The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: William Neal McBrayer

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Nashville, TN 37219-1407 (Davidson County)

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Home Address: (including county) [redacted]
Brentwood, TN 37027 (Williamson County)

Home Phone: [redacted] Cellular Phone: [redacted]

INTRODUCTION

The State of Tennessee Executive Order No. 54 (May 19, 2016) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in Microsoft Word format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov. See section 2(g) of the application instructions for additional information related to hand-delivery of application packages due to COVID-19 health and safety measures

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Judge, Tennessee Court of Appeals

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

1989, BPR #013879

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.

I am only licensed to practice in Tennessee.

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).

Trabue, Sturdivant & DeWitt (Sept. 1989 – Dec. 1998)

Miller & Martin PLLC (Jan. 1999 – June 2012)

Butler Snow LLP (June 2012 – May 2014)

Tennessee Court of Appeals (May 2014 – Present)

In addition to the above, I am a book author and receive royalties.

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.

As a judge on the court of appeals, I hear civil appeals, which can range from challenges to the manner in which the death penalty is carried out to collection of negotiable instruments. I have also sat by designation with the Tennessee Court of Criminal Appeals and on a Special Workers' Compensation Appeals panel.

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

After becoming licensed, I handled insurance defense and subrogation cases, almost exclusively for Tennessee Farmers Mutual Insurance Company. I also handled collection cases. Initially, my practice was almost entirely in general sessions court, but as I gained experience and the amounts at issue became more substantial, I appeared primarily in circuit and chancery courts.

In addition, I represented creditors in bankruptcy cases. Eventually, I took on work as debtor's counsel in Chapter 11 reorganization cases. I also represented individual defendants in collection cases and in Chapter 7 bankruptcies as part of my commitment to the Nashville Bar Association Pro Bono Program.

In the late 1990s, due in part to a client's desire to start an air charter operation, I developed expertise in aviation law. I represented parties in various types of transactions involving aircraft, including purchases, leases, and management agreements. I advised clients on the Federal Aviation Regulations and appeared on behalf of clients before the Federal Aviation Administration. I have also tried cases involving aircraft transactions.

I have always had an interest in code law, so I was often called upon by my law partners as a resource on the Uniform Commercial Code. My particular area of interest is secured transactions.

Before I went on the bench, my clientele ranged from individuals to large corporations. I was appearing in both federal and state courts, from Oklahoma City to New York City.

Although I would describe my private practice as primarily in commercial litigation, I occasionally worked on corporate/transactional matters. I advised financial institutions on

documenting secured transactions and on enforcement of security interests. I also served a brief stint as an interim general counsel for a client that developed and sold software for health, training, safety, and compliance programs.

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

The last case I tried was in 2012, *Valley Commercial Capital, LLC v. Averitt Air, Inc.*, First Circuit for Davidson County, Tennessee, Case No. 09C3849. I successfully defended Averitt Air in a suit over the storage of a business jet in which the plaintiff sought damages in excess of $3 million, plus treble damages and attorney's fees.

The last appeal I argued was *Pureworks, Inc. v. Unique Software Solutions, Inc.*, 554 Fed. Appx. 376 (6th Cir. Jan. 21, 2014). I represented Pureworks in an unsuccessful appeal of an order confirming an arbitration award.

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.

In private practice, I served as a mediator on a few occasions. As I recall, I mediated preference avoidance actions in connection with a large bankruptcy case.

As a judge, I have authored opinions of note in the following cases:

In re Bridgestone/Firestone, 495 S.W.3d 257 (Tenn. Ct. App. 2015). I authored the opinion of the court. The case addressed the application of collateral estoppel to prior forum non conveniens dismissals and possible exceptions to the application of collateral estoppel.

WM Capital Partners, LLC v. Thornton, 525 S.W,3d 265 (Tenn. Ct. App. 2016). I authored the opinion of the court. The case held that a debtor or an obligor in a secured transaction could not force a secured party to elect one post-default remedy over another.

Aragon v. Aragon, No. M2014-02292-COA-R3-CV, 2015 WL 7752440 (Tenn. Ct. App. Nov. 30, 2015), *rev'd*, 513 S.W.3d 447 (Tenn. 2017). I authored a dissent to the decision. I argued that the term "reasonable purpose" in the parental relocation statute should be given its natural and ordinary meaning. The supreme court granted permission to appeal and adopted the ordinary meaning interpretation.

In re Estate of Starkey, 556 S.W.3d 811 (Tenn. Ct. App. 2018). I authored the opinion of the court. The case held that Tennessee's adoption of parts of the Uniform Probate Code did not abrogate the common-law rule that fraud will not defeat revocation of a will.

Davis v. 3M Co., No. M2018-02029-COA-R3-CV, 2020 WL 3542175 (Tenn. Ct. App. June 30,

2020), *perm. appeal denied*, Nov. 12, 2020. I authored the opinion of the court. The case addressed the proper method to apportion an award of noneconomic damages among multiple, liable defendants in a wrongful death suit.

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

None.

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

From March 17, 2003, until March 17, 2009, I served as a hearing committee member for the Tennessee Board of Professional Responsibility.

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

In 2013, I applied to the Tennessee Judicial Nominating Commission for a vacancy on the Tennessee Court of Appeals. My application was considered at a meeting held on June 28, 2013. The Commission submitted my name, and I was appointed by Governor Bill Haslam in August 2013.

EDUCATION

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

Maryville College, Maryville, TN (1982-1986). Graduated with a Bachelor of Arts (Political Science), magna cum laude. Recipient of the Alumni Association's Outstanding Senior Award. Member of Alpha Gamma Sigma (Honor Society). Recipient of Tennessee Political Science Association's John W. Burgess Award. Chairman of the Judicial Council.

Marshall-Wythe School Law, The College of William & Mary, Williamsburg, VA (1986-1989). Graduated with a Juris Doctor. Student Articles Editor for the *William & Mary Law Review*. Served on the Board of Directors of the William & Mary Public Service Fund.

PERSONAL INFORMATION

15. State your age and date of birth.

Age 58. [redacted] 1963.

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

51 years. Except for my time in law school, I have lived continuously in Tennessee since 1970.

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

25 years.

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

Williamson County.

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

Not applicable

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

No.

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

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of

professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

None.

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

No.

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

No.

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

McBrayer v. Mapco Express, Inc., Case No. 2017CV1826, Williamson County General Sessions Court. An automatic car wash at a Mapco Express location damaged a vehicle owned by my wife and I. The case was filed on June 27, 2017, and we were awarded a $400 judgment against Mapco Express on August 7, 2017. Mapco Express satisfied the judgment.

In the following cases, I was named as a party in my official capacity and, in some instances, also in my individual capacity:

Durham v. Haslam, Case No. 14C2598, Circuit Court for Davidson County, Tennessee. Action to determine the constitutionality of the process for selecting appellate court judges. The case was dismissed on a motion to dismiss in 2014.

Sears v. Sears, Case No. 03-19-0807, United States District Court for the Middle District of Tennessee. Action for damages for alleged violations of the Racketeer Influenced and Corrupt Organizations Act by several judges. The case was filed on September 12, 2019. To my knowledge, I have never been served with the suit.

Kinney v. State of Tennessee, Case No. 2019-053, Chancery Court for Blount County, Tennessee. Action for damages and declaratory and injunctive relief arising from a collection action filed against the plaintiffs. I was made aware of the action sometime after "Plaintiff's [sic] First Amended Complaint and Petition to the Governor of the State of Tennessee for

Vindication of Civil and Equal Rights, Injunctive and Declaratory Relief" was filed with the chancery court on December 6, 2019. To my knowledge, I have never been served with the suit.

Larry E. Parrish, P.C. v. Bennett, Case No. 3:20-cv-00275, United States District Court for the Middle District of Tennessee. Action for declaratory judgment that asserted an opinion, in which I concurred, violated the plaintiff's constitutional rights. The case was filed and dismissed on a motion to dismiss in 2020. The United States Court of Appeals for the Sixth Circuit affirmed the dismissal in Case no. 20-5898 on March 2, 2021. There may be some ongoing litigation regarding an award of sanctions against the plaintiff and the plaintiff's attorney.

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

Member of Forest Hills Baptist Church – 2003 to Present

Leadership Brentwood Alumni Association – 2014 to Present

Member of Board of Directors of Maryville College – 2015 to Present

The Trinity Forum – 2018 to Present

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

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

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

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 that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Tennessee Judicial Conference – 2014 to Present

Convention Co-Chair (2016); Vice President (2021).

Business Court Rules Advisory Commission – 2015 to 2016

Chair (2015-2016)

Belmont University College of Law American Inn of Court – 2014 to 2019

Inn President (2015-2017).

Harry Phillips American Inn of Court – 2018 to Present

The Federalist Society – 2021 to Present

American Bar Association – 1989 to Present

Tennessee Bar Association – 1989 to Present

Twentieth Judicial District Delegate to the TBA House of Delegates (2001-2014); Vice Chair of the Business Law and Bankruptcy Section (2003-2004); Chair of the Bankruptcy Law Section (2004-2005); Member of the TBA Joint Article 9 Committee – Responsible for studying and proposing legislation adopting the 2010 amendments to Article 9 of the Uniform Commercial Code (2011-2012).

Nashville Bar Association – 1989 to Present

Chair of the Bankruptcy Court Committee (2001); Member of the Facilities Committee – Responsible for examining the Association's space needs and identifying a new location for its offices (2008-2011).

Mid-South Commercial Law Institute – 2007 to 2012

Member of the Board of Directors (2007-2012); President – Responsible for producing the 32nd Annual Mid-South Commercial Law Institute Seminar (2011-2012).

Defense Research Institute – 2007 to 2014

American Bankruptcy Institute – 2002 to 2014

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

Fellow of the American Bar Foundation, Tennessee Bar Foundation, and the Nashville Bar Foundation

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

W. Neal McBrayer & James H. Porter, *Tennessee Secured Transactions Under Revised Article 9 of the Uniform Commercial Code: Forms and Practice Manual* (2001 & Supp. 2020)

Contributing Author, *Inside the Minds: Chapter 15 Bankruptcy Strategies* (2012)

Contributing Author, *Inside the Minds: Navigating Recent Bankruptcy Law Trends* (2010).

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.

May 31, 2016 - Waller - A Comedy of Ethics (with Donald Capparella and Jason Gichner)

August 18, 2016 - Office of the Attorney General of Tennessee, Nashville - National Attorneys General Training & Research Institute Appellate Practice Seminar - A View from the Bench (with Solicitor General Andrée Blumstein, Justice Connie Clark, and Judge Jane Stranch)

September 21, 2016 - Fall Creek Falls State Park - Department of Children's Services Legal Division Annual Training - New Challenges Facing DCS Counsel

December 1, 2016 - Marriott at Vanderbilt University, Nashville - Mid-South Commercial Law Institute - Commercial Law Update (with Kathi Allen and John Murdock)

May 24, 2017 - TBA Bar Center, Nashville - Family Law Forum 2017 - Preserving the Record

December 1, 2017 - Marriott at Vanderbilt University, Nashville - Mid-South Commercial Law Institute - Commercial Law Update (with John Murdock and Courtney Gilmer)

April 9, 2018 - Waller - A Comedy of Ethics (with Donald Capparella and Tyler Yarbro)

November 11, 2018 - AOC Nashville - Administrative Office of the Courts Law Clerk Staff Attorney Training - Conclusions About Findings of Fact . . . and Conclusions of Law

November 16, 2018 - NBA Office - Nashville Bar Association - Ethics, Lies, and Videotape, Part XVI (with Magistrate Judge Barbara Holmes and Ed Lanquist)

November 30, 2018 - Marriott at Vanderbilt University, Nashville - Mid-South Commercial Law Institute - Commercial Law Update (with John Murdock, Amanda Stanley, and Evelyn Hill)

March 25, 2019 - Vanderbilt University - Judicial Process Class - Question and Answer Session with Judge Tim Easter

June 27, 2019 - Supreme Court Building, Nashville - Judicial Process Class - Question and Answer Session with Judge Andy Bennett

September 18, 2019 - Williamson County Enrichment Center - The Tennessee John Marshall American Inn of Court Panel Discussion with Judge Richard Dinkins

November 4, 2019 - Metro Courthouse, Nashville - Tennessee Business Court Docket Panel Discussion Moderator

November 7, 2019 - Supreme Court Building, Nashville - Question and Answer Session with Judge Frank Clement and Judge Richard Dinkins and Tour for the Nashville Bar Association Appellate Practice Committee

November 22, 2019 - NBA Office - Nashville Bar Association - Ethics, Lies, and Videotape,

Part XVII (with Magistrate Judge Barbara Holmes and Ed Lanquist)

April 30, 2020 - Virtual - The Tennessee John Marshall American Inn of Court Panel Discussion - "After The Emergency, Then What? Civil Liberties, and Court Procedures in the Age of Pandemics" with Judge Richard Dinkins

June 12, 2020 - Virtual - Vanderbilt University Judicial Process Class Summer School - Panel Discussion with Judge Thomas Brothers and Judge Lynda Jones

November 20, 2020 - Virtual - Nashville Bar Association - Ethics, Lies, and Videotape, Part XVIII (with Magistrate Judge Barbara Holmes and Ed Lanquist)

December 8, 2020 - Virtual - Nashville Bar Association - Top Tips for Winning Your Appeal in Tennessee (with Donald Capparella, Sara Sedgwick, and Kim Macdonald)

March 18, 2021 - Virtual - Tennessee Judicial Conference - Mini-Judicial Academy 2021 - Making Findings and Drafting Orders (with Judge Robert Holloway and Chancellor Jerri Bryant)

August 20, 2021 - Renaissance Hotel, Nashville - DRI Product Liability Conference - Ethics, Lies, and Videotape (with Ed Lanquist)

September 16, 2021 - Virtual - TBA Litigation Law Forum 2021 - Appellate Practice Panel Moderated by Chancellor Will Perry (with Justice Sharon Lee, Justice Holly Kirby, Buck Lewis, Laura Deakins, and Nathan Sanders)

October 7, 2021 - Doubletree by Hilton Hotel Nashville - National Association of Women Judges 43rd Annual Conference - Ethics, Lies and Videotape: "Reel"-Life and Real-Life Ethics and Professionalism Issues I (with Ed Lanquist and Judy Lojek)

October 8, 2021 - Doubletree by Hilton Hotel Nashville - National Association of Women Judges 43rd Annual Conference - Ethics, Lies and Videotape: "Reel"-Life and Real-Life Ethics and Professionalism Issues II (with Ed Lanquist and Judy Lojek)

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.

In March 2009, I was appointed to a three-year term on the City of Brentwood Planning Commission. I was reappointed in March 2012. I resigned my position upon becoming a judge.

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

No.

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

reflects your own personal effort.

The attached documents represent my own personal effort. With the both the opinion and the article, I was provided some editorial assistance. In the case of the opinion, I was also provided some research assistance.

ESSAYS/PERSONAL STATEMENTS

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

To make a positive impact on the lives of others. The judiciary as a whole makes a positive impact by ensuring the promise of equal justice under law. But the Tennessee Supreme Court is unique. The supreme court, through its justices, actively fosters access to justice, sets the standard for lawyers who seek justice on behalf of their clients, and develops the processes through which justice is sought. They also educate the public on the important role the rule of law and the justice system plays in our society.

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

While in private practice, I accepted cases from the Nashville Bar Association Pro Bono Program. For the most part, I represented individuals seeking debt relief, either by helping them defend against collection actions or seek debt relief in bankruptcy. I also had the honor of providing pro bono legal services to the Legal Aid Society of Middle Tennessee and the Cumberlands. In 2011, I participated in a pilot program of the Nashville Bar Association to provide assistance to pro se litigants in the bankruptcy court.

Since joining the court, I have been involved in efforts to establish a functioning appellate pro bono program.

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 seek a position on the Tennessee Supreme Court, the State's highest court. If selected, I would bring the perspective of an attorney who has spent the majority of his career in private practice. I would be a strong advocate for programs that aid lawyers in representing their clients and in fulfilling their professional obligation to render pro bono legal services.

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)***

Much of my community involvement has come through my church and through my service on

the Maryville College Board of Directors. For about five years, I taught Sunday School to second and third graders. I also have participated in Room In The Inn. More recently, my involvement has been limited to being a substitute Bible study teacher for my adult Bible study class.

I have served on the Maryville College Board since 2015. I chair the Board's Audit and Risk Management Committee. As a committee chair, I serve on the Board's Executive Committee. I also serve on the Board's Governance Task Force, which is examining the College's bylaws and considering possible revisions.

I am a strong believer in liberal arts education. While I am unsure if the time commitments of being a justice would allow me to continue to serve as a board member, I hope to continue to be involved with the College in some capacity.

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

I have always thought I would like to teach law, but I believe my true calling may be in mentoring new lawyers. Working with law clerks just out of law school is one of the best parts of my current job. And I have sought out other opportunities to be a mentor through two different Inn of Court programs. The Belmont University College of Law American Inn of Court is unique in that it is affiliated with a law school and all first-year students are members of the Inn. Lawyer members of the Inn are assigned to mentor from two to three law students. For the past two years, I have also served as mentor for the Nashville School of Law's Rigorous Writing Program.

I see being a justice as an opportunity to broaden my reach as a mentor for new lawyers. The justices have a tremendous influence on the bar, and they are in a position to encourage lawyers to mentor those new to the profession.

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 would and do uphold the law even if I disagree with its substance. In 2010, as a member of the City of Brentwood Planning Commission, I faced a vote on a rezoning request to construct a mosque. The property in question had several attributes that made it unattractive for a public venue. Supporters of the rezoning request relied on the Tennessee Religious Freedom Restoration Act (Tenn. Code Ann. § 4-1-407) to argue that denying a change in zoning would substantially burden a religiously motivated practice. Based on the statute and despite my reservations about the suitability of the property, I felt obligated to vote in favor of the requested rezoning. I disagreed with the very broad definition of "substantially burden" found in statue, but I based my decision on the definition, which put the City to a standard and burden of proof it could not meet.

REFERENCES

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

A. Hulet M. Chaney, C.E.O. Emeritus, Tennessee Farmers Insurance Companies, [redacted] Farragut, TN 37934. [redacted]
B. Clara or Gary Hill, [redacted] Nashville, TN 37315. [redacted]
C. William R. O'Bryan, Jr., Butler Snow LLP, [redacted] Nashville, TN 37201. T: [redacted]
D. James H. Porter, Butler Snow LLP, [redacted] Nashville, TN 37201. [redacted]
E. Andrea Sinclair, Sherrard Roe Voigt & Harbison, PLC, [redacted] Nashville, TN 37201. [redacted]

AFFIRMATION CONCERNING APPLICATION

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

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

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

Dated: November 18, 2021.

W Neal McBrayer

Signature

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

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

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

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

WAIVER OF CONFIDENTIALITY

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

William Neal McBrayer
Type or Print Name

W. Neal McBrayer
Signature

11/18/21
Date

013879
BPR #

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

FILED
05/24/2018
Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 7, 2017 Session

DALE ROBERT SCHERZER v. MELISSA MARIE SCHERZER

Appeal from the Chancery Court for Williamson County
No. 40104 Michael Binkley, Chancellor

No. M2017-00635-COA-R3-CV

W. NEAL MCBRAYER, J., concurring.

I concur in the result reached by the majority and with its analysis, except in one respect. In my view, Tennessee Code Annotated § 36-5-121 does not authorize an award of attorney fees in these circumstances.

This appeal arises from Dale Robert Scherzer's petition to terminate or modify his obligation to pay transitional alimony, which the trial court ultimately granted. Although he also requested an award of attorney fees in his petition, Mr. Scherzer did not cite the authority for his request. In a response to Melissa Marie Scherzer's Rule 59 motion to alter or amend, Mr. Scherzer for the first time argued that an award of attorney fees was appropriate under Tennessee Code Annotated § 36-5-103(c). The trial court concluded, correctly in the majority's view and in mine, that attorney fees could not be awarded under the version of Tennessee Code Annotated § 36-5-103(c) then in effect. Mr. Scherzer was seeking "to terminate, not enforce, the existing alimony decree." *Evans v. Evans*, No. M2002-02947-COA-R3-CV, 2004 WL 1882586, at *19 (Tenn. Ct. App. Aug. 23, 2004) (Koch, J., concurring).

Instead, the trial court awarded Mr. Scherzer attorney fees as spousal support under the alimony statute, Tennessee Code Annotated § 36-5-121, citing *Evans v. Evans*. The majority determines that such an award was inappropriate because there was no proof that Mr. Scherzer was a disadvantaged spouse but there was evidence that Ms. Scherzer did not have an ability to pay.

Irrespective of the proof, in my view, Mr. Scherzer could not recover his attorney fees because Tennessee Code Annotated § 36-5-121, by its terms, is inapplicable in post-divorce modification proceedings. Since *Evans* was decided, the alimony statute has

changed substantially.[1] *Compare* Tenn. Code Ann. § 36-5-101(d) (2001), *with* Tenn. Code Ann. § 36-5-121 (2017). The alimony statute interpreted in *Evans*, the precursor to the current alimony statute, did not limit its application to specific types of proceedings and did not include any detail concerning attorney fees. *See* Tenn. Code Ann. § 36-5-101(d) (2001). But, in 2005, the General Assembly amended the alimony statute by moving it into a new section, inserting additional restrictive language, and detailing the different types of alimony. 2005 Tenn. Pub. Acts 654-60. Under the current version of the alimony statute, trial courts are authorized to award alimony "[i]n any action for divorce, legal separation or separate maintenance." Tenn. Code Ann. § 36-5-121(a) (2017). The current statute also references attorney fees as being a form of alimony in solido or lump sum alimony. *Id.* § 36-5-121(d)(5), (h)(1).

Tennessee Code Annotated § 36-5-121 authorizes an award of attorney fees in a divorce in only two instances. First, pending a final hearing, the court may award attorney fees "to enable . . . [a] spouse to prosecute or defend the suit of the parties." *Id.* § 36-5-121(b). Second, the court may award attorney fees as alimony in solido "calculable on the date the [divorce] decree is entered." *Id.* § 36-5-121(d)(5), (h)(1); *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 108 (Tenn. 2011) ("The total amount of alimony in solido is set on the date of the divorce decree . . . ."). No provision is made in the statute for an award of attorney fees in post-divorce modification proceedings. To interpret the statute otherwise would render the prepositional phrase that begins the statute, "[i]n any action for divorce, legal separation or separate maintenance," surplusage. *See Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d 593, 600 (Tenn. 1999) ("We are constrained to interpret statutes so that no part or phrase of a statute will be rendered inoperative, superfluous, void, or insignificant.").

Although the alimony statute is not ambiguous, the broader statutory scheme also supports the conclusion that Tennessee Code Annotated § 36-5-121 does not authorize an award of attorney fees for post-divorce modification proceedings. *See In re Estate of Tanner*, 295 S.W.3d 610, 614 (Tenn. 2009) ("It is only when a statute is ambiguous that we may reference the broader statutory scheme, the history of the legislation, or other sources."). The alimony and child support statutes include Tennessee Code Annotated § 36-5-103(c), which authorizes trial courts to award attorney fees "both upon the original divorce hearing and *at any subsequent hearing*." Tenn. Code Ann. § 36-5-103(c) (emphasis added). The "at any subsequent hearing" language has not changed since the *Evans* decision and is absent from Tennessee Code Annotated § 36-5-121, both before and after the 2005 amendment. Additionally, it would be unnecessary to authorize

[1] Even the version of the alimony statute at issue in *Evans* would not have authorized an award of attorney fees to Mr. Scherzer. In *Evans*, the court held that the *recipient* spouse may seek attorney fees in the form of alimony if he or she is "forced to deplete those funds . . . to pay" an attorney to defend a modification proceeding initiated by the payor spouse. *Evans*, 2004 WL 1882586, at *16. Mr. Scherzer was not the recipient spouse.

attorney fees "incurred in enforcing any decree from alimony" under Tennessee Code Annotated § 36-5-103(c) if such authority already existed under Tennessee Code Annotated § 36-5-121. *Id.* § 36-5-103(c).

Finally, I note that the General Assembly recently amended Tennessee Code Annotated § 36-5-103(c) to permit an award of attorney fees in an instance such as this one. Effective July 1, 2018, the amendment broadens the circumstances under which attorney fees may be awarded in domestic relations cases. In contrast to the current version of Tennessee Code Annotated § 36-5-103(c), which allows "[t]he *plaintiff spouse* [to] recover . . . reasonable attorney fees incurred in *enforcing* any decree for alimony," Tenn. Code Ann. § 36-5-103(c) (2017) (emphasis added), the new version allows "[a] *prevailing party* [to] recover reasonable attorney's fees . . . in *any* . . . *proceeding* to *enforce*, *alter*, *change*, or *modify* any decree of alimony."[2] H.R. 2526, § 1, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018) (amending Tenn. Code Ann. § 36-5-103(c)) (emphasis added). If Tennessee Code Annotated § 36-5-121 in its current form already provided the mechanism for attorney fees to be awarded in post-divorce modification proceedings, presumably the recent amendment to Tennessee Code Annotated § 36-5-103(c) would have been unnecessary. *See Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 899 (Tenn. 1992) ("[T]he Legislature is presumed to know the state of the law on the subject under consideration at the time it enacts legislation.").

Thus, I concur in the result reached by the majority, and I join in all but part VI of the opinion.

W. NEAL McBRAYER, JUDGE

[2] The language "both upon the original divorce hearing and at any subsequent hearing" is retained.

Achieving Recognition and Relief Pending Recognition in a Chapter 15

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ASPATORE

Introduction[1]

Chapter 15 does not share the same objectives as other chapters of the Bankruptcy Code. When requesting relief other than under Chapter 15, the objective is either liquidation or restructure of debt. A Chapter 15 has two objectives: obtaining comity from a United States court for a foreign insolvency proceeding and obtaining cooperation in the form of the relief necessary to carry out the objectives of the foreign insolvency proceeding. The client's ultimate objective may be liquidation or restructuring of its debt, but the Chapter 15 is ancillary to the foreign proceeding, where the ultimate objective is being pursued. In some respects, Chapter 15 is the bankruptcy analogue to domesticating a foreign judgment. Rather than a proceeding to determine whether a final judgment is entitled to full faith and credit, a Chapter 15 proceeding determines whether the foreign insolvency proceeding should be recognized, thereby giving representatives of the foreign proceeding access to the United States courts.

Focusing on the Key Goal of a Chapter 15 Filing

The ultimate goal of a Chapter 15 filing, therefore, is obtaining recognition of a foreign insolvency proceeding from the United States bankruptcy court. The bankruptcy court can rule on a petition for recognition of a foreign insolvency proceeding in one of three ways: (1) granting recognition of the foreign proceeding as a foreign main proceeding, (2) granting recognition of the foreign proceeding as a foreign nonmain proceeding, or (3) denying recognition.[2] Recognition as a foreign main proceeding means that the debtor has its center of main interests in the jurisdiction where the foreign insolvency proceeding is pending.[3] Recognition as a foreign nonmain proceeding means that the debtor has an establishment, but not its center of main interests, in the jurisdiction where the foreign insolvency proceeding is pending.[4] Although there are certain advantages to recognition as a foreign

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[1] The opinions expressed in this article are mine and not necessarily those of Butler Snow O'Mara Stevens & Cannada PLLC or its clients. I thank Robert F. Parsley for his editorial assistance.

[2] *See In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122 (Bankr. S.D. N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D .N.Y. 2008) (denying recognition despite no objection to recognition).

[3] 11 U.S.C.A. § 1502(4) (West 2004 & Supp. 2012).

[4] *Id.* at § 1502(5).

main proceeding over recognition as a foreign nonmain proceeding, recognition as either type is preferable to denial of recognition, which implies that, to be entitled to comity and assistance in the United States, "the debtor's liquidation or reorganization should be taking place in a country other than the one in which the foreign proceeding was filed."[5]

Recognition means "entry of an order granting recognition of a foreign main proceeding or foreign nonmain proceeding" under Chapter 15.[6] Recognition is the prerequisite to the foreign representative's access to United States courts. Absent recognition, the foreign representative may not obtain "comity[7] or cooperation from courts in the United States."[8] With recognition, the foreign representative "has the capacity to sue and be sued in a court in the United States" and "may apply directly to a court in the United States for appropriate relief in that court;" and the court "must grant comity and cooperation to the foreign representative."[9] Additionally, recognition permits the foreign representative to commence an involuntary bankruptcy case or, if the recognition is as a foreign main proceeding, a voluntary bankruptcy case.[10] The foreign representative may also participate as a party-in-interest in a pending bankruptcy case.[11]

Once recognition has been achieved, the goal shifts from gaining to maintaining recognition and obtaining the relief necessary to carry out the

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[5] *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd.*, 389 B.R. 325, 334 (S.D. N.Y. 2008).
[6] 11 U.S.C.A. § 1502(7).
[7] *Hilton v. Guyot*, 159 U.S. 113, 163-64(1895) (Defining comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.").
[8] 11 U.S.C.A. § 1509(d) (West 2012); In the case of *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd.*, the bankruptcy court notes that a foreign representative whose petition for recognition is denied is not without any remedy. Under 11 U.S.C. § 303(b)(4), the foreign representative may commence an involuntary case under Chapter 7 or 11, and under 11 U.S.C. § 1509(f), denial of recognition may not affect any right the foreign representative may have to sue in the United States to collect or recover a claim that is property of the debtor. 374 B.R. at 132-33. However, the exception found in section 1509(f) to obtaining recognition prior to seeking relief in United States courts should be read narrowly. *In re Loy*, 380 B.R. 154, 165 (Bankr. E.D. Va. 2007)
[9] 11 U.S.C.A. § 1509(b).
[10] *Id.* at § 1511.
[11] *Id.* at § 1512.

objectives of the cross-border insolvency. Recognition may be modified or terminated "if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist."[12]

The requirements for achieving recognition have been described as "procedurally quite rigid"[13] and "formulaic,"[14] but in application, they have been anything but formulaic. Section 1517,[15] which details the requirements for recognition, presumes that the application is filed by a foreign representative seeking recognition of a foreign proceeding. Therefore, the initial inquiry is whether a "foreign proceeding" and "foreign representative" are involved.[16] "Foreign proceeding" is defined as "a collective judicial or administrative proceeding in a foreign country...under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation."[17] A "foreign representative" is "a person or body...authorized in a foreign proceeding to administer the reorganization or liquidation of the debtor's assets or affairs or to act as a foreign representative of such foreign proceeding."[18] The Bankruptcy Code's definitional section specifies that a foreign representative appointed on an interim basis or in an interim proceeding would also qualify.[19]

Assuming that a "foreign representative" is seeking recognition of a "foreign proceeding," Section 1517 provides that an order of recognition "shall" be entered if the following requirements are met: (1) the foreign proceeding is a either a foreign main proceeding or a foreign nonmain proceeding as defined by the Bankruptcy Code; (2) the foreign representative is either a person or body;[20] and (3) the petition complies with Section 1515.[21] In effect, because

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[12] *Id.* at § 1517(d).
[13] *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 46 (Bankr. S.D. N.Y. 2008).
[14] *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 126 (Bankr. S.D. N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D .N.Y. 2008).
[15] 11 U.S.C.A. § 1517
[16] H.R. REP. NO. 109-31, at 133 (2005), *reprinted in* 2005 U.S.C.C.A.N. 175-76 (requirements incorporate the definitions in 11 U.S.C.A. § 101(23) and § 101(24)).
[17] 11 U.S.C.A. § 101(23) (West 2012).
[18] *Id.* at § 101(24).
[19] *Id.* at § 101(23), (24).
[20] This requirement is redundant in that, by definition, a foreign representative must be a person or body.
[21] 11 U.S.C.A. § 1517.

the "person or body" and petition requirements are easy to satisfy and may even be presumed,[22] the hurdle narrows to Section 1517(a) and whether the debtor has at least an "establishment" in the place where the foreign proceeding is pending, which is what defines a "foreign nonmain proceeding;"[23] thus satisfying the first requirement. The drafters of the Model Law on Cross-Border Insolvency "understood that only a main proceeding or a nonmain proceeding meeting the standards of Section 1502 (that is, one brought where the debtor has an establishment) were entitled to recognition...."[24] Proving that the foreign proceeding is nonmain requires a lesser showing than a main proceeding.[25] The debtor need only have a place of operations carrying out a non-transitory economic activity in the jurisdiction where the foreign insolvency proceeding is pending.[26]

There is one variation to the recognition formula noted above, which adds some elasticity to the procedure. Recognition is subject to a public policy exception that allows a bankruptcy court to deny recognition "if the action would be manifestly contrary to the public policy of the United States."[27] This exception, however, has been described as "narrow" and intended only for "exceptional circumstances concerning matters of fundamental importance for the United States."[28] No creditor has successfully challenged recognition based upon the public policy exception.

Helping Clients Achieve Recognition of Their Foreign Proceeding

Achieving recognition starts by gathering information about the debtor's connection to the country where the foreign proceeding is pending. The

[22] *Id.* at § 1516(a) (providing that if the decision commencing the foreign proceeding and appointing the foreign representative or the certificate of the foreign court affirming the foreign proceeding's existence and the appointment of the foreign representative "indicates that the foreign proceeding is a foreign proceeding and that the person or body is a foreign representative," the US bankruptcy court may so presume.); *See id.* at § 1516(b) (The availability of this presumption highlights the need for early coordination with foreign counsel for the debtor. The US bankruptcy court may also presume that the documents submitted in support of the petition are authentic.).
[23] *Id.* at § 1502(5).
[24] H. Report No. 109-31, at 133 (2005), *reprinted in* 2005 U.S.C.C.A.N. 175-76.
[25] *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 50 (Bankr. S.D. N.Y. 2008)..
[26] 11 U.S.C.A. § 1502(2) (West 2012).
[27] *Id.* at § 1506.
[28] *In re Ran*, 607 F.3d 1017, 1021 (5th Cir. 2010).

foreign representative must prove the requirements for recognition[29] by a preponderance of the evidence.[30] Although recognition may be achieved by showing that the debtor only has an establishment where the foreign proceeding is pending, counsel can make information-gathering easier by first explaining to the client the concepts of center of main interests and establishment and by identifying the kind of evidence that might lead to a finding of either. Due to logistics, language barriers, or the need to act quickly, the client sometimes is the attorney's primary source of information concerning the debtor and its relationship to the country where the foreign proceeding is pending. Independent investigation of the debtor is often limited to the most rudimentary checks.

The breadth of the inquiry depends on whether recognition is being sought as a foreign main or a foreign nonmain proceeding. If the client insists that its foreign insolvency proceeding is pending in the location of its center of main interests and therefore the foreign insolvency proceeding should be recognized as a foreign main proceeding, the inquiry must be broader. The initial client interview should attempt to identify all the places where the debtor conducts its business or, in the case of an individual, all the places where the debtor maintains a residence. All the places identified are potential locations for the center of main interests. If multiple countries are identified, the attorney must understand the debtor's connection to each country identified, not just the country where the foreign insolvency proceeding is pending, to properly assess if recognition as a foreign main proceeding is likely.

If the foreign proceeding is pending in the country where the debtor has its center of main interests, it can be recognized as a foreign main proceeding,[31] satisfying Section 1517(a)(1).[32] "Center of main interests" is not defined in the Bankruptcy Code. The Bankruptcy Code does provide that, absent countervailing evidence, the debtor's registered office or an individual's habitual residence is presumed to be the debtor's center of main interest.[33] But the

[29] H. Report No. 109-31, at 112-13 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 175; *see e.g., In re Ran*, 607 F.3d. at 1021 (citing *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 334 (S.D. N.Y. 2008)); *In re Tri-Continental Exchange Ltd.*, 349 B.R. 627, 635 (Bankr. E.D. Cal. 2006).
[30] *In re Betcorp Ltd.*, 400 B.R. 266, 285-86 (Bankr. D. Nev. 2009).
[31] *Id.* at § 1502(4).
[32] *See* 11 U.S.C.A § 1517(a) (West 2012).
[33] *.Id.* at § 1516(c).

presumption, as Section 1516 suggests, is rebuttable and does not shift the burden to those opposing recognition.[34] The statutory presumption "may be of less weight in the event of a serious dispute,"[35] but even where there are no objections to recognition as a main proceeding, the foreign representative may still be required to put on proof to address questions raised by the court.[36] Courts do not consider recognition a "rubber stamp exercise."[37]

International sources must be considered when interpreting Chapter 15 terms, such as center of main interests,[38] which comes from the Model Law on Cross-Board Insolvency. The UNCITRAL Legislative Guide on Insolvency Law (UNCITRAL Guide) defines the term as "the place where the debtor conducts the administration of its interests on a regular basis and that is therefore ascertainable by third parties."[39] The definition "generally equates with the concept of a 'principal place of business' in United States Law."[40] Several factors, either standing alone or taken together, may be relevant to determining the center of main interest, including:

> the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.[41]

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[34] FED. R. EVID. 301 ("[T]he party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.")

[35] *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D. N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D. N.Y. 2007).

[36] *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 126 (Bankr. S.D. N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D .N.Y. 2008).

[37] *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 40 (Bankr. S.D. N.Y. 2008).

[38] *See* 11 U.S.C.A. § 1508 (West 2012) ("[T]he court shall consider its international origin, and the need to promote an application of similar statutes adopted by foreign jurisdictions.")

[39] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL), LEGISLATIVE GUIDE ON INSOLVENCY LAW, at 4, U.N. Sales No. E.05.V.10 (2005) *available at* http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf (citing European Council Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings, recital 13.).

[40] *In re Tri-Continental Exchange Ltd.*, 349 B.R. 627, 634 (Bankr. E.D. Cal. 2006).

[41] *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D. N.Y. 2006), *aff'd*, 371 B.R. 10

The debtor's type and place of incorporation can also be factors. For example, notwithstanding incorporation as an "exempted company" under Cayman Islands law and despite having a registered office there, the center of main interests might lie elsewhere, because operations of an exempted company under Cayman Islands law must be conducted mainly outside of the Islands.[42]

The Bankruptcy Code also does not define "habitual residence." This phrase is interpreted almost identically to the concept of domicile in the United States.[43] Habitual residence "largely depends on whether the debtor intends to stay in the location permanently."[44] Other considerations include "(1) the length of time spent in the location; (2) the occupational or familial ties to the area; and (3) the location of the individual's regular activities, jobs, assets, investments, clubs, unions, and institutions of which he is a member."[45]

If the jurisdiction of the foreign proceeding is not the debtor's center of main interests and, therefore, recognition as a foreign main proceeding is inappropriate, the question becomes whether the foreign proceeding can be recognized as nonmain. A "foreign nonmain proceeding" is "a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment."[46] The Bankruptcy Code does define "establishment," which is "any place of operations where the debtor carries out a non-transitory economic activity."[47] According to the UNCITRAL Guide, an establishment is essentially "a place of business, which is not necessarily the center of main interests."[48]

The relevant time period of the debtor's connection to the country where the foreign proceeding is pending may be an open question. The debtor's connection to the foreign country might have changed over the years, being stronger in some years than in others. A few reported decisions have held

(S.D. N.Y. 2007).

[42] *In re Basis Yield Alpha Fund (Master)*, 381 B.R. at 48-49; *see also In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 129-30 (Bankr. S.D. N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D .N.Y. 2008). (finding interests of Cayman Islands exempted limited liability companies conducted in the United States).

[43] *In re Ran*, 607 F.3d 1017, 1022 (5th Cir. 2010).

[44] *Id.*

[45] *Id.*

[46] 11 U.S.C.A. at § 1502(5) (West 2012).

[47] *Id.* at § 1502(2).

[48] UNCITRAL, *supra* note 39, at 42.

that the connection should be examined as of the date of the filing of the Chapter 15 petition,[49] but events following the filing of the petition might also be considered,[50] so the attorney must inquire about any anticipated changes to the connection. Even other time periods might be considered "where there may have been an opportunistic shift to establish [center of main interests]."[51] More recently, a court has held that "[t]he substantive date for the determination of the . . . [center of main interests] issue is at the date of the opening of the foreign proceeding for which recognition is sought."[52]

Developing an Effective Chapter 15 by Focusing on Timing and the Relief Required

The initial step in developing an effective Chapter 15 case, as discussed above, is addressing the issues of recognition and whether the foreign proceeding is entitled to comity and cooperation from United States courts. In the event recognition appears likely, the next step is determining what cooperation is required from the United States courts and, perhaps more importantly, when it is needed. The timing of a Chapter 15 petition can be critical, given notice requirements and the heightened standards for relief before recognition. Consideration should also be given to the relief that may be available following recognition.

Timing and Provisional Relief

Chapter 15 requires a petition for recognition to "be decided upon at the earliest possible time,"[53] but the decision comes only "after notice and a hearing"[54] Under Rule 2002, notice of the petition for recognition must be given by mail at least twenty-one days prior to the hearing on the petition.[55]

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[49] *In re Ran*, 607 F.3d 1017, 1025-26 (5th Cir. 2010); *In re Betcorp Ltd.*, 400 B.R. 266, 290-91 (Bankr. D. Nev. 2009).
[50] *In re British American Ins. Co. Ltd.*, 425 B.R. 884, 910 (Bankr. S.D. Fla. 2010) (advocating examining the connection as of a date as close as possible to the date of the recognition hearing).
[51] *In re Fairfield Sentry Ltd.*, 440 B.R. 60, 66 (Bankr. S.D. N.Y. 2010).
[52] *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 72 (Bankr. S.D. N.Y. 2011) (rejecting the examining of the connection as of the date of the petition for recognition because the date of the petition can be "a matter of happenstance").
[53] 11 U.S.C.A. § 1517(c) (West 2012).
[54] *Id.* at § 1517(a).
[55] FED. R. BANKR. P. 2002(q).

Section 1520 specifies the effects of recognition, and Section 1521 lists the relief that may be granted upon recognition.[56] Relief is not granted automatically upon the filing of the petition. In considering timing, therefore, the client must determine if comity and cooperation from the United States court can await the outcome of a recognition hearing that will not take place until at least twenty days following the filing of the petition.

If twenty days is too long to wait for relief, the foreign representative may request provisional relief pending recognition, including:

- a stay of execution against the debtor's assets;[57]
- an order "entrusting the administration or realization of all or parts of the debtor's assets located in the United States to the foreign representative or another person authorized by the court;"[58]
- a suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor;[59]
- an order authorizing "the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, rights, obligations or liabilities;"[60] and
- an order granting any rights that could be exercised by a trustee with the exception of avoidance powers.[61]

The list found in Section 1519, which addresses the relief that may be granted upon the filing of a petition for recognition, is non-exhaustive.[62] The UNCITRAL Guide describes the relief that may be available upon application for recognition under the Model Law on Cross-Border Insolvency as "somewhat more narrow" than the relief that may be granted upon

[56] *See* 11 U.S.C.A. §§ 1520, 1521.
[57] *Id.* at § 1519(a)(1).
[58] *Id* at § 1519(a)(2).
[59] *Id* at §§ 1519(a)(3), 1521(a)(3).
[60] *Id* at §§ 1519(a)(3), 1521(a)(4).
[61] *Id* at §§ 1519(a)(3), 1521(a)(7).
[62] *In re Ran*, 607 F.3d 1017, 1021 (5th Cir. 2010). (holding 1519 contains a "non-exhaustive list of relief available to a foreign proceeding's representative in a Chapter 15"); *In re Pro-Fit Holdings Ltd.*, 391 B.R. 850, 866 (Bankr. C.D. Cal. 2008); *see also In re Vitro, S.A.B. de C.V.*, 455 B.R. 571, 579 (Bankr. N.D. Tex. 2011).

recognition.[63] Elsewhere, however, the UNCITRAL Guide provides that, other than being restricted to "urgent and provisional measures," the relief available pre-recognition and post-recognition "are essentially the same."[64]

As suggested by the UNCITRAL Guide, there are limitations to provisional relief. The showing required for relief prior to recognition is more exacting, the duration of the relief is finite, and the relief may be conditioned, modified, or terminated. Relief that may be granted is limited to relief that "is urgently needed to protect the assets of the debtor or the interests of creditors." Section 1519(e) further provides that "[t]he standards, procedures, and limitations applicable to an injunction shall apply to relief [granted prior to recognition]."[65] But despite its plain language, Section 1519(e) has been held to apply only where the relief being sought before recognition is injunctive relief,[66] and even in the case of injunctive relief, not all procedures may be applicable in a Chapter 15 filing. For example, under Rule 7001(7), "a proceeding to obtain an injunction or other equitable relief, except when a Chapter 9, Chapter 11, Chapter 12, or Chapter 13 plan provides for the relief" is an adversary proceeding,[67] but Rule 1018, which governs contested petitions commencing Chapter 15 cases, does not include Rule 7001 as one of the applicable Part VII rules.[68]

Although it may be extended, relief granted before recognition "terminates when the petition for recognition is granted."[69] Provisional relief in the form of an injunction granted before recognition would be subject to the time limits found in Rule 65 with the result that a temporary restraining order may not exceed fourteen days.[70] Consequently, when provisional relief includes injunction relief, to avoid any time gap, two court hearings may be necessary before the hearing on recognition: one hearing on the request for a temporary restraining order, and a second hearing on the request for a preliminary injunction.

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[63] UNCITRAL, *supra* note 39, at 341.
[64] *Id.* at 342.
[65] 11 U.S.C.A. § 1519(e) (West 2012).
[66] *In re Pro-Fit Int'l Ltd.*, 391 B.R. at 861.
[67] FED. R. BANKR. P. 7001(7).
[68] *Id.* at 1018; *see also In re Ho Seok Lee*, 348 B.R. 799, 801 (Bankr. W.D. Wash. 2006) (granting post-recognition injunction relief on a motion).
[69] 11 U.S.C.A. at § 1519(b).
[70] FED. R. BANKR. P. 7065; FED. R. CIV. P. 65(b)(2).

The timing limitation applicable to injunctive relief has necessitated a creative approach to enjoining actions against the debtor's property before recognition. One court has held that a provisional request for application of the automatic stay of 11 U.S.C. § 362 is not injunctive relief and, therefore, the standards applicable to injunctions do not apply.[71]

Provisional relief is permissible only "if the interest of the creditors and other interested entities, including the debtor, are sufficiently protected."[72] The court may condition the relief, including requiring the "giving of security or the filing of a bond."[73] Relief granted before recognition may be modified or terminated upon request by the foreign representative or by an entity affected by the relief or the court's own initiative.[74]

Timing and Relief Following Recognition

Following recognition, the relief available and the timing for such relief depends on whether the foreign proceeding is recognized as a foreign main or foreign nonmain proceeding. Section 1520 contains relief available only in the case of foreign main proceedings.[75] The moment the foreign proceeding is recognized as a main proceeding, the automatic stay of 11 U.S.C. § 362 applies to the debtor, and the automatic stay and adequate protection provisions of the Bankruptcy Code apply to the debtor's property located within the territorial jurisdiction of the United States.[76] Recognition as a foreign main proceeding also automatically grants the foreign representative authority to operate the debtor's business and to exercise the rights and powers of a trustee under Section 363 regarding the use, sale or lease of property; and under Section 552, regarding post-petition effect of security interests.[77] Property of the debtor located within the territorial jurisdiction of the United States and transfers related to such property are made subject to Sections 363, 549, and 552.[78]

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[71] *See In re Pro-Fit Holdings Ltd.*, 391 B.R. 850, 867 (Bankr. C.D. Cal. 2008).
[72] 11 U.S.C.A. § 1522(a) (West 2012).
[73] *Id.* at § 1522(b).
[74] *Id.* at § 1522(c).
[75] *Id.*at § 1520.
[76] *Id.* at § 1520(a)(1).
[77] *Id.* at 1520(a)(3).
[78] 11 U.S.C.A. §§ 1520(a)(2), (a)(4).

Recognition as a foreign nonmain proceeding does not include any "automatic" relief; rather, the foreign representative must seek relief under Section 1521.[79] Therefore, to prevent a delay in relief, foreign representatives should consider requesting a hearing on Section 1521 relief to coincide with the hearing on recognition. This approach is advisable whether recognition is expected as a foreign main or foreign nonmain proceeding. Section 1521 relief is available to both foreign main and nonmain proceedings.[80] Although in some instances, the relief authorized under Section 1521 is duplicative of the relief that automatically applies to a foreign main proceeding under Section 1520,[81] Section 1520 includes unique relief as well. For instance, relief under Section 1521 is discretionary with the court.[82] To obtain relief under Section 1521, the relief must be "necessary to effectuate the purpose of . . . [Chapter 15] and to protect the assets of the debtor or the interests of creditors."[83] Like provisional relief before recognition, the relief is permissible "only if the interest of the creditors and other interested entities, including the debtor, are sufficiently protected,"[84] and the court may condition the relief on the posting of security or a bond.[85] Section 1521 relief is also subject to modification or termination upon the request of the foreign representative or an entity affected by the relief or the court's own initiative.[86]

Conclusion

Recognition of the foreign insolvency proceeding is the primary goal of a Chapter 15. Recognition grants access to the United States courts. Denial of recognition can effectively prevent a foreign representative from obtaining any relief on behalf of a debtor in the United States. Therefore, the first consideration in a Chapter 15 is whether recognition of the foreign insolvency proceeding is likely. To achieve recognition, the debtor at a minimum must have an establishment where the foreign insolvency proceeding is pending. An establishment includes "any place of operations where the debtor carries out a non-transitory economic activity."

[79] *Id.* at § 1521.
[80] *Id.*
[81] *See e.g. id.* at § 1521(a)(1), (a)(2), (a)(3) (limiting relief to the extent not already provided for under section 1520(a)).
[82] *In re Condor Ins. Ltd.*, 411 B.R. 314, 317 (S.D. Miss. 2009)
[83] 11 U.S.C.A. § 1521(a)(1) (West 2012).
[84] *Id.* at § 1522(a).
[85] *Id.* at § 1522(b).
[86] *Id.* at § 1522(c).

Recognition of the foreign insolvency proceeding can be either as a foreign main proceeding or as a foreign nonmain proceeding. If the debtor has no more than an establishment in the place where the foreign insolvency proceeding is pending, the foreign insolvency proceeding is recognized as a foreign nonmain proceeding. If the debtor has its center of main interests, which is similar in concept to principal place of business, where the foreign insolvency proceeding is pending, the foreign insolvency proceeding is recognized as a foreign main proceeding. The type of recognition, foreign main or foreign nonmain, dictates whether any relief is granted automatically upon recognition.

Once the requirements for recognition are evaluated and recognition is determined to be likely, the focus should shift to what cooperation is required from the United States court and when is it needed. Timely relief is the key to an effective Chapter 15. No relief is granted automatically upon the filing of a petition under Chapter 15, and because a hearing on recognition requires twenty days' notice, timing of the petition is important. Relief may be granted pending recognition, but such relief is limited to that "urgently needed to protect the assets of the debtor or the interests of creditors." Upon recognition, certain relief is granted automatically to foreign main proceedings. Relief for foreign nonmain proceedings and relief beyond that granted automatically to foreign main proceedings is discretionary with the court and limited to relief "necessary to effectuate the purpose of . . . [Chapter 15] and to protect the assets of the debtor or the interests of creditors."

Key Takeaways

- Begin the Chapter 15 filing process by addressing the issue of recognition, determining whether the foreign proceeding is entitled to comity and cooperation from United States courts. Gather information about the debtor's connection to the country where the foreign proceeding is pending, focusing on both when the foreign proceeding was filed and the anticipated date of the Chapter 15 petition. Inquire about any recent changes, positive or negative, in the connection to the foreign country.
- In the initial interview, explain to the client the concepts of both center of main interests and establishment and also explain the differences between the relief granted to a recognized foreign main proceeding and the relief granted to a recognized foreign nonmain proceeding.

- If recognition as a foreign main proceeding is sought, inquire about the debtor's connection to countries other than where the foreign insolvency proceeding is pending. In the case of an entity, the inquiry should extend to all countries where the debtor conducts business. In the case of an individual debtor, the inquiry should extend to all countries where the debtor maintains a residence.
- Be aware of the factors that may be relevant to determining the center of main interests, including the location of the debtor's headquarters; the location of those who actually manage the debtor; the location of the debtor's primary assets; the location of the majority of the debtor's creditors; and the jurisdiction whose law would apply to most disputes.
- Keep in mind that the timing of a Chapter 15 petition can be critical, given the notice requirements and the heightened standards for relief prior to recognition. Explore what relief may be necessary prior to recognition, and evaluate whether such relief is urgently needed to protect the assets of the debtor or the interests of creditors.
- If relief prior to recognition is necessary to protect assets, consider whether imposition of the automatic stay might be a better alternative to seeking injunction relief.

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