhibit 13 to Appellant's Appendix: Amended Motion to Recuse, para. 16 and Mother's Petition for Recusal Appeal pp. 14-15);

e. The bifurcation of the trial to hear the custody matter first.

Additionally, the alleged ongoing "hostility"(since the Order on Amended Motion to Recuse) by the Trial Court toward Mother and her counsel that Mother claims are:

a. Mother says the Court "paints Mother in a negative light, while omitting facts that reveal Father's faults" (Petition for Recusal Appeal, p. 16), by giving purported examples without citation to any evidence in the record to support same. Part of

Mother's psychological issues include her keeping the children needy, weak and isolated by not getting them the help they needed. (Ruling p. 16). Mr. (S.D.R.) does not have similar issues and was selected as custodial parent, in part, because of his ability to get "Child" the help she requires. Mother's above described behavior continued in the time period that "Child" alternated weeks with each parent between the proof closed and the issuance of the Trial Court's Ruling on custody. Father wrote Mother several times asking Mother to allow "Child" to go to tutoring during Mother's parenting weeks. Mother ignored Father's requests despite the fact that "Child" was doing very poorly in school and was in peril of having to repeat the 4th grade. (See, Exhibit 15 of Appellee's Appendix: Section VI (iii) of Father's Answer of Mother's T.R.App.P. 10 Application for detailed explanation.) Yet, when Father called the problem with the tutoring issue to the Court's attention with a Motion, the method the Trial Court handled that Motion is argued by Mother as demonstrative of prejudice toward her. The issue of tutoring is dealt with in greater detail at pp. 56-63, infra.

b. Mother says the Trial Court is biased toward her because it doesn't mention Father's missing appointments for "Child" with her psychologist, Dr. Collins, and only mentions Mother not taking her. The fact that Mother omits in making this statement to the Court is Father accidentally missed a small number of appointments but was generally the person who made "Child"'s appointments and took her to them. Dr. Collins testified that Mother stopped bringing "Child" and stopped communicating

with her regarding "Child" for more than five months after she tried to talk to Mother about agreeing to let Father have more parenting time.[7]

c. Mother complains about the Trial Court's accurate description of the sequence of events which occurred as a result of her counsel's filing a document entitled "Closing Memorandum of Mother". In Mother's "Closing Memorandum" filed at the conclusion of the Custody Trial, Mother's counsel made inappropriate, personal comments about Father's counsel. Mother criticizes as bias against her and her counsel the following statement made by the Trial Court in her Order on Amended Motion to Recuse about the "Closing Memorandum". See Mother's Petition to Recuse Appeal, pp. 16 - 17. The particulars of Mother's claim are contained in the footnote below.[8]

The Trial Court stated:

> "Much discussion was had concerning the pleading filed on February 4, 2013 entitled 'Closing Memorandum of Mother,' which amounted to a highly unusual criticism directed solely at opposing counsel and a hearing was necessary to discuss whether Mr. Nick Rice should withdraw this unprofessional pleading from the record. Mr. Nick Rice asked for a few days to think about the court's recommendation that he withdraw the

[7] See testimony of Catherine Collins December 6, 2012 Transcript p.1073, lines1-24- p.1074, Lines 1-19; p. 1089, line 18-24- p.1090, line 1-14; p. 1090, line 24- p. 1091, lines 1-23 Exhibit 3 to Appellee's Appendix.

[8] Mother specifically complains that the above statement by the Trial Court evidences bias against the Mother's Counsel, stating: "The Trial Court goes on to bring up Mother's counsel's Closing Memorandum of Law in the recusal order. The Trial Court's view of this pleading is not relevant to the resolution of the recusal motion. Moreover, the Trial Court's discussion of this issue attempts to disparage Mother's counsel while omitting key facts. The Trial Court calls the pleading "unprofessional." The Trial Court goes on to explain that Mother's Counsel announced that he would withdraw the pleading, but that the docket shows no order of withdrawal. The Trial Court's statement is framed in such a way as to indicate that Mother's counsel is unprofessional and dishonest. The closing memo was an explanation of Father's counsel's trial strategy. This is permitted in closing. The Judge instructed Mother's Counsel to write a letter to the Trial Court withdrawing the closing memo, or he may be barred from further representation of his client. On March 5, 2013, counsel for Mother wrote the letter, as instructed, agreeing to strike the closing memo from the record." Petition for Recusal Appeal, pp. 16-17.
Then, Mother's counsel claims that his failure to prepare the necessary order to withdraw the offensive pleading is bias on the part of the Court because he believed it was the Court's responsibility to follow up and make sure Mother's counsel appropriately implemented counsel's commitments.

> pleading and Mr. Rice eventually told the court he had decided to withdraw the pleading. However, the Court's docket entries reflect no removal or withdrawal order was ever entered and the document remains in the Court file." See Order on Amended Motion to Recuse, p. 4, Exhibit 11, Volume 1 of Appellant's Appendix.

Apparently, the lesson in professionalism, which the Trial Court wanted Mr. Nick Rice to learn has fallen on deaf ears, because even though he wrote the Court that he would withdraw his Closing Memorandum, he submitted no order to effectuate same and he argues to this Honorable Court that the Closing Memorandum was appropriate and professional. The Closing Memorandum, Father's Response to the February 28, 2013 transcript, the letter withdrawing the Closing Memorandum and Father's Reply to Mother's Response are attached as Exhibits 8, 9, 10, 11 and 12 to Appellee's Appendix. The issue of the Closing Memorandum is relevant to the Amended Motion to Recuse as it further demonstrates Mother's pattern and practice of unduly aggressive, personal attacks on people who get in her way.

Additionally, it is important to note that the Trial Court mentions Mother's counsel's "unprofessional pleading" in the context of the Mother's repeated statements that the Trial Court's decision "was not rendered until four (4) months after the close of the hearing [on January 17, 2013]..." The Trial Court points out "Counsel did not finish arguing about what should be in the findings of fact and conclusions submissions until after the 1st of March, 2013. Much discussion was had concerning the pleading filed on February 4, 2013 entitled 'Closing Memorandum of Mother...'" Order on Amended Motion to Recuse, Exhibit 7 to Appellant's Appendix, Part 1, pp. 3-4.

In other words, at least one (1) month of the four (4) month period about which Mother complains was consumed by controversy created by Mother.

d. Mother did have a history of cutting out or distancing her family from any person, professional or otherwise, if they took views contrary to hers, as the Trial Court noted "the great weight" of evidence showed. Mother has demonstrated she is unable to accept the responsibility of the consequences of her behavior on her children and cannot accept that the conclusions of the Trial Court in the Ruling is, therefore, accurate. In order to try to remove Dr. Steinberg from the litigation, Mother provided her psychologist, Dr. Leite, false information that Father was buying Dr. Steinberg. Further, during the Custody Trial, Mother's personal psychological counselor, Dr. Leite, impugned the ethics of the Forensic Evaluator, Dr. Steinberg.[9]

As the Court stated:

> "Mother did not like the results rendered by Dr. Fred Steinberg, the forensic psychologist... and even made ethical misconduct allegations against Dr. Steinberg through her therapist, Dr. Leite. In light of the evidence introduced at the hearing, the Court could only conclude that when the Court issued a ruling that was not what the Mother had wanted, Mother and her counsel embarked on a mission to get rid of the author of that unfavorable opinion." Order on Amended Motion to Recuse, p. 16, Exhibit 11 of Volume 1 of Appellant's Appendix.

Further, Dr. Leite's session notes record Mother's statements that she thought Father was "buying off" their son [Son Z], who went to live with Father. See Dr. Leite's note of May 23, 2011, Excerpt from Trial Exhibit 1, attached as Exhibit 4 to Appellee's Appendix. As noted in the Ruling, the evidence was that Mother withdrew "Child" from

[9] Dr. Leite claimed, initially, that Dr. Steinberg acted unethically in accepting payment solely from Father. The information given him came from his patient, Mrs. (M.F.R.). December 18, 2012 Trial Transcript p. 1333, lines 5-24 through p. 1334, lines 1-12, Exhibit 5 to Appellee's Appendix. On the basis of the information communicated to Dr. Leite by Mother, Dr. Leite filed an ethics complaint against Dr. Leite. Examination of the facts and record revealed that, by agreement of the parties, their Consent Order provided that Father would advance the funds to engage Dr. Steinberg as the Forensic Evaluator and Mother would pay her share later. See, Consent Order Appointing Dr. Fred A. Steinberg to Perform Forensic Psychological Custodial Evaluation, para 4, p.2, Exhibit 2 to Appellee's Appendix.

riding and dance lessons when Mother disagreed with the teachers.[10] When Dr. Collins, "Child"'s counselor, suggested that "Child" should spend more time with her Father, Mother withdrew "Child" from counseling. (See, p. 8 para b. supra.)

e. Mother claims the Trial Court's description of Mr. Rice's effort to distance himself from the claims made in the Amended Motion to Recuse as "disingenuous". See, issue discussed pp. 44-45 herein.

f. When Mother filed her Amended Motion to Recuse, she claimed an additional *ex parte* communication took place and was prejudicial to Mother. The circumstances of this claim were as follows: On September 4, 2013, a number of other Motions were scheduled to be heard as well as requests to set other matters for a time for hearing in this matter[11].

Instead, because of Mother's filing the August 29, 2013 Motion to Recuse, at the September 4, 2013 proceedings, the only thing dealt with was discussion of the mechanics of how and when the Motion to Recuse was to be dealt with. This Transcript is attached as Exhibit 16 in Appellee's Appendix.

After the proceedings on September 4, 2013, that afternoon, the Courtroom Deputy had advised the Trial Court that he thought Mother had recorded the proceedings in the Courtroom that day which, would have been prohibited by Shelby County Circuit Court Local Rule 1(D). At the Trial Court's direction, her courtroom clerk James S. Long attempted to contact Larry Rice, Mother's attorney, to ask him to set up

[10] Order on Amended Motion to recuse, page 11, Exhibit 11, Volume 1 of Appellant's Appendix.
[11] One Motion, Father's "Petition to Disqualify Dr. John Leite as Mother's Treating Psychologist for the Purpose of Reporting to the Court Mother's Progress Pursuant to the Court's Ruling of May 17, 2013" (the "Dr. Leite Disqualification Motion") had been continued from its last setting on September 4, 2013 because the Court's calendar would not accommodate an evidentiary hearing on August 16, 2013, the day it was originally set. In addition, Father's Petition to Order Sale of (S.D.R.) Industries, Inc. was also was going to be requested to be set. All were continued due to Mother's intervening Motion to Recuse having been filed.

a conference call with all counsel[12] on the case so that the Court could order Mother's attorneys to investigate whether Mother made the unauthorized recordings in the Courtroom that the Courtroom Deputy believed he saw Mother make during the proceedings. Mr. Rice would not accept the call from Mr. Long, insinuating to the rest of counsel that "the judge" had called him and that he wanted no part of an *ex parte* communication with her[13] unless all counsel were present. See, E-mail Thread dated September 4, 2013 from Larry Rice contained as Exhibit 19 to Mother's Amended Motion to Recuse, which motion is Exhibit 2 of Volume 1 of Appellant's Appendix.

Thereafter, the Court sent an e-mail to all counsel on September 6, 2013, attached as Exhibit 20 to the Amended Motion to Recuse. (Exhibit 20, Amended Motion to Recuse at Exhibit 2 of Volume 1 of Appellant's Appendix.) Mr. Larry Rice was an unintentionally omitted addressee on the September 6, 2013 e-mail, even though the contents of the e-mail clearly were directed to him. This e-mail glitch by the Court was discovered when Father's counsel wrote Mother's counsel requesting a report of what information the investigation had garnered. The Court's September 6, 2013 email was sent to Mr. Rice on September 10, 2013, as shown on Exhibit 20 to the Mother's Amended Motion to Recuse at Exhibit 2 of Volume 1 Appellant's Appendix. Mr. Rice claimed that the phone call and the e-mail from which he was accidentally omitted was another *ex parte* communication by the Court and added that claim to the Amended Motion to Recuse filed October 11, 2013. Between September 10, 2013 when Mr. Rice

[12] It should be noted that at this point in the proceedings, [Son B], the child of the [parties] who, over age of majority, had hired his own counsel (Patrick Ardis) as had Mrs. (M.F.R.)'s therapist, Dr. John Leite (Bill Monroe originally, now Attorney Joe Barton. Also, due to Mother's allegations against the Guardian Ad Litem and subpoenas to her firm, both the Guardian Ad Litem and her firm had to hire lawyers (respectively Daniel Lloyd Taylor and Arthur Quinn) to represent them.

[13] Even if the Judge had talked personally to Mr. Rice to ask for a conference call be set up, such would be an administrative matter that would clearly not be an impermissible ex parte communication.

did receive the Court's instruction to investigate the issue and October 29, 2013 (Mother's deposition, below), Mr. Rice provided no information to Counsel for Father or the Trial Court regarding what he had learned from his investigation.

Mother was asked about the recording issue at her deposition on October 29, 2013. She admitted that she had videotaped the after lunch-portion of the September 4, 2013 proceedings. The citations below refer to the Excerpt of the Deposition of (M.F.R.) taken on October 29, 2013 and which is attached as Exhibit 4 to Father's Response, Exhibit 4 being located in Appellant's Appendix, Part 2[14].

At Mother's deposition on October 29, 2013, Mother stated as follows:

> Q: Were you recording anything in the courtroom at the last hearing?]
> A:I did have my phone on record, mm-hmm. ...I turned the phone on record when we came back from lunch because before lunch I had stepped out in the hall and Mr. (S.D.R.) had accosted me, was trying to say something to me. It didn't sound friendly and I immediately turned and walked away.... And, I went to my attorneys at lunch about that and told them that (S.D.R.) had, once again, cornered me out there in the hall when no one was around and said – tried to say something to me. I turned around and ran – or walked really briskly away towards the other end of the hall. My attorneys told me that the only way I was going to stop it was to catch it on tape and for me to record when – when he was around and I turned the recorder off (sic) and it was left on during court. (Excerpt, p. 25, l. 4 – 24, p.26, l. 1-5).....
> It was the – just video was turned on. It was just laying – it was laying down on the bench next to me because (S.D.R.)was sitting directly in back of me. (Excerpt, p. 26, l. 8 – 16)
> I believe that the recording is still on the phone. ... I believe it's still on there. I haven't listened to it. I don't know, but believe it's still there. I haven't done anything to try to delete it. Exhibit 4 to Father's Response, which is located in Volume 2 of Appellant's Appendix, Excerpt, of Transcript of (M.F.R.) p. 26, l. 17 – 24, p. 27, l. 1-2)

[14]After Mother made this admission in her deposition on October 29, 2013, her Counsel, Larry Rice announced to the Court on November 4, 2013 a version of what Mother did in the Courtroom regarding the videotaping which appeared inconsistent in details with Mother's version of the events, but did also admit that she had done such videotaping and claimed that it was by accident.

The Trial Court found that:

> "Mother was, in fact, video recording the proceedings in violation of Rule 1(D). Mother claimed the rule violation was inadvertent. The Court realized that efficient case management required communication by e-mail at times and requested that all counsel should check all e-mails from all counsel and the Court to guarantee that no lawyer was inadvertently omitted from an e-mail distribution list. Such inadvertent omission of the Court, illogically, now surfaces as an allegation of judicial misconduct."

In conclusion, the call made by the Courtroom Clerk, Mr. James S. Long, to Mr. Larry Rice's office was to effectuate the Judge's request that he ask Mr. Rice to get a conference call together to discuss an issue of concern pertaining to alleged video or audio taping taking place in the courtroom by Mother or others. It was purely administrative in nature, not substantive, material or related to the merits of the case, not indicative of bias, prejudice or harm to any party, and not an impermissible *ex parte* communication.

g. On October 11, 2013, Mother filed her 'Amended Motion to Recuse' in which she continued, notwithstanding the statement of the Guardian Ad Litem and the Trial Court, to allege that a "reasonable person" would believe that Mr. (S.D.R.) bought the outcome in the Custody Trial. Mother claimed Father's financial resources enabled him the ability to buy what he wants, with the clear implication that he had bought the result he wanted from the Trial Court. (Amended Motion to Recuse, para. 9, 13 and 71, Exhibit 2, Vol. 1, Appellant's Appendix). This is impertinent, cynical, scandalous and nonsensical speculation. There is not one scintilla of evidence anywhere in the record to support Mother's assertion, nor is there any material of any nature anywhere in the discovery exchanged by the parties, or manifest in the conduct of the parties

themselves, to give rise to such speculation. Mother is as equally wealthy as Father[15]. Further, Mother stated in her deposition given October 29, 2013, when asked what she relied on to form the basis of her Motion to Recuse, that her views were "suspicions:

> "I just don't know what [my suspicions] might be. I just suspect that there may have been something that occurred, but, I don't know what that might be"[16] and They're [my suspicions] not- I don't think you can say they are concrete. It's more just an attitude... Stan's and the judge and some other – maybe the Guardian Ad Litem[17].

Regarding the above statement made by Mother, the Trial Court noted:

> Movant herself stated in her deposition that she did not know of any details of whether Respondent, Mr. (S.D.R.), had done anything inappropriate to influence the judge in this case. Mother has "suspicions that there may be some improprieties, but I don't have any details." October 29, 2013 Deposition of (M.F.R.), p. 5, lines 11, 12, 18 and 19. Since the subject of the calls was irrelevant to the Court's ruling, a reasonable person would conclude that the phone calls showed no bias or prejudice, or bias or prejudice that resulted in an unjust disposition of the case. Counsel for Movant tacitly admits that the subject of ponds or pools is irrelevant to the Court's Ruling. Amended Motion to Recuse, paragraph 9 (f)."
>
> See, Order on Recusal, Exhibit 7 to Appellant's Appendix Volume 1, p.13 [Emphasis Added.]

The Trial Court further noted:

> "Movant's request for recusal can be read to imply that the Court elicited a bribe in those telephone calls.[18] Movant's counsel, Mr.

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[15] Father has provided all of the bank statements and cancelled checks of every account that he has, and every account that (S.D.R.) Industries has, on regular periodic basis since this case was filed and has provided Mother a 69- page detailed accounting of his expenditures[15]. Mother points to no transactions that she can assert suggest financial irregularities between Father and the Guardian Ad Litem or the Trial Court.

[16] See, Excerpt from October 29, 2013 Deposition of (M.F.R.), p.6: lines 4-6 attached as Exhibit 4 to Father's Response, Exhibit 4 being located in Part 2 of Appellant's Appendix.
Furthermore, Black's Law Dictionary defines "suspicion" as "The apprehension of something without proof or upon slight evidence", stating "Suspicion implies a belief or opinion based upon facts and circumstances which do not amount to proof." Black's Law Dictionary. Fifth Ed. P.1298.

[17] See, Excerpt from October 29, 2013 Deposition of (M.F.R.), p.6: lines 4-17, of Appellee's Appendix, attached as Exhibit 18.

[18] The Guardian ad Litem (and her counsel) interpreted Mother's court filings as accusing her of bribery. *See*, Response to Amended Motion to Excuse Guardian ad Litem p. 7. The Father interpreted the Mother's court filings as accusing him of bribery. *See*, Affidavit of (S.D.R.) in Response to Amended

Rice, acknowledged this implication in open court but disingenuously distanced himself from it, stating:

> "I don't believe either of you [judge or guardian] did what the general public, I believe, the conclusion is that they would draw." Transcript of Proceedings, September 4, 2013, p. 51, lines 7-10.

"Additionally, the Movant Mother has stated in her October 29, 2013, deposition that she suspected that the Guardian Ad Litem, Lisa Zacharias, was bribed or had an inappropriate relationship with the Father, which influenced her professionalism. Deposition of Mother, October 29, 2013, pp. 9-13. Similarly, Mother directly accused the forensic psychologist, Dr. Fred Steinberg, of accepting bribes from the Father. Deposition of Mother, October 29, 2013, p. 16, line 2-5; and p. 19 line 10. Mother provided no evidence of the criminal wrongdoing she alleged.

"If Movant is directly making the allegation of bribery, Movant should so state the allegation on the record. Movant's unfounded innuendo is dramatic and offensive but establishes nothing. The Court rejects it."

Order on Recusal, Exhibit 7 to Appellant's Appendix, Volume 1, pp 15-16.

It is respectfully submitted that Mother's claims of ongoing bias are hollow, and without merit. Again, it is clear she doesn't like the Trial Court's Ruling, but all rulings made in this case have been based on the evidence and the law. As the Honorable Trial Court appropriately cites "Adverse rulings, however, are not usually sufficient grounds for recusal. Owens v. State, 133 S.W.3d 742 (Tenn. Cr. App. 1999)."

Motion to Recuse. Father's lawyer interpreted Mother's court filings of accusing the Guardian ad Litem, the Father and others of bribery. Hearing Transcript, September 4, 2013, p. 19.

III. STATEMENT OF THE CASE

B. TRIAL COURT FINDINGS AND ORDERS PERTINENT TO APPEAL OF RECUSAL DENIAL

On November 19, 2013, the Trial Court issued a 17 page written Order denying Mother's Amended Motion to Recuse which is attached to Volume 1 of Appellant's Appendix in this matter as Exhibit 7. At Mother's request, the Trial Court found that an evidentiary hearing was not necessary but did carefully consider the facts that were submitted by the parties and the Guardian Ad Litem, as well as, all written arguments of counsel in Mother's Motion to Recuse, Amended Motion to Recuse, Father's Response and Memorandum of Law in Opposition to the Amended Motion to Recuse, Mother's "Reply" to Father's Response to Amended Motion to Recuse, her "Amended Reply" to Father's Response to Amended Motion to Recuse, Supplemental Authorities submitted by both parties, Ms. Zacharias' Response to Amended Motion to Excuse Guardian Ad Litem and the Affidavits submitted by Guardian Ad Litem, Lisa Zacharias and by (S.D.R.)

Mother's "Amended Reply" to Father's Response to Amended Motion to Recuse contained a document submitted to the Trial Court as a purported "poll" or "anonymous survey" that Mother had commissioned in an effort to prove that the Trial Court had an appearance of bias. It should be noted that such "Amended Reply" containing this purported "poll" was delivered by Mother's Counsel to Father's Counsel in the hall outside the Courtroom and to the Court at the same time on November 12, 2013 which was the morning that Counsel had been slated to argue the Amended Motion to Recuse. Shortly thereafter, on November 12, 2013, upon notification by the Court that

further oral argument was not going to occur, Counsel for Father noted his objection to any consideration by the Trial Court of such attempted "evidence".[19]

In her Order on Amended Motion to Recuse, the Trial Court found that the proffered affidavit of 'Superior Dataworks LLC' (which pertained to the "anonymous survey") was "inadmissible and inappropriate for consideration under Rule 402, 702 and 802(6) T.R.E" finding that it

> "contained flaws and insufficiencies of facts , reporting and methodology as well as bias and ambiguity in survey question construction,....[and] lacks trustworthiness under Tennessee Rule of Evidence 802(6) as it was prepared solely for litigation." Order on Amended Motion to Recuse, p. 14-15, Exhibit 7 Vol. 1 of Appellant's Appendix.

It is further respectfully submitted by Father that the "anonymous survey" contains assumptions and questions drafted in such a way so as to suggest the desired answer, and that such questions appear to deliberately mislead the survey participants and to show no correlation between the true facts as they occurred, and the premises of the questions asked on the survey. It is respectfully submitted that the manner the poll was sought to be introduced (by last minute sandbagging) and the poll itself are considered examples of Mother's pattern and practice of omitting and misstating facts that are essential to an appropriate, reasoned evaluation of the issues.

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[19] It should be noted that when the parties appeared in Court on November 12, 2013, the Honorable Donna Fields indicated that because the Amended Motion to Recuse had been extensively briefed by the parties in the original and Amended Motions, Mr. (S.D.R.)'s Response and Memorandum of Law, the Response of the Guardian Ad Litem to the Amended Motion to Excuse the Guardian Ad Litem and Mother's Reply to the Memorandum of Mr. (S.D.R.) and Amended Reply filed on November 12, 2013, and the Court felt that all arguments that needed to be made had been made and that it was not necessary for the Court to take live testimony with respect to this matter. The Trial Court indicated "I do not believe there's a need for further argument or submissions on these two pending Motions. Please expect a formal ruling. Unless you have something important to say, I do not need to hear further from you." Exhibit 22 to Appellee's Appendix, p. 6, lines 18-23. Transcript of Proceedings, November 12, 2013. The Trial Court promised a promptly made written ruling on the recusal issue and delivered same on November 19, 2013, one week later. The transcript of the November 12, 2013 appearance before the Court is attached to Appellee's Appendix as Exhibit 22.

The Trial Court carefully considered the submissions and filings by the parties and the Guardian Ad Litem and made observations and findings concerning the relevant Exhibits submitted by Mother.

For instance, the Trial Court noted that Mother's submission of the joint tax return of the parties for 2011 did not show that Father could "buy anything he wished" any more than it showed that Mother could do the same as it was a joint tax return. It should be noted that in the original Motion to Recuse and the Amended Motion to Recuse the parties' 2011 tax return was attached as an Exhibit along with descriptions of Mr. (S.D.R.) as a person of immense wealth, for the purported purpose to "prove" that Father could "buy" anything he wanted, including the Trial Judge. In the "anonymous survey", Mother made sure that the factual premise given to the participants mentioned that the case was a multimillion dollar divorce case. Yet, in the instant Appeal, Mother now abandons this premise, presumably because she knows that her "innuendo... offensive and dramatic," as the Trial Court aptly described it, "establishes nothing." See, Order on Amended Motion to Recuse, p. 15-16, Exhibit 7 to Volume 1 of Appellant's Appendix.

With respect to the *ex parte* communication regarding pools/ponds on which Mother based her Motion to Recuse, the Trial Court further found as follows:

> "Included in the proof at trial was the fact that Mother disapproved of Father's purchase of a houseboat. Her reason was that two of their children could not swim. Mother's anger at Father's purchase of a boat because it endangered the children raised in the Court's mind the question of whether either parent's home had a pool as the Court recalled some testimony about a pool but could not find a reference in her notes. As previously stated, the testimony in this case required fifteen days of trial and eventually generated a 4,000 page transcript.
>
> The question of a pool at the parents' homes had been addressed at least once in the proof at trial (Transcript p. 2261, line 4, hearing on January 9, 2013), but

the Court could not find a reference in her trial notes to the testimony concerning whether either parent's home had a pool. The Court had her courtroom clerk call the Guardian Ad Litem's office solely concerning whether there was a pool at the Mother's home, and then a call to see if there was a pool at the Father's home. The answer came back that neither home had a pool, but there was a pond at the Mother's home.

Regardless of which counsel the Court had contacted, the answer would have been exactly the same – that there was no pool at the mother's house (but there is a pond), and that there was no pool at the father's house. The answer to this question confirmed the Court's recollection of the testimony that there was no pool. The answer to this question added no new fact to this matter. The answer to this question provided no facts that were a part of, or that influenced, the Court's ruling. The phone calls did not concern anything that had any substantive bearing on the custody ruling. The phone calls gave no party any advantage. The phone calls involved no outside influence and nothing that created any weighting of the evidence in favor or against either parent. Ms. Zacharias' assistant merely took the question, posed it to Ms. Zacharias, and relayed the answer back to the Court's clerk, as a double check of the Court's recollection." Order on Amended Motion to Recuse, Exhibit 7 to Volume 1 of Appellant's Appendix in this cause, pp.9-10.

On December 16, 2013 the Trial Court issued its order, sua sponte, staying the proceedings in this matter stating:

> "Mrs. (M.F.R.)'s counsel has filed a motion for recusal in this matter. When the Court denied that motion, Mrs. (M.F.R.)'s counsel filed an appeal from the Court's ruling. The Court is confident that it can continue to handle this matter in a fair and impartial manner, but the very serious charges raised in the motion for recusal make it prudent for the Court to, on its own initiative, pursuant to Rule 10B Section 2.04, stay Trial Court proceedings pending the appellate court's determination of that appeal. See, Order entered December 16, 2013 attached to Father's Appendix as Exhibit 23, p.1 (called the "Stay Order") [Emphasis supplied.]

IV. STATEMENT OF FACTS

A. UNDISPUTED FACTS

1. A trial on the custody of the parties' minor child, "Child", was held over a period of 15 days between November 16, 2012 and January 17, 2013 (the "Custody

Trial"). A trial transcript of 4,000 pages was generated and 157 exhibits were introduced.

2. On or about August 26, 2013, attorneys for the Mother called the Guardian Ad Litem to discuss an entry on the Guardian Ad Litem's statement for services rendered pertaining to a communication which occurred on April 16, 2013, (as reflected on the Guardian Ad Litem's statement for services rendered). The subject matter of such communication was apparently that on April 16, 2013, the Trial Court's staff person called the assistant of Lisa Zacharias, the Guardian Ad Litem, to inquire about the existence of a pool/pond at the home of either of the parties. Ms. Zacharias replied to the inquiry indirectly through her assistant providing an answer to the Court's assistant.[20] It is not disputed that a communication occurred about a pool/pond/body of water at the homes of the parties.

3. In fact, there is a pond at the marital residence where Mother resides, as accurately reported in the April 16, 2013 communication and as testified to by Mother at the Custody Trial.[21]

4. It is further undisputed that counsel for Mother views the Trial Court's and the Guardian Ad Litem's ethics as unimpeachable. It is not disputed that Mother's attorney, Mr. Larry Rice, stated the following in open Court on September 4, 2013:

> "No, ma'am, and I want to say clearly, for the record, I've known you since law school; I've known [the Guardian Ad Litem] for decades. I don't believe either of you all did what the general public, I believe, the conclusion is

[20] Transcript of Proceedings, September 4, 2013, p. 10, l. 2-6, attached as Exhibit 16, Appellee's Appendix.
[21] Transcript from Trial, Testimony of (M.F.R.) January 9, 2013, Vol. XIII, p. 2259 – 2263; January 16, 2013, Vol. XVII, p. 3192 – 3195; Trial Exhibit 129, all attached as Collective Exhibit 7 to Appellee's Appendix.

that they would draw. I won't even let those words slip my lips. I don't believe that either one of you all would have done this.[22]

5. It is undisputed that the Guardian Ad Litem and Judge did not talk directly to each other and that their staff members did.

6. It is undisputed that the question and answer are not relevant.

7. It is undisputed that no mention of a pond/pool is found anywhere in the Trial Court's Ruling.

8. Further, there is no evidence of any type whatsoever that was offered that an *ex parte* conversation took place directly by the Trial Judge with the Guardian Ad Litem about the pool issue.[23] Further, there is no evidence whatsoever that any other *ex parte* communication took place pertaining to this case between the Trial Court and the Guardian Ad Litem or the Trial Court and any other person involved in this litigation.

9. On or about September 4, 2013, the Court's Clerk, James S. Long, called Larry Rice to ask him to set up a conference call with all counsel. Mr. Rice did not take the call and did not set up the conference call.

10. It is undisputed that when Mother was asked about the basis for her amended Motion to Recuse, Mother stated she had "suspicions", and nothing "concrete".

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[22] Transcript, Proceedings, September 4, 2013, pp. 51, l.5-16, Exhibit 16 to Appellee's Appendix

[23] The Guardian Ad Litem was telephoned on August 26, 2013 by Mrs. (M.F.R.)'s lawyer, Nick Rice, with Larry Rice and other lawyers and staff at Mr. Rice's firm listening in to the conversation without telling the Guardian Ad Litem that they were doing so, and without advance notice of the subject to of the conversation. Without being familiar with the details of the entry on her bill from several months prior, the Guardian Ad Litem speculated that she may have talked to the judge. When, the next day, Ms. Zacharias was concerned that she seemed to have no recollection of talking to the Judge outside of the proceedings and learned from her assistant that she couldn't remember talking to the judge because she didn't talk to the judge, Ms. Zacharias immediately clarified the mistake with Mr. Rice by email attached as Exhibit 5 to at Exhibit 2 to Appellant's Appendix. In addition, the Guardian Ad Litem filed her sworn response to the "Amended Motion to Excuse the Guardian Ad Litem" and deals with some of the same complaints elicited by Mother against the Trial Judge. The Guardian Ad Litem's sworn "Response to Amended Motion to Excuse the Guardian Ad Litem" is the sworn response mentioned by the Trial Court in the Order on Amended Motion to Recuse and is included as Exhibit 19 in the Appellee's Appendix

IV. STATEMENT OF FACTS

B. CLARIFICATION OF MISSTATEMENTS AND OMISSIONS IN MOTHER'S STATEMENT OF FACTS

- The Alleged Four-Month Time Period Between Hearing and Ruling.

The Trial Court noted that Mother made misstatements in the Amended Motion to Recuse with respect to the reasons that it took a certain period of time between the close of the proof and the entry of the Court's Ruling on May 17, 2013. The Court stated in its Order on Recusal the following:

> The Movant has omitted relevant facts in Movant's recitation of the facts herein. Movant repeatedly points out that the Court's decision was not rendered until four (4) months after the close of the hearing that generated a 4000 page transcript. At the close of proof, this Court limited counsel to no closing argument, but invited counsel to submit proposed Findings of Fact and Conclusions of Law; both counsel indicated that they would prepare and submit proposed Findings of Fact and Conclusions of Law. The Court cautioned counsel that the court would begin a three week medical malpractice trial in seven days and then would be having surgery of a major nature. Counsel did not finish arguing about what should be in the findings of fact and conclusions submissions until after the 1st of March 2013. Much discussion was had concerning the pleading filed on February 4, 2013 entitled "Closing Memorandum of Mother," which amounted to a highly unusual criticism directed solely at opposing counsel and a hearing was necessary to discuss whether Mr. Nick Rice should withdraw this unprofessional pleading from the record. Mr. Nick Rice asked for a few days to think about the court's recommendation that he withdraw the pleading and Mr. Rice eventually told the court he had decided to withdraw the pleading. However, the Court's docket entries reflect no removal or withdrawal order was ever entered and the document remains in the Court file.[24]
>
> This Court was out for surgery and recovery time. After surgery, the Court returned to a two-week divorce trial, and thereafter rendered the

[24] Mother's Petition for Recusal Appeal also misstates the facts. The Trial Court warned Mother's counsel that, if Mother's Closing Memorandum was not withdrawn, sanctions proceedings would follow. Transcript of Proceedings, February 28, 2013, p. 13, lines 13-14, p. 20, lines 1-15; p. 25, lines 14-17; p. 27, lines 13-24 – p. 28, lines 1-9, Exhibit 10, Appellee's Appendix. Contrary to Mother's assertions in her Petition for Recusal Appeal, (Petition for Recusal Appeal, p. 17), the Trial Court did not tell Mother's counsel to withdraw the Closing Memorandum or he may be barred from further representation of his client.

Court's opinion on May 17, 2013 after reviewing hundreds of pages of notes.

Order on Recusal, Exhibit 7 to Appellant's Appendix Volume 1, pp. 3-4.

It is further respectfully submitted that Mother misstates and omits other important facts in her Statement of Facts to this Honorable Court as follows

- Primary Caregiver for "Child".

"Child" has not been in Mother's primary care since birth as stated in Mother's Petition for Recusal Appeal, p 1. She has been in the care of both of her parents until their separation in August, 2011. Thereafter, Father sought to have significant parenting time with "Child" and the proof in the hearing of this matter showed that Mother thwarted Father's efforts at every turn.[25] Mother interfered with Father's parenting time and with "Child"'s relationship with Father and alienated [Son B], the parties' older son, from Father.[26]

- Bifurcation.

Mother has asserted that her counsel objected to the custody and financial aspects of this case being bifurcated. (Petition for Recusal Appeal, p. 2). Such is not the case. The facts are set out in detail in Father's Answer to Mother's T.R.A.P. 10 Application, page 36-38, which Answer is attached as Exhibit 15 to Father's Appendix. In fact, bifurcation was not objected to by counsel for Mother at the time the Court made the decision to do so, or at any time during the trial of the custody matter. See also Section V(C)(iv) pp. 65-67, supra.

[25]Father's Answer to Mother's TRAP 10 Application, para 8, p. 10, Exhibit ____ to Appellee's Appendix
[26] Father's Answer to Mother's TRAP 10 Application, para. 1, p. 8; para. 5, p.9; para. 6, p. 9 and para. 8, p. 10, Exhibit ___ to Appellee's Appendix.

- Reasons No Trial Date Set.

Mother states that the financial part of the case has not been set for trial. In fact, she omits that the financial portion of the trial was set for November 4, 2013 and was unable to go forward because of the stay of proceedings resulting from Mother's pending Amended Motion to Recuse before the Trial Court. The Amended Motion to Recuse was served on Father on October 11, 2013; the Mother's Reply was served on November 8, 2013 and the Amended Reply delivered to Father's counsel at Court on November 12, 2013 when the parties were at Court to argue the Mother's Motion to Recuse. [27]

- Consistency of Guardian Ad Litem's Statements.

The Guardian Ad Litem's sworn response to Mother's Amended Motion to Excuse the Guardian Ad Litem [28] was filed on November 1, 2013 which is a sworn denial of any direct *ex parte* communications between the Guardian Ad Litem and the Trial Judge, and further is a denial by the Guardian Ad Litem of the exertion of any effort outside the trial of this matter to influence the decision of the Trial Court and is included as Exhibit 19 to Appellee's Appendix. In addition, the Affidavit of the Guardian Ad Litem, Lisa Zacharias, and the Affidavit of (S.D.R.) were filed November 12, 2013, are attached herewith as Exhibits 20 and 21 respectively to Appellee's Appendix to this Response. Ms. Zacharias' Affidavit and the affidavit of her assistant, Theresa Lamb,

[27] See footnote 6, infra.

[28] In furtherance of her overly aggressive trial tactics, Mother, or her Counsel, have filed Complaints to the Tennessee Board of Professional Conduct and the Tennessee Court of the Judiciary against the Guardian Ad Litem and Trial Judge, respectively, for what are respectfully submitted to be baseless claims of ethical violations by The Guardian Ad Litem and the Trial Judge claimed to have stemmed out of the actions complained in Mother's Amended Motions to Recuse and the Excuse the Guardian Ad Litem. It is respectfully submitted that Father (S.D.R.) has not been provided copies of such complaints but Father's Counsel is aware that such complaints have been responded to by the Guardian Ad Litem and Trial Judge to the respective bodies complained to. The Court noted this on November 4, 2013 in open Court with all parties present.

which was attached to Ms. Zacharias' Affidavit, both swore to the fact that Ms. Zacharias did not speak to the Judge or her staff, that Ms. Zacharias' assistant spoke to the Court's Assistant, Susan Wilson, who called Theresa Lamb to clarify if a pool or pond existed at either parent's house. Ms. Lamb obtained the answer from Ms. Zacharias and called Ms. Wilson with the answer.

- The Significance of Week to Week Parenting Time.

The chronology of the alternating week parenting time between the parties is set forth specifically in great detail in Father's Answer to Mother's T.R.A.P. 10 Application in this cause. (Father's Answer to Mother's TRAP 10 Application, p. 13, Footnote 12, Exhibit 15 to Appellee's Appendix). In fact, all pre-trial or pre-Ruling orders agreed to were done on a temporary basis with no creation of any bias until the ruling at trial could be made by the Judge. The orders were not made because the Trial Judge heard proof and decided that such schedule was the best for "Child".

- Spring Break 2013.

Mother argues that the Spring Break Order is indicative of a point of view by the Judge that alternating week parenting time was appropriate after the conclusion of the custody trial. The facts are that the Spring Break Order was a consent order. It was temporary in a way similar to the previous pre-trial Orders. During the Custody trial there was testimony that Mother had insisted and, in fact, did have Spring Break with "Child" in 2012. During the Custody Trial, the Trial Court made the statement that Father would have Spring Break with "Child" in 2013.[29] Thereafter, despite the Court's instructions on same, Mother would not agree in 2013 for Father to have Spring Break.

[29] Transcript of Proceedings, December 18, 2012, Volume X, p. 1555, lines 5-24 – p. 1557, lines 1-8, Exhibit 6 to Appellee's Appendix.

The Trial Court's Ruling had not yet been entered. The Court had to be addressed and the Court again stated that Spring Break, 2013 would be Father's parenting time.

In the Trial Court's Order on Amended Motion to Recuse the Court indicated that the issue of Spring Break was not one that the Court viewed as inconsistent with its Ruling. Mother attached the transcript and Order on Spring Break as Exhibits 3 and 4 to her Amended Motion to Recuse and, of same, the Trial Court stated:

> "Exhibits 3 and 4 [to the Amended Motion to Recuse which were Spring Break Consent Order and Transcript of phone call with Judge when she was in the hospital] similarly have no bearing on the Amended Motion to Recuse. The Court's ruling in this cause sets out why the facts of this case and the law required the Court to rule as it did."
>
> Order on Motion to Recuse, p. 6, Exhibit 7 to Volume 1 of Appellee's Appendix.

Mother's statement on page 2 of her Petition for Recusal Appeal that "the Trial Court sought evidence against Mother, *ex parte*", is an absolute misstatement of the events as they had clearly occurred. Mother neglects to tell this Honorable Court that the question asked by the Court's assistant to the Guardian Ad Litem's assistant pertained to whether there was a pool or pond on the property of either parent. Mother argues that she was not given an opportunity to respond to the question which was whether there was a pool or pond on the property of either parent.[30] In order for it to be reasonable to give a party an opportunity to respond, there needs to be a question for which additional response is needed for either clarification or elaboration, rather than a question like the one at bar which was either a "yes there is a pool" or a "no there is not a pool", as was the case here.

[30] In fact, neither party was given an opportunity to respond to the information that was provided in the communication between the judge's secretary and Ms. Zacharias' assistant.

- Mother's Incorrect Statement That "Child" Had Not Been Abused by Mother.

In her Petition for Recusal Appeal, Mother states that "Mother was not found to have emotionally abused "Child"." See Petition for Recusal Appeal, p. 17. Mother's statement that there was no finding of child abuse is patently false.

The Trial Court specifically addressed the concerns that it had for "Child". The fact that the Trial Court did not issue a temporary order pending the final ruling was not dispositive of whether the Judge did or did not have concerns about the emotional abuse that was going on pertaining to "Child".

In this case, the Trial Court found that Mother is an emotionally abusive parent to her 10-year-old daughter and such abuse was of "long standing etiology." This finding was no radical departure from the proof that was presented in this case. As stated by the Trial Court in its Ruling:

> "An ordinary happy childhood for this child, "Child", is in question at this point. However, this Court believes that the only hope for this child to have a normal life, will occur by being placed in the custody of her Father with her Mother having limited visitation until significant psychological assistance can be completed. The Court is aware that problems may arise in "Child"'s behavior as a result of this Court's ruling. However, this Court is called upon to do what is in the best interest of this child and to determine the comparative fitness of each parent. Mother shall have visitation supervised at The Exchange Club Family Center for up to 2 hours per week until Dr. Catherine Collins and the Mother's psychologist of choice report to the Court that Mother recognizes and has corrected her destructive behavior. Until the Court sees evidence that "Child" will be positively parented, the visitation shall occur at The Exchange Club Family Center in the presence of a psychologist or social worker. This matter will be reviewed every six months. Trial Court's Ruling, p. 29, p. 30, Exhibit 11 to Appellant's Appendix).

Further, in the Court's June 10, 2013 Ruling Addendum, the Trial Court stated:

> "I found, from all of the proof, that the destructive influence and emotional abuse (i.e., by Mother of the children) was of long standing etiology and insidious in nature... This was a long standing and continuing

danger of the former psychological and emotional abuse by Mrs. (M.F.R.) toward her children, specifically "Child"... This Court determined that "Child" needed to be removed from the destructive behavior that was harming her. This Court found that "Child"'s best interest required such removal. (Ruling Addendum, Exhibit 14 to Appellee's Appendix, p. 3, lines 14-21.)

- Mother's Suggestion That Everyone Except Mother and her Counsel knew About the Communication Between the Judge's Office and the Guardian Ad Litem's Office is Untrue.

Finally, Mother suggests to this Honorable Court that only the Mother and her counsel were unaware of communication between the Court's assistant and the Guardian Ad Litem's assistant. In fact, this communication was not known to Father or his counsel, either, and such was learned of at the time that Mother filed her Motion to Recuse.

V. ARGUMENT AND AUTHORITY

A. THE COURT'S COMMUNICATIONS DO NOT DEMONSTRATE BIAS OR A LACK OF IMPARTIALITY

As Father understands Mother's Amended Motion to Recuse and Petition for Recusal Appeal, Mother claims that a conversation occurring between the assistant for the judge and the assistant for the Guardian Ad Litem to request confirmation of information pertaining to whether there were swimming pools or ponds at the parties' residences was a prohibited *ex parte* communication. Mother, then, claims that the occurrence of the conversation necessitates the Trial Court's recusal from this case, stating "the appearance of impropriety is intrinsic." (Amended Motion to Recuse; para.

71, Exhibit 2 to Volume 1 of Appellant's Appendix). This is simply not the law, nor the result mandated by the law[31].

As a threshold issue, an *ex parte* communication must be from or on behalf of only one side of a lawsuit or with a non-party concerning a pending matter. Malmquist v. Malmquist, 2011 WL 4342655 at *8 (Tenn. Ct. App. 2011).

The Malmquist Court addressed the appellant's contention that the *ex parte* communication that the appellant asserted was indicative of the existence of bias. The Court examined Canon 3(E)(1)[32], which provided, in pertinent part:

> "A judge shall disqualify himself or herself in a proceeding in which a judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding." Malmquist, supra, at *9.

The Malmquist Court, then, addressed the comments to the Canon[33], noting, as follows:

> "The comments to the Canon are informative and state that '[a] judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification. (citation omitted) Canon 3(E) makes clear that disclosure is only required when the 'judge believes' that the information might be relevant.'"
>
> Malmquist, supra, at *9

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[31] The subject matter of the April 16, 2013 communication to the Guardian Ad Litem's office is not disputed. It was neither substantive nor material. "Substantive proof" is that which proves the truth of the matter asserted. Dial v. Harrington, 138 S.W.3d 895, 898 (Tenn. App. 2003) A "material fact" is a fact that must be decided to resolve a substantive claim. Abshure v. Upshaw, 2009 WL 690804 at * 5 (Tenn. Ct. App. 2009) (rev'd on other grounds, 325 S.W.3d 98 (Tenn. 2010) The substantive issues at the Custody Trial related to the fitness for custody of the parents, the best interests of the minors, and the application of Tennessee Law including, but not limited to, Tenn. Code Ann. §36-6-106. The issue, pools/ponds/bodies of water in existence at either of the parties' homes was testified to in the custody trial, and was not found relevant nor included in the Ruling. As such, it is neither substantive nor material.

[32] The predecessor provision to Tenn. Sup. Ct. R. 10, RJC 2.11.

[33] The predecessor provision to Tenn. Sup. Ct. R. 10, RJC 2.11, comment (5).

Here, Mother's attorneys admit that the fact (i.e., ponds/pools) which was the subject of the April 16, 2013 communication was "irrelevant." (Amended Motion to Recuse, para. 9.f., Exhibit 2 to Appellee's Appendix).

A judge may consider an *ex parte* communication, as is the case at bar, if the communication does not involve a substantive matter or an issue on the merits and the judge believes no party will gain an advantage, and, if the judge believes such communication is relevant, notifies the parties of the substance of the communication and allows them an opportunity to respond. Bean v. Bailey, 280 S.W.3d 798, 804 (Tenn. 2009), applying Tenn. Sup. Ct. R. 10, Canon 3(B)(7)(a), to determine that a long, acrimonious and public dispute between a plaintiff's law firm and judge is the sort of fact that a person of ordinary prudence would find a reasonable basis to question the judge's impartiality.

The Trial Court found the following with respect to the *ex parte* communication pertaining to the pool or pond at the parents' homes:

> "The question of a pool at the parents' homes had been addressed at least once in the proof at trial (Transcript p. 2261, line l.4., hearing on January 9, 2013), but the Court could not find a reference in her trial notes to the testimony concerning whether either parent's home had a pool. The Court had her courtroom clerk call the Guardian Ad Litem's office solely concerning whether there was a pool at the mother's home and then a call to see if there was a pool at the father's home. The answer came back that neither home had a pool but there was a pond at mother's home.
>
> Regardless of which counsel the Court had contacted, the answer would have been exactly the same – that there was no pool at mother's house (but there is a pond), and that there was no pool at the father's house. The answer to this question confirmed the court's recollection of the testimony that there was no pool. The answer to this question added no new fact to this matter. The answer to this question provided no facts that were part of, or that influenced, the Court's ruling. The phone calls do not concern anything that had any substantive bearing on the custody ruling. The phone calls gave no party any advantage. The phone calls

> involved no outside influence and nothing that created any weighting of the evidence in favor or against either parent. Ms. Zacharias' assistant merely took the question, posed it to Ms. Zacharias and relayed it back to the Court's clerk as a double check of the Court's recollection." (Order on Amended Motion to Recuse, Exhibit 7 to Appellee's Appendix, Exhibit 7, p. 10).

The Tennessee Supreme Court reviewed the standard of law relating to the "appearance of impropriety" in Clinard v. Blackwood, 46 S.W.3d 177 (Tenn. 2001), relating to the disqualification of a lawyer and the appearance of impropriety in a conflict of interest setting. The standard of law is the same, whether it is disqualification of a lawyer or a judge. The Supreme Court held:

> The appearance of impropriety standard is not amorphous. There are subtle, but identifiable, contours of the rule that aid in its application. First, the mere possibility of impropriety is insufficient to warrant disqualification. "It cannot be a fanciful, unrealistic or purely subjective suspicion of impropriety that requires disqualification. The appearance of impropriety must be real." Second, the standard is objective. Avoidance of the appearance of impropriety is intended to promote public confidence in the legal system. Therefore, objective public perception rather than the subjective and "anxious" perceptions of the litigants govern.
>
> Third, because judges have a privileged understanding of the legal system, they may fail to find an appearance of impropriety where one would be found by a layperson. [Regarding the disqualification of an attorney for the appearance of impropriety], the existence of an appearance of impropriety should therefore be determined from the perspective of a reasonable layperson. Fourth, that layperson is deemed to have been informed of all of the facts .... In sum, an appearance of impropriety exists "in those situations in which an ordinary knowledgeable citizen acquainted with the facts would conclude that the ... representation poses substantial risk of disservice to either the public interest or the interest of one of the clients". N.J. Rules of Proof. Cond. 1.7(c)(2); cf. Davis, 38 S.W.3d at 564 (holding judge should be recused when a "person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality").

Clinard v. Blackwood, supra, at 187. [Emphasis supplied.] (citations omitted, except the final citation relying upon the same standards as applying to judges and recusal)

A communication between the Judge in this case, as the trier of fact, and the Guardian Ad Litem is much like communications in those cases addressing *ex parte* communications between a judge and jury.

> "A trial judge's *ex parte* communication with a jury does not require reversal *per se*, but reversal is required where a timely complaining party shows specific prejudice or, where owing to the nature of the *ex parte* communication, the reviewing court is unable to determine whether the action was actually harmless." Davis v. Hall, 920 S.W.2d 213, 216 (Tenn. Ct. App. 1995)

In Davis, Mr. Davis observed Judge Wyeth Chandler entering the jury room. It was held to be no error because the Judge responded on the record that he would step into the jury room about logistics for breaks, lunch, etc. and the courtroom bailiff testified to the same practice[34].

The recent Eastern District Court of Appeals case, Burchfield v. Renfree, 2013 WL 5676268 (Tenn. Ct. App. 2013,) provides more guidance directly on point. In Burchfield, there is no per se rule of reversal for an *ex parte* communication. The standard is whether the communication constitutes error. Burchfield, at *8 [Emphasis supplied.] There must be evidence that the communication tainted the deliberative process. Burchfield, supra, at *9. The reviewing court does not speculate what "might" have occurred in a communication. In the absence of evidence of specific prejudice, the error is harmless. Burchfield, at *9. Although it was correct that a judge should not undertake any *ex parte* communication with a jury, in the absence of evidence of resulting prejudice, such error is harmless. Burchfield, at *9.

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[34] By way of illustration, an example of error is found in Holt v. Parton, 2001 WL 987230 (Tenn. Ct. App. 2001). The Judge discussed the jury's deliberations with the jury, then, took case from jury and ruled on the merits. The Court of Appeals ruled that this was error because the reviewing court could not tell if the action was actually harmless. Holt, supra, at *8.

Mother's attorneys asserted in the recent past that there is no "plausible alternative" to Mother's suspicions and speculations (Amended Motion to Recuse, para. 10, Exhibit 2 to Appellant's Appendix). In fact, in the Order on Amended Motion for Recusal, the Trial Court clearly set forth the true facts: that the Judge couldn't find in her notes about swimming pools and ponds and needed to "double check" the Court's recollection". [35] Order on Amended Motion for Recusal, p. 10 (Exhibit 7 to Volume 1 of appellant's Appendix.

For recusal to be mandated because of the appearance of impropriety, it, again, would have to be shown, through evidence, and not speculation, that an ordinarily prudent person, knowing all the facts that the Court knows, would have a reasonable basis to question if the Court lacked impartiality in the matter, Burchfield, supra at 9. Mrs. (M.F.R.) stated in her October 29, 2013 deposition that she doesn't believe Mr. (S.D.R.) paid off the Judge.

Mrs. (M.F.R.) is quoted saying:

> Q: Do you suspect [Mr. (S.D.R.)] has paid the Judge money?
> A: I – I don't think so and I certainly hope not. (Excerpt from Deposition of (M.F.R.) taken October 29, 2013 p. 9: lines 15–20 attached as Exhibit 18 to Appellee's Appendix.)

When a party challenges a judge's impartiality, the law provides they must come forward with some evidence that would prompt a reasonable, disinterested person, knowing everything the judge knows, to believe that the judge's impartiality might reasonably be questioned. Eldridge v. Eldridge, 137 S.W. 3d 1, 7 (Tenn. Ct. App. 2002)

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[35] The Court informed the parties that the Court would be using the Court's notes, not the transcripts, in preparing the Ruling. See, Transcript of Proceedings, February 28, 2013, p. 6, l. 6-10, Exhibit 10 attached to Appellee's Appendix.

In Eldridge v. Eldridge, 137 S.W. 3d 1, 10-11 (Tenn. Ct. App. 2002), several alleged incidents reflecting *ex parte* communication and alleged bias on the part of the trial judge sitting as trier of fact were raised. Mother's attorney learned that father's attorney[36] had provided a computer disk to the Judge to aid her in making her ruling. The mother's attorney learned there were more materials on the disk than just the father's Proposed Ruling. The mother's attorney raised the matter with the Court and asked if the Court had viewed materials belonging to father's attorney relating to the case and other cases and information on the disk provided by the father's attorney. When the Court stated that she had not viewed any other materials on the disk, the mother's attorney replied,

> "...When you say that you did not open a single file except that one, that is the end of the inquiry [from mother's attorneys]." Eldridge, 137 S.W. 3d 1, 8-9 (Tenn. Ct. App. 2002) The Court of Appeals ruled that "this evidence fails to prompt a reasonable person to question the impartiality of the trial court." Eldridge, 137 S.W. 3d 1, 9 (Tenn. Ct. App. 2002).

Later, in Eldridge, where, in court on a different issue, the new attorney for the mother questioned whether communications from the father's attorney to the clerk of the court influenced the court's ruling on a latter matter in the case. The court stated, "Do you think I do not have an independent view of this case?" and the court proceeded to explain. The attorney for the mother responded that he felt he had to raise the question and agreed to go on. The Court of Appeals ruled "In light of the trial judge's explanation and lack of any other evidence in the record to suggest to the contrary, a reasonable person would not be prompted to question the trial court's impartiality... mother's inferences are tenuous at best." Eldridge v. Eldridge, 137 S.W. 3d 1, 11 (Tenn. Ct. App. 2002)

[36] Larry Rice was one of Father's attorney in Eldridge.

Here, as in Eldridge, supra, the Guardian Ad Litem has given an explanation and the Trial Court has given an explanation. Mother has no evidence to the contrary. Mother's contentions are, as in Eldridge, "tenuous at best". Similarly to the interchange between lawyer and Judge in Eldridge, supra, in the case at bar, Mr. Rice, Mother's attorney, who is also the person swearing to the bias and improper *ex parte* communications in the Amended Motion to Recuse, stated to the court:

> No, ma'am, and I want to say clearly, for the record, I've known you since law school; I've known [the Guardian Ad Litem] for decades. I don't believe either of you all did what the general public, I believe, the conclusion is that they would draw. I won't even let those words slip my lips. I don't believe that either one of you all would have done this.

Transcript, Proceedings September 4, 2013, p. 51, lines 5-12, Exhibit 16 to Appellee's Appendix.

If Mr. Rice, Mother's attorney, is to be taken at his word, applying the appropriate law, then, he does not believe that a reasonable person, knowing all the facts that the Judge knows, would have any reason to believe that improper communications occurred or that bias exists.[37] The speculations contained in Mother's Petition for Recusal Appeal are baseless and there is no evidence that supports Mother's contentions.

In Spencer v. A-1 Crane, the Tennessee Supreme Court held that the defendant had the opportunity to demonstrate whether a specific prejudice had resulted from an *ex parte* communication between the Judge and jury and by failing to so show such prejudice, the error in the *ex parte* communication was harmless, Spencer v. A-1 Crane,

[37] Equally so, Father has no doubt that an ex parte communication between the Court (or Court staff) and one of Mother's attorneys on or about February 8, 2013, regarding Mother's filing, without leave of Court. "Amended Proposed Findings of Fact and Conclusions of Law" filed February 8, 2013, was innocuous and irrelevant. The Court referred to the communication in a proceeding on February 28, 2013. (See Exhibit 6, Transcript of Proceedings February 28, 2013, p. 3, l. 12 – 16; p. 5, l. 4-6).

800 S.W.2d 938, 940-941 (Tenn. 1994). The Tennessee Supreme Court in Spencer v. A-1 Crane, stated

> "the best position seems to us to be that a trial judge's *ex parte* communication with a jury in a civil case does not require reversal per se, but reversal is required where a *timely* complaining party shows specific prejudice or where, owing to the nature of the *ex parte* communication, the reviewing court is unable to determine whether the action was actually harmless." Spencer v. A-1 Crane Service, 880 S.W.2d 938 at 941.

The subject matter of the communication (ponds/pools) was subject matter for which testimony was previously elicited in the Custody Trial, (albeit in the 4,000 page transcript of the proceedings). During the Custody Trial, Mother testified about the existence of a pond at the marital residence (See, Transcript from Trial, Testimony of (M.F.R.) January 9, 2013, Vol. XIII, p. 2259 – 2263; January 16, 2013, Vol. XVII, p. 3192 – 3195; Trial Exhibit 129, all attached as Collective Exhibit 7 to Appellee's Appendix).

The information sought by the Judge from the Guardian Ad Litem was not new evidence or information and can only be construed as, in fact, constituting a request by the Court for what turned out to be a reminder of evidence previously testified to by both parties. Moreover, neither the subject matter of the communication or the evidence from the parties on the subject matter was included in the Court's 32 page Ruling[38]. From this it is respectfully submitted that it can be concluded that the Court did not find the subject matter to be relevant enough to the facts of the case to be included in the Court's Ruling.

Therefore it is respectfully submitted that with respect to the April 16, 2013 communication, the fact that the Judge's staff inquired of the Guardian Ad Litem's office

[38] Nor is the subject mentioned by the Court in its Addendum to the Ruling of June 10, 2013.

about this does not make it an impermissible *ex parte* communication. It is not related to the merits, it is of no substantive import, it is an irrelevant fact, as stated by the Mother (Amended Motion, para. 9,f, Exhibit "2" to Appellant's Appendix). The fact of the communication is not intrinsically probative of bias or lack of impartiality. The question itself was not subjective in nature. Neither question, nor answer were subject to interpretation or weighing of credibility. Assuming that the information sought had not already been put in evidence (as it was in this case), the question elicited only a "yes" or "no" answer and would be the same whether the Guardian Ad Litem obtained it from either of the parties or the Court obtained it during the proceedings.

Therefore, the subject matter of this communication does not indicate a lack of impartiality or bias in any way, and most definitely does not indicate same under the legal standard of the "prudent ordinary person who knows all the facts known to the judge". It is only through Mother's speculations and suspicions that the subject matter of the conversation becomes something other than that which both of the parties to the conversation clearly say it was.

Having addressed the Mother's contentions, as needed to distinguish the various tenuous claims and speculations of Mother, Father would respectfully submit that, as a matter of law, the communication is not an *ex parte* communication that does not justify reversible error or prejudicial harm.

Without any evidence to support her contentions, Mother asserts that, somehow, the Court's office's single communication with the Guardian Ad Litem's office about an "irrelevant fact" formed some part of the basis for the Court's 32 page Ruling and thereby was evidence of bias against Mother.

Assuming, for argument's sake, that the communication had some casual connection to the preparation of Ruling. Even then, it was not a prohibited *ex parte* communication. It is established law that the drafting of an order is an administrative function and, thus, an exception to the rule. In Re Jonathan S. C-B, 2012 WL 3112897 at *22 (Tenn. Ct. App. 2012) (court delegated the drafting of an order in a contentious custody proceeding that generated a voluminous record to the Guardian Ad Litem as the most neutral party; communications about the order were not *ex parte* communications).

The Trial Court found in its Order on Amended Motion to Recuse that:

> "The Court clerk made phone calls to the Guardian Ad Litem to help the Court administratively marshal the Court's notes while working on a ruling. Tennessee Supreme Court Rule 10, Rule 2.9, recognizes that *ex parte* contact is permitted for such administrative matters, when the Judge reasonably believes that no party will gain procedural, substantive or tactical advantage as a result of the communication. That is the case here. Rule 2.9 further requires that the Judge promptly notify all other parties of the substance of the *ex parte* communication and give the parties opportunity to respond. No substance was discussed. Since the topic was irrelevant to the Court's ruling, there was nothing for any party to respond to, nor would any response be any different at all on the facts reported by the Guardian Ad Litem. The phone calls did not touch on the merits of the case. The phone calls are no evidence of any bias or pre-judging of the case."
>
> Trial Court's Order on Amended Motion to Recuse, pp. 13-14, Exhibit 7 of Volume 1 of Appellant's Appendix, Exhibit 7.

B. THE ORDINARY PRUDENT PERSON STANDARD FOR RECUSAL

(i.) Generally

Recusal is a matter for the Trial .Court's discretion. The Trial Court should not recuse itself from this matter unless it finds that a *person of ordinary prudence*, knowing all the facts that the Court knows about the case, would have a reasonable basis for

questioning the judge's impartiality. Bean v. Bailey, 280 S.W.3d 798,805 (Tenn. 2009) [Emphasis Added], Malmquist v. Malmquist, 2011 WL 4342655 at *10 (Tenn. App. 2011)[39]. A "person of ordinary prudence" has also been described as a "well-informed, disinterested observer." Phillips v. Phillps, 2013 WL 3462731 at *5 (Tenn.Ct.App. 2013) [emphasis added].

It is respectfully submitted that such is not the case at the case at bar. The Trial Court in denying Mother's Motion to Recuse stated:

> "The pending Amended Motion to Recuse calls into question the integrity of the Judge herein and the judicial process and requires serious and careful consideration. [citing In re Hooker, 340 S.W.3d 389, 394 (Tenn.2011)] .....
>
> "Tennessee Supreme Court Rule 10, RJC 2.11, requires a judge to disqualify himself or herself in any proceedings in which the judge's impartiality might reasonably be questioned. .....
>
> "The standard for evaluating whether a judge's impartiality might reasonably be questioned is an objective standard. The Tennessee Supreme Court recently stated:
>
> > The objective standard consistently used by Tennessee's courts is that recusal is warranted only when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality. [Citing, In re Hooker at 395.]
>
> "The question is whether a reasonable person, knowing all the facts of a case, would have a reasonable basis for questioning the judge's impartiality? [Citing Bean v. Bailey, 280 S.W.3d 798, 805 (Tenn. 2005)].....
>
> "The question before the Court on this motion is not whether the matters at issue were improper judicial conduct, but whether the conduct complained of shows bias or prejudice or resulted in bias or prejudice,

[39] See, also, Camp v. Camp, 361 S.W.3d 539, 547 (Tenn. App. 2011). In Camp, supra, the Judge sua sponte recused himself from hearing a divorce because of a social relationship and a working relationship with one of the parties. It was held as error that the Judge later heard post-divorce proceedings without recusing himself because he didn't specifically articulate the reasons he believed that recusal was not longer mandated due to the social relationship and the working relationship having ended.

considered by an objective standard. [Citing State v. Boggs, 932 S.W.2d 467, 472 (Tenn. Ct. Cr. App. 1967)]."

Trial Court Order on Amended Motion to recuse, Exhibit 7 to Volume 1 of Appellant's Appendix filed herein, pp 11-12.[Emphasis Supplied.]

The objective view of a judge's conduct is characterized by two important limitations. The first is:

"In order to disqualify a judge, the bias or prejudice must come from an extra-judicial source and not result from the judge's impressions during trial. If this were not the case, a judge who makes a ruling adverse to one of the parties would be subject to charges of bias and prejudice. Indeed, adverse rulings by a trial court are not usually sufficient grounds to establish bias. Rulings of a trial judge, even if erroneous, numerous and continuous, do not, without more, justify disqualification." Eldridge v. Eldridge, 137 S.W. 3d 1, 7 (Tenn. Ct. App. 2002) [Emphasis Added.]

The second of the two important limitations identified by the Court of Appeals concerns the judge's background experience.

"Disqualification is not warranted when the judge's impersonal prejudice arises from the judge's background experience. Judges will generally have strong feelings about certain conduct and behavior. When the judge perceives that one party or the other has engaged in that conduct, the party should not be surprised that he/she has incurred the judge's wrath." Eldridge v. Eldridge, 137 S.W. 3d 1, 7-8 (Tenn. Ct. App. 2002)

In this case the Trial Court found that the basis of every decision in this cause came from evidence properly proffered and admitted into evidence stating:

"The hearing of this custody issue took place over fifteen days. The Court's ruling sets forth the facts that were the basis for the Court's ruling. Both Mother and Father had ample opportunity to introduce facts to persuade the Court to rule in their favor. **The facts presented in this courtroom are what caused the Court to rule, as it did, nothing else**." Trial Court Order on Recusal, Exhibit 7 to Volume 1 of Appellant's Appendix filed herein, p. 13.[Emphasis Supplied.]

and

"It is the facts these parties presented that form the basis for this Court's Ruling, not any matter outside the evidence presented in the case and not any personal prejudice or preconceived bias of the person who served as judge in this case." Trial Court Order on Recusal, p. 17, Exhibit 7 to Volume 1 of Appellant's Appendix filed herein.

(ii) Mother Has No Evidence That Persuades An Ordinary prudent Person That There Was Extra-Judicial Influence Crating Bias.

The direct implication of Mother's Amended Motion to Recuse, was that the *ex parte* communication about the ponds on the parties property was really substantively some other conversation that took place directly between the Guardian Ad Litem and the Trial Judge and that resulted in the Trial Judge abandoning some earlier held position for one unduly favoring Mr. (S.D.R.) in return for some kind of unspecified benefit received by the Guardian Ad Litem and/or the Court from Mr. (S.D.R.).[40] In its Order on Amended Motion for Recusal the Trial Court noted:

"A party challenging a judge's impartiality must come forward with evidence that would prompt a reasonable person to believe that the judge's impartiality might reasonably be questioned. *Todd v. Jackson*, 213 S.W.3d 277, 282 (Tenn. Ct. App. 2006).

Movant herself stated in her deposition that she did know of any details of whether Respondent, Mr. (S.D.R.), had done anything inappropriate to influence the judge in this case. Mother has "suspicions that there may be some improprieties, but I don't have any details." [See Exhibit 18 to Appellee's Appendix, October 29, 2013 Deposition of (M.F.R.), p. 5, lines 11, 12, 18 and 19.]

Since the subject of the calls was irrelevant to the Court's ruling, a reasonable person would conclude that the phone calls showed no bias or prejudice, or bias or prejudice that resulted in an unjust disposition of the case. Counsel for Movant tacitly admits that the subject of ponds or pools is irrelevant to the Court's ruling. Amended

[40] Mr. (S.D.R.) & Ms. Zacharias denied any such misdoing in his Affidavit filed in this cause and included as Exhibit20 and Exhibit 21 to Appellee's Appendix filed in this cause.

Motion to Recuse, paragraph 9 (f). Trial Court Order on Recusal, Exhibit 7 to Appellant's Appendix filed herein, pp 12-13.

The Trial Court in its Order on Amended Motion to Recuse noted:

> Movant's request for recusal can be read to imply that the Court elicited a bribe in those telephone calls. [FN1] Movant's counsel, Mr. Rice, acknowledged this implication in open court but disingenuously[41] distanced himself from it, stating:
>
> > "I don't believe either of you [judge or guardian] did what the general public, I believe, the conclusion is that they would draw." Transcript of Proceedings, September 4, 2013, p. 51, lines 7-10.
>
> Additionally, the Movant Mother has stated in her October 29, 2013, deposition that she suspected that the Guardian Ad Litem, Lisa Zacharias, was bribed *or* had an inappropriate relationship with the Father, which influenced her professionalism. See, Deposition of Mother, October 29, 2013, Exhibit 4 to Volume 2 of Appellee's Appendix pp. 9-13. Similarly, Mother directly accused the forensic psychologist, Dr. Fred Steinberg, of accepting bribes from the Father. Deposition of Mother, October 29, 2013, p. 16 line 2-5; and p. 19 line 10. Mother provided no evidence of the criminal wrongdoing she alleged.
>
> If Movant is directly making the allegation of bribery, Movant should so state the allegation on the record. Movant's unfounded innuendo is dramatic and offensive but establishes nothing. The Court rejects it."

---

[41] The Merriam Webster Dictionary defines "disingenuous" as an adjective meaning "not truly honest or sincere; giving the false appearance of being honest and sincere; lacking in candor; giving a false appearance of simple frankness; calculating."

Mother's counsel Larry Rice drafted and signed the Motion to Recuse and the Amended Motion to Recuse and signed affidavits under oath on both Motion and Amended Motion that such were not being presented for any improper purpose and certified that "the facts presented in..(such) Motion are true and correct to the best of my knowledge, information and belief." Amended Motion to Recuse, p.30, Exhibit 2 to Appellant's Appendix.

Despite the above, the Amended Motion to Recuse makes allegations from which the only reasonable inference that can be drawn is that Mrs. (M.F.R.) is alleging that the Court was bribed in some fashion by Mr. (S.D.R.). After causing all of this "dramatic and offensive" innuendo to have been made, Mother's Counsel, Mr. Rice then stands before the Court and makes the statement that he knows neither the Court or the Guardian Ad Litem is capable of such wrongdoing. If such can't be described as disingenuous, then it must only be evidence that Mr. Rice's affidavit was falsely made and the Amended Motion to Recuse is false on it's face.

> [FN1:] The Guardian Ad Litem (and her counsel) interpreted Mother's court filings as accusing her of bribery. *See*, Response to Amended Motion to Excuse Guardian ad Litem p. 7. The Father interpreted the Mother's court filings as accusing him of bribery. *See*, Affidavit of (S.D.R.) in Response to Amended Motion to Recuse. Father's lawyer interpreted Mother's court filings of accusing the Guardian Ad Litem, the Father and others of bribery. Hearing Transcript, September 4, 2013, p. 19.
> See Order on Amended Motion to Recuse, pp. 15-16, Exhibit 7 to Volume 1 of Appendix of Appellee.

It is respectfully submitted that neither Mr. (S.D.R.), nor any person on his behalf has paid or given anything of benefit to this Court or to the Guardian Ad Litem for any purpose, including most especially for the purpose of seeking to influence this Court's decisions and rulings in this divorce case, nor could any reasonably prudent person think otherwise. See, Exhibits 20 and 21 to Appellee's Appendix hereto: Affidavits of (S.D.R.) and Guardian Ad Litem Lisa Zacharias.

The Trial Court noted that this case has already taken up an enormous amount of the Court's resources stating in its Order on Amended Motion to Recuse:

> The Movant alleges that this Court violated her due process rights. Amended Motion to Recuse, ¶¶ 120-123. Movant's due process rights were clearly respected given a Court Docket Sheet that is 48 pages in length, a custody hearing with a transcript in excess of 4,000 pages, and the disproportionate time and resources devoted to this case by the Court." See, Order on Amended Motion to Recuse, p. 16, Exhibit 7 to Appellant's Appendix Volume 1.

Including the 15 day custody trial held between November 16, 2012 and January 17, 2013, the parties and/or their counsel have appeared before the Trial Court has heard more than 36 different pretrial proceedings or matters in the time between the April, 2011 filing of this divorce and through present date and the Court has entered 39 Orders to date in this cause. See, Affidavit of Kimbrough B. Mullins, Exhibit 24 to Appellee's Appendix hereto.

Mother argues that since the Motion to Recuse was filed that "the Trial Court continues to demonstrate hostility and bias toward Mother and Mother's Counsel, necessitating her recusal." Mother's Petition for Recusal Appeal, p. 16. In fact, Mother proffers no evidence to support her position of Trial Court bias or lack of impartiality, and demonstrates a complete inability to absorb that her own conduct and the evidence are the bases for the decisions of the Court. Mother complains of bias and partiality when she is called to account for the misbehaviors which the evidence proves against her. It is respectfully submitted that Mother's Motion to Recuse, as well as the Motion to Excuse the Guardian Ad Litem and Motion to Set Aside Judgment follow a pattern and practice repeatedly employed by Mrs. (M.F.R.) in aggressively attacking personally and/or ethically all who stand between her and her getting her way.

Likewise, here, when Mother was faced with the Ruling, which she does not like, Mother has pursued strategies to avoid it, such as the Motion for Interlocutory Appeal, the Petition to Modify Visitation (subsequently withdrawn) and the Application for Extraordinary Appeal (denied by the Court of Appeals). Mother's Motions to Recuse and Excuse the Guardian Ad Litem impugn the personal integrity of this Court, the Guardian Ad Litem and Father, with no evidentiary basis to support the impertinent material.

Undoubtedly, it is not unfamiliar to this Court for litigants to be dissatisfied with the Court's decisions in their cases, but in this case, it is respectfully submitted that the instant Motion to Recuse and the Mother's Motion to Excuse the Guardian Ad Litem are clearly interposed for the purpose of harassment and delay and made purely because Mrs. (M.F.R.) doesn't like nor wish to comply with the Court's Ruling, and for no other

reason. The allegations contained in the motions are a continuation of an established pattern demonstrated in this cause.

The Trial Court found in the Order on Amended Motion to Recuse, Exhibit 7 to Appellant's Appendix, p. 16:

> "As the Court observed in its ruling, the great weight of the evidence at the custody hearing established that the Mother has a pattern of attempting to get rid of people she does not like: she resisted Mrs. Rotzell as a tutor because she did not like her. She did not like Dr. Catherine Collins and tried to stop taking her daughter to her. She did not like an equine riding instructor, or Ms. Peggy Doyle, a dance teacher. She got rid of them.
>
> Mother did not like the results rendered by Dr. Fred Steinberg, the forensic psychologist, and hired another psychologist, Dr. John Ciocca to attempt to combat the forensic opinion, and even made ethical misconduct allegations against Dr. Steinberg through her therapist, Dr. Leite.[42] In light of the evidence introduced at the hearing, the Court can only conclude that when the Court issued a ruling that was not what the Mother had wanted, Mother and her counsel embarked on a mission to get rid of the author of that unfavorable opinion. Adverse rulings, however, are not usually sufficient grounds for recusal. *Owens v. State*, 133 S.W.3d 742 (Tenn. Cr. App. 1999)."

Wife is in a position similar to the wife in Johnson v. Johnson, 2003 WL 61249 (Tenn. App. 2003) where the Court of Appeals observed,

> "No doubt [mother] would like to have a different judge because her court-mandated time with her daughter has been steadily reduced. But, adverse rulings by a court are not in themselves sufficient grounds to establish bias. Also, where a court has been involved in a case for a very long time, recusal is not favored because of the expense and difficulty of starting over." Johnson v. Johnson, 2003 WL 61249 (Tenn. App. 2003)

[42] Mother argues that the Trial Court shows further bias toward her in making the above finding in that Mother made ethical misconduct allegations against the forensic custodial evaluator, Dr. Fred Steinberg through her own therapist, Dr. John Leite. However, in fact, Mrs. (M.F.R.) complained to her counselor, Dr. Leite that Dr. Steinberg was taking payment for his forensic services from Mr. (S.D.R.) only. Dr. Leite indicated that she neglected to tell him that Dr. Steinberg's payments being advanced by Mr. (S.D.R.) with the anticipation of later reimbursement by Mrs. (M.F.R.), were done in strict accordance with the Consent Order Guardian Ad Litem entered in this cause on January 6, 2012.

In Johnson, supra, the Judge called one party to bring daughter to court the next day, then, notified the other party a few hours later. Conversation was procedural, neither party gained any advantage and were both equally disadvantaged.

(iii). Mother's "Survey" Is Not Evidence Of Anything, Is Not Reliable For Any Purpose And Was Properly Deemed Inadmissible In The Trial Court Proceedings

Mother argues to this Honorable Court that the anonymous "survey" she commissioned proves that the public would find a reasonable basis for this Judge to step down from the case under the standard of Camp v. Camp, 361 S.W.3d 538 (Tenn. Ct. App. 2011). It is respectfully submitted that it does no such thing.

What Mother calls a "survey" was actually Exhibit 1 to Mother's Amended Reply to Father's Response to Amended Motion to Recuse which was filed and served at the very last minute just prior to the commencement of proceedings on November 12, 2013. Exhibit 1 consists of papers labeled "Affidavit of Custodian of Records for Superior Data Works, LLC" signed by Susan Vega as the custodian of records of Superior Data Works, LLC (the "Affidavit"). Susan Vega also states in the Affidavit her experience as a "professional opinion researcher" and her education. More papers were attached to the Affidavit which appear to be various papers associated with a survey.

On November 12, 2013, Father objected timely to the late filing and lack of notice. In addition, Father objects to the methodology, interpretation, form of questions, design of the questions and the so-called facts used in the papers that Mother calls the "survey." Transcript of November 12, 2013 Proceedings, P. 5, lines 5-17, included as Exhibit 22 of Appellee's Appendix filed herein.

Mother's Petition states that Mother commissioned the "survey" to determine whether, "given the facts", the public would find the Trial Judge's acts proper or

improper. Mother then asserts that 451 of those surveyed found a "reasonable basis for questioning the judge's impartiality in this case. Mother states, "[Camp v. Camp's] objective standard has been overwhelmingly met and exceeded by the 'survey'." (emphasis added) (Mother's Petition to Recuse Appeal, p. 19)

Mother's contention is without any foundation whatsoever. The questions of the survey are not accurate or in sufficient depth to possibly give survey participants full knowledge of all the aspects of this case that the Trial Court knows. The "objective standard" in determining whether a judge should be recused is a matter of law. An opinion "survey" of the public is not the manner in which questions of law are determined.

The papers Mother calls the "survey" have not been authenticated as a business record pursuant to Tennessee Rules of Evidence 9.02(11) and may not be used for any purpose in this proceeding.

Mother states that the papers Mother calls the "survey" have been "authenticated as a business record pursuant to Tennessee Rules of Evidence 9.02(11)." (Petition for Recusal Appeal, p. 19) This is not accurate.

Tennessee Rules of Evidence 803(6) provides that

> "A memorandum, report, record or data compilation" prepared and maintained under the conditions described in the rule is an exception to the hearsay rule, "unless the source of information or the method or circumstances indicate lack of trustworthiness."

Tennessee Rules of Evidence 911 requires that a party intending to offer a record into evidence must provide written notice of the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them. Mother provided no notice of the

documents intended to be offered as a record. Mother failed to meet the requirements of Tennessee Rules of Evidence 911 and may not rely upon the documents for any purpose.

The Trial Court ruled correctly when it held that the Affidavit and papers were not admissible, stating:

> The Court finds the Affidavit of Custodian of Records for Superior Dataworks, LLC, inadmissible and inappropriate for consideration under Rules 402, 702 and 802(6) (sic, meaning 803(6)).
>
> Order on Amended Motion to Recuse, Exhibit 7 to Appellant's Appendix, part 1, pp. 14-15, footnote 3.

Even if they were admissible as a business record, the papers that Mother calls the "survey" are irrelevant to the determination of the motion. The provisions of Tennessee Rules of Evidence 803(6) and 902.11 relate to documents, not testimony or opinion. Department of Children's Services v. B.F., 2004 WL 2752808 (Tenn.Ct.App.,2004).

The Trial Court opined:

> "Movant argues that the making of the phone call gives the appearance of impartiality. Would a reasonable person think that the calls show the Judge was partial to one party or the other? That reasonable person must be assumed to know the subject of the calls and that it had no bearing on the Court's ruling, facts which were not disclosed to those purportedly surveyed in the Movant's ' anonymous survey'." (Footnote omitted). That question, when presented to a reasonable person who knows this case, must be answered, no, those calls show nothing about bias or impartiality or prejudging the case." See Order on Amended Motion to Recuse, pp. 14-15, attached as Exhibit 7 to Volume 1 of Appellant's Appendix.

In sum, the papers Mother calls the survey have absolutely no place or meaning in the proceedings or in this appellate determination. Any arguments based thereon should not only be disregarded for the procedural and evidentiary reasons stated above,

but, also, are meaningless because a "survey" does not determine a question of law. Even if it could, the survey in question would be completely deficient in making such determination.

C. THE COURT'S ACTIONS BEFORE ITS RULING ON MAY 17, 2013 AND ADDENDUM TO RULING DATED JUNE 10, 2013 ARE NOT EVIDENCE OF THE COURT'S HAVING ANY INTENT CONTRARY TO THAT OF IT'S ULTIMATE RULNG WITH RESPECT TO "CHILD"

Mrs. (M.F.R.) speculates that, during the time period between the close of proof and the issuance of the Court's Ruling on May 17, 2013, the Court somehow had a different result in mind with respect to the parenting time supervision that was more favorable to Mother's interests and, then, the Trial Court changed her mind. Further, Mother claims that such "change" constitutes some indicator that the Court lacked impartiality toward Mother. As the Trial Court repeatedly provided in its Order on Amended Motion to Recuse,

> "The Court's ruling in this cause sets out why the facts of this case and the law required the Court to rule as it did." Order on Amended Motion to Recuse, p. 6, attached as Exhibit 7 to Volume 1 of Appellant's Appendix filed in this cause.

This argument is without merit and nonsensical.

Mother cites the following statement by the Court made on December 18, 2012, before the trial was even half way over, purportedly to show that the Court planned a ruling that didn't include supervision of Mother's parenting time. The comment was as follows:

> "[I]t is not my intent for the parties to have supervised visitation **unless there is some major concern that I can be convinced of.** These children need their parents. They need both of their parents.[43]"

[43] Order on Amended Motion to Recuse, pp. 5-6, Exhibit 7 of volume 1 of Appellant's Appendix.

In its Ruling, the Trial Court stood by this comment stating, however, that "the Court's ruling clearly sets out the facts in evidence that required the Court to rule as it did." See, Order on Amended Motion to Recuse, pp. 5-6, shown as Exhibit 7 in Volume 1 of Appellant's Appendix.

It is respectfully submitted that the above cited comment, relied upon by Mother, indicates only two things with respect to the Court's Ruling. First, this Court does not make restrictions on parenting time and parental access lightly and the Court **was, indeed, convinced** in this case that, for all the reasons set out in its Ruling, supervised visitation for Mother was in the best interest of "Child" until such time as Mother was able to demonstrate an understanding of how her behavior harmed her children and was working to change that behavior. Such comment does not suggest to an ordinarily prudent person who knows all the facts, a reasonable belief that this Court lacked impartiality.

It is respectfully submitted that the vast weight of the evidence in this case from both psychological experts and lay witnesses supports the decision by the Court contained in the Ruling, and that a reasonable person, knowing all the facts known to the judge in this case, would believe the same.

Furthermore, the decision-making with respect to the Spring break issue and the tutoring issue were both case management pending the Ruling rather than any pre-judgment articulation of the Court's opinion.

It is respectfully submitted that once again, the full context of the phone conference on March 6, 2013 regarding Spring Break is omitted in Mother's Amended Motion to Recuse. Despite the fact that the Court clearly stated during the Custody Trial

that Father was to have Spring Break 2013 because Mother had had Spring Break 2012, Mother's counsel insisted on arguing against it and in doing so on a telephone conference while the Court was in the hospital. It is, ironic to say the least, that Mother argues in her Motion to Recuse that comments made by the Court to counsel for the parties during the pendency of the trial and between the close of proof and the Court's Ruling are tantamount to having "ruled" in favor of Mother on the matter, but when such statements by the Court are made that are not in her favor, such as, allowing Father Spring Break, her counsel had to interrupt the Judge in the hospital for "more decision making". This Court's Order with respect to Spring Break 2013 pending the ruling, did not "reaffirm (the Court's) intent that the parties not have supervised visitation." Further, this Court's instruction that Mrs. (M.F.R.) have Spring Break is not inconsistent with the Court's May 17, 2013 Ruling in this cause, as the Court ordered Mrs. (M.F.R.) to have supervision while she was to have received "substantial psychological help" so as to have the supervision restriction lifted from her parenting time with "Child". Indeed, if Mrs. (M.F.R.) would choose to energetically and committedly comply with the Ruling of the Court it is not be unimaginable that she could be at a point to share Spring Break with "Child" in 2014.

Ultimately, however, the Court's statement is clear that:

> "The Court's ruling clearly sets out the facts in evidence are required the Court to rule as it did..." The hearing of this custody issue took place over 15 days. The Court's ruling sets forth the facts that were the basis for the Court's ruling. Both Mother and Father had ample opportunity to introduce facts to persuade the Court to rule in their favor. The facts presented in this Courtroom are what caused the Court to rule, as it did, nothing else.
>
> Order on Amended Motion to Recuse, p. 13, Exhibit 7, Volume 1 of Appellant's Appendix filed herein.

And finally,

> "The Court did not seek these parties out, but once these parties came before it, the Court carefully and impartially considered the evidence they brought and the arguments their counsel presented. It is the facts these parties have presented that formed the basis of the Court's ruling, not any matter outside the evidence presented in the case, not any personal prejudice or preconceived bias of the person who served as judge in this case." Order on Amended Motion to Recuse, p. 17.
>
> Exhibit 7 of Volume 1 of Appellant's Appendix filed herein.

D. THE ALLEGED ACTS OF WHICH MOTHER ACCUSES THE TRIAL COURT ARE NOT BIAS OR LACK OF IMPARTIALITY

(i) Generally

Mother Relies upon three[44] incidents as her primary examples of the Trial Court's bias or prejudice against her. Mother cites no evidence of bias or prejudice, other than the rulings of the Trial Court in those incidents. Most important, these three incidents are ancillary to the central, substantive subject matter of the Trial Court's Ruling – the primary custody of "Child" and the findings underlying the Ruling's requirement that Mother's visitation be limited and supervised.

Additionally, in each of the incidents about which Mother complains, Mother had options available to her to rectify any harm immediately. Instead, Mother waited, in the first incident over eight (8) months and, in the second incident, over four (4) months, to claim bias and prejudice and never brought the bifurcation issue at all until she was at the Appellate level.

[44] The three are: handling of tutoring, handling of [Son B]'s therapy data, and the bifurcation of the custody and financial parts of the trial.

(ii.) THE METHOD OF RESOLVING THE TUTORING MOTION DID NOT EVIDENCE BIAS OR LACK OF IMPARTIALITY TOWARD MOTHER

Mrs. (M.F.R.) complains that she was denied due process of law in the way that the Court handled Father's "Motion to Require Mother to Take Minor Child to Tutoring with Mrs. Maureen Rotzoll" (hereafter referred to as "Father's Motion for Tutoring" or alternatively the "Tutoring Motion") implying that such showed a lack of impartiality toward her. First, the Court's ruling on the Tutoring Motion was not a denial of due process of law. Second, there was no evidence of bias/lack of impartiality or prejudice in the way that the Court handled the matter.

It appears that despite significant amount of proof developed in the Custody Trial on the issue, Mother claims the terms of the Court's Order on Tutoring (portion of Exhibit 1 to Appellant's Appendix, Volume 2) were made in a deprivation of Mother's due process rights. Further, she seems to claim that the Court's findings in the May 17, 2013 Ruling regarding Mother's lack of cooperation and ineffectiveness in about tutoring for "Child" should not be contained in the Court's Ruling because the finding mentions facts that are additional facts that were the subject matter of Father's Motion for Tutoring. In other words, Mother claims a denial of due process, because her request for an evidentiary hearing to determine whether tutoring would harm the interests of the struggling child was denied. Mother makes this assertion as "Child" **continued** to struggle so much with school that she was at risk of failing 4th grade and having to repeat it at a new school. This is respectfully a prime example of being asked to exalt form over substance and make sense out of nonsense.

The Trial Court found as follows relative to the tutoring issue:

Throughout the trial of this matter there has been ample evidence that the minor child in question, "Child", has performed poorly in school. This child was evaluated for ADD and ADHD and was placed on medication. According to Mother, "Child" suffered numerous side effects, some of which her treating pediatric physician, Dr. Jerry Heston, stated were not attributable to the ADD/ADHD medications. "Child" missed a significant number of school days for doctor appointments. "Child" struggled significantly because of the divorce fight, as this Court found from the proof and which the doctors confirmed. The Guardian ad Litem learned that Dr. Heston felt it was not an ADD/ADHD issue, but was an environmental issue, *viz.* the divorce.

There was no doubt that this child needed tutoring during the 2012-2013 school year, as was confirmed by her teacher as well as by several doctors. The Father acquiesced in Mother's selection of Sylvan Learning, but Father had to register "Child" because Mother did not. After the close of proof, an issue came up about "Child" and summer tutoring. The Court, by conference call to all attorneys, due to the emergent nature of the issue, allowed both counsel to argue as to summer tutoring for "Child". Mother's counsel argued that an evidentiary hearing was necessary to determine "Child"'s needs. The Court denied that request because there was experts involved who had opined on the child's needs for tutoring. Mother, through counsel, stated that if the doctors opined that tutoring in the summer would not harm "Child" and if in fact would be assisted in her studies by tutoring, Mother would approve of "Child" attending tutoring in the summer. The Court ordered the Guardian ad Litem to contact the doctors, who agreed and opined that "Child" would not be harmed by tutoring in the summer. One professional, Dr. Catherine Collins, stated that she felt "Child" might lose some of the year's benefit over the summer if she did not have tutoring. Since no additional pleadings were filed or hearings held concerning the summer tutoring issue, it appears that the phone conference hearing [FN1] gave the parties sufficient guidance to resolve the matter.[FN2] It is surprising to see the objection now resurface as an allegation of judicial misconduct."
See, Order on Amended Motion to Recuse, pp.2-3, Exhibit 7 of Volume 1 of Appellant's Appendix filed herein .

[FN1: According to the Affidavit of Jan Lentz, Exhibit 9, Amended Motion to Recuse, the phone conference hearing lasted 27 minutes. Twenty-seven minutes seems to be more than a reasonable amount of time to devote to the question of whether summer tutoring for "Child" would be in her best interest, given that experts, including "Child"'s teacher, had previously testified that "Child" needed school tutoring during the 2012-2013 school term.]

[FN2Mother alleges judicial misconduct on the basis that the Court did not permit Mother's counsel to have a court reporter present for the phone conference hearing. The affidavit of Jan Lentz, a staff member in Mr. Rice's office, as well as the record, does not support the claim. According to the Affidavit of Jan Lentz, she was summoned, along with another staff member, Erin O'Dea, to Mr. Rice's office to "take contemporaneous notes on what was going to be discussed during the telephone" conference hearing. There is not mention in the affidavit that Mr. Rice even requested a court reporter until after the substance of the Court's instructions had been relayed to the parties. Until that point, the note taking by Jan Lentz (and Erin O'Dea) seemed sufficient for Mr. Rice. According to the affidavit of Janet Lentz, Mr. Rice did not mention a court reporter until late in the hearing.]

In Spring 2013 while awaiting the Ruling and before Father filed his Tutoring Motion, Mr. (S.D.R.) tried on at least two occasions to communicate by email with Mrs. (M.F.R.) to request that Mother take "Child" to Mrs. Rotzell (the Tutor) during her parenting weeks. Mother did not respond and did not take "Child" to tutoring. In Mr. (S.D.R.)'s "Motion for Tutoring," Father urged the Court that time was of the essence with respect to "Child" having consistent tutoring with both parents given that only 8 weeks were left of the 4th grade school year.

The history of this issue prior to Father's Motion for Tutoring is contained in the transcript of the Custody Trial. The evidence therein clearly proved that Mrs. (M.F.R.) had not cooperated in getting outside help for "Child" in the summer between 3rd and 4th Grade, and later while she was in 4th grade and had not been effective for "Child" by Mother's efforts to "tutor" her. Mrs. (M.F.R.) testified at the Custody Trial that that she did not think Mrs. Rotzell, "Child"'s tutor was helping her, and that she didn't believe that "Child" needed a professional tutor as late as in the fall of 4th grade during the Custody Trial. This was despite the fact that the child's therapist, Dr. Catherine Collins expressly

recommended a tutor outside of the family as early as Fall 2011 in her Psycho-Educational Assessment.[45]

Mother's Counsel's argument that an evidentiary hearing needed to take place to decide whether the tutoring was necessary and in the best interest of the child and whether Mrs. (M.F.R.) should be ordered to take her was not ignored by the Court, it was denied by the Court. In fact, in an abundance of caution, after a request by Mr. Nick Rice to find out whether Drs. Heston & Collins, (medical & psychological providers respectively for "Child"), believed that the tutoring was harmful for "Child",[46] the Court instructed the Guardian Ad Litem to communicate with both of those providers and report back to counsel for the parties and the Court with respect to their views. The Guardian reported that neither doctor felt that ordering "Child" to tutoring was harmful to her in any way. Accordingly, the Court made the order that it did.

Before the Tutoring Motion was even filed, Mrs. (M.F.R.) herself, had the ability to call and consult with Drs. Heston and Collins about tutoring, and did not do so. This is a textbook example of Mrs. (M.F.R.)'s continually stirring up the pot, while in the meanwhile she makes none of the desperately needed positive changes or actions and the children suffer.

It is respectfully submitted that the Court's determination to have a conference call with counsel for the parties and the Guardian Ad Litem, and to rule that the Motion would be granted in an expedited way and without an evidentiary hearing was manifestly appropriate and in the best interests of "Child". This Honorable Court made

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[45] See, Trial Exhibit 19, Psycho Educational Evaluation of "Child" [performed by Dr. Catherine Collins] p.5 from Custody Trial. Exhibit 1 of Appellee's Appendix filed herein.

[46] Mrs. (M.F.R.) took the position in her Amended Motion to Recuse that she would agree to the tutoring if Drs. Heston and Collins agreed that it wouldn't hurt "Child". Amended Motion to Recuse, para. 57, Exhibit 2 to Appellant's Appendix.

the only common sense decision based on the considerable amount of proof adduced from the evidence at trial that "Child" continued to struggle at school and was not getting consistency by Mother in getting her the help she needed. Despite all this, the Court accommodated Mother's request that Dr. Heston and Dr. Collins be consulted to determine whether tutoring would be harmful to the child.

Mrs. (M.F.R.) also complains that she was not allowed a court reporter during the April 10, 2013 conference call, but took no action to mitigate any damage she allegedly incurred because of same. She filed no Motion to Reconsider the Court's Decision on the Motion for Tutoring, or Motion to be Permitted an Tender of Proof, nor any kind of Petition to Discontinue Tutoring on the grounds that such was not in the best interests of the child or any of the other actions set forth below. Naturally, such Motions were not filed because Mrs. (M.F.R.) agreed with the outcome decided by the Court at least as admitted in her Motion to Recuse, para. 57, wherein Counsel for Mother describes the Response to the Tutoring Motion that Mother was going to file as saying "Mother goes on to explain in paragraph twenty-two (22) of her response that if Dr. Heston and Dr. Collins both believed that "Child" was in need of a tutor, then a tutor would be in "Child"'s best interest and Mother would support same." Mother's Motion to Recuse, para. 57.

Further, there was no damage to Mother at all that the Ruling occurred in the way it did. Mother's argument that the Court erred in handling Father's Motion for Tutoring is pure exaltation of form over substance and made without utilizing any of the remedies available to her under the law and as such is too little, too late.

The important issue of tutoring and "Child"'s school struggles had been the subject of a great deal of testimony at the Custody Trial. The Court was very familiar with the parties' positions, which were obviously unchanged at the time of the April 10, 2013 phone conference. The Court has the discretion to manage its docket and did so. Andrews v.Bible, 812 S.W.2d 284, 291 (Tenn. 1991) (Court's power to best manage its cases and proceedings among the parties before it.) The Court is not required to hear the same cumulative evidence and arguments in order to rule.

The matter was disposed of along these procedural lines and an order was duly entered. (See, Order on Motion to Require Mother to Take Minor Child to Tutoring dated April 24, 2013, Exhibit 1, Appellee's Appendix, Part 2).

Mother, now, asserts that Mother was denied several rights as a result of the April 10, 2013 phone conference and the Court's rulings during the phone conference that occurred 4 months and 2 weeks before Mother filed the Motion.

Mother's assertions are not timely and should be barred.

> A party may not silently preserve an event as an ace in the hole to be used in the event of an adverse decision. Eldridge v. Eldridge, 137 S.W.3d 1, 8 (Tenn. Ct. App. 2002).

> Courts frown upon the manipulation of the impartiality issue to gain procedural advantage and will not permit litigants to refrain from asserting known grounds for disqualification in order to experiment with the court... and raise the objection later when the result of the trial is unfavorable. Eldridge v. Eldridge, 137 S.W.3d 1, 8 (Tenn. Ct. App. 2002).

Mother's contentions that several important rights were denied her in the April 10, 2013 are suspiciously, and conveniently, raised only now, rather than that at the time of the proceeding.

This is a classic "ace in the hole" maneuver that is abhorrent to the system of justice. First, no rights of Mother were denied her; secondly, if they had, in fact, been denied here, the time to raise that issue was at the time of the occurrence.

In fact, in the intervening 4 months and 18 days between the April 10, 2013 phone conference and the August 29, 2013 filing of the Motion to Recuse, Mother failed to avail herself of many remedies available to Mother to redress the alleged wrongs she now complains, to wit:

a. Mother could have filed her Response that she claims was in process, along with her objections, for the record, which Mother failed to do.
b. Mother could have filed a motion for reconsideration or to set aside the Order on Tutoring and availed herself of the April 19, 2013 setting date, which she failed to do.
c. Mother could have filed Mother's own motion or petition relating to the discontinuing the tutoring schedule and set it for hearing, which she failed to do.
d. Mother could have noted Mother's objections and that such objections were overruled in the Order on Motion to Require Mother to Take Minor Child to Tutoring entered April 24, 2013 to preserve the issues for the record, which she failed to do.
e. Mother could have filed an objection to the procedure employed in the April 10, 2013 phone conference and set the matter for a hearing, with a court reporter, which she failed to do.

f. Mother could have asked for a motion for interlocutory appeal, or filed an extraordinary appeal, which she failed to do.

Mother relies upon Warren v. Warren, 731 S.W.2d 908 (Tenn. Ct. App. 1987) for the proposition that she had a right to a court reporter during the April 10, 2013 phone conference. The holding of Warren v. Warren, supra, applies in trial proceedings and proceedings directly incident thereto that will determine the substantive aspects of the case, not matters of administration and procedure. Warren v. Warren, 731 S.W.2d 908, 909 (Tenn. Ct. App. 1987); Wilson v. K Mart Corp., 1992 WL 75870 at *5 (Tenn. Ct. App. 1992) If Mother believed, in good faith, that her rights had been violated, then, Mother should have raised the issue timely. Further, the issue is now moot because the time period for tutoring contemplated by the Motion to Require Mother to Take Minor Child to Tutoring with Mrs. Maureen Rotzel filed April 2, 2013 had passed at the time the Mother filed her Motion.

In addition, Mother argues that her attorneys' computer system can establish that Mother's response was in process and makes specific references to her contentions. (Motion, para. 54-58) Such a contention is completely irrelevant as significantly, in her TRAP 10 Application and her Motion to Recuse in the Trial Court, Mother raised no additional defenses or arguments to the tutoring issues that she did in the April 10, 2013 phone conference.

It is respectfully submitted, for the reasons set out above, that Mrs. (M.F.R.) has been availed of more due process of law in this case than most people see in a lifetime and that this Honorable Court's Order that Mother take "Child" to tutoring was appropriate, time having been of the essence. Such was not a denial of due process to

Mother. In fact, it was necessary to protect the interests of the minor child from the emotional neglect of Mother. Further, the issue of whether a child does, or does not, need tutoring is not a constitutional right.

The Trial Court held:

> "Movant alleges that this Court erroneously included the issue of summer tutoring when the subject had not been addressed in the hearing between November and January of 2013. This Court ruled on May 17, 2013 that this matter would be reviewed in six months, after Mother had a chance to address what the court felt were serious concerns. To have considered summer tutoring or any other matter regarding "Child" is appropriate at any time while the minor child is within this Court's jurisdiction in a pending action."
> See, Order on Amended Motion to Recuse, p. 6, Exhibit 7 to Volume 1 of Appellant's Appendix.

(iii.) THE *IN CAMERA* REVIEW OF [SON B]'S COUNSELOR'S WRITING WAS APPROPRIATELY DONE AND DOES NOT EVIDENCE BIAS OR LACK OF IMPARTIALITY TO MOTHER.

The in camera review of correspondence between the Guardian Ad Litem and Mr. Robert Pugh regarding [Son B] during the December 18, 2012 proceedings was not improper conduct and did not evidence lack of impartiality, and was not an offer of proof, nor allowed by the Court to constitute an offer of proof. Rather, the Court denied allowing the offer of proof without a release from [Son B] as to the documents. The documents in question were not admitted into proof and not considered by the Court in its rulings in this cause. It is respectfully submitted that there was a large volume of testimony in the trial from Father, Mother, Dr. Collins, Dr. Leite and Dr. Steinberg regarding the emotional circumstances of [Son B] and it was from this proof that the Court made its Ruling regarding [Son B]. Further, the Court finds that neither parent was given access to these documents, and as a result an objection came from Mother's counsel, Nick Rice to try to get a copy of the documents in question. Notably, the

objection did not pertain to the admissibility or lack of admissibility of the documents (due to confidentiality or otherwise.) Rather, the objection was solely about whether Nick Rice, and presumably Father's counsel were entitled to a copy of the document inspected in the in camera review. The court denied the request, and offered counsel for the parents two options: 1.) get a release signed by [Son B] or 2.) file a memorandum of law by the next Court appearance, which was to be January 7, 2013 (19 days later), persuading the Court that it was in error in not allowing the parties or their counsel have a copy. Neither of these suggestions were followed up on by Mother's counsel.

In the Order on the Amended Motion to Recuse, the Trial Court stated:

> "Exhibit 21 is an excerpt of the transcript of a hearing on December 18, 2012 where the Court, in response to an offer of proof from the Guardian Ad Litem, reviewed *in camera* the therapy records of [Son B], one of the parties' children. The Mother alleges that the *in camera* review of the therapy records constitutes judicial misconduct by this Court sufficient to require recusal. The Court stands by its ruling as reflected in the transcript excerpt because the ruling was correct. It would have been inappropriate to provide the records to counsel for the Mother and Father without the written permission of [Son B] who had reached the age of majority when the records were tendered as an offer of proof. The Health Insurance Portability and Accountability Act of 1996 (HIPPAA) and T.C.A. §63-23-109 prohibit the disclosure since the (sic) [Son B] was age 18. It was not in the best interest of [Son B] to disclose the records based upon the Court's observation and concern at the time of the hearing on December 18, 2012, that this case was 'one of the most contentious divorces [the court had seen] [wherein the divorce process] already damaged the children... [and the court was not going to] jeopardize this child's [Ben's] counseling' by disclosure of the records. Exhibit 21 Amended Motion to Recuse. The records were not marked as an exhibit." See, Order on Amended Motion to Recuse, contained in Volume 1, Exhibit 7 of Appellant's Appendix.

(iv) BIFURCATION OF HEARING DOES NOT DEMONSTRATE A LACK OF IMPARTIALITY

The Custody Trial heard between November 16, 2012 and January 17, 2013 were bifurcated, but were not heard over the objection of the Mother as Mother argues in her Amended Motion to Recuse. On September 21, 2012, when Mother asked the Court for a continuance of the November 5, 2012 trial date, the circumstances included Father and the Guardian Ad Litem's asserting the urgency that the Mother was not acting consistently with the children's wellbeing. With Dr. Steinberg's investigation complete, Father moved the Court to set his Petition for Temporary Parenting Plan for hearing on November 5, 2012.[47] The Mother's Motion for a Continuance and Father's Motion to Set the Petition for Temporary Parenting Plan were both argued on September 21, 2012.[48] The parties agreed that the financial issues would not be ready for trial in November 2012. The Trial Court made the statement that it was not going to hear the custody issues twice, but that it agreed with Father that the children's issues needed prompt resolution.[49]

Neither counsel made objection to the custody matter being heard separately from that of the rest of the divorce. In fact, the only argument made to the Court on September 21, 2012, with respect to the trial date of November 5, 2012 was that Mother's counsel, Nick Rice said he could not be ready for the custody hearing to take place on November 5, 2012.[50] In response to Mother's counsel's argument that they could not be prepared on November 5, 2012 for a custody hearing on Father's Petition

[47] Father's Petition for Temporary Parenting Plan had been filed back in April, 2012.
[48] See, Transcript of September 21, 2012 hearing attached as Exhibit 5.
[49] See, Transcript of September 21, 2012 hearing attached as Exhibit 5 to Volume 2 of Appellant's Appendix, p.99. [This was especially true since the case had been filed a year and half previously to the hearing date set.]
[50] See Transcript of September 21, 2012 Hearing, p. 97-99 attached as Exhibit 5 to Volume 2 of Appellant's Appendix.

(which had been filed in April, 2012), the Judge granted Mother's counsel an extension of time from the previously agreed-to trial date of November 5, 2012 to November 16, 2012.[51] Further, Mother could have preserved the objection to the Custody Trial being bifurcated at trial and failed to do so. No objection was lodged by Mother's counsel during Mother's opening statement in the Custody Trial began or at any time thereafter during the pendency of the hearing.

Further, it is respectfully submitted that the Trial Court was well within its discretion to bifurcate the proceedings in a non-jury matter that are distinct and separable issues pursuant to the authority of Tennessee Rules of Civil Procedure, Rule 42.02 and Lamar Advertising Co. v. By-Pass Partners, 313 S.W.3d 779, 790 (Ct. App. Tenn. 2009). In this case the bifurcation of the custody matters was not an abuse of discretion. The many problems being experienced by the [parties'] children benefitted by having the Court's full attention on those matters. Further, the bifurcation was appropriate under this Court's power to best manage its cases and proceedings among the parties before it. Andrews v.Bible, 812 S.W.2d 284, 291 (Tenn. 1991).

VI. CONCLUSION

It is respectfully submitted that it is the interest of the (name omitted) family that the divorce litigation be completed in as expeditious manner as circumstances will permit before this Court. This case will have been pending for three years in April, 2014. The Trial Court has specialized and important knowledge from the Custody Trial and numerous other hearings and Court appearances. It is respectfully submitted that changing judges this late in the divorce would result in delay, and significant expense,

[51] See Transcript of September 21, 2012 Hearing, p. 100 attached as Exhibit 5 to Volume 2 of Appellant's Appendix.

both financial and emotional to the parties and the resources of the judicial system, and that the interests of this family, and particularly "Child", and all the interests of justice strongly favor this Court continuing to preside over this matter.

IT IS THERFORE respectfully submitted that for the reasons set out above and Mother's Petition to Recuse Appeal should be denied and that Father be awarded all of his attorney fees and suit expenses to defend against Mother's Amended Motion to Recuse in the Trial Court and Mother's Petition to Recuse Appeal in this Honorable Court, and for such other relief to which Father is entitled under law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kimbrough B. Mullins, hereby certify that a copy of the foregoing Response of (S.D.R.) to Petition of (M.F.R.)'s Petition for Recusal Pursuant to Tennessee Supreme Court Rule 10B has been delivered via U.S. Mail, to Mr. Larry Rice, Attorney for Defendant, 275 Jefferson, Memphis, Tennessee 38103, and to Mr. Dan Taylor, attorney for the Guardian Ad Litem, 8304 Walnut Grove Road, Suite 200, Memphis, Tennessee 38018, Ms. Lisa Zacharias, Guardian Ad Litem, 200 Jefferson, #725, Memphis, Tennessee 38103, Mr. Patrick Ardis, Attorney for [Son B], 5810 Shelby Oaks Drive, Memphis, Tennessee 38134 and Mr. Art Quinn, Attorney for the Baer Firm, 62 North Main, #401, Memphis, Tennessee 38103, this 9th day of January, 2014.

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Kimbrough B. Mullins