

The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Kristi M. Davis

Office Address: 400 Main Street, M40
(including county) Knoxville, TN 37902 (Knox County)

Office Phone: (865) 215-2397 Facsimile: (865) 215-2210

Email
Address: [REDACTED]

Home Address: [REDACTED]
(including county) Knoxville, TN 37923 (Knox County)

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

INTRODUCTION

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

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Circuit Court Judge, Division I, for Knox County (Sixth Judicial District).

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

1998; 019487.

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

Tennessee; 1998; active.

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

No.

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

September 2014-present: Knox County Circuit Court Judge, Division I.

June 2000-September 2014: Attorney, Hodges, Doughty & Carson, PLLC in Knoxville.

May 1998-June 2000: Judicial Law Clerk for Judge Joseph M. Tipton, Tennessee Court of Criminal Appeals, Knoxville.

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

Not applicable.

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

The jurisdiction of Circuit Court is broad, and I preside over a wide range of cases encompassing civil disputes, including personal injury, property damage, health care liability, commercial disputes, breach of contract, defamation, employment disputes, and civil rights claims. My duties include researching and ruling on preliminary and dispositive motions and conducting bench and jury trials. I frequently write opinions on dispositive motions. I handle domestic litigation cases when the judges in Chancery Court and in Fourth Circuit (Knox County's domestic court) have conflicts. I also hear Orders of Protection on a rotating basis. I have served as a Special Judge on the Tennessee Supreme Court Workers' Compensation Panel, which is responsible for deciding workers' compensation appeals.

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.

Immediately after graduating from law school, I accepted a position as a judicial law clerk for Judge Joseph M. Tipton, Tennessee Court of Criminal Appeals. In this role, I was responsible for reviewing all appellate briefs submitted by the parties, preparing bench memoranda for the judge's use during oral argument, attending oral argument, attending post-oral argument briefings with all judges on the panel, performing legal research regarding the issues raised, drafting preliminary opinions, reviewing other judges' opinions, and drafting preliminary concurring and dissenting opinions, if warranted. This experience was incredibly valuable, as it gave me a solid foundation in legal analysis and writing, as well as the perspective of the appellate court.

I knew that I wanted to be a trial lawyer, so after two years as a judicial law clerk, I accepted a position as an associate with Hodges, Doughty & Carson in June of 2000. When I began my practice, I was given immediate responsibility for litigation files. I appeared in courtrooms throughout East Tennessee and Southeast Tennessee and tried personal injury cases, property disputes, premises liability claims, landlord/tenant disputes, and breach of contract cases. I also had a large collections practice at that time. In addition, I agreed to accept appointed appellate cases from the Tennessee Court of Criminal Appeals, and I represented many indigent criminal

defendants on appeal in the early years of my practice.

After a few years, my civil litigation practice expanded into more complex cases, and from that point on, almost all my case load was within the Circuit and Chancery Courts in East Tennessee and the United States District Courts. Examples of the types of cases I handled include civil rights, personal injury, commercial litigation, workers' compensation, Tennessee Consumer Protection Act, representation of homeowner's associations, property disputes, and general negligence and tort claims. From the beginning of my civil litigation practice, my cases were my own to handle from start to finish, and I was solely responsible for all pleadings, written discovery, depositions, motions, trials, settlements, and appeals.

After several years of practice, I developed an interest in employment law, and I began receiving employment litigation files that were primarily defense files. These cases involved claims under the Tennessee Human Rights Act, the Tennessee Disability Act, the Family Medical Leave Act, Title VII, the Americans With Disabilities Act, and enforcement of non-compete agreements. I then began accepting plaintiff's employment cases, and at the end of my tenure at Hodges, Doughty & Carson, the majority of my employment case load involved representing individuals who had been wrongfully terminated or discriminated against in the workplace.

In addition to my litigation practice, I maintained an appellate practice at Hodges, Doughty & Carson. During the course of my career in private practice, I briefed and argued twenty-six appeals in the Tennessee Court of Appeals, Tennessee Court of Criminal Appeals, Tennessee Supreme Court, and the United States Court of Appeals for the Sixth Circuit. In addition to my own case load, I worked with other attorneys in my office on cases that were particularly complex or that required significant research and legal writing. My partners frequently enlisted my assistance in drafting dispositive motions and briefs, applications for permission to appeal, appellate briefs, and presenting oral argument in the appellate courts.

I was proud of the practice I developed, as it was varied, complex, and it allowed me to represent both plaintiffs and defendants. In late 2012, a vacancy occurred in Knox County Circuit Court when Judge Wheeler Rosenbalm retired. I applied for the position, and I was chosen to be in the panel of three sent to Governor Haslam's office. Ultimately, Governor Haslam selected Deborah Stevens for the position, and she has been a tremendous asset to Knox County in that role.

An opening arose again in 2014 when Judge Dale Workman announced that he would be retiring and would not seek re-election. I immediately knew that I would seek the position, which involved running in a contested, county-wide election. I had never run for office, and I was not entrenched in local politics. Despite my lack of campaign knowledge, I embraced the campaign process with enthusiasm, and I spent six months campaigning while also maintaining my law practice. Two other lawyers also sought the position, so I was faced with a three-way race in the Republican primary. No Democrat ran for the seat. Campaigning was one of the most difficult and rewarding things I have ever done. I felt strongly that my background and professional experience would prove valuable for the position of Circuit Court Judge, and that was the basis of my campaign. I won the primary in May of 2014, and I took office in September of 2014.

The job of Circuit Court Judge has been every bit as rewarding as I thought it would be. It is a tremendous privilege to be in a position that affects the lives of the citizens of Knox County.

Every person who comes into the courtroom is faced with a problem that they cannot resolve without the help of the legal system. My goals as a trial judge are to ensure that every litigant is treated fairly and with respect and to ensure that my decisions are just and are based solely upon the law. I have always loved research and writing, and I particularly enjoy those issues that require me to “dig deep” into the law, review existing case law for precedent, and apply that existing case law to the unique facts presented.

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

As mentioned above, I have served as a Special Judge on the Tennessee Supreme Court Workers’ Compensation Panel. In that capacity, I have participated as an appellate judge in workers’ compensation cases, including participation in oral argument, discussion with other judges on the panel post-oral argument, and drafting opinions.

I have also served on the Tennessee Board of Professional Responsibility investigative panel, which is responsible for reviewing disciplinary complaints against attorneys and making disciplinary recommendations.

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.

I have served as the Knox County Circuit Court Judge, Division I, since September of 2014. It is difficult to single out certain cases as being noteworthy because all cases are equally important. Some cases present more complex issues than others. One of the more difficult cases over which I presided involved a termination of parental rights. Given the gravity of the relief requested, those cases are always challenging, and I ultimately had to make the difficult decision to terminate a father’s parental rights. One of the most complex cases over which I presided is a case that preceded my election. It has been to the appellate courts three times, and it involves fraud claims regarding the purchase and sale of sophisticated securities. This case has presented unique discovery issues regarding conspiracy jurisdiction.

With respect to mediation, I have served as a facilitator for judicial settlement conferences, which are essentially mediations of other Circuit Court cases in which I act as the mediator.

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

Not applicable.

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

One of my goals as a trial judge has been to ensure that the docket moves efficiently. Litigants often complain that the legal system simply moves too slowly. I am proud that in Division I, we have kept our docket current, and we do not allow cases to languish. Through the use of status conferences and show cause orders, when necessary, our cases generally move through the system in an appropriate amount of time. An efficient court system promotes public confidence in the judiciary.

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

In November of 2012, I applied for the position of Circuit Court Judge, Division III, in Knox County. The Governor's Council met on December 14, 2012, and my name was submitted 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.

1995-1998: The University of Tennessee College of Law, J.D. I graduated *magna cum laude* in the top 15% of my class. I was a member of the *Tennessee Law Review* and served as a Student Materials Editor. I was also a member of the Jerome Prince National Evidence Moot Court Team, and our team placed first in brief writing. I received the John D. Baugh Award for Excellence in Oral Advocacy, the Gunn, Ogden & Sullivan Award for Excellence in Brief Writing, and the E. Bruce & Mary Evelyn Foster Scholarship. I served as a member of the Moot Court Board, and I coached the Karns High School Mock Trial Team, which placed first in Knox County in 1998 and 1999.

1991-1995: The University of Tennessee, Knoxville, B.S. in Communications with a major in broadcasting and a minor in political science. I graduated *cum laude* and was awarded an academic scholarship my senior year. As a member of Pi Beta Phi fraternity for women, I served as a Pledge Educator and Vice President for Moral Advancement. I also served on the Senior Gift Challenge Steering Committee for UT and was a member of Vol Corps, a group of student

ambassadors for UT.

PERSONAL INFORMATION

15. State your age and date of birth.

46; [REDACTED] 1973.

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

I have lived continuously in the State of Tennessee since birth.

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

Approximately 43 years.

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

Knox County.

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

Not applicable.

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

No.

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

No.

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

None.

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

No.

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

No.

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

No.

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

- University of Tennessee Chancellor's Associates
- Executive Women's Association
- Sacred Heart Cathedral
- Gettysvue Golf and Country Club

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.

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.

- Knoxville Bar Association. I am currently on the Board of Governors. I have co-chaired the Unauthorized Practice of Law Committee. I have been a member of the Judicial Committee, Membership Committee, Professionalism Committee, and Work-Life Balance Committee. I have served on the nominating committee for the Board of Governors and the selection committee for the Governor's Award.
- Knoxville Bar Foundation.
- Tennessee Bar Association. I was a member of TBA's Leadership Law class.
- Tennessee Judicial Conference. I currently serve on the Executive Committee as a conference co-chair.
- Tennessee Trial Judges Association. I have served on the Pattern Jury Instructions Committee and Legislative Committee.
- American Inn of Court, Hamilton Burnett Chapter.
- East Tennessee Lawyers' Association for Women.

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.

- *Cityview Magazine* Top Attorney in Appellate Law, 2012.
- *Cityview Magazine* Top Attorney in Labor and Employment Law, 2011.
- *MidSouth Super Lawyer's* Rising Star Award, 2012.

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

- *The Knoxville News Sentinel Business Journal*, "Know What to Expect When Co-Worker Is Expecting," October 2012.
- KBA *Dicta*, "A Bundle of Joy and a Bundle of Questions: Navigating Maternity Leave Laws," June 2012.
- KBA *Dicta*, "There's More to It Than Passing the Bar Exam: What Every Law Firm Needs to Teach Its New Lawyers," August 2008.
- *Smoky Mountain Paralegal Association*, "Appellate Practice Tips," February 11, 2004.

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.

- KBA CLE, "*Essentials of Motion Practice*," May 15, 2015.
- KBA CLE, "*In Chambers*," March 30, 2016.
- KBA CLE, "*Sovereign Citizens*," January 1, 2018.
- KBA Law Day Luncheon, "*Judicial Independence and the Separation of Powers*," May 2, 2018 (panel member).
- East Tennessee Lawyers Association for Women, presentation and discussion of the film, "*RBG*," September 19, 2019.
- KBA Ethics Bowl, December 6, 2019.

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.

Knox County Circuit Court Judge, Division I, elected in 2014.
Knox County Circuit Court Judge, Division III, applicant for appointment in 2012.

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

No.

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

reflects your own personal effort.

See attached Orders, which were researched and written solely by me.

ESSAYS/PERSONAL STATEMENTS

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

I am applying for a position on the Tennessee Court of Appeals because I love legal research and writing and because my particular background and skills are well-suited for the position. Having started my legal career at the appellate court, then progressing to trial lawyer and trial judge, I believe the knowledge and perspective I have gained throughout my career have prepared me for the work of an appellate judge. I truly enjoy the process of examining a legal issue, researching the existing case law, analyzing how the existing case law applies to the facts presented, and communicating that analysis in a way that makes sense. I also believe in the importance of public service, and I want to use my skills to be of service to the State of Tennessee and its citizens. Our State has been blessed with a rich heritage of fantastic appellate court judges who are thoughtful, articulate, and of high moral character and integrity. I hope to continue that tradition.

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)*

In Circuit Court, we are seeing an increased number of individuals appearing *pro se*. Those litigants are required to comply with the same rules as licensed attorneys, which can be challenging for them, but they are always treated fairly, respectfully, and with dignity. Regardless of ability to pay for an attorney, everyone deserves to be heard in a meaningful way. As a practicing attorney, I fulfilled my obligation to assist those who could not afford legal representation by routinely accepting *pro bono* cases, including referrals from Legal Aid. I also volunteered for the *Pro Bono* Appellate Case Referral program sponsored by the Tennessee Bar Association. Several members of my firm and I were recognized in 2005 with the *Pro Bono* Partner Award.

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)*

I am seeking a position on the Tennessee Court of Appeals, Eastern Tennessee Grand Division. There are twelve judges on the Court of Appeals, four of which are from the Eastern Tennessee Grand Division. The Court hears civil appeals. I have spent my career as a litigator and as a judge working on the very types of cases that are heard by the appellate court. My experience as a trial judge would provide a valuable perspective, as I have seen how evidentiary, procedural,

and substantive decisions by the appellate court directly impact the cases for trial.

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)*

Judges should be visible in the community and should participate in community activities to the extent permitted by the Rules of Judicial Conduct. Most of my community involvement has been through participation in my church and my children's school and activities. I have also served on several nonprofit boards, including Friends of Literacy and the American Heart Association's Circle of Red. For the past two years, I have served as a moderator for the Knox County Community Action Committee Neighborhood Issues Day, and I have participated in Constitution Day at a local elementary school. I am a volunteer reader at Beaumont Elementary School. My husband and I believe it is important for our children to be involved in community service, and for the past several years we have participated as a family in the Salvation Army's bell ringing program and delivered FISH meals.

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 grew up in a rural community in Northwest Knox County and became interested in the law when I participated in my high school's mock trial program. I discovered that being a lawyer would allow me to help people while doing the things that I naturally enjoyed- writing, reasoning, and public speaking. I have been privileged to be a part of this profession, and I am proud to serve Knox County as a member of the judiciary. I want the Council to know that the values I learned from my parents growing up are the values I would bring to the appellate court- hard work, personal responsibility, and a commitment to doing things the right way. My approach to the law, both as a litigator and a judge, has been very practical. I think this pragmatic approach, combined with my experience as a trial lawyer, an appellate lawyer, and a trial judge, would prove beneficial for the Tennessee Court of Appeals. Having worked in the appellate court system as a judicial law clerk and having served as a Special Judge for workers' compensation appeals, I understand how the appellate courts operate. I learned from my first legal mentor, Judge Tipton, the importance of properly researching and analyzing issues and clearly communicating the court's decisions in written opinions. In short, I understand the skills required for this position, and I understand what the position entails. I believe my background has prepared me to do this job well.

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, and I have taken an oath as a trial judge to do just that. The legislature is tasked with

making the law. Judges are tasked with interpreting and applying it. I cannot say that I have been in a position to apply a law with which I personally disagreed. In my tenure as a trial judge, however, there have been a couple of times when existing law has been challenged or unsettled. Specifically, application of the collateral source rule was recently in question, and there were several occasions where attorneys requested that I deviate from the rule while the issue was on appeal. My position was and has always been that I will follow the law as it currently exists until I receive a definitive opinion from a higher court that the law has changed. In other words, I strongly believe in the importance of *stare decisis*.

REFERENCES

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

A. The Honorable Joseph M. Tipton, Tennessee Court of Criminal Appeals (retired)
[REDACTED] Knoxville, TN 37922

B. J. William (Bill) Coley, Hodges, Doughty & Carson, PLLC
[REDACTED] Knoxville, TN 37902

C. Kristi Bennett, Senior Counsel, Eastman Chemical Company
[REDACTED]
Kingsport, TN 37662
[REDACTED]

D. Hugh Nystrom, Chairman, Knox County Commission
[REDACTED]
Knoxville, TN 37919
[REDACTED]

E. Becky Thompson, Vice President of Planning and Marketing, UT Medical Center
[REDACTED] Suite 300
Knoxville, TN 37920
[REDACTED]


AFFIRMATION CONCERNING APPLICATION

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

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

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

Dated: January 30, 2020.



Signature

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



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

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

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

WAIVER OF CONFIDENTIALITY

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

Kristi M. Davis

Type or Print Name

Kristi M. Davis

Signature

January 30, 2020

Date

019487

BPR #

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

IN THE CIRCUIT COURT FOR KNOX COUNTY, TENNESSEE

STATE OF TENNESSEE,)
ex rel. HERBERT H. SLATERY III,)
ATTORNEY GENERAL and REPORTER,)
)
Plaintiff,)
)
v.)
)
PURDUE PHARMA L.P.,)
a foreign limited partnership,)
)
Defendant.)
)

Case No. 1-173-18

ORDER

In this case, the State of Tennessee makes various allegations against Purdue Pharma L.P. (“Purdue”) related to Purdue’s marketing of opioid medications, including OxyContin, Butrane, and Hysingla ER. The State alleges that Purdue’s marketing is in violation of the Tennessee Consumer Protection Act, Tenn. Code Ann. §47-18-104(a), (b); is in violation of a 2007 Agreed Final Judgment between the parties; and constitutes a common law public nuisance. Purdue has filed a motion to dismiss, contending that it cannot be liable for its proper promotion of FDA-approved medication and that the State’s Complaint does not adequately plead causation or public nuisance. For the reasons set forth herein, Purdue’s motion is denied.

I. STANDARD OF REVIEW

When considering a motion to dismiss for failure to state a claim upon which relief can be granted, the Court is limited to an examination of the complaint alone. *See Walcotts Fin. Serv., Inc. v. McReynolds*, 807 S.W. 708, 710 (Tenn. Ct. App. 1990). Such a motion avers that the allegations in the complaint, when considered alone and taken as true, are insufficient to state a claim as a matter of law. *See Cornpropst v. Sloan*, 528 S.W.2d 188 (Tenn. 1975). In other words,

such a motion tests the legal sufficiency of the complaint, not the strength of the plaintiff's proof. *See Bell ex rel. Snyder v. Icard*, 986 S.W.2d 550, 554 (Tenn. 1999). The Court is required to construe the complaint liberally in favor of the plaintiff, taking all the allegations of fact therein as true. *See Cook ex rel. Uithoven v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994).

II. PREEMPTION

Purdue first contends that the Complaint should be dismissed because federal law preempts the State's claims. It is well-established that states possess sovereignty "concurrent with that of the Federal Government, subject only to the limitations imposed by the Supremacy Clause" of the United States Constitution. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). The Supremacy Clause provides that federal law "shall be the supreme Law of the Land." (U.S. Const. art. VI, cl. 2). Thus, when state law and federal law conflict, federal law controls, and Purdue's argument is based on this conflict preemption. Conflict preemption only occurs "where it is impossible for a private party to comply with both state and federal requirements" or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (quotations and citations omitted). A motion to dismiss based on preemption should only be granted when "the facts alleged in the complaint do not plausibly give rise to a claim that is not preempted." *Galper v. LP Morgan Chase Bank, NA*, 802 F.3d 437, 444 (2d Cir. 2015).

Importantly, the United States Supreme Court has held that "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996). Those police powers include protecting consumers against deceptive business practices. *See California*

v. ARC Am. Corp., 490 U.S. 93, 101 (1989). When the issue is one that is traditionally the subject of state control, courts must “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Id.*

Synthesized, Purdue’s argument is that the Food and Drug Administration (“FDA”), via the Federal Food, Drug, and Cosmetic Act (“FDCA”), controls prescription medication warning labels; that Purdue’s labels complied with FDCA requirements; and that the State is seeking to impose state law liability on Purdue when federal law controls. The Court finds that Purdue’s argument is based upon a mischaracterization of the State’s Complaint, which is not grounded in the content of the medication labels but rather the conduct of Purdue and its pharmaceutical sales representatives.

For example, Purdue contends that the State’s Complaint regarding dosing limitations conflicts with the FDA’s decision not to recommend a maximum duration of use for the medications. However, the Complaint alleges that Purdue’s sales representatives incorrectly asserted that OxyContin had no dose ceiling at all:

58. Purdue represented without qualification that OxyContin did not have a dose ceiling when those claims were false, deceptive, and/or unsubstantiated at the time they were made.

59. OxyContin has a dose ceiling that is imposed by adverse reactions to patients taking increased doses of the drug, including overdose, respiratory depression, somnolence, addiction, and other serious adverse effects.

60. While the FDA approved a limited statement on OxyContin’s Full Prescribing Information making clear that OxyContin’s dose ceiling *was* imposed by adverse reactions, Purdue’s Tennessee sales representatives routinely asserted that OxyContin had no dose ceiling *at all*. Further, Purdue failed to discipline or correct sales representatives who made such claims.

(Complaint) (emphasis original). Similarly, regarding the State’s claim that Purdue pushed the concept of “pseudoaddiction” in order to increase prescriptions, Purdue contends that its FDA-

approved label addresses these concerns. However, the State’s allegation is that Purdue invented and pushed the concept of pseudoaddiction (which Purdue described as “the misinterpretation by members of the health care team of relief-seeking behaviors in a person whose pain is inadequately treated as though they were drug-seeking behaviors”)¹ for the purpose of getting around the FDA-required language regarding red flags for drug-seeking behaviors.

Purdue further takes issue with the State’s allegations regarding Purdue’s use of screening tools and failure to disclose the efficacy of OxyContin use beyond twelve weeks. Again, the State has not alleged liability for Purdue’s use of the FDA-mandated Risk Evaluation and Mitigation Strategy Program; rather, the State alleges that “[i]n order to make health care providers more willing to prescribe its addictive opioid products, Purdue overstated the efficacy of abuse and diversion mitigation tools like patient contracts, urine drug testing, pill counts, and similar strategies” and that a 2016 CDC Guideline “confirms the lack of adequate substantiation to support Purdue’s claims regarding the utility of screening tools and patient management strategies in managing addiction risk.” (Complaint, ¶¶93, 96). The Complaint then gives specific examples of ways in which Purdue allegedly overstated the efficacy of abuse prevention programs, including the use of a “General Objection Handler” to address provider concerns, as well as specific notes from sales representatives documenting their touting of the various screening tools. In addition, the Complaint alleges that Purdue “downplayed the increased risk of addiction from higher doses of its opioid products through material omissions” and “failed to disclose the material fact that there is an increased risk of addiction at higher doses of its opioid products.” (Complaint, ¶¶ 139, 140).

¹ Complaint, ¶79.

In sum, Purdue's argument with respect to preemption is based upon its erroneous assertion that the Complaint seeks to hold it liable for actions that were approved or required by the FDA and the FDCA. In reality, the Complaint seeks to hold Purdue liable for alleged misleading and deceptive practices in violation of Tennessee's Consumer Protection Act and actions that constitute Tennessee's common law tort of public nuisance. Thus, the Court concludes that the State's claims do not conflict with FDA and FDCA requirements, and preemption does not apply.

III. THE 2007 AGREED FINAL JUDGMENT

Purdue also seeks dismissal of the State's claim that Purdue violated portions of a 2007 Agreed Final Judgment between the parties. The Judgment required Purdue to stop promoting and marketing off-label uses for OxyContin and to establish and implement an abuse and diversion detection program to identify providers who were over-prescribing OxyContin. Upon discovery of these "red-flag" providers, Purdue was obligated to "take further steps as may be appropriate based on the facts and circumstances, which may include ceasing to promote Purdue products to the particular Health Care Professional, providing further education to the Health Care Professional about appropriate use of opioids, or providing notice of such potential abuse or diversion to appropriate medical, regulatory or law enforcement authorities." (Agreed Final Judgment, ¶13). Purdue characterizes the State's Complaint as alleging that "the 2007 Agreed Judgment requires Purdue to stop promoting opioid medication for long-term treatment of chronic pain." Purdue contends that the State is judicially estopped from making claims of misrepresentation based on statements that were permitted or required by the Agreed Judgment.

The Court again disagrees with Purdue's characterization of the Complaint. The State has not alleged that Purdue is liable for promoting opioids in a manner consistent with FDA requirements, nor has the State alleged liability for promotion of Purdue's products in accordance

with the 2007 Agreed Final Judgment. Rather, the State has alleged that Purdue was required but failed to stop promoting its products to specific health care providers or otherwise failed to take any appropriate action once Purdue had knowledge of behaviors indicative of over-prescribing. The Complaint describes in great detail the specific factual bases for these allegations- in fact, these allegations comprise the bulk of the 273-page Complaint. The State describes and names specific red-flag providers and explains when, how, and why Purdue continued to market to these providers, as well as Purdue's alleged failure to take the steps required in paragraph 13 of the Agreed Final Judgment. The Complaint adequately states a claim for relief for violation of the 2007 Agreed Final Judgment.

IV. TENNESSEE CONSUMER PROTECTION ACT

Purdue seeks dismissal of the Tennessee Consumer Protection Act ("TCPA") claim, contending that the State has failed to adequately plead causation. The Tennessee Supreme Court explained the purpose and construction of the TCPA in *Faye v. Vincent*, 301 S.W.3d 162, 177-78 (Tenn. 2009):

The Tennessee Consumer Protection Act, enacted in 1977, was passed, in part, to protect consumers from unfair and deceptive acts and practices occurring "in the conduct of any trade or commerce" in the state and to provide a means "for maintaining ethical standards of dealing between persons engaged in business and the consuming public." Tenn. Code Ann. § 47-18-102(2),-102(4). The Act is to be liberally construed in order to enable it to protect the consumer and to promote the other policies which motivated its passage. Tenn. Code Ann. § 47-18-102; *Myint v. Allstate Ins. Co.*, 970 S.W.2d at 926; *Morris v. Mack's Used Cars*, 824 S.W.2d 538, 540 (Tenn. 1992); *see also* Tenn. Code Ann. § 47-18-115 (noting that the Act is "remedial legislation" which would be construed to effectuate its purposes). It is also to be construed consistently with the Federal Trade Commission and federal courts' interpretations of the Federal Trade Commission Act. Tenn. Code Ann. § 47-18-115. The Tennessee Consumer Protection Act forbids "unfair or deceptive acts or practices affecting the conduct of any trade or commerce." Tenn. Code Ann. § 47-18-104(b)... The Act defines "trade," "commerce," or "consumer transaction" as "the advertising, offering for sale, lease or rental, or distribution of any goods, services, or property, tangible or intangible, real, personal, or mixed,

and other articles, commodities, or things of value wherever situated.” Tenn. Code Ann. § 47-18-103(11).

A “deceptive act or practice” under the TCPA is “one that causes or tends to cause a consumer to believe what is false or that misleads or tends to mislead a consumer as to a matter of fact.” *Tucker v. Sierra Builders*, 180 S.W.3d 109, 115 (Tenn. Ct. App. 2005).

Purdue first contends that that the State failed to plead an ascertainable loss of money or property. In response, the State contends that at least part of its claim is based on the TCPA’s enforcement provision, not its private right of action. The State is correct that the TCPA’s enforcement provision, Tenn. Code Ann. § 47-18-108, does not require that a person suffer an ascertainable loss. The enforcement provision provides as follows: “Whenever the division has reason to believe that any person has engaged in, is engaging in, or, based upon information received from another law enforcement agency, is about to engage in any act or practice declared unlawful by this part and that proceedings would be in the public interest, the attorney general and reporter, at the request of the division, may bring an action in the name of the state against such person to restrain by temporary restraining order, temporary injunction, or permanent injunction the use of such act or practice.” Tenn. Code Ann. § 47-18-108(a)(1). Thus, to the extent the State’s Complaint seeks injunctive relief, civil penalties, and other remedies contemplated by the enforcement provision of the TCPA, the State correctly asserts that pleading an ascertainable loss of money or property is not required.

In addition to the enforcement provision, however, the State acknowledges that it also seeks recovery of ascertainable losses as a remedy under Tenn. Code Ann. § 47-18-108(b)(1). An “ascertainable loss” is broadly defined in the TCPA as “[a]n identifiable deprivation, detriment, or injury arising from ... any unfair, misleading, or deceptive act or practice even when the precise amount of the loss is not known. Whenever a violation of this part has occurred, an ascertainable

loss shall be presumed to exist.” Tenn. Code Ann. § 47-18-2102(1). Purdue’s objection to the Complaint is that the State has failed to adequately causally link the alleged deceptive behavior to any such ascertainable loss. The Court disagrees. As set forth in the State’s response to Purdue’s motion, “the Complaint alleges Purdue made widely-disseminated, deceptive, and express health and safety claims, material omissions of health and safety information, and material omissions of Purdue’s financial connections to third-party groups it substantially funded,” and that, as a result, persons purchased Purdue’s opioid products. The State then alleges that Purdue’s conduct “led to addiction, abuse, diversion, and other negative outcomes that have caused the State and its political subdivisions to spend substantial resources to attempt to address.” (Complaint, ¶ 874). The State further alleges that it and its political subdivisions “have spent significant public resources on treatment, toxicology reports and autopsies, law enforcement, corrections, intervention programs, drug courts, prosecution, probation, and child welfare related to opioids, OxyContin, and heroin and more funds are needed to address this public health crisis.” (Complaint, ¶ 909). At this juncture, the Court does not inquire into whether the State can actually prove its assertions. It must assume the State’s assertions are true and determine whether the assertions state a claim for relief. The Court finds that the State has properly pleaded a claim for violation of the Tennessee Consumer Protection Act.

V. PUBLIC NUISANCE

Finally, Purdue seeks dismissal of the State’s public nuisance claim and contends that the State seeks to hold Purdue liable for a sweeping array of societal harms that have occurred as a result of the opioid crisis. Purdue contends that the Complaint fails to adequately plead causation, that the derivative injury rule applies, and that the State does not allege an interference with any right common to the public.

A public nuisance is an act or omission that unreasonably interferes with or obstructs rights common to the public. *See Metropolitan Gov't of Nashville v. Counts*, 541 S.W.2d 133, 138 (Tenn. 1976); Restatement (Second) of Torts §821B (1977). In *Sherrod v. Dutton*, 635 S.W.2d 117, 119 (Tenn. Ct. App. 1982), the Tennessee Court of Appeals explained that a nuisance “extends to everything that endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable and comfortable use of property.” (Citations omitted); *see also State ex rel. Swann v. Pack*, 527 S.W.2d 99, 113 (Tenn. 1975) (defining a public nuisance as “a condition of things which is prejudicial to the health, comfort, safety, property, sense of decency, or morals of the citizens at large, resulting either from an act not warranted by law, or from neglect of a duty imposed by law.”) (Citations omitted).

With respect to causation, the Court finds that the Complaint is adequately pleaded. As has been set forth previously, the Complaint describes with great specificity the actions of Purdue with respect to its marketing of opioid products, including alleged misrepresentations regarding the safety, efficacy, and benefits of its products and an alleged practice of marketing its products to known “pill mills.” The Court will not rehash the allegations, but the Complaint is replete with specific examples of behavior on the part of Purdue that, if proven, would establish interference with the health, comfort, and safety of the citizens of the State of Tennessee. Furthermore, the Complaint alleges resulting damages, including but not limited to “increased opioid use, abuse, addiction, and overdose deaths” and “[t]he greater demand for emergency services, law enforcement, addiction treatment, and other social services,” which place “an unreasonable burden on governmental resources including the State and its political subdivisions.” (Complaint, ¶ 960, 961).

Purdue further argues that intervening and superseding acts prohibit a finding of causation. Specifically, Purdue contends that any alleged nuisance was caused not by Purdue's sale of its medications but rather by doctors who wrote "improper prescriptions" and/or by third parties who allowed persons without prescriptions to obtain opioid medications illegally. However, the State's Complaint alleges that the foregoing acts were foreseeable and made possible by Purdue's acts. In addition, "[t]here is no requirement that a cause, to be regarded as the proximate cause of an injury, be the sole cause, the last act, or the one nearest to the injury, provided it is a substantial factor in producing the end result.... An intervening act will not exculpate the original wrongdoer unless it appears that the negligent intervening act could not have been reasonably anticipated." *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn. 1991).

Purdue contends that the Complaint should be dismissed because "where a plaintiff's injuries are wholly derivative of harm to a third party, the injuries are generally deemed indirect and consequently, too remote as a matter of law to support recovery." *Steamfitters Local Union No. 614 Health & Welfare Fund v. Philip Morris, Inc.*, 2000 WL 1390171 (Tenn. Ct. App. Sept. 26, 2000). However, the Complaint seeks damages for injuries to the State, not for the injuries of those who have become addicted to opioids. Purdue's reliance on the *Steamfitters* case is misplaced. In that case, the union's Health and Welfare Fund sued tobacco companies to recover money spent by the Fund to treat its members' smoking-related illnesses. The premise of the Fund's claim was that the tobacco companies' activities prevented the Fund from implementing programs to educate its participants on the addictive qualities of tobacco. Ultimately, the Court of appeals held that "it would be 'virtually impossible' for the Funds to prove with reasonable certainty the effect education or smoking cessation programs would have had on the physical injuries suffered by plan participants since the damages stem from individual smokers' decisions

whether to continue smoking and, if so, how frequently to smoke.” *Id.* at *6. The Court noted that “it would be the sheerest sort of speculation to determine how these damages might have been lessened had the Funds adopted the measures defendants allegedly induced them not to adopt.” *Id.* (citing *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 238-39 (2d Cir. 1999)).

The allegations in the present case are wholly different in that they are not based upon the State being fraudulently induced to inaction, nor does the State seek damages for the physical injuries of the individual opioid users. Rather, the State seeks damages sustained by it and its political subdivisions as a direct result of Purdue’s alleged marketing activities designed to increase prescriptions. The claims are simply different.

Lastly, Purdue contends that the Complaint must be dismissed because the State does not allege interference with any right common to the public, “such as clean air or water.” Purdue’s argument takes too narrow a view of public nuisance. As set forth above, a public nuisance can encompass virtually anything that endangers life or health. In fact, the Tennessee Supreme Court has deemed a church’s handling of snakes to be a public nuisance:

Under this record, showing as it does, the handling of snakes in a crowded church sanctuary, with virtually no safeguards, with children roaming about unattended, with the handlers so enraptured and entranced that they are in a virtual state of hysteria and acting under the compulsion of “anointment”, we would be derelict in our duty if we did not hold that respondents and their confederates have combined and conspired to commit a public nuisance and plan to continue to do so. The human misery and loss of life at their ‘Homecoming’ of April 7, 1970 is proof positive.

Our research confirms the general pattern. Tennessee has the right to guard against the unnecessary creation of widows and orphans. Our state and nation have an interest in having a strong, healthy, robust, taxpaying citizenry capable of self-support and of bearing arms and adding to the resources and reserves of manpower. We, therefore, have a substantial and compelling state interest in the face of a clear and present danger so grave as to endanger paramount public interests.

Pack, 99 S.W.2d at 113-14.

In the present case, the State's Complaint alleges that Purdue engaged in misleading and deceptive marketing practices for the purpose of increasing opioid prescriptions and that, as a result, Purdue created an opioid epidemic that has endangered the health and safety of the citizens of Tennessee and has resulted in financial loss to the State. The Complaint adequately states a claim for public nuisance.

VI. CONCLUSION

Having carefully considered the arguments set forth in Purdue's motion to dismiss, the Court finds that the State's Complaint sets forth a cause of action for violation of the Tennessee Consumer Protection Act, violation of the 2007 Agreed Final Judgment, and public nuisance. Accordingly, Purdue's motion to dismiss is respectfully **DENIED**.

Entered this _____ day of _____, 2019.

JUDGE KRISTI M. DAVIS

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify pursuant to Rule 58, Tenn. R. Civ. P., that a copy of this ORDER has been served on all parties or their counsel of record by mail.

This _____ day of _____, 2019.

Charles D. Susano, III
Knox County Circuit Court Clerk

By: _____
Deputy Clerk

IN THE CIRCUIT COURT FOR KNOX COUNTY, TENNESSEE

<i>IN RE</i> : THE ADOPTION OF A.L.R.)	
)	
By: JOHN C. and KELLEE C.)	
)	
Petitioners,)	
)	
and)	
)	
LAURA M. and TEDDY M.,)	
)	
Co-Petitioners)	
)	
v.)	No. 1-401-16
)	
DUSTIN R., and/or)	
UNKNOWN BIOLOGICAL FATHER,)	

JUDGMENT

This case involves a petition for adoption and termination of parental rights. The case was tried on October 18-19, 2017. Having considered the evidence presented, including the testimony of the parties and their witnesses and documents to which the parties stipulated, the Court makes the following findings of fact and conclusions of law:

The minor child was born in Florida to co-petitioner Laura M. on October 13, 2014. Laura M. was married to but estranged from her husband, co-petitioner, Teddy M. Laura was romantically involved with Respondent Dustin R., and he is listed as the father on the child's birth certificate. Petitioners John C. and Kellee C. are the maternal uncle and aunt of the child, Kellee being Laura's sister.¹

¹ To protect the minor's privacy and for ease of reading, the Court will refer to the parties by their first names in the remainder of the Order.

The Alabama Proceedings.

Laura and the child stayed with Dustin in Florida for a few weeks after the child's birth. At some point, Laura left with the child. According to Dustin, he was not certain where Laura went, although he was aware of her living with friends for a period of time and also with Dustin's mother in Alabama for a period of time. According to Dustin, Laura had a substance abuse problem. On March 2, 2015, Dustin filed a complaint for paternity and child support in Jefferson County, Alabama, alleging that "mother is an endangerment." That case bears docket number CS-2015-87. On April 6, Dustin filed a Petition in the same court, alleging that Laura "has a history of drug use, and I found syringes in purse with blood on 3.24.15 when she was at my grandfather's house. I also found (3) – (4) other types of pills in her purse and took pictures. Multiple felon in AL/TN/FL for drugs. I am seeking custody of my son." That case bears docket number JU2015-652.01.

On April 9, 2015, the Alabama Department of Human Resources ("DHR"), filed a Dependent Petition, alleging that the child was dependent and had been placed in protective custody due to mother being arrested on drug-related charges. That case bears docket number JU2015-652.02. On April 10, 2015, a hearing was held, and legal custody of the child was vested in the DHR. On April 22, 2015, John and Kellee filed a Dependency Petition, docket number JU2015-652.03, seeking custody of the child.

An initial hearing took place on April 24, 2015 in cases JU2015-652.01, .02, and .03. All parties were present, except Teddy M. The Court's Order reflects that Laura stipulated to a general need for services. The Order provides that custody of the child remained vested with the DHR and allowed Laura to have supervised visitation of the child. A second hearing took place on May 15, 2015. Again, all parties were present, and Dustin was represented by counsel at this hearing.

No transcript of the hearing has been provided, but the Court's Order reflects that physical custody of the child was vested with the John and Kellee. Laura and Dustin were allowed supervised visitation "as agreed to and arranged by the parties."

Regarding Dustin's petition in case number CS-2015-87, a hearing was scheduled for July 20, 2015. Dustin appeared, but Laura had not yet been served in that case. Accordingly, the case was re-set to August 6, 2015. This Court was not provided with any documentation regarding what, if anything, occurred on August 6, 2015. Subsequently, the State of Alabama filed its own petition for support against Laura on September 25, 2015. That case bears docket number CS-2015-901135.00.

To summarize the pleadings, three dependency petitions were pending- one filed by Dustin (JU2015-652.01), one filed by the Alabama DHR (JU2015-652.02), and one filed by John and Kellee. (JU2015-652.03). Two support petitions were pending- one filed by Dustin (CS-2015-87), and one filed by the State of Alabama (CS-2015-901135.00).

In the dependency cases, another hearing took place on October 22, 2015. Again, all parties were present.² At this hearing, the Court maintained physical custody of the child with John and Kellee and legal custody with the DHR. The Order references Dustin's support petition, CS2015-87. The Order further provides Laura, but not Dustin, with supervised visitation of the child.

No activity occurred in either set of proceedings until February 22, 2016, when the DHR filed a motion to close dependency cases JU2015-652.02 and .03. In the two support cases, Dustin's lawyer filed a motion to consolidate the cases. On March 2, 2016, Dustin's lawyer filed

² It is unclear why Dustin did not have Laura served at this hearing with his petition in case number CS-2015-87.

a motion to continue the dependency cases in light of the pending support cases. The motion asserts that Laura was just served in case number CS-2015-87 on February 27, 2016.

A hearing was held on March 3, 2016. The Order reflects that the Court granted the DHR's motion to close cases 652.02 and .03 over Dustin's objection, denied his motion to continue, and dismissed his dependency petition (652.01) because he was not the legal father of the child. The Order so reflecting was filed on March 9, 2016. No appeal from this Order was filed by Dustin. This Court has not been provided with evidence of any further activity on Dustin's Alabama support case (CS-2015-87). John and Kellee filed the present Petition to adopt the child and terminate parental rights on August 30, 2016.

Visitation and Support of the Child.

Dustin last saw the child at the May 15, 2015 hearing in Alabama. The parties presented evidence of the communications between Dustin and John and Kellee subsequent to May 15, 2015. This evidence consisted of testimony, text messages, and Facebook messages, which the Court will summarize.

On May 20, 2015, Dustin telephoned Kellee to set up a visit on Father's Day, to which Kellee agreed. She requested that Dustin confirm the time closer to the date. Dustin requested a photograph of the child, which Kellee sent. On May 31, 2015, Dustin texted Kellee and requested to see the child that weekend. Kellee agreed and asked for specifics on the meeting, but Dustin did not respond. Dustin asked for another photograph of the child, which Kellee sent. On June 2, 2015, Dustin canceled the meeting to see the child, and Kellee told Dustin to let her know what other weekend would work. Father's Day came and went without Dustin making plans to see the child. Dustin testified that he could not schedule a visit because his brother passed away. On June

28, Dustin requested the address for John and Kellee in order to send money for the child. Kellee provided the address, but Dustin never sent money.

Dustin's next request for a visit came on July 15, 2015. Dustin told Kellee that he would be in Cleveland, Tennessee, that weekend with his friends for a whitewater rafting trip and wanted to see if Kellee would bring the child to Cleveland for a visit. Kellee told Dustin that she could not arrange the visit due to the short notice and, specifically, due to the fact that her daughter was returning to Knoxville that weekend after having been out of the country for six months.

Dustin's next request for a visit came on August 7, 2015. Dustin requested all available dates in August, and Kellee responded that her calendar was completely open in August. On August 10, Dustin texted that he would let Kellee know about a specific weekend in August for a visit. On August 18, the parties confirmed that a visit would occur on August 29 in the afternoon. Between August 27 and 28, the parties had a disagreement via text about the location of the visit. Dustin requested that John and Kellee bring the child to the Chattanooga Aquarium from 2:00-5:00 p.m. Kellee responded that she would meet Dustin at the McDonald's in Cleveland, Tennessee from 3:00-5:00 p.m. She told Dustin that the Aquarium was not an appropriate place for a baby. She testified at trial that she was also concerned about the expense associated with traveling to Chattanooga and purchasing tickets for her and her husband because they would be supervising the visitation. At trial, Dustin seemed unaware that John and Kellee would be required to supervise the visitation. The following text exchange occurred regarding the visit:

DUSTIN: Why can't we meet at the aquarium it's my bday weekend and
 wanna do something cool with my son....have worked my but[t] off
 and moved here for him³ PLz Kelly...it's a hour and half and 84
 miles that's a halfway point
 We talked about look out Mountain and the aquarium in
 court....Don't wanna spend my time at mcDonald's...wanna see my

³Dustin moved for a period of time from Florida to Alabama.

son see his father and grandma and see amazing animals... and it's my bday just want to have an amazing time with my boy.

KELLEE: Cleveland McDonald's or downtown Knoxville where there is a few more things to do. The baby is really too young to enjoy the aquarium.

DUSTIN: It's my son what the problem why are you making this difficult....this is what me and my mother have planned and will be an amazing experience....he will love the fish, it's my son.

KELLEE: I respect what you are saying but I have told you what I am willing to do. I will not argue over it. I understand you say you want to see your son but yet you have not paid the first bit of support. Words and actions are different. We are willing to work with you but we either meet at McDonald in Cleveland or downtown Knoxville.

DUSTIN: Ok so ... fine but we have both sat and Sunday

KELLEE: Saturday from 3-5 only

DUSTIN: Why the courts and DHR said weekends....see how this is going to work....unbelievable...ITS MY SON...and Support have over \$30k building a home ...surgeries, court....and re-location....smh lb⁴ is the problem not me
Calling DHR in the morning we agreed in Chattanooga...
Just buried my little brother too....and have been going through so much and you do this? Does God believe what your doing and actions are right?

Kellee did not respond to this text. The morning of August 28, the following exchange occurred:

DUSTIN: GOING TO LET THE JUDGE AND DHR KNOW HOW UNCOOPERATIVE YOU HAVE BEEN....NEVER AVAILABLE AND TAKIN MY SON ALL OVER, HAVING TEDDY NOT SIGN THE LEGAL PAPERWORK....and NOW THIS....tried to come up many times but never good times for you....see YA in court and major changes are going to be made with "said" dates was trying to be kosher with you....but you people are just plain ridiculous, your sister still gets wasted and drinks and drives and if wasn't for her stupid shenanigans and didn't get the divorce I would have my son, so remember this day on my bday....so when you decide to come see [the child] in my custody, remember this weekend!!!!!!!!!!!!

⁴ "lb" is a reference to Laura M.

KELLEE: I have given you two reasonable options to see your son. If you choose not to accept one of those days then that is okay.

DUSTIN: That's not even a halfway point ...we discussed Chattanooga in court...

KELLEE: We agreed to allow you 2 supervised visits per month. You haven't taken that up since May. We've offered to meet you in Cleveland. The offer still stands but please let us know today.

DUSTIN: Yes, I have... you went to Hawaii and then tried to come up before I went to Florida when we close to you the ocoee and nothing then had to bury my brother and then fly back to Miami and pack my stuff to move here to see my son.... I didn't choose this route....but have given up racing and flying to come and live this county lifestyle to fight for my kid....so stop saying I haven't done anything....was already here fighting for him with DHR when your junkie sister got him taken away....have been mislead by my atty and lb never showed up for DNA testing....and was paying \$1250 a day for atty....also have the check from my \$18,690 in rent for our home that lb wanted to go out be an idiot and drug out....paid for his circumcision and bought him tons....now she says he's not mine and teddy wants to be part of his life so I honestly don't understand you people and YOIR thought process....THIS IS MY SON....and have sacrificed EVERYTHING....once my brothers court and dads empire I coming hard....for my son....I haven't done anything for this treatment and have had it....

KELLEE: We need to know by 7pm tonight if you plan on meeting us tomorrow.

DUSTIN: We are not coming that is NOT....the halfway point and between you and your sister have ruined EVERY HOLIDAY....this and last year....really sad!!!! My grand parent are getting old and we all had this planned....karma is karma and we shall engage in court...,def my son but wanna tell teddy not to sign papers? WHATS WRONG WITH YOU PEOPLE....[The child] IS MY SON AND HAVE GIVING UP EVERYTHING TO FIGHT FOR HIM, MOST FATHERS DON'T CARE I DO!!!!

On August 29, Dustin posted the following on Facebook:

WANNA THANK ALL OF YOU FOR THE BDAY WISHES, BEEN A BAD DAY HAD PLANNED FOR A MONTH TO SEE MY SON & TAKE HIM TO THE TN AQUARIUM AND THE AUNT WHO HAS CUSTODY WANT MEET ME AS THE COURTS SAID THE HALFWAY POINT WAS CHATTANOOGA,

SHE SUGGESTED MY SON WAS TOO YOUNG AND THAT I HAVE TO DRIVE (2) HOURS TO MEET AT MCDONALDS....[The C family] are ALL POS!!!!

The next communication between the parties occurred on October 4 and 5 when Dustin again requested the address to send a birthday gift to the child. Dustin asked if the address would accept packages, and Kellee responded that it would. Dustin never sent a gift. At trial, he testified that he did not send any gifts or provide any support to the child because DNA testing had not yet occurred, and he did not want to send gifts or provide money until DNA testing confirmed paternity. However, he also testified that he did not doubt that the child was his son. On October 15, 2015, Dustin posted on Facebook: "...working my ass off to get custody of my boy...the aunt only sent me this one pic....the mother family is sooo fucked up its crazy....and there Christians smfh." Dustin requested another photograph from Kellee, which she sent.⁵ Dustin complained that only one photograph was sent and texted the following to Kellee:

This was one year ago today: I was there for EVERYTHING!!!! IM HIS FATHER!!!! Oh and probably don't know ...but my son was born at 9:12PM....your unbelievable...see YA on the 22nd!!!! HAPPY BDAY SON....sorry for what you have been THROUGH...DADDYS COMING!!!! Enjoy my son...and thank for taking care of him "Hopefully" have work and a flight tomorrow!!!! He's not yours HES MINE....remember that!!!!

On October 14, 2015, Dustin sent the following text to Kellee: "Can I see my son? Friday at closest airport Friday or Sunday?...Up to you...AGAIN.5th time trying to see my son...and what you did yesterday is un-excusable I am not your junkie sister so will be flying to Kentucky. And would love to see me boy....balls in your court once again...let me know my Friday." Kellee did not respond because the request was last-minute, was not specific, and requested a visit at a random airport. In addition, due to the increasingly hostile nature of Dustin's texts and Facebook posts,

⁵ It should be noted that Dustin made requests for photographs during the previous months, and Kellee sent photographs at each request.

Kellee blocked Dustin from texting her. At some point, Dustin sent the following to John via Facebook Messenger:

Your a POS And def will not stop fighting for my son....may god be with you...as this is just the beginning....start saving as I'm coming to TN...HICKVILLE after DNA....never meet MORE EVIL PEOPLE THAN You....see ya soon..... I made him remember that so, get ready and start saving more \$\$\$\$...your nothing but a person whom chooses to keep my son from me temporary....enjoy this time with my son....ONLY TEMPORARY....see ya soon yee HAAA Coming for ya....can't wait to see ya in court hillbilly....don't think for one minute you're a father to my son....Bitch!!! Want stop ever!!!! And start saving as I am working my ass off to come after my son and sue your family....this has just started!!!! So be PREPARED!!!!

Dustin sent several texts to Kellee from October 27, 2015 through June of 2016. Kellee did not receive those texts because she had blocked Dustin. In the October 27 text, he made a request to see the child: "I am asking you to let me see my son...we can meet half way or whatever may be able to fly up...." On October 30, he stated, "SO I TAKE IT YOUR GOING TO KEEP MY SON AWAY FROM ME AND MY FAMILY FOR AS LONG AS YOU CAN HUH? Have no idea why a person would do such a thing....just isn't right nor human....have a great weekend." He sent texts on October 31, November 11, and December 27, 2015. Those texts can be summarized as complaining and threatening. He did not make a request to see the child in any of the texts. He sent no texts in 2016 until March 3, after the Alabama court date where the C.'s retained custody and Dustin's dependency petition was dismissed. In a series of texts from March 3 through March 5, Dustin called the C.'s evil, stated he could not believe they called themselves Christians, stated he would "see ya in TN," that "God is looking at you....," that "once I get the paternity I'm coming to TN," and to "Sleep well as have always been there for my son and gave up EVERYTHING!!!!" Again, no specific request was made by Dustin to see his son. In addition, no other method of communication was used by Dustin. Having received no response from Kellee to his texts, Dustin did not try to contact John (other than the message quoted above), via telephone call, text, or

Facebook, nor did he write the C's. John and Kellee testified that they have a landline telephone and that their number is listed but that Dustin did not contact them via their landline. Dustin sent another text to Kellee on March 28, 2016, again berating the C.'s and stating, "Enjoy this time as he has my DNA....and in the long run he WILL BE WITH HIS DAD!!!!"

On June 1, 2016, Dustin sent the following text to Kellee:

"My grandpa just died and he loved his great grandson soo much you evil people have kept him from me and my family you disgusting fucks YOU THINK THIS IS A JOKE AND I AM THE FATHER OF [the child] AND GAVE UP MY WHOLE CAREER AND BACK DOING WHAT I LOVE, RACING BUT I WILL BE IN TOWN SOONER WITH THE BEST ATTY MONEY CAN BUY!!!! May take some years but I want stop let that be known....also sueing you and Teddy as well as your junkie ass sister so enjoy your mediocre life as I am furious and want GO AWAY!!!!!!!!!!"

The only other communication from Dustin to the C.'s that has been provided to this Court is a text message to Kellee. It is not dated, but it is a photograph of Dustin with a motorcycle. He stated, "Work (7) days a week for the past (6) weeksall for my son...plz send me a pic of my boy plz I see so many fathers at the track and miss my boy so much!!! You have kids be my 1st"

John and Kellee filed the present petition on August 30, 2016. Dustin did not make any requests to see the child subsequent to the filing of the petition until August 23, 2017, when his attorney made a request for Dustin to see the child when he was in town for depositions on August 28. At trial, Dustin explained that he was busy working during this time period. Also, no paternity test was conducted until Dustin was in Knoxville for depositions. The paternity test established that Dustin is the child's biological father.

With respect to the support provided to the child by Dustin, it is undisputed that Dustin provided no support to the child of any kind from the time the C.'s gained physical custody of the child in May of 2015 until September of 2017. Dustin made at least two promises to send money and gifts, but he never did. Immediately before trial, Dustin sent two separate checks to the C.'s

in September and October of 2017 for \$250.00 each, and he sent the child birthday gifts in October of 2017. At trial, Dustin explained that he did not want to send money or gifts until paternity was confirmed. However, Dustin made no efforts to have DNA testing done from the time Laura M. was served with the Alabama petition in February of 2016 until August of 2017.

Conclusions of Law.

It is well-settled that parents have a fundamental right to the care, custody, and control of their own children. See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010). Although the right is fundamental, it is not absolute. Thus, the state may interfere with parental rights in certain statutorily-designated circumstances. *Id.*

The petition for termination of parental rights in the present case is based on the allegation of abandonment, and specifically, willful failure to visit and willful failure to support the child.⁶ Pursuant to Tennessee Code Annotated §36-1-113(c), termination of parental rights requires: (1) a finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and (2) that termination of the parent's or guardian's rights is in the best interests of the child. "Abandonment" is defined in Tenn. Code Ann. §36-1-102(1)(A)(i) as follows:

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 or parents or the guardian or guardians of the child who is the subject of the petition for termination of parental rights or adoption, that the parent or parents or the guardian or guardians either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child[.]

⁶ The petition also alleges grounds for termination pursuant to Tenn. Code Ann. §36-1-113(g)(9), which deals with putative fathers. At the time the petition was filed, no paternity test had been conducted. Prior to trial, however, a paternity test was conducted and concluded that Dustin is the biological father.

The statute defines willful failure to visit as “the willful failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation.” Tenn. Code Ann. §36-1-102(1)(D). Similarly, willful failure to support is defined as “the willful failure, for a period of four (4) consecutive months, to provide monetary support or the willful failure to provide more than token payments toward the support of the child.” Tenn. Code Ann. §36-1-102(1)(E). Token visitation is defined visitation that “under the circumstances of the individual case, constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child.” Tenn. Code Ann. §36-1-102(1)(C). Token support is that which, “under the circumstances of the individual case, is insignificant given the parent’s means.” Tenn. Code Ann. §36-1-102(1)(B). A parent’s failure to visit or support is considered to be willful when the parent has a duty to visit or support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so. See In re M.J.B., 140 S.W.3d 643, 655 (Tenn. Ct. App. 2004). The clear and convincing evidence necessary to terminate parental rights is that evidence which “enables the fact-finder to form a firm belief or conviction regarding the truth of the facts, and eliminates any serious or substantial doubt about the correctness of these factual findings.” In re Bernard T., 319 S.W.3d 586, 596 (Tenn. 2010).

The Court will first address the allegation of abandonment by willful failure to visit. The relevant time period is April 29 through August 30, 2016. It is undisputed that Dustin did not visit the child during that time period. Dustin contends, however, that his failure to visit was not willful because the conduct of John and Kellee thwarted his visitation, both early in the proceedings when he claims they would not work with him on scheduling visitation, and later when, unbeknownst to him, Kellee blocked his text messages. Dustin relies primarily upon the case of In re Lyric J.

2014 WL 7182075 (Tenn. Ct. App. Dec. 16, 2014). In that case, the Court of Appeals reversed the Trial Court's finding of willful failure to visit. The Court of Appeals noted that the father, who lived in another state, had called the child's grandmother, who had physical custody of the child, once per month to set up visitation; however, the grandmother always told the father that visitation was not a good idea at the time. In addition, the grandmother testified that she was afraid to let the father visit the child because she feared the father would take the child. The Court of Appeals held that a parent who has tried to visit his or her child but has been "thwarted by the acts of others and circumstances **beyond his [or her] control**' has not willfully failed to visit." *Id.* at *5 (quoting *In re Adoption of A.M.H.*, 215 S.W.3d 798, 810 (Tenn. 2007) (emphasis added)). The Court determined that a parent's failure to visit may be excused by a third party's conduct if the conduct "actually prevents the person with the obligation from performing his or her duty, or amounts to a significant restraint of or interference with the parent's efforts to support or develop a relationship with the child." *Id.* (quoting *In re Audrey S.*, 182 S.W.3d 838, 864 (Tenn. Ct. App. 2005)). The Court went on to note that it had deemed the following actions to be a significant restraint or interference with a parent's efforts to develop a relationship with a child: "(1) telling a man he is not the child's biological father, (2) blocking access to the child, (3) keeping the child's whereabouts unknown, (4) vigorously resisting the parent's efforts to support the child, or (5) vigorously resisting a parent's efforts to visit the child." *Id.* (citation omitted).

First, the Court notes that cases involving termination of parental rights are always fact-specific. It is, therefore, somewhat difficult to equate the fact pattern of one case to another when trying to determine whether a failure to visit was willful. Dustin contends that his situation is directly analogous to that in *In re Lyric J.* Although there are some similarities, the Court finds that there are several important distinguishing facts. First, unlike the grandmother in *In re Lyric*

J., John and Kellee were not afraid to allow Dustin to visit, nor did they make scheduling visitation difficult. The evidence shows that from May to October of 2015, Dustin made six attempts to see the child. In May, he requested to see the child on Father's Day, and the C.'s agreed. On May 31, he requested to see the child the following weekend, and the C.'s agreed. Both visits were either cancelled or were not followed up on by Dustin. On July 15, Dustin requested to see the child because he would be in Cleveland for a whitewater rafting trip, but Kellee objected based on the last-minute nature of the request and the fact that the family already had plans. The Court does not find Kellee's decision unreasonable. In August, Dustin requested dates for visitation, and the C.'s informed him that August was wide open for scheduling a visit. This, of course, ultimately resulted in the disagreement between the parties about the location of the visit, which culminated in Dustin refusing to travel to Cleveland for a visit, stating to Kellee that "karma is karma and we shall engage in court," and announcing on social media that the C.'s were all "POS." Dustin requested an airport visit for October 14 and another visit on October 27, to which the C.'s did not respond. Kellee blocked Dustin's cell phone number because of the derogatory and threatening nature of his texts and social media posts. From October 2015 to the filing of the petition in August 2016, Dustin's only attempts at communication, other than the Facebook message sent to John, calling him a "POS," were via text. Those text messages cannot be construed as a legitimate attempt to schedule a visit with the child. Instead, the messages are insulting and threatening. The Court notes that during this entire time, Dustin never attempted to call John, call the C.s landline, write the C.'s, or try any other form of communication other than texting Kellee. Dustin did not petition any court for visitation. In sum, the proof simply does not support Dustin's contention that the C.'s thwarted visitation with the child. The C.'s did quite the opposite. Dustin cannot behave in such a way that Kellee had to block his text messages, then complain that he could not

communicate with Kellee via text to schedule a visit. In short, any difficulty Dustin had communicating with the C.'s was a problem of his own making.

With respect to willful failure to support, the law is clear that “biological parents must, as a general matter, support their children until they reach the age of majority.... The parent’s obligation to support, as well as the child’s right of support, exist regardless of whether a court order exists, and regardless of whether the parents were ever married.” Tenn. Code Ann. §36-1-102(1)(H). It is again undisputed that Dustin did not pay any money for the support of the child during the four months preceding the filing of the petition. Dustin offers various reasons for his failure to provide support. First, Dustin contends that he was not required to provide support until paternity was confirmed. Dustin also contends that he was financially unable to provide support. In his deposition, Dustin testified that he did not pay support because the C.’s “were keeping my kid and not working with me at all. So, they were not being flexible on any dates for me to see my son, at all, and I don’t trust what they were gonna do with the money.” Finally, Dustin testified in his deposition that he did not pay support because “the courts have not told me to pay anything to them at this time.” The Court finds these excuses to be disingenuous.

First, Dustin’s contention that he did not want to pay support until confirmation of paternity is inconsistent with his previous statements and behavior. On two occasions, Dustin asked John and Kellee for their address so that he could send money and gifts to the child. Dustin never did. In addition, Dustin told the C.’s several times, forcefully via text, that the child was his child. Dustin cannot now come before this Court and use the lack of paternity confirmation as an excuse for his failure to support the child. Furthermore, Dustin did not actively seek paternity confirmation after Laura M. was served or once the Alabama proceedings concluded. Even when the present petition was filed, Dustin waited for a year before seeking paternity testing. Again,

Dustin cannot wait until the eve of trial to obtain paternity confirmation, then use the lack of such confirmation as an excuse for two years of failure to support.

With respect to ability pay, the Court first notes that Dustin did not provide any tax returns because, apparently, he has not filed any. This is because some jobs were worked “under the table,” according to Dustin. Dustin testified that he is currently enrolled in a helicopter academy and has been for some time. Tuition of \$80,000 was paid up front from trust funds from his father’s death.⁷ Since May of 2015, Dustin has worked for JCM Performance as an apprentice technician, for MidSouth Aviation, T.T. Motosports, and SpeedStar Customs. He is a professional chassis technician, and he builds and races motorcycles. He provided an Affidavit of Income and Expenses from June 30, 2017 and prior, which reflects a net income of \$2,933.33 and expenses of \$2,924.05. His expenses include \$755.00 for attorney’s fees.

The Court finds that Dustin had an ability to pay something toward the support of his child, even if only a meager amount. Examining the Affidavit of Income and Expenses and assuming it to be true,⁸ Dustin could have sent just \$10.00 per month, which would have been better than nothing. To the extent Dustin contends that he could not afford to send support payments because of his attorney fees, this argument was rejected by the Tennessee Court of Appeals in *In re Makenzie L.*, 2015 WL 3793788 (Tenn. Ct. App. Feb. 24, 2015) (rejecting the argument that “when parents are compelled to redirect their finances to seek legal representation to protect their right to parent their child, the abandonment by failure to pay financial support is not grounds for termination.”).

⁷ Shortly before the hearing, Dustin came into a large sum of money from his father’s business. He now claims a monthly income of \$6,300.00.

⁸ Again, no supporting documentation for either income or expenses is contained in the record.

In conclusion, the Court finds that the petitioners have established by clear and convincing evidence that Dustin willfully failed to visit the child and willfully failed to support the child. Dustin's efforts at visitation early on were half-hearted at best. When Dustin finally appeared ready to actually visit the child, he refused to do so because he did not like the location chosen by the petitioners. His subsequent actions resulted in Kellee having to block him from texting, and Dustin made no genuine effort at visitation since October of 2015. The same is true with respect to support. Dustin offered various excuses as to why he did not support the child, and the Court is persuaded by none of them. The Court's overall impression of Dustin with respect to his efforts at a relationship with his child are that he talked a lot but did very little.

Having found clear and convincing evidence to support the termination of Dustin's parental rights, the Court must now address whether such termination is in the child's best interest. The best interest of a child must be determined from the perspective of the child, not the parent. See *In re Arteria H.*, 326 S.W.3d 167, 182 (Tenn. Ct. App. 2010). Tennessee Code Annotated §36-1-113(i) provides a non-exhaustive list of factors for the Court to consider in making this determination. Ascertaining a child's best interest does not call for a rote examination of each of the statute's factors and then a determination of whether the sum of the factors tips in favor of or against the parent. See *In re Marr*, 194 S.W.3d 490, 499 (Tenn. Ct. App. 2005). The relevancy and weight to be given each factor depends on the unique facts of each case. Id. Thus, depending upon the circumstances of a particular child and a particular parent, the consideration of one factor may very well dictate the outcome of the analysis. Id. (citations excluded).

The Court finds that the following factors are relevant in this proceeding:

- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;

(5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

....

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe....

....

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to §36-5-101.

First, with respect to factors three and four, Dustin has not seen the child in over two years. Dustin has no relationship with the child. In his deposition, Dustin testified that he believed the child would recognize him because "I set there and talked to him while he was in the womb for months and months, we watched motorcycles, played with things. And when he was born and heard sounds I made he lit up, he knew exactly who I was." At trial, however, Dustin acknowledged that he would be a stranger to the child. In his deposition, Dustin acknowledged that when he met with the guardian ad litem, she discussed therapeutic visitation.⁹ He denied that she instructed him to take steps to set up therapeutic visitation. He also denied that she discussed reactive attachment disorder with him. The Court finds that these denials are not credible. In his deposition, Dustin was asked whether he had taken any steps to get himself reacquainted with the child, and he testified that he did not know.

With respect to factor nine, Dustin did not make child support payments. Even when he came into money shortly before trial, he sent only \$250.00 for two months.

With respect to factors five and seven, the Court first notes that the proposed physical environment of Dustin's home appears to be healthy and safe. Dustin has recently moved to a larger home in Florida that would have ample space for the child, and he has worked with a friend to locate a pediatrician and daycare services. This factor weighs in Dustin's favor. However, the

⁹At trial, the guardian ad litem advocated for termination of parental rights and for custody to remain with John and Kellee.

Court must also consider that John and Kellee are the only parents this child has known, and the child knows them as “mom” and “dad.”¹⁰ John and Kellee have two older daughters who interact with the child like a brother. John and Kellee have provided the child with a safe, stable, and loving home since the child was approximately seven months old. They have paid for and provided the child with food, shelter, clothing, and doctor visits. If the child were removed from this home and placed with Dustin, the Court finds that the possibility for significant emotional harm exists.

Having considered the foregoing factors, the testimony of the parties, and the record as a whole, and keeping in mind the significant consequences of severing the child’s ties with his biological father, the Court finds by clear and convincing evidence that it is in the child’s best interest to remain with John and Kellee in the only home the child has known.

Conclusion.

In sum, the Court finds that Dustin’s parental rights should be terminated for abandonment based on clear and convincing evidence of willful failure to visit the child and willful failure to support the child. The Court further finds that it is in the child’s best interest to remain with Kellee and John and that their adoption proceeding shall move forward.

Entered this ____ day of _____, 2017.

JUDGE KRISTI M. DAVIS

¹⁰ John and Kellee testified that if they were permitted to adopt the child, they would tell him of the adoption at the appropriate age.