TENNESSEE JUDICIAL NOMINATING COMMISSION
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Nashville City Center
Nashville, TN 37219

APPLICATION FOR NOMINATION TO JUDICIAL OFFICE

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Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

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INTRODUCTION

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

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website http://www.tncourts.gov). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) ***and*** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit seventeen (17) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to

debra.hayes@tncourts.gov

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am a self-employed attorney practicing with associates Teresa Webb Oglesby and Janelle A. Simmons at Suite 2400, 401 Church Street, Nashville, TN 37219

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

1975

Tennessee Board of Professional Responsibility No. 3023

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

Tennessee Board of Professional Responsibility No. 3023

Date of licensure: October 18, 1975

License is currently 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).

I graduated from University of Tennessee College of Law in May, 1975 and took the bar the following July. Between July, 1975 and November, 1975, when I was sworn in to begin my practice, I worked at Phillips-Robinson Funeral Home as an ambulance attendant, driver and apprentice embalmer. (Sorry, I know this is creepy but it's true). In November, 1975, I began practice in the Norman Law Offices as described in response #8 below. In 2001, associates Philip E. Smith (now Judge, Fourth Circuit Court for Davidson County, TN), Teresa Webb

Oglesby and I opened our own office practicing almost exclusively family law. In 2005 when my father's health began to fail, I became Chairman of the Board of Directors for Hermitage Explosives Corporation which is a distributor and manufacturer of explosive products and blasting agents. In addition to playing a major role in the management of that business, I was the company representative dealing with the Bureau of Alcohol, Tobacco, Firearms & Explosives (BATFE) which regulates all aspects of the explosives industry. Since the tragic events of 9/11, homeland security and BATFE have dramatically intensified their scrutiny of the manufacture, sales and storage of explosive products. As a result, I have dealt extensively with the Bureau on BATFE regulations.

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.

For the last twenty-five years of my thirty-six year legal career, I have dealt exclusively in the area of domestic relations. This is comprised of the following:

Parentage actions

Divorce actions

Custody and custody modifications

Child support and alimony modifications

Orders of protection

Juvenile court dependent and neglect actions

Prenuptial agreements and postnuptial agreements

Appellate work related to all of the above

The foregoing comprises one hundred percent of my practice.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Commission needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of

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

I was licensed to practice law in October, 1975 and immediately began my law career in the Norman Law Offices in Nashville under the tutelage of attorneys Jack Norman, Sr., Jack Norman, Jr. (now Special Master, Fourth Circuit Court for Davidson County, TN), Seth Norman (now Judge, Division IV, Davidson County, TN), Muriel Robinson (Judge, Fourth Circuit Court for Davidson County, TN, retired), and Herb Rich.

Originally, my practice included domestic relations cases, personal injury cases including workers' compensation, civil litigation including contracts and landlord/tenant matters, as well as criminal and probate matters. I also handled some collection cases. I have tried jury medical malpractice cases, automobile accident cases, jury criminal cases, and even jury divorce trials. Since 1975, there have been three jury divorce trials in Davidson County, and I was an attorney in two of those cases. In probate matters, I have probated estates and handled conservatorships. In General Sessions Court, I have handled landlord/tenant acts, personal injury and property damage cases, as well as preliminary hearings in criminal matters both on the jail docket and the criminal bond docket. In all of the foregoing litigation, whether bench trials or jury trials, I prepared my own pleadings, interviewed witnesses, did my own research and wrote pretrial briefs when necessary. I also prepared my own opening and closing arguments whether before a judge or jury.

For the last twenty-five years, I have handled almost exclusively family law matters. This includes drafting pre- and postnuptial agreements, trying divorce, custody and parenting time issues, alimony and child support modifications as well as orders of protection. Divorce cases generally involve dividing assets and liabilities, setting alimony when appropriate and when the parties have minor children, determining custody, child support and parenting time. I also handle family matters in juvenile court including parentage actions, custody, child support matters, and dependent neglect actions.

I have represented clients on appeals from state courts including appeals from criminal cases to the Tennessee Court of Criminal Appeals and appeals in civil and domestic matters to the Tennessee Court of Appeals. I have also prepared briefs for and argued before the Tennessee Supreme Court. A case of note is the case of *Nash v. Mulle*, 846 S.W. 2d 803 (Tenn. 1993) which established the authority of the trial court to order high income parents of minor children in divorce cases to set aside funds for the children's college education in appropriate cases. I also served as Special Prosecutor to the Davidson County Juvenile Court in prosecuting a contempt action against the Juvenile Court Clerk. See *In re: Robert Victor Lineweaver*, 343 S.W. 3d 401 (Tenn. Ct. App. 2010).

Since 2007, I have been a hearing panel member for the Tennessee Board of Professional Responsibility which hears disciplinary actions against attorneys charged with ethical violations.

Earlier in my career when judges were allowed to have attorneys sit for them as substitute judges, I sat in the General Sessions Court as judge on the traffic dockets, the civil small claims docket, and the criminal docket hearing both preliminary hearings and bench trials. I also sat

numerous times as judge in Circuit Court on the divorce and Probate Court dockets hearing divorce and probate motions, divorce cases, custody and support modifications and contempt actions. I was appointed by Mayor Richard Fulton to serve on the Mayor's Commission on Crime and subsequently, to the Municipal Auditorium Commission which helped manage that facility for the city. I was also appointed by Mayor Phil Bredesen to serve on the Farmer's Market Board which oversaw that facility.

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

I was lead counsel in the noteworthy case of *Nash v. Mulle*, 846 S.W. 2d 803 (Tenn. 1993) which was decided by the State Supreme Court. This case was one of the early decisions interpreting certain aspects of the Tennessee Child Support Guidelines. The case established the authority of the trial court, in cases involving high income parents, to require them to place funds over and above their child support obligation into educational trusts for their minor children's college educations once the child has emancipated. Prior to that case, the interpretation of Tennessee law was that a parent's obligation to a minor child ceased at that emancipation. The *Nash v. Mulle* case recognized that in certain cases, parents should be required to place money aside during their child's minority for the child's use after the child's emancipation.

State v. Hollingsworth, 647 S.W. 2d 937 (Tenn. 1983). This was a ruling from the Tennessee Supreme Court in a criminal matter wherein the defendant was involved in an armed robbery in an attempt to commit a felony. The case helped define the trial judge's discretion in denying probation when the defendant had no prior criminal record and, as a result of his extensive cooperation with the District Attorney's Office, the District Attorney recommended that his sentence be suspended.

In re: Robert Victor Lineweaver, 343 S.W. 3d 401 (Tenn. Ct. App. 2010). This was an Appeals Court decision acknowledging and defining the trial court's authority over an elected clerk of court to compel the clerk to perform his duties. I was appointed special prosecutor by the Davidson County Juvenile Court.

Means v. Ashby, 130 S.W. 3d 48 (Tenn. App. 2003). This was an adoption case which helped define the definition of willful abandonment in efforts to terminate parental rights.

Henderson v. Mabry, 838 S.W. 2d 539 (Tenn. App. 1992). This case carved out an "exigent circumstance" exception granting temporary custody of children to non-related third parties in certain circumstances.

Other reported decisions are as follows:

Burnette v. State, 596 S.W. 2d 839 (Tennessee Court of Criminal Appeals, 1979)

Gaines v. Gaines, 591 S.W. 2d 561 (Tennessee Court of Appeals, 1980)

Moon v. Moon, 621 S.W. 2d 767 (Tennessee Court of Appeals, 1981)

State v. Bilbrey, 816 S.W. 2d 71 (Tennessee Court of Criminal Appeals, 1991)

The following are unreported cases in which I was involved:

State v. Orender, 1986 WL 3676

Selby v. Selby, 1986 WL 7086

State v. Bokor, 1987 WL 12056

Proctor v. Proctor, 1989 WL 25785

State v. Duke, 1989 WL 11204

In Matter of Rogers, 1989 WL 119394

State in Matter of Baye, 1989 WL 130595

Shelton v. Shelton, 1990 WL 131418

Morris v. McLearan, 1991 WL 57984

Marlar v. Marlar, 1991 WL 71899

Nash v. Mulle, 1991 WL 228992

Faircloth v. Locke, 1991 WL 259478

Justice v. Justice, 1995 WL 81414

Clabough v. Clabough, 1996 WL 668345

Wright v. Stovall, 1997 WL 607508

Sheucraft v. Roberts, 2000 WL 1817290

Justice v. Justice, 2001 WL 177060

State ex rel. Hartley v. Robinson, 2001 WL 487558

Houston v. Houston, 2002 WL 598548

Baral v. Bombard, 2002 WL 1256246

Haas v. Haas, 2002 WL 157917

Siefker v. Siefker, 2002 WL 31443213

Siefker v. Siefker, 2003 WL 21525263

Helton v. Helton, 2004 WL 63478

In re: Conservatorship of Jones, 2004 WL 2973752

Williams v. Williams, 2005 WL 2086029

Means v. Ashby, 2006 WL 1627280

Proctor v. Proctor, 2007 WL 2471504

Hodge v. Hodge, 2007 WL 3202769

Hudson v. Hudson, 2009 WL 3631017

Huffman v. Huffman, 2009 WL 4113705

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 never served as a mediator or arbitrator. I have served as a judicial officer as described in response #8 above. As noted, earlier in my career when the trial courts were allowed to appoint special judges to sit in the judge's absence, I had numerous opportunities to sit for General Sessions Judges on both their criminal dockets and civil dockets. I also sat for Fourth Circuit Court which handled exclusively domestic matters and the Probate Court which handled probate matters and domestic relations matters. Sitting on the General Sessions criminal docket, I handled bench trials for generally minor criminal offenses and also preliminary hearings. On the General Sessions civil docket, I conducted bench trials on small claims matters and also sat on the General Sessions traffic dockets for various judges.

In the Fourth Circuit Court, I heard exclusively domestic matters including divorce cases, custody cases, petitions to modify alimony, child support and parenting time. I also heard numerous contempt petitions, both civil and criminal. I also heard the court's motion docket on numerous occasions dealing with all aspects of family law cases.

In the Probate Court, which also handled domestic cases, I heard divorce cases, custody cases, and petitions to modify alimony, child support, and parenting time. I also dealt with motions related to domestic cases. I also sat on probate matters, generally hearing the probate motion docket.

Because of the passage of time and the numerous opportunities I had to sit, I cannot give the exact dates and times of my service.

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

I served as the executor of my father's estate, Charles Robb Robinson, and the administrator of my mother's estate, Sarah Dozier Robinson. I have four siblings and the five of us were the heirs of the estates. In each case, it was my responsibility to marshal the assets, have them valued for estate tax purposes, ensure that the estate tax returns were appropriately filed and disburse the property to the various beneficiaries. After my father's death, I also served as trustee on two trusts related to his estate. The trusts were dissolved with my mother's passing.

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

None

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

None

EDUCATION

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

University of Tennessee, Knoxville (1968-1972), Bachelor of Science degree in Political Science

University of Tennessee College of Law (1972-1975), Doctor of Jurisprudence degree

PERSONAL INFORMATION

15. State your age and date of birth.

60- October 14, 1950

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

60 years

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

60 years

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

Davidson

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.

None

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

No

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

No

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

Not applicable

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

No

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

No

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

Yes, I have been a party in two legal proceedings both associated with my practice of law.

(1) In approximately 1994, I represented the husband in a divorce action which also involved

custody and parenting of the parties' minor child. The court in which the case was filed had a standard parenting time or visitation arrangement which it always adopted except in the most unusual circumstances. I made my client aware of this, but he insisted that we make an effort to secure additional parenting time for him. When the case was tried, my client took the stand and testified to all of the reasons why he should receive additional parenting time with his minor child. Despite my best efforts, the Court found no basis to deviate from its standard parenting arrangement. My client was very disappointed. As a result, on July 26, 1994, he filed a breach of contract action against me in the General Sessions Court for Davidson County, Tennessee under docket number 94GC15837. This case was tried on August 12, 1994 and was dismissed.

(2) I was a co-defendant in a case in Federal Court which began in December, 1997. This action was based on a custody case I had prosecuted approximately four years earlier. Along with my co-defendant, I represented the father in a post-divorce petition to change custody. Although the mother had been awarded custody in the original divorce litigation, the mother had a very unstable lifestyle and had repeatedly left the child in the possession of the father and the paternal grandparents when she passed through town, often for months at a time. The father and the child's grandparents would care for the child and enroll the child in a local school only to have the mother come back to town and take possession of the child again. The father had finally had enough and requested that I file an action to secure custody for him. I did so and, pursuant to Rule 65.07 of the Tennessee Rules of Procedure, I requested that the trial court issue a temporary restraining order enjoining and restraining the mother from interfering with the father's temporary possession of the child pending a final hearing. The mother secured counsel and on two occasions during the pendency of the action, the mother filed motions seeking to dissolve the restraining order and return possession of the child to her. On both occasions, the trial court denied the mother's request and kept the restraining order in place. I eventually secured custody of the child for my client. Approximately four years later, the mother filed a suit against my client, his mother, my co-counsel and me in Federal District Court for Tampa/St. Petersburg, Florida (docket number 97-2846-CV-T-17E). She alleged that we had violated her civil rights by denying her due process in relying on Rule 65.07 of the Tennessee Rules of Civil Procedure which allows the trial court in domestic cases to issue temporary restraining orders which remain in effect until the final hearing. Although neither the original divorce nor the subsequent custody case had any contact with the state of Florida, the mother had at some point lived in Florida and chose this venue because it had a four-year statute of limitations. The case was subsequently transferred to the Federal District Court for the Middle District of Tennessee and was dismissed in January, 1999 as not timely filed and barred by the statute of limitations. Since that time, the Tennessee Supreme Court has repeatedly upheld the constitutionality of Rule 65.07.

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

32nd Degree Scottish Rite Freemason

Al Menah Shrine

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

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

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

No

ACHIEVEMENTS

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

Nashville Bar Association (1976 - present)

Vice-Chairman, Domestic Relations Committee (1988)
Chairman, Domestic Relations Committee (1989)

Tennessee Bar Association (1980 - present)

American Academy of Matrimonial Lawyers (2008 - present) The AAML is an association of the nation's leading practitioners in the field of family law. Membership, by invitation only, follows passage of a written examination on wide-ranging issues pertaining to matrimonial and family law. AAML Fellows are generally recognized by judges and attorneys as preeminent family law practitioners with a high level of knowledge, skill, professionalism and integrity.

National Board of Trial Advocacy Board Certified Family Law Trial Advocate (2009 - present) The NBTA is a non-profit organization devoted to improving the quality of trial advocacy and to aiding clients in choosing experienced legal representation. Members have met objective and rigorous standards, including a written examination, approved by the U.S. Supreme Court, the American Bar Association and the Supreme Court Commission on Certification of attorneys as specialists. Speciality certification is a highly recognized and very importuned credential.

Tennessee Board of Professional Responsibility Hearing Panel (2007 - present)

Nashville Bar Foundation Fellow (1998 - present)

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

Best Lawyers® (2005 - present) Best Lawyers® is the oldest and most respected peer-review publication in the legal profession, helping lawyers and clients find legal counsel in unfamiliar jurisdictions or unfamiliar practice areas. It compiles lists of outstanding attorneys by conducting exhaustive peer-review surveys in which leading lawyers confidentially evaluate their professional peers.

Mid-South Super Lawyers (2007 - present) Super Lawyers rates outstanding lawyers who have attained a high degree of peer recognition and professional achievement. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations.

Martindale-Hubbell® AV® Preeminent Rating (1995 - present) Martindale-Hubbell® Peer Review Ratings reflect a combination of achieving very high general ethical standards and legal ability. The AV® Preeminent rating demonstrates that a lawyer's peers rank him or her at the highest level of professional excellence.

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

None

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

"Practical Tips for Attorneys in the Domestic Relations Arena," M. Lee Smith Publishers, LLC, December 4, 2009

"Addressing Private School Tuition," Nashville Bar Association, October 8, 2009

"Client Contact," Tennessee Association For Justice, April 16, 2009

"Can You Have a Parenting Coordinator in a Custody or Divorce Case?", Tennessee Association For Justice, April 3, 2008

"Observations From the Bench and Bar Faculty," (Family Law Institute) Nashville Bar Association, October 9, 2007

"Presenting Your Case," Nashville Bar Association, October 19, 2006

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

None

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

No

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

See attached hereto examples of my legal writing as follows:

(1) The first example is a brief filed on behalf of my client, the Appellee. The case involved a post-divorce petition by the Appellant/Father for custody of the parties' minor children. The Mother had been awarded custody at trial and, several years later, the Father went back to Court in an effort to be awarded custody. He was unsuccessful at trial and appealed the Court's ruling. The Appeals Court ruled in my client's favor and affirmed the trial court's decision but remanded the case back to the trial court for further consideration of child support. This case involved whether there was a material change of circumstance to modify custody and parenting time. It also involved interpretation of the child support guidelines as well as evidentiary issues.

(2) The second case is a pre-trial memorandum in a divorce action. The parties settled the case in mediation, but the Wife subsequently filed a motion to set aside the mediated agreement alleging fraud on behalf of the Husband. This pre-trial memorandum was submitted on behalf of my client, the Husband, prior to the first of two hearings on this matter. The case involved primarily contract defenses.

On each of these examples, I performed one hundred percent of the writing and ninety percent of the research.

ESSAYS/PERSONAL STATEMENTS

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

I am seeking this position to bring many years of legal experience and a patient and calm judicial demeanor to the bench, in hopes of making our circuit courts a less stressful, more courteous and professional environment in which to litigate. I have practiced law for thirty-six years and have appeared in most of the courts in Middle Tennessee. While knowledge of the law and procedure are important, I believe the most important traits for a judge to possess are patience and judicial temperament.

I have seen and experienced instances of judges being discourteous or dismissive of litigants and attorneys alike. Other judges may have their own special "rules of procedure" or built-in prejudices that make it difficult, if not impossible, for some litigants to receive a fair hearing. Such courts are challenging in which to practice, especially for new or young attorneys who are afraid to appear in front of some of these judges. Even older or more seasoned attorneys, after a bad experience, are reluctant to return to these courts.

I would like to oversee a court that is a courteous and professional place for the attorneys to practice and a comfortable place for the litigants to appear. The only way to achieve a just result is to give both litigants an opportunity to be heard and not make a snap decision based on the first person to speak. While justice is a nebulous concept that depends on the facts and circumstances of each case, I believe that attorneys and litigants alike who feel that the court treated them respectfully and gave them an opportunity to be heard will leave the courtroom with respect for the court's ruling even if adverse to them.

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

During my first ten years of practice, in addition to family law cases, I also handled civil personal injury claims and criminal matters. As a criminal lawyer, I was often appointed by the court to represent indigent defendants. The remuneration was small. However, it was a point of pride to me that the Davidson County criminal judges, often at the suggestion of the District Attorney's Office, appointed me to some very serious and difficult criminal cases. I believe this was because they understood that I would work just as hard on that case as one for which I was being well paid. Even though I often knew my client was guilty of the charge, I put on the best defense I possibly could. More recently, I have accepted domestic cases from the Nashville Pro Bono Program and am currently finishing up a *pro bono* divorce case. I have often represented clients privately at reduced rates or, on some occasions, for no charge at all because they simply needed someone to help them. I have also accepted representation of indigent individuals when requested to by the Court. I have, on a number of occasions, volunteered to help *pro se* litigants prepare answers out in the hall on the motion docket when they were facing motions for default judgment. When one of our judges experimented with the concept of having an attorney available on the orders of protection docket to assist litigants and explain the process to *pro se* individuals, I volunteered as the first attorney to provide that service.

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 the position of Judge of Third Circuit Court for Davidson County, Tennessee. Currently, Davidson County has eight circuit courts, four chancery courts and six criminal courts. Of the circuit courts, while all have concurrent civil and criminal jurisdiction, Seventh Circuit Court handles exclusively probate matters. Likewise, Fourth Circuit Court was legislatively created to handle domestic cases and currently is assigned fifty percent of all family law filings. Until recently, the other fifty percent were handled by Eighth Circuit Court.

Recently, the Judge of Eighth Circuit Court has requested that she be relieved of the domestic cases. While Third Circuit Court has historically been a civil court that handled all types of civil litigation other than domestic cases, it is anticipated that the trial judges will take this opportunity to create a second domestic court to hear the other fifty percent of the domestic

filings. Domestic law affects more people in Davidson County than any other area of the law. While I have experience in all types of civil litigation, my expertise lies in the area of domestic litigation and I believe my appointment to the bench of Third Circuit Court would present a unique opportunity to improve domestic practice in this county. I am a Fellow of the American Academy of Matrimonial Lawyers and am a Board Certified Family Law Trial Advocate by the Nashville Board of Trial Advocacy. I believe that there is an opportunity here to standardize practice and pleadings with the other domestic court and to bring consistency and uniformity in rulings to those two courts.

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)***

For the past ten years, I have appeared regularly (approximately four to five times per year) on a local morning television show. The show provides information about domestic law matters and answers questions about divorce or other family law issues for viewers who call in to the show. The opening segment generally deals with changes in the law or recent cases of interest, and the remainder of the hour-long show consists of answering questions from the viewers. This television show also gives me the opportunity to bring on guest attorneys and trial and appellate judges to address issues related to the law.

Although I have not recently been active, in the past I have been active in the Masonic Lodge and the Al Menah Shrine. The Shrine is an organization affiliated with the Masonic Lodge whose sole purpose is to support the twenty-two Shrine crippled and burned children's hospitals scattered across the United States. These hospitals provide the most modern and up-to-date treatment free of charge to children regardless of their race, religion or ethnicity. The Shrine raises funds to support these hospitals through the yearly Shrine paper sales.

If I am appointed judge, I intend to continue my affiliation with the above organizations. In addition, I would like the opportunity to speak in the community to promote educational programs for high school students to help raise awareness of their responsibilities as young adults and the impact of teen pregnancies on both parties' lives.

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

From the age of seventeen until I was licensed to practice law, I worked part-time, generally during the summers and holidays at my family's business, Phillips-Robinson Funeral Home. During that time, I had the opportunity to interact with the families who had lost a loved one. You generally saw people at their most distraught moment. I learned to empathize with families as they were dealing with the loss of a loved one and the tremendous impact such a loss has on one's life. I have often observed that there are many similarities between divorce and the loss of a loved one. A divorce is the death of a relationship. Many of the emotions as well as the healing process are similar. People feel lost, abandoned, hurt, angry and traumatized. Further, in order to

recover, they must go through a grieving and healing process. A person cannot properly grieve and heal emotionally while going through the divorce process. It is the duty of their attorney to see that they get through the process as quickly as possible so that they can try to get back to a normal life.

Also while I was in college and law school, I had the opportunity to spend two summers as a deputy clerk in the Davidson County Circuit Court Clerk's Office and one summer in the Davidson County Criminal Court Clerk's Office. During this time, I had the chance to learn about the filing of the lawsuits and how they move through the courts, as well as criminal warrants and how those charges move through the criminal courts. I also had the opportunity to meet many attorneys, police officers, and judges. Both experiences were important learning opportunities.

I feel like the above life experiences helped me better understand the thought process of people in crisis and to empathize with what they are experiencing. I also better understood the legal process as lawsuits or criminal cases moved through the system. A view of how the clerk's offices work and all of the many details that are normally not obvious to the public, or even the practicing attorneys, has been helpful to me during my legal career. I learned to appreciate the value of the deputy clerks in both the Circuit and Criminal Court Clerk's Offices. The system simply cannot operate without these dedicated people and the assistance they provide to attorneys, litigants and judges.

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)***

I will uphold the law even if I disagree with it. While judges are often required to interpret the law, they do not draft the statutes. Our laws are written by the Tennessee General Assembly which is elected by the people. To the extent that the court is called upon to interpret a statute, it should do so keeping that interpretation as close to the intent of the legislature as possible. I reject the notion of activist judges who use their position to affect social and political change. It is a judge's duty to determine the facts and make fair and impartial rulings based on the law as written and previously interpreted by legal precedent.

A recent example of my insisting on the strict enforcement of the law, even though I disagreed with the result, dealt with a prenuptial agreement that my client had entered into. The facts and law dealing with this prenuptial agreement supported its strict enforcement. However, to do so would result, in my opinion, in an unjust and unfair division of assets considering the facts of the case. It was clear from the facts surrounding the execution of the agreement that my client was apprised of his rights, that there had been full disclosure by both parties, and neither party was under duress at the time they executed the agreement. One option open to my client was to challenge the validity of the agreement even though there was no legal basis to do so. Such a position would have given my client additional leverage at mediation in an effort to negotiate a better settlement that was not in strict compliance with the terms of the agreement. I counseled with my client that to take such a position, just because we did not agree with the result, would

be morally and ethically inappropriate. To my client's credit, he agreed. He acknowledged the validity of the agreement, and a mediated settlement resulted in compliance with the terms of that agreement. While both my client and I felt that the result was unjust, it was in compliance with the law and the strict terms of the parties' agreement.

REFERENCES

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

A. Lee A. Beaman, Chairman and CEO
Beaman Automotive Group
1525 Broadway
Nashville, TN 37203
(615) 251-8400

B. David G. Howard, CPA
Frasier, Dean & Howard, PLLC
Suite 550, 3310 West End Ave.
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C. Edward M. Yarbrough, Attorney
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D. Hal Hardin, Attorney
Hardin Law Office
Suite 200, 211 Union St.
Nashville, TN 37201
(615) 369-3377

E. Pamela A. Taylor, Attorney
Stites & Harbison, PLLC
Suite 800, 401 Commerce St.
Nashville, TN 37219
(615) 244-5200

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

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

Dated: October 24th, 2011.

Signature

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

TENNESSEE JUDICIAL NOMINATING COMMISSION

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

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY

WAIVER OF CONFIDENTIALITY

I HEREBY WAIVE THE PRIVILEGE OF CONFIDENTIALITY WITH RESPECT TO ANY INFORMATION WHICH CONCERNS ME, INCLUDING 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, AND I HEREBY AUTHORIZE A REPRESENTATIVE OF THE TENNESSEE JUDICIAL NOMINATING COMMISSION TO REQUEST AND RECEIVE ANY SUCH INFORMATION.

PHILLIP ROBINSON
TYPE OR PRINTED NAME

SIGNATURE

OCTOBER 24, 2011
DATE

3023
BPR #

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION

[redacted]	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	Case No. M2008[redacted]
[redacted]	)	FROM THE FOURTH CIRCUIT
([redacted]),	)	COURT FOR DAVIDSON
	)	COUNTY, TENNESSEE
Defendant/Appellee.	)	

BRIEF OF APPELLEE

Phillip Robinson, #3023
Attorney for Appellee
Suite 2400, L&C Tower
401 Church Street
Nashville, Tennessee 37219
(615) 467-1801

ORAL ARGUMENT REQUESTED

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ABBREVIATIONS

The following abbreviations are used to refer to the record on appeal:

The Appellant will be referred to as "Appellant," "Mr. Huffman," or "Father"

The Appellee will be referred to as "Appellee," "Ms. Morgan," or "Mother"

The Technical Record will be referred to as "T.R."

The Supplemental Technical Record will be referred to as "S.T.R."

The Trial Exhibits will be referred to as "Ex."

The Supplemental Exhibits will be referred to as "Supp. Ex."

The Transcript will be referred to as "tr."

STATEMENT OF THE CASE

This is an appeal from a post-divorce Petition to Modify the original Parenting Plan to change the primary residential parent of the parties' minor children to the Appellant/Father; to hold the Appellee/Mother in contempt and to modify child support. The Appellee/Mother filed a Counter-Petition to Modify Residential Time and to require the Appellant/Father to contribute to private school tuition.[1]

The parties hereto were divorced by Final Decree of Divorce entered in the Fourth Circuit Court for Davidson County, Tennessee on December 11, 2002. (T.R. 1) The Court approved the incorporated Marital Dissolution Agreement and a Permanent Parenting Plan which provided that the Appellee Angela Shayne Huffman was the primary residential parent based on the fact that the children spent the majority of their time in her possession. Each party's residential time was set under the Parenting Plan (T.R. 10) and the Appellant Martin William Huffman was ordered to pay child support in the amount of $1,338.00 per month. This support was based on the original Child Support Guidelines then in effect requiring a flat percentage of the obligor's income which, based on three (3) children, would be forty-one percent (41%) of his net monthly take home. (see Parenting Plan; T.R. 13)

On September 27, 2006, Appellant filed a Petition to Modify the Parenting Plan to name him the primary residential parent of the minor children and for civil contempt against the Appellee/Mother. (T.R. 20) He also requested a review of his child support obligation in the event his request to be named the primary residential parent was not granted. On November 13, 2006, the Appellee/Mother filed an Answer and Counter-Petition to Modify Residential Time. (T.R. 29) On

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[1]FN The issue related to the Father contributing to the children's private school tuition was moot at the time of trial as the Mother had removed the children from private school and no proof was presented on this issue.

March 31, 2008, nearly one and half years later, the Appellant/Father filed an Answer to the Counter-Petition. (T.R. 47)

This cause was heard over two (2) days being August 12 and August 13, 2008 before the Honorable Muriel Robinson, Judge of the Fourth Circuit Court for Davidson County, Tennessee. The trial court entered its ruling on September 11, 2008 setting forth numerous findings and dismissing the Appellant/Father's Petition to Modify the Primary Residential Parent and for Contempt; granting in part Appellee/Mother's request to modify the Father's parenting time; finding that the child support obligation should remain as previously set based on the needs of the Appellee/Mother; and awarding her an upward deviation to maintain said amount. The child support was ordered reviewed in ninety (90) days. The trial court also awarded the Appellee/Mother her reasonable attorney's fees in the amount of $18,420.00. The Appellant/Father was ordered to pay the court costs. (T.R. 53)

Appellant/Father filed a Motion to Alter or Amend on October 10, 2008 (T.R. 58) which was denied by the court on November 26, 2008. (T.R. 68)

Thereafter, pursuant to the trial court's ruling of September 11, 2008, a hearing was had on December 11, 2008 to review the issue of child support. The trial court ruled by Memorandum Opinion and entered an Order dated April 28, 2009 concluding that there was insufficient evidence before the court to conclude that a modification in child support was warranted at that time and the child support previously ordered was ordered to remain in effect. (T.R. 76, Supp. T.R. 1)[2]

From all of the foregoing, the Appellant has timely filed this appeal by Notice of Appeal

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[2] FN It should be noted that although there was a hearing with testimony and exhibits submitted to the court (see Exhibits 1-4 to the First Supplemental Technical Record), no transcript or statement of the evidence or proceedings was filed nor included with the record for this appeal.

entered on December 23, 2008. (T.R. 70, 73)

STATEMENT OF FACTS

This is an appeal from the trial court's dismissal of the Appellant/Father Martin William Huffman's post-divorce Petition to Modify the original Parenting Plan to name the Father the primary caretaker of the parties' three (3) minor children, for a finding of civil contempt against the Appellee/Mother related to un-presented or unpaid medical bills and to modify child support. The Appellee/Mother Angela Shayne Huffman filed a Counter-Petition to Modify Residential Time and to require the Father to contribute to the three (3) children's private school tuition. The latter issue was moot by date of trial as the Mother had removed the children from private school and placed them in public school.

The parties hereto were divorced by Order of the Fourth Circuit Court for Davidson County, Tennessee dated December 11, 2002. The parties' Marital Dissolution Agreement and Permanent Parenting Plan were incorporated into the Final Decree of Divorce. (T.R. 1) The Parenting Plan (T.R. 10) provided that the children would reside with the Mother. The Father was awarded every other weekend visitation from Friday picking the children up from school and returning them to school on Monday mornings. Every other month, he was awarded an additional weekend. He was also awarded midweek parenting time picking the children up from school on Wednesday afternoon and returning them to school on Thursday morning every week. In addition to alternating holidays, the Father was awarded a total of four (4) weeks in the summer with one (1) week in June, two (2) weeks in July and one (1) week in August.

The Father's child support obligation was set at $1,338.00 for the parties' three (3) minor children. This support was based on the original Tennessee State Child Support Guidelines promulgated pursuant to T.C.A. §36-5-101(e)(2) effective October 13, 1989. The Father's support

was based on a flat percentage of his net monthly income being forty-one percent (41%) for three (3) minor children. Rules of the Tennessee Department of Human Services, Ch. 1240-2-4-.03(4)(5) The Father testified that at the time of the divorce, he was making between $52,000.00 and $53,000.00 per year working in his father's garage as an automobile mechanic. (tr. 58)

On September 27, 2006, the Father filed a Petition to modify the Parenting Plan by naming him the primary caretaker of the children and charging the Mother with civil contempt for allegedly not providing him with certain medical bills of the children for timely payment nor paying medical bills which he alleged damaged his credit. In the event the court did not make him primary caregiver of the children, he asked that the court review his child support obligation. (T.R. 20) On November 13, 2006, the Mother filed an Answer denying the Father's allegations and a Counter-Petition asking the court to modify the Father's residential schedule by eliminating his midweek overnight parenting time on Wednesday nights and his overnights on Sunday and reducing his extended summer parenting time. (T.R. 29)

PARTIES' PROOF

Appellant, Mr. Huffman, is a thirty-eight (38) year old automobile mechanic who, at the time of the divorce, had worked in his father's business, but in early 2006, voluntarily left to start his own business selling tools. (tr. 5-6) At the time of the divorce when his child support was set at $1,338.00 for three (3) children, he was making $52,000.00 to $53,000.00 per year. (tr. 57) In 2005, he earned $54,300.00 from his father's business and voluntarily quit in early 2006. (tr.58-59) His tool business was not successful. His 2006 federal income tax return reflected a loss of $70,000.00. (tr. 60; Ex. 5) However, he admitted that in addition to paying business expenses from his business checking account, he also paid personal expenses including groceries, home mortgage, children's healthcare,

utilities, etc. He admitted that he called his business checking account "his cash box" because he paid any expense he needed to out of that account. (tr. 61-71) Although the Father amended his 2006 tax returns, he still reflected a loss of $5,575.00 (tr. 65; Ex. 6) His 2007 tax return reflected a loss of $11,344.00. (tr. 72; Ex. 8) Amazingly, however, at the trial in August of 2008, he submitted Exhibit #3 being a child support worksheet indicating that his income had jumped to $3,657.00 per month, or $43,884.00 per year. He acknowledged that this was a surprising turnaround, but testified that he was still not making the $54,000.00 that he walked away from at his father's business in 2006. (tr. 72, 73; Ex. 8, Ex. 3)

The Appellee/Mother Angela Morgan (Huffman) was called as an adverse party witness. She testified that she had remarried. She had been selling real estate for the last twelve (12) years. That the current real estate market was "horrible." (tr. 152) Her adjusted gross income for 2003 was $20,805.00; 2004, $24,316.00; 2005, $64,129.00; and for 2006, $31,260.00. (Ex. 20) For 2007, she only had an adjusted gross income of $8,430.00. (Ex. 15) For 2008, her total income before expenses was $12,294.00.

The Father alleged several complaints which he believed constituted a material change of circumstance to justify making him the primary residential parent. He complained that the Mother often left the parties' minor children alone when she had to work or was attending school, leaving the parties' oldest son, Austin, to supervise his younger siblings, Allyson and Andrew. At the time the Petition was filed, Austin was fifteen (15) years of age, and his siblings, Allyson and Andrew, were ten (10) and seven and a half (7 ½), respectively. (T.R. 10) Although the Father complained that this happened often, he testified that he only had personal knowledge of this "a couple of times." (tr. 14) The Father admitted that on the occasions he was allegedly concerned about the children

being unsupervised, he never went to the Mother's home to check on the children. As a result, he did not know who was at home with the children, whether they were being supervised by the oldest child, or whether the children's stepfather was at home since he never went to check. (tr. 76) The Father admitted that on occasion he allowed the oldest child to supervise the other children when they were in his possession. (tr. 74, 106) He admitted that the Mother's parents lived immediately behind her home and were able to assist when the oldest child was watching the children. (tr. 104) He also admitted that there had never been a time when the oldest child was supervising the children that there had been an emergency or that the police or ambulances had to be called, or any other problem requiring the intervention of an authority figure. He admitted that his children had never been in trouble with the law or juvenile authorities. (tr. 109-113)

The Mother did not deny that the oldest child often supervised the children. She also indicated that her current spouse helped care for her children and was home most nights, and her mother, who lived behind her, was available to assist with the children. (tr. 116-118)

The Father complained that the Mother did not consistently provide the parties' oldest son, Austin, with his Attention Deficit Disorder medication. He complained that the child often did not bring his medicine with him when the child was visiting in his home. He admitted that the Mother could not send the medication to school with the child, and since he picked the child up from school for his parenting time, he either had to go to the Mother's home to get it or she had to bring it to him. (tr. 23, 24) He admitted that the Mother was the one who regularly took the child to the doctor for this condition. (tr. 102, 103)

Regarding the Father's concerns about the ADD medication, the Mother testified that she did not like her son taking the medication, but she did make him take it in school. She always brought

the medicine to the Father's home when requested to do so. She was concerned about sending the medicine to school with her child. (tr. 129-133) The proof showed the child was doing well in school.

The Father attempted to prove that the Mother drove the children in her vehicle without complying with the restrictions on her driver's license requiring side mirrors on her vehicle and that she wear corrective lenses. (tr. 135)

The Mother testified that she had the side mirrors on her vehicle and, that because she was legally blind in one eye, there were no lenses that would correct this problem. Her eyesight in that eye was not correctable. (tr. 135-138) The court stated that this complaint was trivial and the court's only concern was that the Mother might get a ticket if she did not wear some type of glasses whether they helped or not. (tr. 138)

The Father complained that the Mother had not taken the youngest child, Andrew, to the eye doctor. (tr. 24, 25, 26) He admitted, however, that he had "just recently" asked the Mother to have his eyes checked and that the Mother informed him that the child had been to the doctor the previous year and she did not think he had any eye problems. (tr. 27)

Regarding her youngest son, Andrew's eye exam, she testified that within the year, the child had had an eye exam. That approximately one (1) week before trial, the Father had mentioned that the child's eyes seemed to be bothering him, but she had only had the children back from the Father's summer vacation for two (2) days and had not yet had an opportunity to make an appointment, but had intended to do so. (tr. 141)

The Father next complained about not receiving clothing for the children during his parenting time. However, he admitted to purchasing his own clothing for the children which he kept at his

house which had taken care of the problem. He admitted that this was a problem with the children coming to his house from school. He testified that because they were spending overnights on Wednesdays and overnight on Sundays, this was "a huge problem." (tr. 33)

Regarding the Father's complaints of clothing problems, the Mother denied that there were problems. She always returned clothing purchased by Mr. Huffman and the children take clothing with them when the Father has extended parenting time. The children are now in charge of packing their own clothing and, as they are older, there are less problems. (tr. 149, 150)

The Father next complained that the children did not always have lunch money at school. He testified that when the children attended Donelson Christian Academy, he had gone to the school often to bring the children lunch money. (tr. 35, 36) He admitted, however, that some of his complaints were five (5) years old. He admitted that there had not been a problem since the last year the children were in Donelson Christian Academy. (tr. 96) (All of the children attended Wilson County Public Schools for the 2007-2008 school year).

Regarding the lunch money issue, the Mother testified that there was not a problem with the children's lunch money. (tr. 120) On occasion, the children would forget their lunch money, but it was not a problem because the school had a petty cash account for this purpose. That the Father's taking lunch money to school was completely unnecessary. (tr. 121)

The Father complained that the parties' daughter, Allyson, suffered from night terrors and the Mother had done nothing to deal with the issue. (tr. 37, 38)

Regarding the parties' daughter having anxiety issues, the Mother denied this was a serious problem or the child needed treatment. The child was almost thirteen (13) years of age and had outgrown any problems she had with being alone or going upstairs by herself. (tr. 146-147)

He also complained that on a number of occasions since the divorce, the Mother had requested his help to talk to one or more of the children to assist her in disciplining them. (tr. 42) He admitted, however, that he wanted to be involved in assisting the Mother with disciplining the children and agreed that it made sense for both of the parties to work together. He admitted he had volunteered to help with the children, but when she sought his assistance, he tried to use it to try to take custody away from her. (tr. 86, 87)

The Mother denied that the children were a discipline problem. She admitted that on occasions she had asked the Father to talk to one of the children about their behavior. She denied dropping by his place of business for this purpose, but did drop the children off occasionally for the Father to watch them when she had to show a piece of real estate. She testified that the Father had offered to help her at any time and she had accepted his help on occasion. (tr. 150, 151)

The Father was opposed to the Mother's request to modify his parenting time by eliminating the Wednesday overnights and the Sunday overnights. He admitted that since the Mother had removed the children from Donelson Christian Academy, a private school, and they were now attending Wilson County Public Schools, the distance was very difficult for him picking the children up and taking them to school. (tr. 45) He admitted that while he originally did not want the children to attend private school, refused to assist the Mother in paying any tuition whatsoever, and used the fact that she occasionally fell behind in tuition payments as a basis to change custody, he now wanted the children put back into the private school. (tr. 55, 79, 80, 85) The Father admitted that his children do well in school and had excellent grades. (tr. 88-95; Ex. 9, 10, 11)

The Mother testified that the overnight Wednesdays during the school year and the overnight on Sundays during the school year presented problems. She testified that the children were older and

wanted to be at home more; that they were constantly forgetting things at the Father's home, including clothing and library books which had to be brought to them. She also did not get notes that the teachers sent home from school when the children went to their Father's. Also, summertime was shorter than in the past. The Father now had the children during the first week of school which was problematic. She requested that the court eliminate the midweek and Sunday overnight and modify the summer so that the children would be home at the start of school. (tr. 158-160)

Regarding his contempt allegations, he alleged that he had not received one of the children's medical bills from a hospital in Chicago which he alleges went unpaid. He also complained that the children's dentist mailed the bill directly to him with a statement for one-half of the unpaid balance. The Father attempted to introduce a credit report from the internet to show that some allegedly unpaid medical bills of the children had affected his credit. Counsel for the Mother objected on the basis of hearsay. The Father admitted that he did not bring the original medical bills to court. The court sustained the hearsay objection of the Mother. (tr. 29-31) The Father admitted that the dentist in question was a friend and customer of his and the parties had used this dentist before the divorce. (tr. 99, 100) He admitted that he received the dental bills in question and knew what he was supposed to pay. (tr. 100, 101) He also admitted that the children had visited the maternal grandparents in Chicago when the oldest son became ill and was hospitalized. He was aware that the grandparents had a copy of his health insurance card on the children which carries his name and address and they used that card when the child was hospitalized. (tr. 101)

Regarding the contempt allegations, the Mother testified that at the time of the divorce, the parties were using the same dentist. Mr. Huffman told her to pay half of the children's bills and have the dentist send the bills to him for his half. This is how the dental bills had been handled ever since.

(tr. 249) His share of the bill does not come to her home, but directly to him and he knows exactly what he is supposed to pay. (tr. 250; Ex. 21) Regarding any unpaid medical bills, she testified that her son, Austin, while visiting her parents in Chicago, came down with meningitis in July of 2004. The child was admitted to the hospital and her parents presented the children's health insurance card which had Mr. Huffman's name and address on the card. When she got to Chicago and the hospital, the child had already been admitted and she had nothing to do with where the bills were sent. She has never received a bill from the healthcare provider related to these medical bills and knows nothing about them. Apparently, the bills went to Mr. Huffman because he forwarded copies of the bills to her and she paid her one-half. She had nothing to do with him getting or not getting any of the bills as it was out of her hands. She knows of no other bills that he is complaining about. (tr. 251-254)

Mr. Huffman presented testimony from his new wife, Patty Huffman, whom he married approximately six (6) weeks before trial. (tr. 258) She was a former teacher of the parties' oldest son at Donelson Christian Academy and testified that he was a typical teenager with lots of energy and very sweet. (tr. 259) She testified that she had observed the parties' middle child, Allyson, have anxieties about being left alone or having to go upstairs or downstairs by herself, and she had seen her upset when her Mother was out of the country in Canada on a trip. She had also seen her have one (1) nightmare. (tr. 268, 269)

The Mother testified that because of the Father's complaints about tuition, and interference from his then girlfriend at Donelson Christian Academy, she removed the children from that school and placed them in Wilson County Public Schools where they were doing great. They were making excellent grades and made new friends. They were involved in school and sporting activities.

The Mother testified that she had spent a considerable amount of money defending the Father's custody action and requested that she be awarded her attorney's fees. (tr. 163) Her attorney's fees Affidavit was admitted as Exhibit #18.

CHILDREN'S TESTIMONY

The parties' oldest son, Austin, testified as part of the Mother's proof. He is seventeen (17) years of age, and has just started the 11th Grade at Mt. Juliet High School where he had been attending for a year. He liked his new school and has made friends. (tr. 170-172) He preferred to continue to live in his Mother's home. (tr. 172) He testified he wanted to modify his Father's parenting time. He did not like the overnights on Sundays and Wednesdays. He had to get up earlier to get to school and it was harder to get to school on time. (tr. 173-174) He testified that he made good grades with over a 3.0 GPA. (tr. 176) He took his ADD medication during the school year, but did not like to take it in the summer. He testified that he did watch his little brother and sister, but felt that he was good at it. (tr. 180)

The parties' daughter, Allyson Huffman, testified as a witness in the Mother's proof. She was twelve (12) years of age and just started the 7th Grade at Mt. Juliet Middle School. (tr. 189-191) She made really good grades and liked to go to school. It was fun. (tr. 192) She testified that she preferred to live with her Mother. (tr. 194) She wanted to discontinue the Wednesday overnights and Sunday overnights and asked to reduce her summer parenting time with her Father. All of these things threw her schedule off and it was harder for her to get to school from her Father's house. (tr. 197-199)

The parties' youngest child, Andrew, testified. He was nine (9) years of age and attended Lakeview Elementary School. (tr. 214, 217) He preferred not to state a preference about where he lived because he loved both parents. (tr. 222, 223) He testified that he made good grades. (tr. 223)

WITNESSES' TESTIMONY

Mr. Huffman presented testimony of a friend and former co-worker, Michael Loring, who testified he had worked with Mr. Huffman at Donelson Auto Clinic. He testified that the Mother occasionally brought the children over to the Father's place of business where she dropped them off. He testified she had occasionally brought the children over for discipline. (tr. 279-280) He testified the Father had on occasion taken lunch money to school. He admitted that the Father had never objected to the Mother leaving the children with him. (tr. 284, 285)

Ms. Terry Rudd next testified on the Mother's behalf. She lives less than a mile from Ms. Morgan, and her daughter was in the First Grade with Allyson Huffman. She has been in Ms. Morgan's home. She testified that Ms. Morgan is a good mother, attentive, and she appears to have a good relationship with her children. The children are respectful of the Mother. She did not observe a discipline problem. The condition of the home was nice and clean. She would certainly allow Ms. Morgan to look after her child. She believed that Ms. Morgan does an excellent job as a mother. (tr. 287-290)

STANDARD OF REVIEW

In non-jury cases, the standard of review is *de novo* upon the record of the proceedings below, with a presumption of correctness as to the trial court's factual determinations unless the evidence preponderates against those findings. Tenn. R. App. Pro. 13(b), *Kendrick v. Shoemake*, 90 S.W. 3d 566 (Tenn. 2002) With respect to legal issues, appellate review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Id.* at 569 If a discretionary decision is within a range of acceptable alternatives, Appellate Courts will not substitute their decision for that of the trial court simply because the Appellate Court would have chosen a different alternative. *White v. Vanderbilt Univ.*, 21 S.W. 3d 215, 223 (Tenn. Ct. App. 1999)

Argument and Brief

I.

WHETHER THE TRIAL COURT ERRED IN ITS FINDING THAT NO MATERIAL CHANGE IN CIRCUMSTANCE HAD OCCURRED AND DISMISSING MR. HUFFMAN'S PETITION TO MODIFY CUSTODY.

Pursuant to T.C.A. §36-6-101(a)(2)(B), if the issue before the court is a modification of the court's prior decree pertaining to custody, the Petitioner must prove by a preponderance of the evidence a material change in circumstances. A material change in circumstance does not require a showing of substantial risk of harm to the child. Existing custody arrangements are favored since children thrive in stable environments. *Kellett v. Stuart*, 206 S.W. 3d 8, 14 (Tenn. Ct. App. 2006) *Hoalcraft v. Smithson*, 19 S.W. 3d 822, 828 (Tenn. Ct. App. 1999) A custody decision, once made and implemented, is considered *res judicata* upon the facts in existence or those which are reasonably foreseeable when the initial custody decision was made. *Kellett v. Stuart* at 14, *Steen v. Steen*, 61 S.W. 3d 324, 327 (Tenn. Ct. App. 2001) The threshold issue is whether a material change in circumstance has occurred. *Curtis v. Hill*, 215 S.W. 3d 836, 840 (Tenn. Ct. App. 2006)

In the case of *Kendrick v. Shoemake*, 90 S.W. 3d 566 (Tenn. 2002), the Tennessee Supreme Court relying on an earlier decision in *Blair v. Badenhope*, 77 S.W. 3d 137 (Tenn. 2002) determined the proper standard to be applied to a Petition to Modify Custody from one parent to another. The Court concluded that once a valid order of custody had been issued, subsequent custody modification proceedings should apply the standard typically applied in parent versus parent modification cases: that a material change in circumstance has occurred which makes a change in custody in the best interest of the child. As the Court explained, the threshold issue is whether a material change in circumstance has occurred since the initial custody determination. *Kendrick v. Shoemake* at 570. The

Court concluded that while there were no hard and fast rules for determining when a child's circumstance has changed sufficiently to warrant a change of custody, the following factors form a sound basis for determining whether a material change in circumstance has occurred: (1) the change has occurred after the entry of the order sought to be modified; (2) the change is not one that was known or reasonably anticipated when the order was entered; (3) and the change is one that affects the children's well-being in a meaningful way. *Id* at 570. Once the court determines a material change in circumstance has occurred, it must then be determined whether the modification is in the child's best interest. *Id.* However, if no material change in circumstance has been proven, the trial court is not required to make a best interest determination and must deny the request for a change of custody. *Kellett v. Stuart* at 15, *Caudill v. Foley*, 21 S.W. 3d 203, 213 (Tenn. Ct. App. 1999)

In the instant case, the trial court heard the testimony of the parties and witnesses, the preferences of the minor children and considered all other relevant factors. From all of the proof, the court specifically found that the original Parenting Plan had generally worked well and to the best interest of the children; that both the parties were fit and proper parents and each appeared to love their children and to get along well with the children. The court made a specific finding that there are "absolutely no problems with these children in either home other than issues typical to teenagers, preteens and nine year olds, and the court is very impressed with them." The court found the children were extremely well mannered, respectful, showed love and respect for both of their parents and make excellent grades in school. (T.R. 53, 54) While the court made a finding that the Father was involved with the children and had done a good job under the Parenting Plan, it was particularly impressed with the Mother finding that she had done an excellent job being the primary parent of the children. The court specifically found that the problems raised by the Father as a basis to modify

the residential parent were either "irrelevant, immaterial, unsubstantiated by the evidence in this case or so trivial in nature as to not come close to establishing any material change of circumstance..." (T.R. 54) The court was at a loss as to why the Petition had been filed giving rise to two years of expensive litigation. In denying and dismissing the Father's Petition, the court specifically found that there was no material change of circumstance in the case and the Petition of the Father was frivolous. (T.R. 54)

A close review of the proof in this cause flies in the face of Appellant's suggestion that the preponderance of the proof establishes a material change of circumstance, i.e., one that was not known or reasonably anticipated when the original order was entered *and* affects the child's well-being in a meaningful way. The Appellant suggests that the court was concerned enough about one of the child's eyesight to order the Mother to have his eyes examined. It should be noted that this issue was never raised in the Father's pleadings and as the Mother testified, he had only raised it one (1) week before trial when he had the child for his summer break. The Mother testified that she intended to take the child for an eye exam but, by time of trial, only had the child back two (2) days from the Father's summer vacation. (tr. 141) She testified that she had taken the child to the child's pediatrician the previous year where he gave the child an eye test. (tr. 140) The child made excellent grades so there is no evidence that any problem with the child's eyes, if it existed, was affecting the child's school work. Finally, there is nothing in the Parenting Plan that would prevent the Father from taking the child to the eye doctor if he felt it necessary. The parties had consulted one another and the Mother had not yet had time to act.

Regarding the oldest child's medication for ADD, there was no medical evidence as to when the child was required to take the medication. There was no evidence that the child was directed to

take it during the summer when he was not in school. The Mother expressed her dislike for the medication but testified that she required the child to take it during the school year, but not during the summer. (tr. 127, 128) The seventeen (17) year old child testified that he took it during the school year, but did not want to take it during the summer. (tr. 178) The Mother admitted that there were occasions such as the spring of 2008 when she had run out of the medication and had not promptly refilled it. But this medication simply helps the child to focus his attention. It does not present a life or death situation. There is no medical evidence before the court that the child's failure to take the medication or occasionally missing the medication created any serious health issue for the child. It is obvious that this child makes excellent grades and has well above a 3.0 GPA in school. Clearly, the occasional lack of medication did not affect the child's well-being in "a meaningful way."

The Appellant's references to the Mother wearing eyeglasses while driving are taken out of context. The Mother is legally blind in one eye, but has good vision in the other eye. Her driver's license requires her to have side mirrors on her vehicles and to wear corrective lenses. The Mother testified that she did, in fact, have side mirrors on her vehicle, but corrective lenses did not improve the vision in her damaged eye. The Judge noted she was only concerned about the Mother receiving traffic tickets. (tr. 135-138)

The Appellant also suggests that anxiety issues raised about the parties' twelve (12) year old daughter were material. At the time of the divorce, the parties' daughter was six (6) years of age. It can certainly be reasonably anticipated that a six (6) year old little girl may occasionally have nightmares or that she is afraid to go upstairs in a house by herself or to be left by herself or upset when her mother is out-of-town or her mother and stepfather argue. These are normal childhood fears experienced by younger children. The Mother testified that the child had no anxiety issues after

the divorce when she was living with her. (tr. 146) When they moved to a new house, the child was, for a period of time, afraid to go upstairs by herself. (tr. 146) She apparently had the same fears when she was at the Father's house. (tr. 267, 268, 276) There is no proof that this child's "anxiety issues" are anything other than normal childhood fears that disappear with age and maturity. In fact, that is exactly what has occurred. Both the Mother and the child's testimony indicate that she has outgrown these problems. (tr. 146, 147, 210) Like her brothers, this little girl is doing wonderfully in school. There is no evidence that this issue has affected the child's well-being in a "meaningful way."

Appellant next complains that the parties' oldest child, Austin, was often in the supervisory position with his younger siblings. It is undisputed that the parties' oldest son, Austin, on occasion supervised his younger siblings. However, between the time of the divorce in December of 2002 and the time of the hearing in August of 2008, Mr. Huffman had personal knowledge of this only "a couple of times." (tr. 14) While Mr. Huffman testified the Mother had told him this many times, as the Mother and the children themselves stated, often the children's stepfather was present when the Mother was not there. (tr. 117, 205, 206) Furthermore, in at least the last year before trial, the maternal grandparents lived immediately behind Ms. Morgan's home. (tr. 109, 110) Moreover, there was no proof of any incidents, accidents, injuries, or emergencies during any time when Austin was supervising his younger siblings. (tr. 111) Had Mr. Huffman been so concerned that Austin was not properly supervising the children, surely he would have immediately rushed to the home of the Mother. Not one time did he do so even on the occasions when his younger daughter would contact him telling him that she was upset or scared. (tr. 76) Although he testified that he did not believe Austin was mature enough to look after his younger siblings, he admitted that he, himself, used Austin to babysit his younger brother and sister on occasion when they were in his possession. (tr.

106)

Applying the formula of the State Supreme Court in *Kendrick v. Shoemake*, *supra,* determining whether a material change of circumstance had occurred, one must determine: is the fact that an older sibling would be used to supervise or babysit his younger siblings one that was not known or reasonably anticipated when the original support order was entered? Further, is such a change one that affects the children's well-being in a meaningful way? Of course, it is anticipated that an older sibling may be used to supervise his younger brother and sister. However, there is no evidence whatsoever that the older child babysitting his younger brother and sister has had any adverse effect on any of the children's well-being in any meaningful way. If such a circumstance by itself constitutes a material change of circumstance, our courts would be inundated with Petitions to Modify Custody.

Appellant next maintains that the allegations of the children occasionally being without lunch money or the parties experiencing difficulty exchanging the children's clothes constitute a material change of circumstance. Like the other issues raised, these are trivial, every day occurrences in the lives of most divorced parents. The Mother explained the circumstances of the children's lunch money. Occasionally, the children or the Mother would forget their lunch money. In those events, the children had access to money through the school and the Mother would periodically reimburse the school for any out-of-pocket expenses. Later the children were able to establish lunch money accounts. As these accounts zeroed out, they would be replenished by the Mother. The Mother testified that the Father's efforts to bring lunch money to the children at school were totally unnecessary. (tr. 120-123) This "tempest in a tea kettle" was one that the Father created.

Regarding the clothing issue, difficulties exchanging clothing during visitation is an age old

post-divorce issue in custody cases. One of the major reasons for the problem was the Father having overnight visitation with the children on Wednesday evening from school and returning them to school on Thursday morning and an additional night on his alternating weekend where he picked the children up from school and returned them to school on Monday morning. As the Mother testified, it is difficult for the children to carry extra sets of clothes with them to school. The Father's complaints were one of the reasons that the trial court modified his parenting time by eliminating the overnight on Wednesday during the school year, and his Sunday overnight on his alternating weekend during the school year. The Mother testified that the children, when younger, often forgot extra clothing, but as they got older they tended to remember more and saw to it that they brought necessary clothing. (tr. 149, 150) Again, this is an issue created by the Father's additional overnights with the children. (tr. 97) It is hardly a material change of circumstance.

The Appellant next complained that the court erred in not conducting a best interest analysis. However, as the State Supreme Court explained in the *Kendrick* case, ***if*** a material change has been proven, it must then be determined whether the modification is in the children's best interest. *Kendrick* at 570 It necessarily follows, however, that if no material change in circumstance has been proven, the trial court is not required to make a best interest determination and must deny the request for a change of custody. *Caudill v. Foley*, 21 S.W. 3d 203, 213 (Tenn. Ct. App. 1999), *Kellett v. Stuart*, 206 S.W. 3d 8, 15 (Tenn. Ct. App. 2006) In the instant case, based not only on the trial court's comments as the proof unfolded, but in its final Order, the court found no basis whatsoever for a material change of circumstance. (T.R. 53) Therefore, there was no reason to conduct a best interest analysis.

All of the foregoing issues raised by Appellant both at trial and in this appeal are examples

of Appellant's effort to take trivial issues and create the basis for a material change of circumstance. However, applying the Supreme Court's formula in *Kendrick* these circumstances were either reasonably foreseeable or did not affect the children's well-being in a meaningful way. The court specifically found that "there are absolutely no problems with these children in either home other than issues typical to teenagers, preteens, and nine year olds, and the court is very impressed with them. The children are extremely well-mannered, respectful, show love and respect for both of their parents and make excellent grades in school." (T.R. 53, 54) The court gave particular praise to the Mother who the court found had done "an excellent job" being the primary parent of these children. (T.R. 54) It is clear that the Father did not establish by a preponderance of the evidence a material change of circumstance. Therefore, his Petition was properly denied and dismissed.

II.

WHETHER THE TRIAL COURT ERRED BY MODIFYING THE CHILDREN'S VISITATION WITH MR. HUFFMAN.

In her Counter-Petition, the Mother alleged that a material change of circumstance had occurred to justify modifying the Father's parenting time with the children. (T.R. 29) Such a request is governed by T.C.A. §36-6-101(a)(2)(C). The most significant case dealing with the statute and the issue of post-divorce modifications of parenting schedules is the recent case of *Boyer v. Heimermann*, 238 S.W. 3d 249 (Tenn. Ct. App. 2007) As noted in the *Boyer* case, the Tennessee General Assembly in 2004 modified the above statute primarily to deal with age appropriate modifications of parenting schedules. As the statute and the Court in *Boyer* recognized, needs of a child's change over time and the modification of the statue enables the Court to adjust to the changes over time and allow modifications to occur more easily. *Id.* at 257 The *Boyer* Court noted that the revised statute sets a very low threshold for establishing a material change of circumstance in these type of cases. Accordingly, evidence that an existing custody arrangement was proven unworkable in a significant way is sufficient to satisfy the "material change in circumstance" standard. *Id.* at 257

Ironically, in the instant case, Mr. Huffman himself first raised the issue of problems with the visitation schedule in his original Petition to Modify Custody. (T.R. 20, 22) As the Court will recall, Mr. Huffman has every Wednesday visitation picking the children up from school, keeping them overnight and returning them to school Thursday morning. In addition, he has every other weekend visitation which is expanded in other months to three (3) weekends a month every other month picking the children up from school on Friday afternoon and returning them to school on Monday morning. (T.R. 10) Mr. Huffman complained that under this arrangement, he was not

receiving Austin's ADD medication. He also complained about problems with clothing issues during his overnight parenting time. (tr. 32, 33) He also complained about the increased distance that he was required to travel to pick the children up from school and return them to school on Thursday and Monday mornings. The two older children testified about the difficulty of getting up extra early in the morning in order to try to get to school on time during the Father's overnight visitation periods when he was required to return them to school. Both older children requested that the midweek overnight be eliminated and the overnight on Sunday be eliminated. This would allow them to come home before the next school day to get ready for school and be prepared. (tr. 174, 196-199) Likewise, the Mother testified that the children were older and were more interested in spending time at home and it was easier to get them ready for the following day of school when they came home on these school nights. (tr. 158, 159) Further, both the Father and Mother testified that the Mother was not allowed to send extra medication to school with her son so that he could take it to his Father's home when his father picked him up. Moreover, it was hard for the children to take clothing to school with them because they were spending the night with their father. (tr. 32, 33, 97, 149, 150, 154)

The court heard from both parties and the children how this overnight parenting time was no longer working in the children's best interest. Based on all the foregoing, the court found a material change of circumstance and modified the Father's parenting schedule by eliminating the overnight on Wednesday and overnight on Sunday *only during the school year.* (T.R. 53) While the Father protests losing these overnights during the school year, the court made a "surgical" modification, i.e., making the smallest change possible to correct a problem in the best interest of the children. The modification was justified by the facts. There was no abuse of discretion and the trial court's ruling should stand.

III.

WHETHER THE TRIAL COURT ERRED BY REFUSING TO MODIFY MR. HUFFMAN'S CHILD SUPPORT OBLIGATION AND BY SETTING AN UPWARD DEVIATION IN MR. HUFFMAN'S CHILD SUPPORT.

In making an award of child support, the courts of this state shall apply as a rebuttable presumption the Tennessee State Child Support Guidelines as provided for in T.C.A. §36-5-101(e). If the court finds evidence sufficient to rebut the presumption, the court shall make a written finding that the application of the Child Support Guidelines would be unjust or inappropriate in that particular case in order to provide for the best interest of the children or the equity between the parties. Findings that the application of the guidelines would be unjust or inappropriate shall state the amount of support that would have been ordered under the Child Support Guidelines and a justification for the variance from the guidelines. T.C.A. §36-5-101(e)(1)(A)

In the instant case, the initial child support set at the time of the divorce in December of 2002 was based on the original Child Support Guidelines promulgated by the Tennessee Department of Children's Services and effective October 13, 1989. Those guidelines provided for a flat percentage of the obligor's net monthly income. In this instance, forty-one percent (41%) for three (3) children. The original Parenting Plan provided for the Father to pay the sum of $1,338.00 per month. The Father testified that his gross annual income at the time of the divorce was between $52,000.00 and $53,000.00 per year. (tr. 57)

At the trial of this cause, Mr. Huffman's income was difficult to determine. His 2005 W2 while working at Donelson Auto Clinic reflected income of $54,300.00. (tr. 58; Ex. 4) He voluntarily left the auto clinic in the early part of 2006. (tr. 58) For 2006, he filed an admittedly erroneous tax return reflecting losses of $70,680.00. (tr. 60; Ex. 5) He subsequently had to amend this tax return

because of errors and showed an amended 2006 tax return with a loss of only $5,575.00. His 2007 tax return showed a loss of $11,344.00, but by time of trial in August of 2008, he had miraculously reversed his income losses and claimed on his proposed child support worksheet to be making a gross monthly income of $3,657.33, or $43,887.00 annually. (Ex. 3) He also admitted that he wrote numerous personal checks out of his business bank accounts. (tr. 61-64, 68-70) In the child support review hearing of December 11, 2008, exhibits introduced showed that thousands of dollars per month were being deposited into both his business and personal accounts (Supp. Collective Ex. 2) The Father paid personal expenses out of both accounts. (tr. 68-70; Ex. 7) Based on all of the foregoing, the Appellant's **true** income was uncertain. Further, the Father had voluntarily given up a job paying $54,000.00 in 2006. (tr. 58, 59; Ex. 4)

The Mother's income, however, was quite clear. Her adjusted gross income for the years leading up to the hearing were as follows: 2003- $20,805.00; 2004- $24,316.00; 2005- $64,129.00; 2006- $31,260.00. For 2007, the Mother's collective exhibit #15 reflected, after expenses and self-employment tax, an adjusted gross income of only $7,239.00 because of the decline in the real estate market. For 2008, she had grossed only $12,294.00 before expenses. (Ex. 16) In its ruling, the court found that both of the parties had experienced a change in their income. However, the court specifically found that the Mother was in need of the current level of child support in the amount of $1,338.00 to adequately support and provide for the parties' three (3) children. The court therefore ordered a temporary upward deviation to maintain that child support level, but scheduled a review hearing within ninety (90) days to try to determine the parties' income. (T.R. 55)

On December 11, 2008, the court conducted the review hearing. At that time, Ms. Morgan presented proof of her additional income since the hearing and evidence of monies going through

the Father's personal and business bank accounts. As noted, the Father admitted at trial to using his business account as his "cash box" and paying numerous personal expenses from these accounts. (tr. 64, 71) Based on all the foregoing, the court found that Mr. Huffman was self-employed and controlled his own income; that he had a history of paying numerous family and personal expenses such as child support from his business account; and that he has maintained his support payments at the current level and kept them current. The court found that there was insufficient proof to conclude that there was a basis for a modification of support. (S.T.R. 1) There is credible evidence to support the court's findings and the trial judge's ruling should stand.

IV.

WHETHER THE COURT ERRED BY EXCLUDING AN ALLEGED COPY OF MR. HUFFMAN'S CREDIT REPORT CONTAINING INFORMATION REGARDING UNPAID MEDICAL BILLS AS IMPERMISSIBLE HEARSAY.

Under Rule 8.01(c) of the Tennessee Rules of Evidence, "hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. A statement may be an oral or written assertion or nonverbal conduct of a person if it is intended by the person as an assertion. Tenn. R. Evid. 801(a) A "declarant" is a person who makes the statement. Tenn. R. Evid. 801(b) Hearsay evidence is not admissible unless there is an exception under the Tennessee Rules of Evidence. Tenn. R. Evid. 802

In the instant case, Mr. Huffman alleged that Ms. Morgan was not complying with the terms of the Parenting Plan in providing him information on medical bills thereby damaging his credit and she was therefore in "civil" contempt of the court's Orders. (T.R. 29) The Parenting Plan provides that the Mother is to pay the children's medical bills as incurred and she is to forward proof of payment to Mr. Huffman for reimbursement. (T.R. 14) Apparently, the children's dentist mailed the children's statements to Mr. Huffman directly. (tr. 248-250) Further, as a result of one of the children's hospitalization out-of-state, the health care provider was mailing the bills directly to Mr. Huffman, not to the Mother, and some bills were not timely paid. (tr. 251-256)

To prove this portion of his case, Mr. Huffman attempted to introduce into evidence a credit report which he printed off the internet allegedly containing evidence of unpaid medical bills related to the children listed in the report. (tr. 28-31) Mr. Huffman was apparently attempting to use the credit report to establish two points: 1) that there were unpaid medical bills related to the children in his name listed in the credit report and 2) to show that these unpaid bills damaged his credit. Mr.

Huffman intended to introduce the contents of the credit report as the truth as to both issues. The document clearly contained impermissible hearsay unless an exception to the hearsay rule existed and a proper foundation was laid to authenticate it. Once the hearsay objection was sustained, counsel for Mr. Huffman made no further effort to introduce the document, nor did counsel make an offer of proof. Mr. Huffman could easily have subpoenaed the medical bills from the healthcare provider by issuing a subpoena to the custodian of business records. The trial judge advised Mr. Huffman that there was an appropriate way to get this information before the court, but he had chosen not to do so. Counsel for the Appellant chose not to make an offer of proof to allow this Court to review the report.

The court did, however, hear testimony regarding both the dental bills and the bills resulting from the oldest child's illness in Chicago. The Father acknowledged receiving the children's bills directly from the dentist reflecting his share of the unpaid medical expense. (tr. 99-101) The Mother testified that the Father had specifically requested that she arrange for those bills to come directly to him. (tr. 248-250) He had an excellent relationship with the dentist having used that dentist during the marriage and having been a friend of the dentist. He works on his vehicles. The Father did not claim that he did not have notice of those bills nor did he testify that the dental bills were unpaid by either party.

Regarding the Chicago medical expenses, the Mother's testimony was that she had not received bills for the child's medical treatment while he was in Chicago and the Father testified that he did not either. (tr. 251-255) Irrespective, the Mother cannot pay a bill that she did not receive, nor forward it to the Father. She clearly was not in willful contempt. Moreover, the Father charged "civil" contempt and there was no way for the Mother to purge these alleged contemptuous acts.

Even if the court's ruling on the evidence was incorrect, the error was harmless. The court heard the evidence on the contempt matter and finding no evidence of willfulness on behalf of the Mother, dismissed the Father's Contempt Petition.

V.

WHETHER THE TRIAL COURT ERRED BY AWARDING THE MOTHER/APPELLEE HER ATTORNEY'S FEES IN DEFENDING MR. HUFFMAN'S PETITION TO MODIFY CUSTODY.

T.C.A. §36-5-103(c) vests the trial court with discretionary authority to award attorney's fees in custody matters. Unless the Appellate Court affirmatively finds that the trial court's decision was against logic or reasoning and caused an injustice or injury to the party complaining, the trial court's exercised discretion will not be reversed on appeal. *Huntley v. Huntley*, 61 S.W. 3d 329, 341 (Tenn. Ct. App. 2001) Such fees are not primarily for the benefit of the custodial parent but rather to facilitate the children's access to the courts. *Sherrod v. Wix*, 849 S.W. 2d 780 (Tenn. Ct. App. 1992) While ability to pay is certainly a factor to be considered, it is not a controlling consideration with regards to the award of legal expenses in custody matters. The trial court may even award attorney's fees without proof that the requesting party is unable to pay them as long as the award is just and equitable under the facts of the case. *Id.*

In the instant case, the Mother was required to defend a Petition to Modify Custody of the parties' three (3) minor children. In addition, the Mother was compelled to defend a contempt action as part of that litigation and an effort to modify the Father's child support. She was successful on all three (3) issues. Further, in her Counter-Petition, she requested a modification of the Father's parenting time and was likewise successful. The case took approximately two (2) years, involved the taking of the parties' depositions, mediation, and a two (2) day trial. Under these circumstances, Appellee submits that whether the Father's Petition had merit or not, the Mother was entitled to her attorney's fees, especially in light of the fact that her income had seriously dropped due to the downturn in the real estate market.

However, the Father's petition was clearly without merit. His complaints were trivial in nature. Mr. Huffman complained in his Petition that the Mother did not properly supervise the children. There was no evidence whatsoever of improper supervision. The Mother did not deny that she often had her oldest son supervise the children when she was away from home. At the time of the trial, he was seventeen (17) years of age. At the time the Petition was filed, he was fifteen (15) years of age. Mr. Huffman admitted that there had been no emergencies while the oldest child was supervising the children and that even with the knowledge that he was doing so, Mr. Huffman did not feel the necessity of checking on the children. (tr. 76, 111) Moreover, Mr. Huffman had no knowledge as to whether the oldest child was supervising the younger children by himself or whether the stepfather was also present. He also admitted that he occasionally had the oldest child supervise the children when they were in his possession. (tr. 74, 106)

He complained that the Mother often fell behind on the children's tuition at the private school they attended, but failed to establish that it in any way adversely affected the children. He also admitted that he refused to pay any portion of the tuition leaving this responsibility totally on the Mother. (tr. 79, 80) Because of his complaint and the Father's new wife's interference at school, the Mother removed the children from the private school. (tr. 234) The Father then complained that he wanted the children to go back to that private school. (tr. 85) The Father's position was totally illogical. The Mother admitted that she struggled with the tuition, but did so because she felt it was best for the children but, eventually, because of the Father's complaint, removed them from the school. The children attended public school at the time of the trial and all had excellent grades and had adjusted to the new schools and were doing well. (tr. 163)

The Father complained *ad nauseam* that the children, on occasion, did not have school lunch

money. However, the Mother's testimony showed that this was never really a problem as the school allowed them to borrow from petty cash when they forgot their lunch money. Moreover, the Mother subsequently set up accounts for the children at school and would replenish these as needed. The Father's complaints regarding the lunch money were trivial and the court agreed. (tr. 120-125)

The Father complained about the Mother not sending clothing during his parenting time. This was a problem resulting from the Father picking the children up from school. It was difficult for the children to carry their clothing to school for upcoming parenting time. Moreover, as the trial judge acknowledged, this is often a problem in most visitation situations. As the children have gotten older, they are better about bringing the appropriate clothing for visitation. (tr. 149, 150) Again, this was a minor issue.

The Father complained in his Petition that the Mother was late in taking the children to school or picking them up and the children were often tardy. However, the school records belied this and there was little testimony on this at trial. (tr. 88-95; Ex. 9, 10, 11, 12) The Father also complained that he had assisted the Mother in picking up or delivering the children to activities and, on one occasion, his parents had been asked by the Mother to assist. However, the Father admitted that he was happy to do so and had offered to assist the Mother. (tr. 86, 87) She occasionally accepted his help. This issue was likewise trivial and one created by the Father.

The Father complained that the Mother was unable to discipline the children, but there was no evidence that the children were a discipline problem and the Father had advised the Mother that they should present a united front and he would be happy to assist her. (tr. 237) In fact, he testified that he wanted to be involved. (tr. 86) He then faulted the Mother for allowing him to do so. This issue was likewise minor and created by the Father.

In his Petition, the Father alleged that the Mother had an awful temper and that she had had physical confrontations with the oldest son. There was no proof whatsoever of this at trial.

The Father complained that the Mother did not give the oldest child his ADD medication. The Mother testified that this was incorrect. The child received it regularly during the school year when it was necessary for him to concentrate on his studies. The Mother acknowledged that she did not like to give the medicine during the summers. (tr. 129-133) However, there is no medical proof as to exactly when the child should be taking the medicine. Moreover, the child has higher than a 3.0 GPA and is doing excellent in school. There was no evidence that any shortcomings of the Mother in this area adversely affected the child.

The Father alleged in his Petition that the Mother did not attend to the children's hygiene, but presented no proof of this in court. (T.R. 24)

The Father alleged in his Petition that he was the primary source of stability for the children and that he had the children actually more days than the Mother did. He put on no proof whatsoever as to any of these allegations. (T.R. 24)

It was clear to the trial court that the Father's Petition on custody was trivial and without merit and the court denied and dismissed same. Likewise, the court dismissed the Father's Contempt Petition, there being no evidence of any willful conduct on behalf of the Mother. While it is discretionary with the trial court to award fees on custody matters pursuant to statute and case law, this is especially so when the court finds that the Petition is without merit. *Maynor v. Nelson*, ___ S.W 3d ___; 2006 Tenn. App. Lexis 745 (Tenn. Ct. App. Nov. 27, 2006)

On the Mother's Counter-Petition to modify the Father's parenting time, the court found that the overnight on Wednesdays and Sundays during the school year presented a problem and

eliminated it. However, it was left in tact during the summer months. The Mother was successful on this issue also.

On the Father's request to modify the child support, the court left the support in place at the trial based on the needs of the children and the Father's ability to pay, and set the matter for a more thorough review ninety (90) days later. At that hearing, the court, considering all of the evidence, found that the Father had not supplied sufficient evidence for the court to determine that a modification was in order.

Finally, this case took two (2) years to get to trial. While Mr. Huffman attempts to blame the Mother for delaying the case, it was Mr. Huffman's Petition and his responsibility to move the case forward. He complains that the Mother contributed to the length of time required to get the case to trial. However, the facts rebut this allegation. He complains that it was necessary to file a Motion for Default for the Mother to file an Answer, a Motion to Compel Mediation and a Motion to Compel the Mother to produce late-filed exhibits. However, not one of those motions was ever heard. There is no corresponding Order on any of these motions. As soon as opposing counsel raised any of these issues, the Mother acted, satisfying the Father's request. Moreover, Mr. Huffman's complaints are disingenuous. He has failed to advise this Court that it was his failure to file an Answer to the Counter-Petition that delayed the setting of this matter. He filed his original Petition on September 27, 2006. (T.R. 20) The Mother filed her Answer and Counter-Petition on November 13, 2006, forty-seven (47) days later. (T.R. 29) Mr. Huffman did not file his Answer to the Counter-Petition until March 31, 2008, approximately sixteen (16) months later. (T.R. 47) It was Mr. Huffman's lack of diligence that prevented this case from being at issue and from securing a court date.

The Father's Petition was without merit and the Mother was entitled to her attorney's fees which were reasonable under the above facts.

VI.

WHETHER THE APPEAL OF APPELLANT/FATHER WAS FRIVOLOUS AND WHETHER APPELLEE/MOTHER IS ENTITLED TO HER ATTORNEY'S FEES INCURRED DEFENDING THIS APPEAL.

Appellee/Mother is requesting that this Court grant her attorney's fees incurred as a result of defending this appeal. Certainly, in the absence of a contract, statute or recognized ground of equity so providing, there is no right to have attorney's fees paid by an opposing party in civil litigation. *State v. Thomas*, 585 S.W. 2d 606 (Tenn. 1979) However, as noted, T.C.A. §36-5-103(c) vests the court with discretion in awarding attorney's fees in custody matters. When considering whether to award attorney's fees on an appeal, the Appellate Court must consider the ability of the requesting party to pay the accrued fees, the requesting party's success on the appeal and whether the appeal was sought in good faith, as well as other equitable factors that should be considered. *Dulin v. Dulin*, No. W2001-02969-COA-R3-CV, 2003 Tenn. Appeal, *Folk v. Folk*, 357 S.W. 2d 828, 829 (Tenn. 1962) As an additional basis for being awarded her attorney's fees on appeal, the Appellee/Mother submits that the appeal of the Appellant/Father was frivolous and she requests an award of damages, i.e., her attorney's fees pursuant to T.C.A. §27-1-122. That code section states as follows:

> [w]hen it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or on its own motion, award just damages against the Appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the Appellee as a result of the appeal. T.C.A. §27-1-122

A frivolous appeal is one that is devoid of merit or that has no reasonable chance of succeeding. *Young v. Barrow*, 130 S.W. 3d 59, 67 (Tenn. Ct. App. 2003) If an appeal has no reasonable chance of success and if the issues raised were ones of fact with material evidence

supporting the trial court's finding on those issues, damages for a frivolous appeal may be awarded. *Liberty Mutual Ins. Co. v. Taylor*, 590 S.W. 2d 920 (Tenn. 1979) The State Supreme Court has referred to a frivolous appeal as one which is "patently meritless on the face of the record." *Brooks v. United Uniform Co.*, 682 S.W. 2d 913, 915 (Tenn. 1984) An award of damages for filing of a frivolous appeal lies entirely within the discretion of this Court. *Banks v. St. Frances Hosp.*, 697 S.W. 2d 340, 343 (Tenn. 1985) However, Appellee would echo our State Supreme Court which held in the case of *Davis v. Gulf Ins. Group*, 546 S.W. 2d 583 (Tenn. 1977) "successful litigants should not have to bear the expense and vexation of groundless appeals." *Id.* at 586. Also see *Riggs v. Riggs*, 250 S.W. 3d 453, 460 (Tenn. Ct. App. 2008)

In the instance case, based on the proof and the trial court's findings, it is obvious that the Appellant's original Petition for Custody was without merit. Further, in light of the respective income of the parties, the award of attorney's fees by the trial court to the Appellee/Mother were justified and reasonable under the circumstances. Appellee submits that likewise she should be entitled to her attorney's fees when considering the parties' respective incomes. Moreover, she submits that the Appellant/Father's chances of success on appeal were remote in view of the facts of the case. There was material evidence supporting the trial court's rulings. She submits that on the face of the record, the appeal was patently meritless and therefore frivolous. The Appellee/Mother submits that she should not be forced to bear the costs of an appeal which was groundless. She therefore respectfully requests that she be awarded her attorney's fees for defending this appeal.

CONCLUSION

Wherefore, Mother/Appellee respectfully requests that this Court affirm the trial court's ruling in all respects and award her her reasonable attorney's fees for defending this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellee has been forwarded via U.S. Mail to Jacob T. Thorington, Attorney for ~~Appellant, 43 Music~~ Square West, P.O. Box 121857, Nashville, Tennessee 37212, ~~on this the~~ 22nd day of June, 2009.

Phillip Robinson

IN THE EIGHTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

FILED
2010 AUG 13 PM 3:40
RICHARD R. ROOKER, CLERK

[redacted]

Plaintiff,

vs.

[redacted],

Defendant.

Docket No [redacted] D.C.

MEMORANDUM OF LAW

COMES the Defendant/Husband and would submit the following statement of facts and law for the Court's consideration in this cause currently scheduled for hearing on August 16, 2010.

Statement of Facts

The parties hereto are litigants in a divorce action currently pending before this Court under the above style and docket number. This is a marriage of approximately ten (10) years, the parties having been married on May 22, 2000. There are no minor children. The Wife filed a divorce action on the 7th day of March, 2006 but, thereafter, the parties attempted a reconciliation although no reconciliation order was ever entered. The reconciliation was not successful and the parties proceeded with a contested divorce. The Wife was represented by attorney Rose Palermo and the Husband was represented by attorney Phillip Robinson. The parties proceeded to mediation on May 20, 2010. The parties' marital estate consisted primarily of an interest in the marital residence, which the Husband co-owned with his father, and a piece of rental property which the Wife owned prior to the marriage, various checking accounts, retirement accounts, vehicles, and the Wife claimed an interest in the appreciated value of the Husband's business owned by him at the time of the marriage, to wit: Tony's Cee Bee, Inc., a grocery store in the

Goodlettsville area. Each of the parties had experts and the experts agreed that the appreciation of the Husband's business interest during the marriage was $525,087.00. This included, among other things, a piece of property being Lot 2, Highway 147, Stewart County, Tennessee (hereinafter referred to as "lake lot") being the property that is at issue in this litigation. The property, the debt associated with it, and a trailer located on the property used by the parties all were owned by the business and are included in the appreciated value of the business. A copy of the Husband's Asset and Liability statement presented at mediation is attached hereto as *Exhibit 1*. The aforesaid lot was located on Kentucky Lake. At mediation, each of the parties was interested in being awarded the aforesaid property. In an effort to resolve this divorce action, the Husband finally conceded and allowed the Wife to take the aforesaid property, the equity in which the mediator placed at approximately $110,000.00. The Wife also agreed to take the indebtedness on the property and the trailer and the debt associated therewith.

The Husband also agreed to pay the Wife alimony in the amount of $2,000.00 per month for twenty-four (24) months. The amount of alimony was based, in part, on the Wife's needs to be able to afford the aforesaid property and trailer note. A copy of the mediated MDA is attached hereto as *Exhibit 2*. The agreement was executed by the parties and this divorce action was considered settled. The MDA was subsequently filed with the Court and the uncontested divorce hearing was scheduled for June 22, 2010.

Late in the afternoon on June 21st, counsel for the Husband received a motion filed by Wife's new attorney Helen Rogers to set aside Paragraph 4 of the mediation agreement dealing with the lake lot property alleging that the Husband had perpetrated a fraud on the Wife as he knew that the aforesaid property was worth considerably less than the value attributed to it at mediation. The Wife's previous attorney Rose Palermo had filed a motion to withdraw.

On June 22, 2010, the Husband and counsel appeared in Court; Ms. Palermo also appeared asking to be relieved and Ms. Rogers subsequently appeared also. At that time, the Court declared the parties divorced, ordered the Husband to continue to pay to the Wife the sum of $1,510.00 per month as temporary support and scheduled this matter for hearing on August 16, 2010. A copy of the Court's Order is attached hereto as *Exhibit 3*.

The Wife alleges that on or about December 29, 2009, the Husband received at his business a letter from the Tennessee Department of Environment and Conservation regarding the aforesaid lot. The letter indicates that the subsurface sewage disposal system previously installed on the property was not permitted nor was the system inspected or approved by the Groundwater Protection Department of the Department of Environment and Conservation. Because the system had not been approved and allegedly did not meet the standards, "any future construction in this subdivision intending to utilize this system would be unlawful." A copy of the aforesaid letter is attached hereto as *Exhibit 4*. The Husband acknowledges receiving the aforesaid letter. He immediately contacted Mr. Darrel Rye, one of the developers of the subdivision and the man from whom he purchased the property. Mr. Rye assured him that the department was mistaken and the issue would shortly be remedied. The Husband was also aware that his next door neighbor on the property, Mr. James Grimes, was in the process of building a home and Mr. Grimes continued with that activity after the receipt of the aforesaid letter. The Husband discussed the letter with Mr. Grimes and, as a result of that discussion, believed that while new construction could not use the existing sanitary sewage system, nothing would prevent a lot owner from utilizing his own septic tank system.

In a subsequent conversation with Mr. Rye, the Husband was informed and believed that the water waste system had indeed been properly permitted and inspected and again was assured

that the issue in question would shortly be remedied. As a result of the foregoing, the Husband did not believe that the correspondence he received presented a serious problem. The property had previously been appraised at $160,000.00 and the Husband did not believe that its value was affected as he believed the issue in question would be resolved. Since the filing of this motion, the Husband has provided the real estate appraiser with the aforesaid correspondence and asked that the property be reappraised which has been accomplished. The appraiser values the property at this time at $13,000.00, however, the appraiser adds "if the septic issue were to be resolved, the value of this property would once again be affected dramatical (sic)." A copy of the new appraisal is attached hereto as *Exhibit 5*.

The Husband is now informed and believes that the despite the fact that the property in question has fallen dramatically in value and now has debt exceeding its appraised value of thousands of dollars, the Wife is still interested in retaining this property. Such a position is illogical in the extreme since the value is well below what is still owed. The Husband submits that in reality he and his former wife both believe that the waste water issue will eventually be resolved and the value of the property will again be restored to the original figure of $160,000.00 resulting in a windfall to the party who continues to own it.

The Husband would submit that at no time did he attempt to perpetrate a fraud on the Wife or mislead the attorneys or mediator. The Husband believed that the property still carried a value of $160,000.00 at the time of the mediation. It is obvious that there was a mutual mistake as to the value of this property and, therefore, the total value of the marital estate.

Statement of Law

Agreements reduced to writing and signed by both parties at the conclusion of mediation are construed and enforced in the same manner as other contracts. *Matlock v. Rourk 2010 WL*

2836638 citing Barnes v. Barnes, 193 S.W.3d 495, 499 (Tenn.2006). Once parties have knowingly entered into such agreements, they are bound by the terms of the agreement. In this jurisdiction Marital Dissolution Agreements are accorded the same interpretive dignity as any other contract entered into between parties. *Bogan v. Bogan, 60 S.W.3d 721, 730 (2001).* However, like all contracts, such an agreement is subject to standard contract defenses available which may defeat enforcement of other contracts. *Matlock v. Rourk 2010 WL 2836638 citing Doe v. HCA Heath Services of Tennessee, 46 S.W.3d at 196; German v. Ford, 300 S.W.3d 692, 701(Tenn.Ct.App.2009)* Contract defenses include but are not limited to fraud, duress, negligent or innocent representation, and mistake.

When examining the facts in the case at bar, the more appropriate defense to contract formation is mutual mistake. As pointed out by the Court of Appeals in *Sikora v. Vanderploeg 212 S.W.3d 277, (2006)* The law has a strong policy favoring the enforcement of contracts as written, however on occasion courts have the power to alter the terms of a written contract when both parties were operating under a mutual mistake of fact regarding a basic assumption underlying the bargain. *Sikora citing Alexander v. Shapard, 146 Tenn. 90, 105-15, 240 S.W.287, 291-94 (1922) Sikora* explains that "A mistake in expression occurs where one or both parties to a written contract erroneously believe that the contract embodies the agreement that both parties intended it to express. In such cases, the courts may adjust the provisions of the written contract to make it express the true agreement reached by the parties." *See Alexander v. Shapard, 146 Tenn. At 107, 240 S.W. at 291; 27 WILISTON ON CONTRACTS § 70:20, at 257.* The current circumstances illustrate that although Mr. Hunter received a letter from the Tennessee Department of Environment and Conservation regarding the parties' sewage disposal system, his conversation with Mr. Rye and Mr. Grimes eased any apprehension with respect to the condition

of the property.

Alternatively, a court may set aside a contract on the grounds of mutual mistake when "neither party to the contract was correctly informed and the parties on each side of the transaction were mistaken in their belief as to the material facts which were a basis for the agreement." *Castleton Capital Company, LLC v Burch 2004 WL 892525 (Tenn.Ct.App) citing Kosterman Development Corp., v. Outlaw Aircraft Sales, Inc., 102 S.W.3d 621, 632 (Tenn.Ct.App.2002)* Both Mr. and Ms. Hunter relied on a valid property appraisal to value the lot in question, which was utilized as a piece to their mediation puzzle memorialized in the agreement attached hereto as *Exhibit 2.*

Due to the emotionally charged nature of divorce proceedings, Ms. Hunter may opine that Mr. Hunter engaged in fraud while negotiating a settlement citing the unfortunate circumstances of the sewage disposal system installed on the property and the letter which Mr. Hunter received attached hereto as *Exhibit 4.* However, when a Plaintiff seeks rescission of a contract due to fraudulent inducement, the Court will review five elements. The five elements of an action for fraudulent inducement are: (1) a false statement concerning a fact material to the transaction; (2) knowledge of the statement's falsity or utter disregard for its truth; (3) intent to induce reliance on the statement; (4) reliance under circumstances manifesting a reasonable right to rely on the statement; (5) an injury resulting from the reliance. *LAMB v. MEGAFLIGHT, INC., 26 S.W.3d 627 citing Lowe v. gulf Coast Dev., Inc., No. 01-A-01-9010-CH-00374, 1991 WL 220576, at *7 (Tenn.App.Nov.1, 1991); *631 fite ex rel. H & M Cost. Co., Inc. v. Fite, 1999 WL 317102 at *6 (Tenn.App. May 19,1999).* When examining the facts at hand, both Mr. and Ms. Hunter relied on a valid appraisal not only to determine the value of the lot, but also to establish a value of the total marital estate. Moreover, Mr. Hunter reasonably believed that the sewage

disposal problem would soon be remedied and in the alternative, a septic tank could be placed on the property, which would enable future construction on the lot.

As illustrated in the case of *McNeil v. Nofal (185 S.W.3d 401)* "An essential requirement of any action for fraud, deceit, failure to disclose or negligent or innocent misrepresentations is detrimental reliance on a false premise. In order to succeed in any action based upon fraudulent or negligent misrepresentation, the plaintiff must prove that it relied justifiably on the defendant's statements." *Id.* The burden of proof falls on the Plaintiff to show her reliance upon statements that the Defendant may have made was reasonable. *Metropolitan Government of Nashville and Davidson County V. McKinney, 852 S.W.2d 233, (Tenn.App.1992)* Once again, both parties relied on a legitimate property appraisal. Alternatively, in Tennessee a property owner is deemed qualified to offer an opinion as to the value of property by virtue of owning said property. *(State ex rel. Smith v. Livingston Limestone Co., 547 S.W.2d 942, 943 (1977); Stinson v. Stinson, 161 S.W. 3d 438, 446 (Tenn. Ct.App. 2004).* Both parties have a marital interest in said property, thereby giving both parties ownership interest. Moreover, as evidenced in mediation by Mr. Hunter's reluctance to relinquish this property and Ms. Hunter's counsel's express refusal to return the property in exchange for something else of value after the sewage disposal issue arose, both parties appear to greatly value this lake lot, irrespective of any sewage disposal issues.

In the case before the Court, each of the parties was under a mis-impression as to the true value of the property in question. Based on a valid appraisal, the parties attributed a value to this property of $160,000.00 with an indebtedness of approximately $50,000.00, resulting in equity of $110,000.00, which was awarded to Ms. Hunter. It is clear that the property was not worth what each of the parties believed it to be. A new appraisal indicates it is worth $13,000.00.

Under the terms of the Marital Dissolution Agreement, the Wife had agreed to accept this property as a portion of her share of the marital estate; to be responsible for the indebtedness on the property and indemnify and hold the Husband harmless; and to refinance the property within six (6) months. In addition, the Wife was awarded the trailer on the property and agreed to be responsible for the indebtedness on the trailer and refinance this debt also. Thus, based on mutual mistake, the Court would be authorized to rescind and reform the contract.

One solution to this controversy is to allow the Wife to keep the real estate in question, the debt and trailer and require the Husband to pay an additional amount of cash to provide the Wife her pro rata share (approximately 26%) of the reduced marital estate. The Wife's expert, Clyde Bright, has provided that calculation (see copy attached as *Exhibit 6)* and it would appear that to make the Wife whole the Husband would owe her approximately $111,359.00. Under the agreement, the Husband is already required to pay a lump sum payment of $45,000.00 thus he would owe an additional $66,359.00. The Husband has no pool of money from which to make said payments and would require at least a five (5) year pay out. This amount of additional cash is necessary to offset the approximately $48,000.00 debt that the Wife has accepted on property worth only $13,000.00. The Husband would suggest that because he would be required to make the aforesaid additional payments, he would be financially unable to pay the alimony agreed upon in the amount of $2,000.00 per month for twenty-four (24) months and would request the Court eliminate same. The Husband would also ask for consideration for damages to the marital residence in the amount of approximately $5,828.00 caused by the Wife's pets. The Court has previously ordered that the Wife should be responsible for such damages (see Order of October 6, 2009 attached as *Exhibit 7*). The Husband submits that both parties believe the sewer system issue will be shortly resolved and the value of this property will be

restored. If the Court rules as set forth above, the Husband would agree to waive any claim to any restoration of the appreciation.

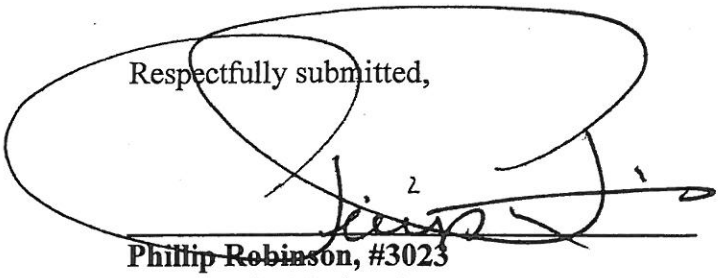
In the alternative, the Husband could retain the lake lot property, mortgage, trailer and debt thereon. His indebtedness would therefore be increased and the Wife's debts related to the property would be eliminated. Husband's accountant, Vic Alexander, has provided these calculations (see copy attached as *Exhibit 8)*. Under these circumstances, the Husband would be required to pay $77,269.00 to make the Wife whole. Giving him credit for the $45,000.00 cash payment due, he would owe an additional approximately $32,269.00. Because of this reduced amount, the Husband could make said payments in installments over three (3) years. Because the Wife's debt load would be substantially reduced, the Husband would request that the Court eliminate or reduce his alimony obligation.

Finally, the Court could adjust the equities as set forth in one of the options above but provide that if the water waste issue is resolved within a specified period of time, the Court would adjust the equities to do justice to both parties. To award the property in question to either of the parties at a reduced value only to have the property be restored to its previous value would be unjust and inequitable.

Conclusion

WHEREFORE, the Husband respectfully requests that the Court adjust the equities in this cause such that the Wife receives her previously negotiated twenty-six percent (26%) of the marital assets which include the Husband's appreciated business interest, eliminate or reduce the Husband's support obligation and order each of the parties to be responsible for his or her attorney's fees.

Respectfully submitted,



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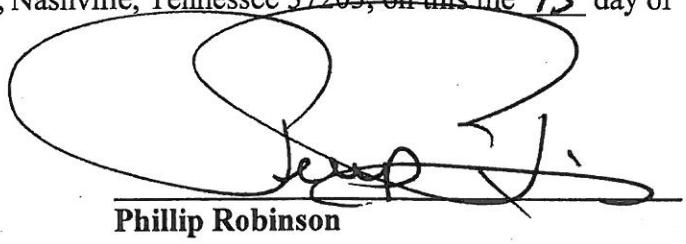
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum of Law has been hand-delivered and forwarded by U.S. Mail to Helen S. Rogers, Attorney for Wife, 3205 State Street, Wind in the Willows Mansion, Nashville, Tennessee 37203, on this the 13th day of August, 2010.



Phillip Robinson