

The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

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

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am an Attorney in private practice in Union City, Tennessee.

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

1988; 013345

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; Oct. 26th, 1988; 013345; active
Texas; Nov. 1st, 1991; 14046250; inactive. Shortly after returning to practice law in Tennessee, I took inactive status in Texas.

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

No, I voluntarily took inactive status in Texas when I resumed my practice in Tennessee in 1997.

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).

Upon completion of my law degree from Southern Methodist School of Law, I returned to Tennessee where I practiced law with my Father, C.W. Miles, III, from 1988 until 1992. In 1992 I moved to Houston, Texas where I served as a prosecuting attorney in the Harris County District Attorney's office for four and one-half years. I returned to Tennessee in 1997 where I have been in continuous practice ever since. The breadth of my experience is set forth in item number 8 below.

In terms of my other experience, upon Graduation from Vanderbilt School of Engineering in 1982, I worked as a design Engineer for Chevron Oil Company in New Orleans, LA before returning to Vanderbilt to earn my MBA with a dual concentration in finance and accounting.

In May of 2000 I was elected to serve as a Director with First State Bank in Union City,

Tennessee, where I continued to serve until the bank's merger with Simmons Bank on September 7, 2015. During my time with First State Bank I served as Chairman of the Subsidiary Committee and also served on the Compliance Committee overseeing the banks compliance with numerous State and Federal banking 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.

N/A

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.

Domestic Relations – 52%
Personal Injury – 15%
Probate, Wills, Estates – 14%
Criminal – 10%
Mediation – 5%
Transactional Work – 4%

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.

Listed below, in alphabetical order, are areas of practice and specific types of cases in which I have engaged.

Administrative Law

Administrative Law actions with the EPA, Department of Children's Services
Administrative Procedures, Forfeiture Warrants, The Tennessee Wildlife Resources

Commission

Civil

Actions to set aside Fraudulent Conveyances, Collections, Condemnation Actions, Conservatorships, Constructive Trusts, Consumer Protection Actions, Contract Disputes, Declaration of Rights Actions, Insurance Coverage Disputes, Personal Injury, Probate, Property Rights, Quantum Meruit, Slip and Fall, Social Security Disability, Subrogation, Will Contests, Workers Compensation, Wrongful Death

Criminal

Aggravated Robbery, Conspiracy to Commit Murder, Conspiracy, Cruelty to Animals, Dog Fighting, Drug paraphernalia, DUI, Murder (Prosecution and Defense), Possession of Drugs, Post-Conviction Relief Petitions, Sale of Scheduled Drugs, Sexual Assault, Theft and Weapons Charges.

Document Preparation and Transactional Work

Articles of Incorporation and Organization, Business Contracts, Deeds, Deeds of Trust, Easements, Farm Leases, Lease Agreements, Liens, Marital Dissolution Agreements, Medicare Set-aside Agreements, Parenting Plans, Releases, Settlement Agreements, Timber Contracts, Trusts, UCC-1 Filings, Wills

Family Law

Adoptions, Child Custody and Visitation, Dependency and Neglect, Divorce, Grandparent Visitation Rights, Orders of Protection and Termination of Parental Rights

As a practitioner, I have always done my own research and have never relied on others to draft my pleadings. I have handled both civil and criminal matters in the United States District Court Western Division. I have appeared before our Court of Appeals and Court of Criminal Appeals in the Western Section, and I have practiced in the circuit courts of the 16th, 24th, 25th, 26th, 27th, 28th and 29th judicial districts as well as the chancery courts of the 24th, 27th, 28th and 29th judicial districts. I arrive at work early, usually around 7:00 a.m., and work typically until 5:00 each evening, and often work from home in an office I have equipped there. In my criminal practice I have served as a prosecutor (four- and one-half years with the Harris County District Attorney's Office in Houston, Texas) and defense counsel, and, in each capacity, my jury trials include murder cases, drug charges and driving under the influence. In my civil practice, I have had jury trials for personal injury cases, both for the plaintiff and the defendant, and I would estimate well over 100 divorce cases, a vast number of child custody cases along with countless hearings on preliminary matters in both civil and criminal courts.

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

administrative bodies.

I have tried approximately 40 jury trials both civil and criminal. I have tried countless non-jury divorces and child custody matters. I have done appellate work in both our Criminal and Civil Courts of Appeal. All of my jury trials were interesting, but none of the appeals resulted in any reported precedent that I am aware of. One of the more interesting cases factually was the defense of the Pastor of the largest church in our county who was charged with attempted murder of his wife. The case got a lot of media attention, but was resolved prior to trial by a plea to a lesser included offense, wherein he received a four-year probated sentence on reckless endangerment.

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 been a Rule 31 Listed Civil and Family Mediator since 2006. During that time, I have helped numerous litigants, especially in the family law area, reach lasting mediated settlements without the necessity and financial burden of trial. The matters dealt with in mediations are confidential.

I have never presided over any case as a judge.

I was appointed by the Tennessee Supreme Court as a Hearing Committee Member for Disciplinary District VII from 2006 to 2012.

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.

I have had numerous appointments in the Circuit and Chancery Courts in the 27th Judicial District, as well as the Obion County Juvenile Court. Some of these are in the capacity of a Guardian ad Litem for incompetent persons or minors, as well as for investigation to approve proposed minor's settlements or attorney ad litem appointments to protect the rights of the elderly. I have received numerous appointments to protect the interests of children in dependency and neglect actions in Juvenile Court.

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

I was a prosecutor with the Harris County District Attorney's office in Houston, Texas where for a period of 4.5 years I went to court daily and tried over 30 jury trials, including murder,

sexual assault, sale of controlled substances, and aggravated robbery. I was assigned to the child abuse prosecution unit during part of my tenure there.

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.

None.

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.

I received a Bachelor of Engineering from Vanderbilt University graduating magna cum laude in 1982. As an undergraduate I was a member of Chi Epsilon and Tau Beta Pi engineering honor societies. I returned to Vanderbilt earning a Master's Degree in Business Administration, with a concentration in finance and accounting in 1985. I received my Juris Doctorate from Southern Methodist University in 1988, where I completed the Oxford summer program in 1986, and was the 2nd year representative for the Student Bar Association from 1986 to 1987.

PERSONAL INFORMATION

15. State your age and date of birth.

I am 59 years of age, and I was born [REDACTED] 1960.

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

I was born and raised in Tennessee and have lived in Tennessee continuously since 1997.

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

I was born and raised in Obion County and have lived in Obion County, with my wife and family, continuously since 1997.

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

Obion 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.

N/A

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.

One complaint with the Board of Professional Responsibility has been made against me. It was in 2011 by Bruce Tuck. It was dismissed by the Board.

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

No

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC,

corporation, or other business organization)?

No

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

No

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

First United Methodist Church of Union City, Positions Held: Pastor Parish Staff Committee, Finance Committee, Sunday School Teacher, Past President of the Character Builders Class

Union City Rotary Club, Current member of the Scholarship Committee and Distinguished Speaker's Committee

Obion County Chamber of Commerce Board of Directors 2011-2014, Positions Held: Board Member and Government and Legislation Vice President

Obion County Tea Party, Position Held: Chairman 2011- 2018

Main Street Union City

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 Bar Association

Obion County Bar Association, Past President 1990, 1991, 2005, 2006, 2007, and 2008, responsible for organizing our annual class for CLE credit.

Union City Planning Commission, Past Chairman

Obion County Audit Committee

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

In 2012, I received a Certificate of Appreciation from the Board of Professional Responsibility of the Supreme Court of Tennessee for my service as a hearing committee member from 2006 to 2012.

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

N/A

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.

I taught class at the University of Tennessee at Martin on Mediation, but that was more than five years ago.

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.

Appointed to the Union City Planning Commission

Appointed to the Audit Committee for the Obion County Commission

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

No

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

See attached. All work is my own.

ESSAYS/PERSONAL STATEMENTS

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

I believe judges must practice restraint when interpreting and ruling on questions of law to ensure they are not revising, rewriting, or amending the law. In my experience judges have always endeavored to do just that. Tennessee has a history of excellence in the Bar and Bench. I have always been treated fairly by trial judges and most graciously by appellate court justices. I want to elevate my involvement in our system of justice, and believe that I have the ability and temperament to do so in a manner that will be a continuance of my own experience. Though domestic relations, civil litigation, and criminal defense dominate my practice, I have not been pigeonholed into any one area, and I have a breadth of experience I hope to bring to the court.

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)*

As a sole practitioner in a small town, there is hardly a week that passes wherein I do not waive fees or provide advice at no charge based upon my own sense of what is just and fair. There is no shortage of the poor in my part of the state. Perhaps even a majority in my area, through no fault of their own, have no resources for an attorney, but they nonetheless present with circumstances meritorious of sound legal advice or services. Although I have never itemized my pro bon hours, except where I am required to, living, as I do, in a small community necessarily entails helping others on a weekly basis who lack the resources to hire an attorney, to whom I provide my services at no fee or for only a nominal one. I consider my time and advice, if sufficient for them to also be sufficient for me, given the blessings I have received in my life. My father practiced law in this way for over 50 years as did his father before him.

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 making this application seeking the appointment replacing Judge Gibson for the Western

Section Court of Appeals. As you know, there are twelve judges of the Court of Appeals, and no more than four may reside in the same grand division. Judge Gibson resides in the Western Division of the state, as do I.

My background in engineering has always been helpful in constructing my arguments as a trial lawyer, and I believe it would enhance my ability to draft well-reasoned opinions as a judge. I view my impact as one of a continuance of competent service from an experienced practitioner who would be respectful of those that come before the court and provide the careful diligence, they have come to expect from appellate review of the issues raised.

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)*

I taught The Senior High class at First United Methodist Church in Union City for several years. I am an active member and teacher of my own Sunday School class which provides tens of thousands of dollars annually to local charities and people in need. I am actively involved in the Union City Rotary Club, which has provided millions of dollars in scholarships to area students, brings distinguished speakers to the area to address high school students and conducts the areas best annual track and field event, the "Rotary Relays". I served a term of three years as a Director of the Obion County Chamber of Commerce. I presently serve on the Union City Planning Commission and am a member of the Audit Committee for the Obion County Commission.

In 2017 I was a speaker at a hearing conducted by the Tennessee Advisory Committee to the U. S. Commission on Civil Rights.

In 2011 I helped organize the Obion County Tea Party with a goal of providing a resource for area residents interested in restoring the functioning of government as originally intended. We have organized public events that were widely attended. In one case we had a capacity crowd at our civic auditorium which holds over 900 people. Presently I am leading an introductory class on the U. S. Constitution at our monthly meetings.

If appointed, I envision going into area High Schools and making presentations based on Bastiat's essay on The Law, illuminating the proper function of the law.

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)*

In over thirty years of practice, I have tried everything from a traffic tickets to "DUI" s to murder cases. I have tried personal injury lawsuits, will contests, property disputes, and countless divorces and child custody cases.

As a sole practitioner, I am the rainmaker, the compliance officer, the business manager, and producer all in one. I am the risk taker, the researcher, the draftsman, and the counselor. In his relations with his client and the public at large, the Sole Practitioner is the defender and the

protector of rights, the advocate, the strategist, the educator, the rationalist, the communicator, the peacemaker, the prayer-leader, the oddsmaker, the diplomat and sometimes the umpire. In his role with the court he is the historian, the wordsmith, the promise keeper, the comedian, and the straight man. In the process of litigation, he can be a trailblazer and an architect, but in the observance of his duty of candor to the court, he is sometimes also called upon to discredit the very authority that he had hoped to rely on.

I have learned firsthand that while you seldom represent the perfect lamb, rarely is your client entirely a goat, and all litigants should be treated justly. There are times in the litigation process, when attorneys are called upon to be the quarterback, but others when the better role is that of a "pulling guard." I would like to bring this background from the bar to the bench.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. *(250 words or less)*

Yes.

Licensed attorneys are charged to zealously represent their clients within the bounds of the law. In so doing they must make arguments under the existing law, but can make good faith arguments for the logical extensions thereof. The role of a judge is to see that the law has been correctly interpreted, impartially applied to the facts, and to ensure that each side was provided with due process to appear and present the relevant facts of their case. This is the most perfect of all imperfect means to see that justice is done. Judges are not law makers, rather they are those entrusted to follow the law as written and as intended by the drafters.

In my practice, I have not favored the areas of administrative law because I have questioned their constitutionality and challenged them on separation of powers and due process grounds. I have made these challenges in my pleadings when the opportunity arises. I have made presentations to interested groups about ways to improve the approach to the problem, but in the meantime, we must all operate within the rules of the administrative body.

Our Supreme Court will, on occasion, issue rulings modifying common law as it did in *Davis v. Davis*, (1983) overruling the longstanding doctrine of interspousal immunity, or in *Planned Parenthood v. Sundquist*, (2000) which elevated abortion rights to a fundamental right. Our Supreme Court is entrusted with this authority whereas the inferior courts are not.

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.

W. Michael Maloan
Chancellor for the 27th Judicial District
116 West Main Street, Suite 300, Dresden, TN 38225
Office: [REDACTED]

Andy Holt
Representative for State House District 76
461 Jewell Store Road, Dresden, TN 38225
Office: [REDACTED]
Cell: [REDACTED]

Charles Anthony Maness
Attorney
505 South Third Street, Union City, TN 38261
Office: [REDACTED]

Leslie Ballin
Attorney
One Memphis Place
200 Jefferson Avenue, #1250, Memphis, TN 38103
Office: [REDACTED]

John Clark
Retired Banker
215 Rambo Road, Sharon, TN 38255
Cell: [REDACTED]

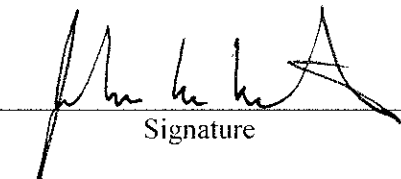
AFFIRMATION CONCERNING APPLICATION

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

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

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

Dated: February 12, 2019.


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.

John M. Miles

Type or Print Name

Signature

February 12, 2019

Date

013345

BPR #

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

State Bar of Texas - Bar # 14046250

**IN THE 27TH JUDICIAL DISTRICT OF THE STATE OF TENNESSEE
WEAKLEY COUNTY CHANCERY DIVISION**

JERRY W. POLLARD and JANICE A. BYARS,

Plaintiffs,

VS.

Civil Action No.: 22,935

**ESTATE OF CARTEL DUANE WHEELER;
LINDA DIANE CRENSHAW, EXECUTOR OF
THE ESTATE OF CARTEL D. WHEELER;
LINDA DIANE CRENSHAW; LARRY POLLARD,**

Defendants.

IN RE:

ESTATE OF CARTEL DUANE WHEELER,

Civil Action No. 22,423

Deceased.

AMENDED MOTION FOR SUMMARY JUDGMENT

COME NOW the Defendants and pursuant to Rule 56.02 of the Tennessee Rules of Civil Procedure and move this Honorable Court for a summary judgment in their favor. In support of this motion, they submit the deposition testimony of each of the Plaintiffs, Jerry Pollard and Janice Byars, the deposition testimony of the Honorable Jeff Parham, the interrogatory responses of Jerry Pollard and the interrogatory responses, as well as the supplemental interrogatory responses of Janice A. Byars, which have all been filed with the Court, in cause number 22,423. The Affidavits of Mike Freeman, Kenneth Rogers, Kenneth Rogers, Jr., Dan Shanklin, and Dr.

Michael Hinds are attached hereto as **Exhibit A**.

This is a probate matter in which Plaintiffs Jerry Pollard and Janice Byars contest the admission to probate of a will and codicil of the decedent, Carthel Duane Wheeler, the will having been executed on December 9, 2005, and a first codicil thereto executed April 1, 2008. The Plaintiff/Contestants have asserted that the will of December 9, 2005, and the first codicil thereto of April 1, 2008, are invalid for a number of reasons, including an allegation that the Testator, Carthel Duane Wheeler, lacked testamentary capacity when he signed the will on December 9, 2005, and again on April 1, 2008 when he executed the codicil. Contestants claim he was of infirm mind and suffered from physical ailments, including an alleged stroke in the early 2000's, and alleging undue influence on the part of Linda Diane Crenshaw in the making of the will of December 9, 2005, and the codicil of April 1, 2008. Finally, the Contestants allege undue influence by Linda Diane Crenshaw and Larry Pollard as a consequence of an alleged confidential family relationship and degraded mental status of Carthel Duane Wheeler, the Testator, again alleging Mr. Wheeler had a stroke in the early 2000's and that Linda Diane Crenshaw and Larry Pollard had taken advantage of him.

The Plaintiffs and the Defendants are step-children of the decedent. Jerry Pollard was an equal beneficiary with Larry Pollard, Susie Henley and Linda Diane Crenshaw under the December 9, 2005 will, but Jerry Pollard was excluded as a beneficiary by virtue of the April 1, 2008 codicil. Janice Byars is not a beneficiary under either document.

In their complaint, the Plaintiffs assert that a November 2003 will of Carthel Duane Wheeler is the valid and effective will of the Decedent; however, they have not produced any such will or any copy or evidence to establish it.

During this litigation, the Defendants provided to the Plaintiffs a copy of a will from January 4, 1988, which had ^{been} given the Defendants from the Decedent's accountant, Art Sparks. A copy of that document was made exhibit 5 to the deposition of Judge Jeff Parham. By its language, it purports to be a will by ^{C. D.} CD Wheeler executed January 4, 1988. There is a codicil attached which is dated October 6, 2003. One of the witnesses to the codicil was Jeff Parham. After diligent search, no one has located the original of either document. Mr. Sparks gave the copy to Diane Crenshaw after this litigation began, but he did not have an original.

The Plaintiff, Jerry Pollard, testified that had never seen the 1988 will or the 2003 codicil until June 1, 2016 when the deposition of Judge Jeff Parham was taken and those documents were produced at that time. He testified he did not have the originals and did not know of their existence before June 1, 2016. *Deposition testimony of Jerry Pollard, page 38-40.* When Jan Byars was asked if she had an original or copy of any will or codicil other than the ones that were offered for probate, "no, I do not." *Deposition of Jan Byars, page 32.* When she was further questioned about whether she had a prior original will of any kind she testified, "I do not." *Deposition of Jan Byars, page 33.*

Below are statements of undisputed facts in support of this motion. The statements of undisputed facts are set forth numerically below followed by supporting references in the record.

Statements of Undisputed Fact

1. **The Plaintiffs are the step-children of the decedent and therefore are not heirs at law.** (Please see numerical paragraph 6 on page 3 of the Plaintiff's complaint.)
2. **The only original will and codicil of the decedent are those originals which are probated by Defendants, the same being a will dated December 9, 2005, along with the**

codicil thereto dated April 1, 2008.

Though in their Complaint the Plaintiffs assert that a November 2003 will of Carthel Duane Wheeler is the valid and effective will of the decedent, they have not produced that will or any alternative will or codicil to the ones offered for probate. There is no evidence that such a will exists. When the Plaintiff, Jerry Pollard, was questioned whether he had an original will or codicil of any kind, he testified he had a copy of the 2005 will and a copy of the 2008 codicil being the same which were admitted to probate. When questioned about the 1988 will and the 2003 codicil thereto, Jerry Pollard stated he did not have originals of those and did not know of their existence before his testimony on June 1, 2016. *Deposition of Jerry Pollard, pages 37-40.*

When Jan Byars was asked if she had an original or copy of any will or codicil other than the ones that were offered for probate, “no, I do not.” *Deposition of Jan Byars, page 32.* When she was further questioned about whether she had a prior original will of any kind she testified, “I do not.” *Deposition of Jan Byars, page 33.*

In her responses to supplemental interrogatories, the Plaintiff, Janice A. Byars, has testified that prior to Judge Jeff Parham’s deposition (which was taken on June 1, 2016) she had never seen an original or copy of the 1998 will or 2003 codicil. *Plaintiff’s Supplemental Interrogatory Responses, a copy of which is attached hereto and the original filed with the Court.* Exhibit 5 to Judge Parham’s deposition was a copy of the will from January 4, 1988, as altered by codicil of October 6, 2003.

In one of the Requests for Production of Documents propounded upon both Janice Byars and Jerry Pollard, they were asked to provide copies of the originals of any drafts, notes, letters, of the testator or contracts, trust indentures, payable on death designations, stock transfer receipts

showing recent transfers, and anything else relevant to proving or disproving issues in a will contest. Each of them responded that there was none. *See Request for Production of Document Number 3 of Janice Byars and Jerry Pollard.*

Both Janice Byars and Jerry Pollard in Request for Production of Documents propounded on each of them were asked to produce a copy of any document or documents that they maintain constituted the last will and testament of the decedent in both cases their response was “None.” *See Request for Production of Document Number 4 of Janice Byars and Jerry Pollard.*

3. There being no competent evidence to the contrary, it is an undisputed fact that Carthel Wheeler was of sound mind and disposing memory and was therefore possessed of testamentary capacity at the time of the execution of the December 9, 2005 will and codicil of April 1, 2008.

Though, in their Complaint, the Plaintiffs allege that Carthel Wheeler lacked testamentary capacity by reason of his infirm mind and physical ailments, they have offered no positive evidence to either of these facts. Though in the Complaint it is alleged the decedent suffered a stroke in the early 2000’s, the Plaintiffs have offered no evidence on that matter and, in fact, the Plaintiff, Jerry Pollard, when questioned about this in his deposition, stated he only had anecdotal reports. *Deposition of Jerry Pollard, pages 14-17 and pages 21-23.* When asked directly whether he had any evidence that Mr. Wheeler had a stroke in the early 2000s as alleged in his Complaint, the Plaintiff Jerry Pollard stated, “no, sir”. *Deposition of Jerry Pollard, page 36.* The only information the Plaintiff, Jan Byars, had on the matter of whether or not Carthel Wheeler had a stroke in the early 2000s, according to her deposition testimony, was that it was information her mother gave her. When asked whether she observed anything in Mr. Wheeler that would cause

her to believe that he had suffered from memory and recognition problems around December 9, 2005, she stated she did not remember. When asked about the allegation about Carthel Wheeler's hospitalization in Jackson Madison County General Hospital, which she had previously testified was sometime between 1998 and 2000, and specifically whether or not it was her mother who was in fact admitted to Jackson Madison County General Hospital rather than her step-father, Jan Byars testified, "I know she was admitted during that time, too, and I could be mistaken." When pressed further and questioned, "You think you could be mistaken that hospital stay you are saying was your step-father was your mother?" Her answer was, "It would have probably been mom's; yes." *Deposition of Jan Byars, pages 37-38.*

Attached hereto as **Exhibit B** are responses we received from Regional Hospital of Jackson and Jackson Madison County General Hospital after inquiry of them as to whether or not they had any records at their facility for Carthel Duane Wheeler. Both facilities certified to Mrs. Crenshaw that they had no records of any treatment of him as either facility.

According to the testimony of the Honorable Jeff Parham, who not only witnessed the execution of Mr. Wheeler's will but also submitted it for probate, Mr. Wheeler was a decisive individual and at the time of the execution of both the will and codicil, he was of sound mind. *Deposition of Jeff Parham, pages 5-7 and pages 10-11.* Mr. Parham testified that while physically Mr. Wheeler was elderly, he observed no mental ailments at the time of the execution of the will or the codicil. *Deposition of Jeff Parham, page 11. See also Exhibits 1 and 2 to the deposition of Jeff Parham.*

According to the testimony of Mr. Parham, though all the Plaintiffs and Defendants are the step-children of Mr. Wheeler, there was disparate treatment by them in his will and codicil

which Mr. Parham explained was due to the fact Mr. Wheeler was upset because those children and their children did not come see their mother or grandmother as often as he would like, and he went on to explain Mr. Wheeler simply did not like Jan, and was in fact “scared of Jan” and was adamant in that regard. *Deposition of Jeff Parham, pages 13-17 and pages 32-33.* (Please see also the language of both the 2005 will and the 2008 codicil.)

Again under cross-examination, Mr. Parham reiterated his belief that from Mr. Wheeler’s perspective, his step-son, Jerry Pollard, was excluded as a residuary beneficiary because Mr. Wheeler did not believe Jerry came to visit Ella Mae (his mother) enough. *Deposition of Jeff Parham, page 42.*

When asked whether or not he observed any infirmity such as memory and recognition problems effecting his ability to understand the identity of the natural objects of his bounty and the nature of his assets, Mr. Parham stated, “No.” When specifically asked whether Mr. Wheeler knew where his money was, Mr. Parham stated, “Carthel Wheeler knew every penny he had at any given time.” When asked did he know what his real estate consisted of, Mr. Parham stated, “He did.” *Deposition of Jeff Parham, pages 17-18.*

Mr. Parham was specifically asked whether he saw any evidence or knew of any fact wherein Diane Crenshaw exercised the power she held as a consequence of the power of attorney granted her by the decedent, Carthel Wheeler, in order to accomplish either the will or the codicil. He testified, “I don’t think so.” He went on to say that had he observed anything like that, he would have had a long discussion with Mr. Wheeler. *Deposition of Jeff Parham, page 18.*

Mr. Parham was specifically asked whether he observed any mental degradation that would impair Carthel Wheeler’s mental capacity in the execution of either the will or the codicil

(collective Exhibit 2 to his deposition). His answer was, "I would not have allowed him to execute the document had I not thought he was competent to do so."

Mr. Parham was specifically asked whether or not anyone had ever relayed to him whether Mr. Wheeler had ever suffered from dementia or Alzheimer, and his answer was, "Absolutely not." *Deposition of Jeff Parham, page 44*. In further support of our position, please see also the Affidavits of Mike Freeman, Kenneth Rogers, Kenneth Rogers, Jr., Dan Shanklin, and Dr. Michael Hinds attached hereto as collective **Exhibit A** to this motion.

Included in Exhibit A is an affidavit of Dr. Michael Hinds, who was Carthel Wheeler's treating physician. The language in the affidavit speaks for itself. In Dr. Hinds's affidavit, he states he was the personal treating physician for Mr. Wheeler for a period of time that would have included the December 9, 2005, and April 1, 2008, dates whereupon he executed his will and codicil that were offered and admitted to probate. According to Dr. Hinds's, during the period of time, including December 9, 2005, up through, and including, April 1, 2008, Carthel Duane Wheeler showed no signs of any mental condition of a general, continuous, chronic, or progressive nature. It was Dr. Hinds's opinion, with a reasonable degree of medical certainty, that Mr. Wheeler would have been of sound mind and disposing memory during the period of time including December 9, 2005, and April 1, 2008. Dr. Hinds went on to also opine that Mr. Wheeler would have known the nature and extent of his property and would have understood the consequences of his actions in executing a will during the same period of that time. There is no other medical evidence to the contrary in this matter.

4. **There was no confidential family relationship between the decedent, Carthel Wheeler, and either Larry Pollard or Diane Crenshaw, and there is no evidence of any**

undue influence from any such confidential family relationship.

When asked what facts he had to support his allegation that Larry Pollard and Linda Diane Crenshaw were in a confidential family relationship with Carthel Duane Wheeler at the time both documents were allegedly executed, the Plaintiff Jerry Pollard stated, "I have no facts, sir, it's only suspicions." *Deposition of Jerry Pollard, page 33.* When Jan Byars was asked what information she had that Diane Crenshaw was active in the procurement of a will, the execution of a will, or getting Carthel Wheeler's will or codicil done, Jan Byars stated she had no information concerning that. *Deposition of Jan Byars, page 24.* When asked about her allegation in the Compliant that Carthel Duane Wheeler was unduly influenced in the making of the alleged Last Will and Testament dated December 9, 2005, and the alleged Codicil of April 1, 2008, by Linda Diane Crenshaw or Larry Pollard, Mrs. Byars stated, "I have no proof of that, but I have suspicions because the one thing about Diane is that she is extremely bossy and very controlling." *Deposition of Jan Byars, pages 24-25.*

Mr. Parham testified that as far as he knew he never even met Larry Pollard until after Mr. Wheeler died. Judge Parham testified that although Diane Crenshaw brought Mr. Wheeler to his office for the 2008 codicil and probably an appointment, she absolutely did not come back into his office with Mr. Wheeler. *Deposition of Jeff Parham, page 19.* Jeff Parham testified that based upon his practice when the 2005 will was executed, he would have instructed his client (Mr. Wheeler) to either bring any prior will for him to shred it at that time, or he would have instructed Mr. Wheeler himself to destroy it. *Deposition of Jeff Parham, page 21.*

On cross-examination by Mr. Dedmon, Mr. Parham was asked whether either of the Defendants, Mrs. Crenshaw or Mr. Larry Pollard, were ever involved in his engagement on the

Wheeler's behalf to handle any of the preparation of the estate planning or estate planning documents, and he answered that other than driving him to the appointment, neither of them had any such involvement. *Deposition of Jeff Parham, pages 24-25.*

5. Though the decedent had granted to Diane Crenshaw a Power of Attorney, there is no evidence of any suspicious circumstances that would give rise to a presumption of any undue influence.

Mr. Parham testified that as far as he knew he never even met the Defendant, Larry Pollard, until after Mr. Wheeler died. Judge Parham testified that although Diane Crenshaw brought Mr. Wheeler to his office for the 2008 codicil and probably an appointment, she absolutely did not come back into his office with Mr. Wheeler. *Deposition of Jeff Parham, page 19.*

On cross-examination by Mr. Dedmon, Mr. Parham was asked whether either of the Defendants, Mrs. Crenshaw or Mr. Larry Pollard, were ever involved in his engagement on the Wheeler's behalf to handle any of the preparation of the estate planning or estate planning documents, and he answered that other than Diane Crenshaw driving him to the appointment, neither of them had any such involvement. *Deposition of Jeff Parham, pages 24-25.*

Law

Pursuant to Tennessee's Rules of Civil Procedure 56.04, a judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment all the evidence must be viewed in the light most favorable to the opponent of the motion, and all

legitimate conclusions of fact must be drawn in favor of the opponent. *Gray vs. Amos*, 869 SW 2d, 925, 926 (Tenn. Court of Appeals 1993).

To properly support its motion, the moving party must either affirmatively negate an essential element of the non-moving party's claim, or conclusively establish an affirmative defense. If the moving party fails to negate a claimed basis for the suit, the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered, and the motion for summary judgment must fail. *Staples vs. C.B.L. and Associates*, 15 SW 3d, 83, 88 (Tenn. 2000, rehearing denied).

The issue of the Plaintiffs' standing to contest falls under the law as set out in the case of *In Re.: Estate of West vs. Overhouse*, 729 SW 2d, 676 (Tenn. Appeals, permission to appeal denied, May 1987). In that case the Court held that where a prior will cannot be found, "the exclusive jurisdiction to show that it has been lost, destroyed or suppressed lies in the Chancery Court." *West* 678. The Court went on to say: "The lost will must first be established in Chancery, before a legatee under that will has standing to contest a later probated will. Then both wills may be certified to the Circuit Court for the determination of which is the will of the deceased." *West* 678. This holding in *West* has never been overruled, but was confirmed in an unreported case. *In Re.: Estate of Ferguson*, No. 01A01-9707-PB-00313 at *3, 1998 WL 161090 (Tenn.App., Apr. 8, 1998).

"[I]f standing rests upon a prior will which is lost, the prior will must be established in Chancery Court before a legatee under the prior will has standing to contest the later will." Also note that *TCA § 32-4-101*, was amended in 2002 to state that, if the validity of any will is contested, the probate court must enter an order expressly "sustaining or denying the contestant's

right to contest the will.” *Act of April 1, 2002, ch. 631, § 1, 2002 Tenn.Pub.Acts 1651, 1651-52*; see also *1 PRITCHARD § 355* (“The [probate or other court of record authorized to try contests] has no jurisdiction to certify a contest at the instance of a party having no right to make such contest. . . . The right to contest is so distinct from the contest itself that the two controversies are to be tried by different jurisdictions.”).

The probate court is authorized to hear evidence to determine whether person seeking to contest the will has standing.

[I]t may be necessary for the probate court to pass upon a question of fact, the determination of which is preliminary to certifying the contest. Thus, if the answer denies that the plaintiff would be interested in the event the will should be set aside, . . . it is necessary for the court to determine the question, upon evidence to be adduced by the parties, before it can be known whether the order removing the cause to the circuit court or otherwise setting it for trial should be made.

1 PRITCHARD § 378. A will contestant cannot establish standing without proving he would take a share or larger share if the contest is successful, and if the original prior will has been lost, the contestant must prove it was not revoked in order to proceed. *Estate of West at 677-78*; *Estate of Ferguson at *3-4*.

In order to establish the lost will, the Contestants must show:

1. The fact that the will was executed in accordance with the forms of law;
2. The substance of the contents of the will; and
3. That the will has not been revoked and that it is lost or destroyed and cannot be

found after a due and proper search; however, the fact that a will cannot be found after a due and proper search raises a presumption that the Testator himself destroyed the will. Therefore to

overcome the presumption, the one seeking to establish the lost will must prove the Testator did not have custody and control of the will after execution, or that he had lost his testamentary capacity for a period before his death and that the will was in existence at the time the loss of competency occurred. *In Re.: Estate of West*, 678, citing *Morris vs. Swaney*, 54 Tenn. 591 (1872); *Sanders vs. McClanahan*, 59 Tenn. App. 590, 442 SW 2d 664 (1969); *Haven vs. Wrinkle*, 29 Tenn. App. 195, 195 SW 2d 787 (1945) and *Shrum vs. Powell*, 604 SW 2d 869, Tenn. App. (1980).

Not one, but all of the above points must be proven by “the clearest and most stringent evidence” or “clear, cogent and convincing proof”. These stringent requirements are imposed to avoid fraud. Where a will has been destroyed, the person seeking to set it up labors under a severe handicap. *Sanders vs. McClanahan*, 442 SW 2d, 644, 677.

Proof of the existence of a confidential relationship, by itself, will not be sufficient to invalidate a will; it is not the relationship that concerns the courts, but rather the abuse of the relationship, and thus the proof of the existence of a confidential relationship must be coupled with evidence of one or more other suspicious circumstances that give rise to a presumption of undue influence. *DeLapp vs. Pratt*, 152 SW 3d, 530, 538 (2004).

Argument

The Plaintiffs, Jan Byars and Jerry Pollard, have no standing in the absence of some will bequeathing property to them from the decedent. That is, they are step-children and would not take from the decedent had he died intestate.

The 2005 will as amended by the 2008 codicil make no provision for either of the Plaintiffs.

The burden is on the Plaintiffs to establish the lost will under the provisions of the law as outlined above. They have wholly failed to do so and there is no evidence to support the establishment of the lost will.

There is no evidence of any confidential family relationship or undue influence resulting therefrom.

There is no evidence that the decedent lacked testamentary capacity when he executed the will and codicil that were admitted to probate. In fact, there is positive evidence from Dr. Michael Hinds, his treating physician, that the decedent would have had testamentary capacity at the time of the execution of the will and codicil which were each admitted to probate.

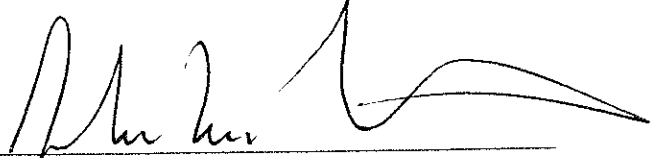
Though the decedent had extended the authority of a Power of Attorney to Diane Crenshaw, there is no evidence of any suspicious circumstances to be coupled with the relationship or authority granted thereunder and, therefore, there is no evidence to give rise to a presumption of undue influence.

Prayer

1. This Court find the Defendants have no standing to contest and therefore, as a matter of law, their action should be dismissed.
2. The Court grant partial summary judgment on the issue of the existence of any confidential family relationship or undue influence exerted therefrom.
3. The Court grant them a partial summary judgment on the issue of lack of testamentary capacity on a finding that there is no evidence that the decedent lacked the requisite testamentary capacity in the execution of either the last will and testament and codicil which were offered for probate in this matter.

4. The Court grant them partial summary judgment on the issue of any undue influence as a consequence of the existence of the Power of Attorney.

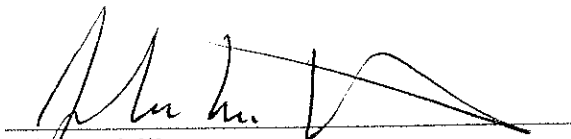
RESPECTFULLY SUBMITTED:



John M. Miles, BPR# 013345
Attorney for Defendants
511 S. Third St.
P.O. Box 8
Union City, TN 38281
(731) 885-1234

Certificate of Service

I hereby certify that I have served a copy of the foregoing upon the Honorable Dean P. Dedmon, Jenkins, Dedmon, Hayes Law Group, LLP, 111 South Mill Avenue, P.O. Box 846, Dyersburg, Tennessee 38025, and Susie Mae Henley, 3695 Guernsey Ave., Memphis, TN 38122, by U.S. Mail, postage prepaid, this the 17 day of November, 2017.



John M. Miles

Exhibit A

IN THE 27TH JUDICIAL DISTRICT OF THE STATE OF TENNESSEE
WEAKLEY COUNTY CHANCERY DIVISION

JERRY W. POLLARD and JANICE A. BYARS,

Plaintiffs,

VS.

Civil Action No.: 22,935

ESTATE OF CARTHEL DUANE WHEELER;
LINDA DIANE CRENSHAW, EXECUTOR OF
THE ESTATE OF CARTHEL D. WHEELER;
LINDA DIANE CRENSHAW; LARRY POLLARD,

Defendants.

IN RE:

ESTATE OF CARTHEL DUANE WHEELER,

Civil Action No. 22,423

Deceased.

AFFIDAVIT

COMES NOW Mike Freeman, and for purposes of making oath, swears that the following information is true and correct to the best of his knowledge, information and belief:

1. I am over eighteen (18) years of age and not suffering from any disability and able and capable of making oath.
2. I was born September 6, 1962, and my address is 233 Lee Road, Martin, Tennessee.
3. I have known Carthel Wheeler all my life. He was a director at Weakley County

Bank, where my mother worked for 40 years. In 1985 I began my farming relationship with Mr. Wheeler producing my first crop on his ground. We had an excellent working relationship all the way up until his death. I never had a cross word with Mr. Wheeler. He was soft spoken and tender hearted, but very firm in his business dealings. I remember going to Mr. Wheeler's wedding reception when he married Ella Mae, and, in fact, I recall he attended mine.

4. My business arrangement, stated generally, was that I would put the crop in and take care of the land and Mr. Wheeler would pay one-third the cost of any fertilizer and any lime expense, and he would receive, each year, one-third of the proceeds. I would see Mr. Wheeler in Spring after planting to deal with the fertilizer inputs cost and in the Fall at harvest I would pay him his one-third of the crop. I would also see him at least 3 to 4 times a year in addition to these meetings. Mr. Wheeler was always knowledgeable about bushels in terms of production that would be expected. He knew current prices. He understood yields and inputs.

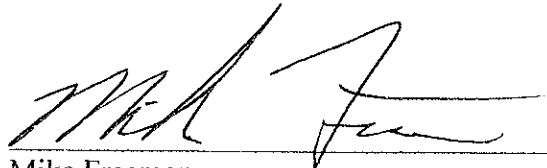
5. The last time I carried a check to Mr. Wheeler was in the fall when he was still living at Magnolia Place and Ella Mae had gone on to reside at the nursing home. His mind was absolutely sharp. There was no one at that meeting other than myself and Mr. Wheeler, but he told me that from that point forward, he wanted me to deal with Diane who he was going to allow to handle things for him. He trusted Diane.

6. Though we no longer had any business transactions, I continued to see Mr. Cart from time to time even after he moved to the nursing home.

7. I remember when Ella Mae passed away on November 22, 2010, Mr. Cart was very distraught. I noticed after her passing that physically he seemed to deteriorate; however, his mental state remained sound.

8. Carthel Wheeler died June 12, 2013. I was a pallbearer at his funeral.
9. The last time I saw him was probably some time in the prior year, 2012. In all my experiences with Mr. Wheeler, I never saw any deterioration in his mental function.
10. Further affiant saith not.

DATED this 17th day of November, 2016.



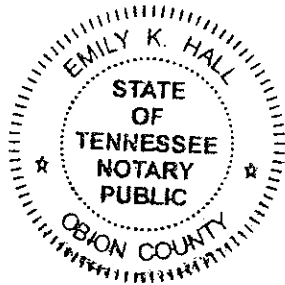
Mike Freeman

SWORN to and SUBSCRIBED before me this the 17th day of November, 2016.

Emily K. Hall

Notary Public

My commission expires: 7/24/2018



IN THE 27TH JUDICIAL DISTRICT OF THE STATE OF TENNESSEE
WEAKLEY COUNTY CHANCERY DIVISION

JERRY W. POLLARD and JANICE A. BYARS,

Plaintiffs,

VS.

Civil Action No.: 22,935

**ESTATE OF CARTEL DUANE WHEELER;
LINDA DIANE CRENSHAW, EXECUTOR OF
THE ESTATE OF CARTEL D. WHEELER;
LINDA DIANE CRENSHAW; LARRY POLLARD,**

Defendants.

IN RE:

ESTATE OF CARTEL DUANE WHEELER,

Civil Action No. 22,423

Deceased.

AFFIDAVIT

COMES NOW Dan Shanklin, and for purposes of making oath, swears that the following information is true and correct to the best of his knowledge, information and belief:

1. I am over eighteen (18) years of age and not suffering from any disability and able and capable of making oath.
2. I was born July 7, 1938, and I presently live at 40 Warmath Circle, Humboldt, Tennessee.
3. I grew up in the Latham community on a farm about 2 miles outside of town,

which was adjacent to the farm owned by Carthel Wheeler.

4. I have known Carthel all my life. I went to New Hope Baptist Church, as did my family. Growing up, I would see Carthel two or three times per week, and his gas station was more or less a hang out for me and my buddies growing up.

5. Carthel knew me very well and knew my fondness for Zero candy bars and would put one on the counter top when he would see me entering the store.

6. Carthel was a forceful and headstrong individual. He was not someone who could be easily swayed in his opinions. Young people referred to him respectfully as Mr. Cart.

7. I am aware that his wife, Ella Mae, died November 22, 2010 and Carthel subsequently died June 12, 2013.

8. In recent years, I would see Carthel on social visits at the New Hope Church in the Latham community.

9. The last time I recall seeing Carthel was at my cousin, Layne Shanklin's, funeral on or about February 21, 2011. Carthel had no problem recognizing me, but I do not recall any specifics of my conversation with him at that time.

10. I can say that I cannot point to anything that I ever observed about Carthel that led me to believe that his mental condition had deteriorated.

11. In my experience and recollection, Carthel was always a clear thinker.

12. Further affiant saith not.

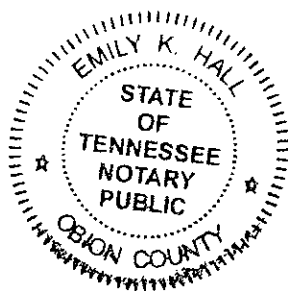
DATED this 10th day of November, 2016.

Dan Shanklin
Dan Shanklin

SWORN to and SUBSCRIBED before me this the 16th day of November, 2016.

Emily K. Hall
Notary Public

My commission expires: 7/24/2018



IN THE 27TH JUDICIAL DISTRICT OF THE STATE OF TENNESSEE
WEAKLEY COUNTY CHANCERY DIVISION

JERRY W. POLLARD and JANICE A. BYARS,

Plaintiffs,

VS.

Civil Action No.: 22,935

ESTATE OF CARTEL DUANE WHEELER;
LINDA DIANE CRENSHAW, EXECUTOR OF
THE ESTATE OF CARTEL D. WHEELER;
LINDA DIANE CRENSHAW; LARRY POLLARD,

Defendants.

IN RE:

ESTATE OF CARTEL DUANE WHEELER,

Civil Action No. 22,423

Deceased.

AFFIDAVIT

COMES NOW Kenneth Rogers, and for purposes of making oath, swears that the following information is true and correct to the best of my knowledge, information and belief:

1. I am over eighteen (18) years of age and not suffering from any disability and able and capable of making oath.
2. I was born August 31, 1944, and I have known Carthel Wheeler all my life. I remember borrowing \$1,500.00 from him in 1965 to buy a 20 acre farm.
3. Ella Mae Wheeler died November 22, 2010 and Carthel Wheeler died June 12,

2013.

4. The farm that Carthel had in Latham was originally his grandfather's farm (Mr. Bob Payne) and it was a very special place to Carthel.

5. Carthel was in the service station business in Latham. He was very accommodating to the genuine needs of customers and, where necessary, would even open up after hours to take care of them.

6. Carthel, Birch Means and I were Trustees on the New Hope Cemetery. I remember in the summer of 2007, Carthel and I were doing some work on some of the grave sites at New Hope adding dirt to some of the low spots and I had commented to him that I looked far and wide, even driving to Missouri, looking for a 6 prong manure fork. On or about January of 2008 I came home and my wife told me Carthel had called and wanted me to come out to his place. I went out to see Carthel and upon my arrival he directed me to a 6 prong manure fork. He told me that he and Ella Mae were going to move into an assisted living facility and wanted me to have the manure fork. My point is, that he remembered the conversation about the manure fork in all that intervening time and gave me that manure fork to keep prior to his entry into assisted living. I remember I told Carthel I wanted to pay for it, but he would not take any money. I reminded him about how he had loaned me money to buy the 20 acre farm and I remember his remark, "well, you paid me back, didn't you?"

7. When my wife passed away in June 2010, even though I did not mention anything directly to Carthel about it, the first thing he said to me when he saw me was to extend his sympathy for my loss.

8. Carthel kept his own garden up until about a year before he entered assisted

living.

9. Carthel was extremely sharp, especially when it came to money. He had inherited some property, but he also made his own money running a service station in the Latham community and as a director at the Weakley County Bank and the Bank of Dukedom.

10. My son, Kenneth "Kenny" Rogers, Jr. replaced Birch Means on the New Hope Cemetery board. Even after Carthel went into assisted living, we met 2 or 3 times at Magnolia Place and then 3 or 4 times at Weakley County Nursing Home.

11. Carthel's mind remained sharp even when in assisted living. In fact, I never really noticed any loss in his mental abilities. I am confident in stating that up until about one and a half years prior to his death he was capable of maintaining his own business affairs, and maybe after that, but that is around the time I stopped conducting business with him. At that time (approximately one and a half years prior to his death), I would notice he would sleep a lot. I did not know whether that was medication the nursing home was providing or whether, due to his age, he was simply worn out, or both.

12. I understand that there is a dispute as to Carthel's mental capacity or that he may have been subject to undue influence when he executed a will in December 2005 and a subsequent codicil in April 2008. In my opinion, Carthel would have been very capable of making a will in either December 2005 or April 2008. I would also state that he would not have been subject to anyone's influence during that time, or any other time. In fact, it is my opinion that if anyone tried to influence Carthel, it would have backfired.

13. Further affiant saith not.

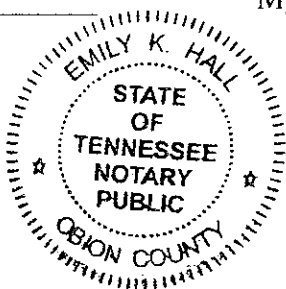
DATED this 15th day of November, 2016.

Kenneth Rogers
Kenneth Rogers

SWORN to and SUBSCRIBED before me this the 15th day of November, 2016.

Emily K. Hall
Notary Public

My commission expires: 7/24/2018



IN THE 27TH JUDICIAL DISTRICT OF THE STATE OF TENNESSEE
WEAKLEY COUNTY CHANCERY DIVISION

JERRY W. POLLARD and JANICE A. BYARS,

Plaintiffs,

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**ESTATE OF CARHEL DUANE WHEELER;
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Defendants.

IN RE:

ESTATE OF CARHEL DUANE WHEELER,

Civil Action No. 22,423

Deceased.

AFFIDAVIT

COMES NOW Kenneth "Kenny" Rogers, Jr. and for purposes of making oath, swears that the following information is true and correct to the best of my knowledge, information and belief:

1. I am over eighteen (18) years of age and not suffering from any disability and able and capable of making oath.
2. I was born May 26, 1966. I have known Carhel Wheeler literally all my life, and my father and I worked together with him on the board of the New Hope Cemetary.
3. Ella Mae Wheeler died November 22, 2010 and Carhel Wheeler died June 12,

2013.

4. I found it remarkable that even after Carthel entered assisted living that he was so attentive to the details of the cemetery, including what interest rate we were receiving on our money, who was mowing the cemetery, what they were charging and whether or not they were doing a good job.

5. Carthel was tight with his money and, in fact, if you were around him you would never know he had a dime.

6. In my opinion, if Carthel did not want you to have any money from him, he was not going to give you any.

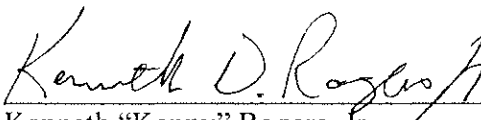
7. He was generous to people who truly deserved money, but was wary of those who might have tried to take advantage of him, or, as I put it, people who would try to “hoo doo” him.

8. To my recollection, the last time I saw Carthel was probably about a year prior to his death. Due to his age, he was physically feeble but, even then, I would not say he was mentally feeble.

9. In my opinion, certainly in December of 2005 and April of 2008, Carthel would have known full well the nature and extent of his property and who he wanted it given to at his death. In other words, he was fully capable of making a will on either of those occasions, and would not have been subject to undue influence from anyone.

10. Further affiant saith not.

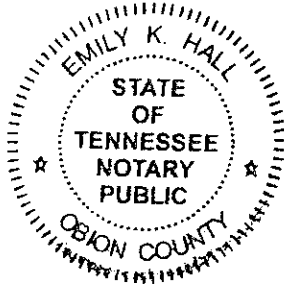
DATED this 15 day of Nov, 2016.


Kenneth “Kenny” Rogers, Jr.

SWORN to and SUBSCRIBED before me this the 15th day of November, 2016.

Emily K. Hall
Notary Public

My commission expires: 7/24/2018



IN THE 27TH JUDICIAL DISTRICT OF THE STATE OF TENNESSEE
WEAKLEY COUNTY CHANCERY DIVISION

JERRY W. POLLARD and JANICE A. BYARS,

Plaintiffs,

VS.

Civil Action No.: 22,935

**ESTATE OF CARTEL DUANE WHEELER;
LINDA DIANE CRENSHAW, EXECUTOR OF
THE ESTATE OF CARTEL D. WHEELER;
LINDA DIANE CRENSHAW; LARRY POLLARD,**

Defendants.

IN RE:

ESTATE OF CARTEL DUANE WHEELER,

Civil Action No. 22,423

Deceased.

AFFIDAVIT

COMES NOW Dr. Michael Hinds, and for purposes of making oath, swears that the following information is true and correct to the best of his knowledge, information and belief:

1. I am over eighteen (18) years of age and not suffering from any disability and able and capable of making oath.
2. I have attached to this Affidavit my curriculum vitae.
3. My medical opinions expressed below are made with a reasonable degree of medical certainty.
4. I was the personal treating physician for Carthel Duane Wheeler for a period of time that

encompassed December 9, 2005, to April 1, 2008.

5. I understand that there is litigation ongoing centered on a will of Carthel Duane Wheeler which was executed on December 9, 2005, and his Codicil that was executed April 1, 2008.

6. I am very familiar with the health of Carthel Duane Wheeler during the period of time which would include December 9, 2005, and April 1, 2008.

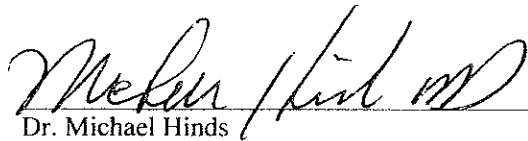
7. During the period of time including December 9, 2005, up through and including April 1, 2008, Carthel Duane Wheeler showed no signs of any mental condition of a general continuous, chronic, or progressive nature.

8. It is my opinion, within a reasonable degree of medical certainty, that Mr. Wheeler would have been of sound mind and disposing memory during the period of time including December 9, 2005, and April 1, 2008.

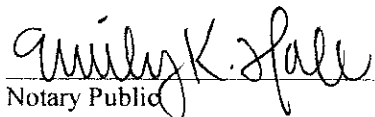
9. It is my opinion, within a reasonable degree of medical certainty, that Mr. Wheeler was able to handle his personal financial and/or business affairs, that he was capable of understanding the consequences of his actions in the execution of a will, that he would have known the nature and extent of his property, and that he knew the nature and manner in which his property would be distributed by the signing of any purported will or Codicil during the time inclusive of December 9, 2005, and April 1, 2008.

10. Further, deponent saith not.

DATED this 14th day of November, 2017.


Dr. Michael Hinds

SWORN to and SUBSCRIBED before me this the 14th day of November 2017.


Notary Public

My commission expires: 7/24/2018

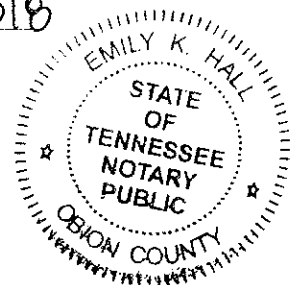


Exhibit B

CERTIFY

Date: 6/3/2016

To: Carthel Duane Wheeler Care Of Linda Diane Crenshaw
1319 Oaklawn
Union City, TN 38261

From: Release of Information
Regional Hospital Of Jackson
367 Hospital Blvd
Jackson, TN 38305-2080

Re: Not at this facility
Medical Records Request for Carthel Duane Wheeler

Ref #:

Dear Carthel Duane Wheeler Care Of Linda Diane Crenshaw:

Re: No Dates of Treatment as Requested
Medical Records Request for Patient Name
Ref #:

We are unable to comply with your request at this time for the following reason(s):

We show no treatment at this facility for the patient.

Thank you,

Health Information Management Department

Sincerely,

Release of Information
Health Information Management Department ? Phone Number

731-661-2158



1A0

All portions of this form **must** be completed to constitute a valid authorization for release of health information under the Health Insurance Portability and Accountability Act (HIPAA) privacy regulations. If any field is left blank, the authorization will be considered defective.

| | | | |
|--|--|-----------------------------------|--------------------------------------|
| Patient's Name Carthel Duane Wheeler | | Date of Birth 2-26-1918 | Medical Record Number NONE |
| Address 1319 Oaklawn | | City Union City TN | Zip 38261 |
| Telephone Number 731-885-1109 | | Email Address | |

I authorize the use and disclosure of health information about me as described below:

Facility Authorized to Release my Health Information
Tennova Healthcare - Regional Jackson

Agency or Individual(s) Authorized to Receive my Health Information

| | | | | |
|---------|------|-------|-----|------------------|
| Address | City | State | Zip | Telephone Number |
|---------|------|-------|-----|------------------|

Health Information that may be used / disclosed is limited to the following:

| | | | | |
|--|---|--|--|--|
| <input type="checkbox"/> Discharge Summary | <input type="checkbox"/> History & Physical | <input type="checkbox"/> Consultation(s) | <input type="checkbox"/> Lab | <input type="checkbox"/> Emergency Room Record |
| <input type="checkbox"/> Operative Note(s) | <input type="checkbox"/> Imaging/X-Ray | <input type="checkbox"/> X-Ray Reports | <input type="checkbox"/> Entire Record | <input type="checkbox"/> Pathology Report |
| <input checked="" type="checkbox"/> Other (specify) ANY | | | | |

Health Information that may be used / disclosed is limited to the following periods of healthcare:

From (date): **Any** To (date): _____ Account Number: _____

From (date): _____ To (date): _____ Account Number: _____

Health information to be released to the above named agency / individual is to be used / disclosed for the following purpose(s):

| | | | | |
|--|--|-----------------------------------|------------------------------------|--|
| <input type="checkbox"/> Treatment/Consultation | <input type="checkbox"/> At Request of Patient | <input type="checkbox"/> Research | <input type="checkbox"/> Marketing | <input type="checkbox"/> Billing or Claims Payment |
| <input type="checkbox"/> At Request of Employer <input type="checkbox"/> Other | | | | |

"Health Information" identifies you (the patient) by name, and includes other demographic information about you. "Health Information" may include, but is not limited to: medical records, X-Ray films, slides, tracings, strips, etc.

I hereby discharge the releasing facility, its agents and employees from any and all liabilities, responsibilities, damages, and claims which might arise from the release of information authorized herein, **to include alcohol, drug abuse, communicable disease including HIV status, and/or psychiatric diagnoses** compiled during my visit, encounter or hospitalization, or make copies thereof in accordance with the policies of this facility.

Yes No If applicable, I agree to the release of my medical or billing records containing the sensitive information listed above.

Protected Health Information used or disclosed pursuant to this authorization may be subject to re-disclosure by the recipient and is no longer protected by this privacy rule. If research-related Health Information is used or disclosed for continued research purposes, an expiration date or event does not apply.

This authorization will automatically **expire 60 days** after the date of signature below (except as indicated below), unless an earlier date is specified, or at the conclusion of a specified event. I understand that I have a right to revoke this authorization at any time, in writing, as stated in the Notice of Privacy Practices, except where the facility has already made disclosures in reliance upon my prior authorization.

Treatment, payment, enrollment or eligibility for benefits may not be conditioned on obtaining an authorization if the HIPAA prohibits such conditioning. If conditioning is permitted, refusal to sign the authorization may result in denial of care or coverage.

NOTICE TO RECEIVING AGENCY OR INDIVIDUAL: This information is to be treated in accordance with (HIPAA) privacy regulations.

| | | | |
|---|-----------------------|--------------------------|---|
| Patient's or Authorized Personal Representative's Signature Linda Diane Crenshaw, Executive | | Date 6-3-2016 | Time |
| Relationship to Patient / Authority to Act on Patient's Behalf Step Daughter / Executive | | Interpreter, if Utilized | |
| Witness Signature Sherry Newborn | Date 6/3/16 | Time | Expiration Date or Event RECEIVED JUN 03 2016 |

*Signature validated against driver's license or signature in Medical Record. There may be a charge for copying Medical Records.

Electronic copy requested.

Patient Label

138020026



Jackson-Madison County General Hospital™

An affiliate of West Tennessee Healthcare

620 Skyline Drive • Jackson, Tennessee 38301 • 731-541-5000 • www.wth.org

DATE: 06-03-16

To Whom it May Concern:

Your request for medical records is being returned for the following reason(s):

To release the Information requested, we require a HIPAA-compliant authorization signed by the patient within 90 days. If the patient is a minor, under the age of 18 years of age, the parent or legal guardian must sign the authorization.

Your authorization was not dated at the time of signature. Please submit a new dated authorization.

Please indicate the reason this authorization was not signed by the patient. If the patient is mentally or physically unable, please have the patient's legal guardian sign

Pursuant to the Privacy Act of 1974, it is necessary to have the patient's signature on the enclosed authorization.

Additional information is required to help us identify the patient. Please provide the patients birth date, social security number, and treatment date(s) and verify spelling of the name. If patient was not admitted, please specify services provided. _____

After a careful and thorough search of our files, we regret that the requested records could not be located.

The patient is currently in house. Please request the records at a later date.

The patient was not seen on requested date(s).

other Carthel Duane Wheeler was not a patient at JMGH

HEALTH INFORMATION MANAGEMENT

(731) 541-7982

JACKSON-MADISON COUNTY
GENERAL HOSPITAL
HIM / MEDICAL RECORDS
620 SKYLINE DRIVE
JACKSON, TN 38301



Jackson-Madison County General Hospital

An affiliate of West Tennessee Healthcare

620 Skyline Drive Jackson, Tennessee 38301-3956 731-541-5000

Cannot locate patient

AUTHORIZATION FOR RELEASE OF PROTECTED HEALTH INFORMATION

| | | |
|---|------------------------------------|---------------------------------------|
| PATIENT NAME: <i>Carthel Duane Wheeler</i> | Birth Date: <i>2-26-1918</i> | SS No. (optional): <i>417-38-2448</i> |
| | Other Names Known By: <i>C. D.</i> | |

INFORMATION BEING RELEASED BY: JACKSON-MADISON COUNTY GENERAL HOSPITAL

| | | |
|--|----------------------------------|------------------------------------|
| Release Records To: <i>Linda Diane Crenshaw</i> | Address: <i>319 Oaklawn</i> | City: <i>Union City</i> |
| | Telephone #: <i>731-885-1109</i> | State: <i>TN</i> Zip: <i>38261</i> |

Purpose of Disclosure: Medical Care Insurance At the Request of the Patient
 Media, Public Relations, Marketing, Advertising, Posting, or Radio Broadcasting
 Other, Please Explain: *Lawsuit*

| | | |
|---|--|--|
| Description of Information to be Used or Disclosed: | | |
| Dates of Treatment: <i>1999-2002</i> | Place of Treatment: <input type="checkbox"/> Inpatient <input type="checkbox"/> Emergency Room <input type="checkbox"/> Outpatient | |

Choose From the Following:

| | | |
|---|---|---|
| <input checked="" type="checkbox"/> Pertinent Summary | <input type="checkbox"/> Consultation | <input type="checkbox"/> Anesthesia Record |
| <input checked="" type="checkbox"/> Entire Chart | <input type="checkbox"/> Operative/Procedure Report | <input type="checkbox"/> ER Record |
| <input type="checkbox"/> All Dictated Reports | <input type="checkbox"/> Pathology Reports | <input type="checkbox"/> Billing Record |
| <input type="checkbox"/> History & Physical | <input type="checkbox"/> Radiology Reports | <input type="checkbox"/> Photographs/Images |
| <input type="checkbox"/> Discharge Summary | <input type="checkbox"/> Lab (may include AIDS/HIV information) | <input type="checkbox"/> Other (specify): |

I understand that:

- I may revoke this authorization in writing at any time, but if I do so, it will not have any effect on any actions taken by the facility releasing the information (hereafter referred to as "the facility") prior to the facility's receiving the revocation. Further details regarding the manner in which this authorization may be revoked may be found in the facility's Notice of Privacy Practices.
- This authorization allows the facility to release the above indicated documents in my medical record, including those copies from other health care facilities and providers as requested. The released information may no longer be protected by federal privacy regulations and may be redisclosed.
- Any disclosure of records concerning diagnosis and/or treatment of alcohol and/or drug abuse is covered by Title 42 CFR, and if there is any such information, I hereby authorize the release of information. This authorization also includes any information related to diagnosis and/or treatment of any psychiatric or mental illness or any state of infection with the HIV (AIDS) virus.
- The facility is hereby released from any liability and the undersigned will hold the facility harmless for complying with this authorization.
- The facility will not condition treatment, payment, enrollment, or eligibility for benefits on whether I sign this authorization, except for research related purposes and as otherwise permitted under applicable law.
- The authorization will expire in ninety (90) days unless I provide an alternate expiration date or event. This authorization will not apply to any dates of service that occur after the date this authorization is signed.
- If the facility will use or disclose my protected health information for marketing purposes, the facility will not receive remuneration or compensation for such use or disclosure for marketing purposes unless the WTH Privacy Coordinator completes the following statement:

I, _____ (signature of WTH Privacy Coordinator) hereby certify that JMCQH will receive remuneration or compensation for the use or disclosure of this patient's health information from _____ (fill in source of remuneration or compensation).

I have read and understood this authorization. I hereby authorize the release, use, and disclosure of the above-requested protected medical information about me.

Signature of Patient: _____
 Signature of Patient's Authorized Representative: *Linda Diane Crenshaw*
 Description of Representative's Authority to Act for Patient: *Executive & next of kin*

Date: _____ Telephone #: _____

**IN THE CIRCUIT COURT FOR RUTHERFORD COUNTY, TENNESSEE
AT MURFREESBORO**

**IN RE: THE ESTATE OF LUALICE
SMITH DODD, DECEASED,
DAVID DODD HOUSTON, and
GLENDALICE HOUSTON CAUDLE,**

PLAINTIFFS / CONTESTANTS,

VS.

**CASE NO.: 69,746
JURY DEMAND**

CREEDA FAYE DODD WRIGHT

DEFENDANT / EXECUTOR.

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' / CONTESTANTS'
SECOND MOTION FOR SUMMARY JUDGMENT**

PROCEDURAL HISTORY

By way of petition for probate in solemn form which was filed January 20, 2015, two writings or documents were submitted for probate by the Defendant. The first writing was the Last Will and Testament of the decedent bearing the date June 7, 2006, the same having been witnessed by Gay Clement of South Fulton, Tennessee, and Jana Bryant of Woodland Mills, Tennessee and prepared by the Decedent's attorney John Warner (for convenience a copy of the will is attached hereto as **Exhibit A**). The second writing was a one page document that bears a date at the top of July 31, 2007, and has been referred to by the Defendant in her petition for probate as a "codicil" or "holographic codicil". A copy of the alleged codicil is attached hereto as **Exhibit B**.

On the 6th day of March, 2015, the Probate Court for Rutherford County, Tennessee entered an order admitting both the Will and Codicil to probate in solemn form.

On the 17th day of March, 2015, the Plaintiffs filed with the Probate Court of Rutherford County a Notice of Contest and Motion to certify their right to contest and for the appointment of an Administrator ad Litem.

On the 26th day of May, 2015, the Plaintiffs filed a Complaint to Contest Will in this Court. Attached to that Complaint as Exhibit A was a copy of the will, and attached as Exhibit B was a document which is purported by the Defendant to be a holographic codicil. In this action, the Plaintiffs do not contest the validity of or interpretation of the will; however, they do contest the admission of the purported holographic codicil which was set forth in Exhibit B to our original petition and is again herein attached to this memorandum and, for consistency, referred to as Exhibit B to this memorandum.

Because the parties agreed that the contestants had not been properly served with notice of the hearing for the solemn form probate, on October 9, 2015, the Probate Court for Rutherford County entered an Agreed Order directing the record be certified to the Clerk of the Circuit Court of Rutherford County, Tennessee, under cause number 69,746 for trial *devisavit vel non* and appointed the Honorable Clifton Sobel as Administrator CTA to conduct any needed administration of the estate pending results from this Honorable Court. It is not apparent that Mr. Sobel has taken any action or done anything on behalf of the estate since no inventory or accounting has been filed since he assumed his responsibilities.

A hearing was had on a prior Motion for Summary Judgment wherein the Court denied the Plaintiffs' motion on the issue of the decedent's signature finding that Plaintiffs had either failed to affirmatively negate the evidence on that matter or that they had failed to show there was insufficient evidence to establish that element of the Defendant's claim.

STIPULATIONS

For the limited purposes of this Motion, the Plaintiffs stipulate that the handwriting in the purported holographic codicil (a copy of which is attached hereto as **Exhibit B**) is that of the Decedent. Also, for the limited purposes of this Motion, the Plaintiffs are not contesting the mental capacity of the Decedent or the issue of undue influence. The Plaintiffs are asking the Court to examine the four corners of the document, and find that it is insufficient on its face to constitute a codicil under Tennessee law. More specifically, the alleged codicil does not comply with T.C.A. § 32-1-105, since it does not bear the signature of the testatrix.

SUMMARY JUDGMENT STANDARD

Rule 56 of the Tennessee Rules of Civil Procedure permits a defending party to move for summary judgment at any time. Tenn. R. Civ. Proc. 56.02 (2015). Summary judgment is appropriate when the record “show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Tenn. R. Civ. Proc. 56.04 (2015).

The Tennessee General Assembly has codified the standard for summary judgment motions, which applies to any case filed after July 1, 2011. Tenn. Code Ann. §20-16-101 provides that “the moving party who does not bear the burden of proof at trial shall prevail on its motion for summary judgment if it: (1) Submits affirmative evidence that negates an essential element of the nonmoving party’s claim; or (2) Demonstrates to the court that the nonmoving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim.” (*Tenn. Code Ann. § 20-16-101.*)

The nonmoving party, in responding to a properly supported motion for summary judgment, must provide “specific facts” to establish that there remains a genuine issue for trial. Tenn. R. Civ. Proc. 56.06 (2013). Mere conclusory statements or generalizations are insufficient

to establish a disputed material fact. *Lee v. Franklin Special School Dist. Bd. of Educ.*, 237 S.W.3d 322, 331 (Tenn. Ct. App. 2007). The nonmoving party cannot simply rely on the allegations in the pleadings. Tenn. R. Civ. Proc. 56.06 (2013).

As detailed below, there exists no genuine issues of material fact in dispute on the issue of the failure of the alleged codicil to contain the decedent's signature as required by TCA § 32-1-105, and thus this matter is ripe for dismissal at this time.

POINTS OF LAW

1. TCA § 32-1-105 provides that no witness to a holographic will is necessary, but the signature and all its material provisions must be in the writing of the testator and the testator's handwriting must be proved by two (2) witnesses.

2. The requirements for a valid holographic will are as follows: "No witness to a holographic will is necessary, but the signature and all its material and provisions must be in the handwriting of the testator and the testator's handwriting must be proved by two witnesses". TCA § 32-1-105. In addition, "A testamentary intent must accompany the performance of the statutory requirements and this must be proven in a manner which conforms to the applicable rules of evidence and procedure." *In Re.: Estate of Blackburn*, 253 SW 3d 603, 614.

3. TCA § 32-1-101 defines a will to include a codicil; therefore, the same provisions would apply for codicils.

4. There is no Tennessee statute regarding what constitutes a signature except T.C.A. § 1-3-105 relating to the use of a "x" as a signature and T.C.A. § 47-3-401 dealing with commercial instruments under the Uniform Commercial Code. *Steel v. Stedman* 1994 WL 25856 (Tenn. Ct. App. 1994).

5. TCA § 1-3-105(a) (30) provides:

As used in the Tennessee Code Annotated, unless the context otherwise requires: “signature” or “signed” includes a mark, the name being written near the mark and witnessed, or any other symbol or methodology executed or adopted by a party with intention to authenticate a writing or record, regardless of being witnessed.

6. Testamentary intent must accompany the performance of the statutory requirements and this must be proven in a manner which conforms to the applicable rules of evidence and procedure. Otherwise, this script cannot be accepted as a will. *Marr vs. Marr*, 39 Tenn. 303; *Smith vs. Smith*, 33 Tenn. App. 507, 511 (1949).

7. Testamentary intent must be determined “from what the testator has written and not from what it is supposed he intended”. *In Re.: Meade*, 156 SW 3d 841, 843-844 (Tenn. Ct. App. 2004); *In Re.: Estate of Blackburn*, 253 SW 3d 603, 615.

8. The intent must be ascertained from the testamentary language of the will or codicil and not from suppositions of the parties. *Fisher vs. Malmo*, 650 SW 2d 43, 46 (Tenn. App. 1983).

9. Mere notes or memorandum of a will, though drawn in the form and manner of a will, but not animus testandi, cannot operate as such, even though there was compliance with all the statutory formalities. *Scott vs. Atkins*, 44 Tenn. App. 353, 358.

DISCUSSION OF THE LAW

Black’s Law Dictionary defines a signature as “the act of putting down a man’s name at the end of an instrument to attest its validity (emphasis added), the name thus written. A “signature” may be written by hand, printed, stamped, typewritten, engraved, photographed, or cut from one instrument and attached to another, and a signature lithographed on an instrument by a party is sufficient for the purpose of signing it; it being immaterial with what kind of instrument a signature is made.” Obviously, Black’s contemplates that a signature be at the end of a document. It would appear that our statute does not

require it be at the end, but there be, nonetheless, a signature with an intent to attest the validity of the instrument.

Attention has been drawn by the Defendant to the provisions of Pritchard on Wills and Administration of Estates § 228, which concerns the manner of execution of holographic wills. Title II of Volume 1 of Pritchard's concerns the execution and revocation of wills. Chapter 3 thereof deals with the manner of executing wills, and Article II of Chapter 3 sets forth the requirements of a holographic will. We set forth below, in its entirety, § 228 of Chapter 3, Article II from Pritchard's concerning the signature of the testator of a holographic will:

The will must have the testator's name subscribed to it or inserted in some part of it. So far as the validity of the instrument is involved, and except to cut off any presumption that the instrument is incomplete because not signed at the end, it is immaterial in what part of the will the name occurs. The statute must be complied with, however, and the name must be subscribed to or inserted in the will.

Where an otherwise complete holograph was found folded in the form of a letter, with the words "David M. Roy's will" endorsed on the back in the testator's handwriting, it was held not to be a sufficient signature of the testator's name. Where the instrument is not signed by the testator, although his name is written in it, and there is an attestation clause and no attesting witnesses, the writer is not presumed to have intended the instrument to be his will.

Support for the statement in the last sentence in the second paragraph above comes from the case of *Campbell vs. Henley*, 172 Tenn. 135, 110 S.W. 2d 329 (1937), a copy of which is attached hereto. In the case of *Campbell vs. Henley* (Tenn. 1937) the decedent, Alexander Henley, left a paper writing that began as follows:

"I, Alexander S. Henley, a citizen of Anderson County, Tennessee, Being of sound mind and memory (blessed be Almighty God) But considering the uncertainty of this mortal life do make publish and declare this my last will and testament, hereby revoking and annulling all former wills made by me." *Campbell vs. Henley* 110 S.W. 2d 329, 330.

The decedent died in his home survived by his wife, Naomi and two grandchildren from a former marriage. The instrument was written by the decedent entirely in his handwriting in lead pencil and found in a trunk among his valuable papers. He made bequests of his property and nominated his wife as executrix. (*Campbell*, 330) The grandchildren contested the instrument. A jury trial was conducted, the jury found it was a completed holographic will and the Court of Appeals affirmed the ruling of the trial court, but the Supreme Court reversed this finding. (*Campbell*, 329-330 and 332)

Tennessee Supreme Court held that, “If the instrument propounded as a holographic will is unfinished and incomplete, or not subscribed by the testator, though his name is inserted in some part of it, or with an attestation clause and no attesting witnesses, the presumption is that the writer did not intend that paper in that imperfect state to be his will; but the presumption may be rebutted by satisfactory proof that it was intended, in the form in which it appears and as far as it goes, to be the last will and testament of the deceased.” *Campbell at 330, citing Crutcher v. Crutcher*, 30 Tenn. (11 Humph.) 377. The Court went on to hold “Our statutes of descent and distribution are considered just and equitable as to the method in which estates are devised, and should be applied unless it clearly appears that the deceased intends his estate to be disposed of otherwise.” *Campbell vs. Henley*, 331. The Court concluded that the trial court was in error in not sustaining the motion of the contestants for a directed verdict. *Campbell vs. Henley* 332.

The reference above from § 228 of Pritchard’s regarding David M. Roy’s will is a Virginia case, and for the court’s convenience, we have attached a copy. Though the *Roy* case is a Virginia decision, we wish to discuss it since it is part of the authority referenced in Pritchard’s. In that case, the decedent endorsed the holograph on the back, but the signature was held to be insufficient since the signature was not held to be intended as final as opposed to

deliberative only. *Roy & als vs. Roy's ex'or, 16 Gratt. 418, 422.* In its ruling the court stated that in a holograph will, the writing of the name of the testator at the commencement of the paper is an equivocal act, and therefore is not, of itself, a sufficient signing of the paper to constitute a will. (*Roy, 418*)

In that case, the court cited Virginia statutory law as requiring that a valid holographic will must be signed by the testator, or by some other person in his presence and by his direction, **in such manner as to make it manifest that it is his intended signature.** (emphasis added, *Roy, 419*) The Court observed that the instrument propounded was in the handwriting of the deceased, that it was written on a sheet of paper with the body of the writing commencing on the first page and ending about the middle of the next page with the paper folded so that a third page was on the outside. The paper was found in a pocket book in the decedent's trunk folded in the form of a letter with the words David M. Roy's will endorsed on the back, being the middle of the third page when unfolded. In the Roy case, reference is made to the fact that the decedent's name was inserted in the body of the instrument, however a copy or complete recitation of the will is not included in the opinion. (*Roy, 420-421*) The proponents insisted that the endorsement on the third page with the words David M. Roy's will, proved to be in the handwriting of the deceased, amounted to a signing in such manner as to make it manifest that the name was intended as a signature or that it was intended to recognize the signature of the name, which was also in the body of the will, as a signing. (*Roy & als vs. Roy's ex'or, 16 Gratt. 418, 421.*)

The Court held that it would be an unusual mode of signing a paper as a concluded act by endorsing the name of the person by executing it on the back, stating that such an endorsement would usually be a label or mark to distinguish it from other papers and that it never occurred to the deceased it would ever have any other function. The Court found that such a signature was at most equivocal, and, therefore, the Circuit Court had erred in admitting the

paper to probate, stating that the document had not been signed by the deceased or by some other person in his presence and by his direction so as to make it manifest that the name was intended as a signature and probate should therefore be refused. *In re Roy vs. Roy*, page 422-423.

Finally, we wish to discuss *In re Jones' Estate*, which the defendant relied on in her response to our first motion for summary judgment. That case holds that, while it is not necessary that the signature be at the end of the document, it is necessary that statute be complied with and there be a "genuine signature" of the holograph under the statute. *In re: Jones' Estate*, 314 S.W. 2d 39, 44 and 46-47(Tenn. App. 1957). In that case, the testatrix had detached everything from her prior witnessed will except a witnessing clause which contained her signature and the signatures of the attesting witnesses. Beneath that, she put the following in her own handwriting, "I have nothing much to leave anyone, but want Loretta to have everything I have. A little money in Citizens Bank in Collierville & some in Plaza Bank joint account Maude & Loretta. My last will." The Court of Appeals held that the genuine signature, "Maude Hall Jones", though used originally in connection with a witnessed will, had been perfectly validated as the genuine signature of the holograph in compliance with the statute on holographic wills. (*In re Jones Estate*, 314 S.W. 2d 39, page 46-47.) Appellate Court noted the probate court had found and decreed that the name "Maude Hall Jones" was the valid signature of the decedent and it found that § 32-105 T.C.A. had been complied with. (*In re Jones Estate*, page 47.) We ask your honor to also note that the mechanism employed for an effective signature by the decedent in *Jones Estate* also complies with the definition of "signature" from Black's Law Dictionary.

ARGUMENT

The Plaintiff's propounded interrogatories and requests for production of documents on the Defendant, Creeda Faye Dodd Wright. Attached hereto as Exhibit C, are her responses to numbers 22, 23 and 24. We include this information simply to make the point that there is no

evidence of any communication between anyone and the Decedent regarding the witnessing or execution of the alleged codicil, nor is there any information regarding any communications between the decedent and any other person prior to the date of the execution of the alleged codicil concerning its terms, including the inclusion or exclusion of any person sharing in the legacies of the will.

The alleged holographic codicil does not meet the requirements of Tennessee law. Specifically, it does not bear the signature of the Decedent. While the Decedent's name is included in the caption, the document is not signed by the Decedent as an acceptance that it is an expression of her intent, complete or otherwise.

Subsequent to your Honor's recent ruling of October 12, 2017, the Plaintiffs have obtained affidavits from the very witnesses relied upon by the Defendant to support her contention that their purported holographic codicil contains the signature of the decedent. Attached to our Supplemental Statement of Undisputed Facts, as Exhibits 1 and 2 thereto, are the Affidavits of Joann Ray of Kenton, Obion County, Tennessee, and Jackie Zaircor of Kenton, Obion County, Tennessee, both of whom now state the document does not bear the decedent's signature. Both Ms. Ray and Ms. Zaricor acknowledge that while the decedent's name is included in the caption at the top of the document, they state that the inclusion of her name in her handwriting in the caption would not carry the weight or significance of her signature indicating her acceptance of the document.

Though it is not pertinent to the issues before the Court, Ms. Zaricor goes on to state that she did not believe that the decedent would have made a last will and testament without some provision for both her grandchildren, David Houston and Glenda Caudle, and while Ms. Ray apparently did not feel strongly enough to make the same statement with regard to Mr. Houston,

she did opine that Lualice Smith Dodd would not have made a will without some provision for the contestant, Glenda Caudle.

Whatever Exhibit B is, it is not a holographic codicil. It was not duly executed and, therefore, does not comply with the requirements of Tennessee law. The presence of blanks and incomplete sentences make it impossible to construe or give effect to the testator's intention. The proponents in this case must prove that the will, or, in this case, the codicil complies with all the formalities of Tennessee law. They, as proponents, have the duty and initial burden to prove that it was duly executed. The Defendant must prove that T.C.A. § 32-1-105 has been complied with, and that the signature qualifies as such under T.C.A. § 1-3-105(a) (30). The document in question is not signed and is too vague to be a testamentary disposition. The intent must be ascertained from the testamentary language of the will or codicil and not from suppositions of the parties. *Fisher vs. Malmo*, 650 SW 2d 43, 46 (Tenn. App. 1983).

Under these facts and circumstances, and relying particularly on the law as set out in *Scott vs. Atkins*, 44 Tenn. App. 353, 358, reasonable minds cannot differ that the document the Respondent purports to be a codicil can be nothing more than mere notes or memorandum and cannot operate as a will.

CONCLUSION

Whether or not the purported holographic codicil meets the statutory requirements of Tennessee law is a question of law for the Court. The purported codicil does not comply with TCA § 32-1-105, because it is not bear the decedent's signature, as such it is not duly executed. The inclusion of the decedent's name in the caption, does not carry the significance of a signature under Tennessee law. Since the document is not acknowledged by the decedent by affixing her signature to attest the validity of the instrument, as defined in Black's, or with the intent to authenticate the writing, as required by TCA § 1-3-105(a) (30), it cannot be concluded

that the same is a signature under Tennessee Law. It cannot be said that the document has the animus testandi required or testamentary intent of the Decedent. The witnesses previously relied by the Defendant to show the document was signed by the decedent now state that the document does not bear the decedent's signature.

The purported codicil therefore does not comply with Tennessee law, cannot be a holographic codicil, and the Plaintiffs are entitled to summary judgment.

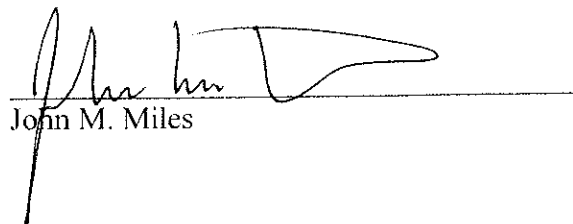
RESPECTFULLY SUBMITTED,



John Miles, BPR# 13345
Attorney for Plaintiffs
511 South Third St.
P.O. Box 8
Union City, TN 38281

Certificate of Service

I hereby certify a copy of this Notice of Contest has been served upon the Honorable J. Russell Nixon, Attorney for Estate, 111 N. Maple St., Murfreesboro, TN 37130, via U.S. Mail, postage prepaid this the 30 day of March, 2018.



John M. Miles

Exhibit A

LAST WILL AND TESTAMENT
OF
LUALICE SMITH DODD

I, Lualice Smith Dodd, a usual resident of Gibson County, Tennessee, make this Will and revoke all Wills and Codicils previously made by me.

MY FAMILY

I am the widow of Fay Edward Dodd.

My only living child is Creeda Faye Wright. My daughter, Alice Houston, predeceased me leaving as her only surviving children, Glenda Houston Caudle and David Houston. ?

APPOINTMENT OF EXECUTRIX

I appoint Creeda Faye Wright Executrix of my Will and in my Will I refer to her as my Executrix. In the event that Creeda Faye Wright fails or ceases to act as Executrix, I appoint Glenda Houston Caudle Alternate Executrix of my Will. When my Alternate Executrix is serving as Executrix all references in my Will to my Executrix shall apply to my Alternate Executrix unless my Will clearly provides otherwise.

BOND OF EXECUTRIX

I waive the making of bond by my Executrix and my Alternate Executrix named in this Will.

POWERS OF EXECUTRIX

Pursuant to the authority contained in Tennessee Code Annotated §35-50-109, I incorporate by reference as the powers of my Executrix all of the language of Tennessee Code Annotated §35-50-110.

DEBTS

I direct my Executrix to pay my legally enforceable debts. My Executrix may decline to pay any debts which are secured by assets of my estate and instead may liquidate or distribute my equity in such assets subject to the secured debts. I direct my Executrix to pay my funeral expenses and the expenses of administration of my estate. I direct my Executrix to pay all death taxes (including interest and penalties) required by law to be paid by my Executrix by reason of my death out of my residuary estate. My Executrix shall not require contribution for death taxes paid by my Executrix from any person receiving taxable assets outside my probate estate. Any insurance on my life or other similar insurance payable to my Executrix or my estate shall be free from the claims of creditors but shall otherwise be governed by the provisions of my Will.

REAL ESTATE

All of my real estate and all income derived from my real estate during administration of my estate are part of my probate estate. Disposition of the real estate is governed by my Will and except for specific devises of particular tracts the real estate does not pass directly to a beneficiary. All real estate is subject to the powers conferred in this Will on my Executrix.

INVENTORY

Pursuant to the authority contained in Tennessee Code Annotated §30-2-301 I expressly excuse my Executrix from making and filing an inventory of my estate with the Court, however, she shall provide my residuary beneficiaries an inventory of my estate.

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W. H. R. J. J.

ACCOUNTING

Pursuant to the authority contained in Tennessee Code Annotated §30-2-601 I expressly waive the requirement that my Executrix make Court accountings of my estate, however, she shall provide my residuary beneficiaries accountings of my estate.

SPECIFIC GIFTS

I give the sum of Ten Thousand Dollars to David Houston in fee simple, if he survives me, but if he does not survive me this gift is given to David's wife, Paula Houston, if she survives me, but if she also fails to survive me this gift shall lapse and be disposed of as hereinafter provided.

RESIDUARY ESTATE

I give all remaining portions of my estate, as follows:

- i) Fifty per cent (50 %) to Creeda Faye Dodd, if she survives me, but if she does not survive me, this gift is given to the descendants of Creeda Faye Dodd, per stirpes, the share of each beneficiary who is either incapacitated or has not attained the age of 21 to be distributed to my Co-Trustees, hereinafter named, to be held, administered and distributed by my Co-Trustees in a separate trust named for the beneficiary as provided in the article of my will entitled "Residuary Trust."
- ii) Fifty per cent (50 %) to Glenda Houston Caudle, if she survives me, but if she does not survive me, this gift is given to the descendants of Glenda Houston Caudle, per stirpes, the share of each beneficiary who is either incapacitated or has not attained the age of 21 to be distributed to my Co-Trustees, hereinafter named, to be held, administered and distributed by my Co-Trustees in a separate trust named for the beneficiary as provided in the article of my will entitled "Residuary Trust."

In the event that there is no taker for any percentage of my Residuary Estate under the foregoing provisions of this Article, then the percentage or percentages for which there is no taker shall be distributed to my then living descendants, per stirpes, the share of each beneficiary who is either incapacitated or has not attained the age of 21 to be distributed to my Co-Trustees, hereinafter named, to be held, administered and distributed by my Co-Trustees in a separate trust named for the beneficiary as provided in the article of my will entitled "Residuary Trust."

RESIDUARY TRUST

If a trust is created under my Will for the benefit of a descendant of mine who is either incapacitated or has not attained the age of 21 my Co-Trustees shall hold, administer and distribute such fund as follows:

- (i) Upon the death of any beneficiary for whom a fund is being held by my Co-Trustees pursuant to this Article of my Will, my Co-Trustees shall continue to hold and administer the

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Lualice Smith Dodd

remaining portions of the fund for the benefit of the descendants, per stirpes, of such beneficiary until such time as such beneficiary's youngest living child attains the age of 21 years at which time my Co-Trustees shall distribute all remaining portions of that fund to the descendants of such deceased beneficiary then living, per stirpes, free of trust. If such beneficiary should not have any descendants who survive him, my Co-Trustees shall distribute the remaining portions of the fund to the descendants, per stirpes, of such beneficiary's parent who is also my child and if such beneficiary's parent has no descendants then living, to my descendants then living, per stirpes, the share of any descendant then a beneficiary of a fund of this Trust to be held by my Co-Trustees as a part of such beneficiary's fund. The share of any such descendant who has not attained the age of 21 and for whom no fund is currently being administered by my Co-Trustees shall be held, administered and distributed by my Co-Trustees for the benefit of such descendant in a separate fund named for such beneficiary pursuant to the provisions of this Article of my Will.

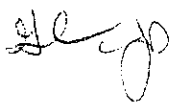
(ii) The net income of each fund being held by my Co-Trustees may be paid by my Co-Trustees to or for the benefit of the beneficiary of such fund. My Co-Trustees are authorized to expend so much of the corpus of each fund as is necessary to effectuate its purposes, it being my intention to fully provide for the reasonable support, care, protection, maintenance, comfort, education and general welfare of my beneficiaries, taking into account such sums as they may receive from other sources, as opposed to preserving corpus for distribution upon the termination of this trust. Any income not needed to effectuate the purposes of this trust may be added to the corpus of the fund which generated the income.

(iii) At such time as any beneficiary attains the age of 21, if the beneficiary is not incapacitated, my Co-Trustees shall distribute all remaining assets then composing such beneficiary's fund to the beneficiary for whom the fund is being held, free of trust.

(iv) Upon the final distribution of all of the funds being held by my Co-Trustees as herein provided this trust shall terminate.

APPOINTMENT OF CO-TRUSTEES

I appoint Creeda Faye Wright and Glenda Houston Caudle, or the survivor, Co-Trustees of the Trusts created in my Will. Any reference in my Will to my Co-Trustees shall include both of my Co-Trustees. Upon the death, disability or resignation of both Creeda Faye Wright and Glenda Houston Caudle, I appoint as successor Co-Trustees Terry Caudle and David Houston, or the survivor. When my successor Co-Trustees are serving as Co-Trustees all references in my Will to my Co-Trustees shall apply to my successor Co-Trustees.



Lualice Smith Dodd

BOND OF CO-TRUSTEES

None of my Co-Trustees or my successor Co-Trustees, named herein, or any corporate successor Co-Trustee shall be required to make bond as a condition of qualification or service as Co-Trustee.

POWERS OF CO-TRUSTEES

Pursuant to the authority contained in Tennessee Code Annotated §35-50-109, I incorporate by reference as my Co-Trustees' powers all of the language of Tennessee Code Annotated §35-50-110, except subsections (1), (2), (3) and (4), to the extent such powers are not inconsistent with other provisions of my Will.

RULE AGAINST PERPETUITIES

If any trust or fund created hereunder shall violate any applicable rule against perpetuities, accumulations or any similar rule or law, my Co-Trustees are required to terminate such trust or fund on the last date allowed by such rule or law and thereupon the property held in trust (or such part thereof) which would violate such rule or law shall be distributed to the then living income beneficiaries of such trust or fund, per stirpes, in fee simple, notwithstanding any provisions of the trust to the contrary.

SPENDTHRIFT PROVISIONS

No interest of any beneficiary in the corpus or income of my estate, or of any Trust created herein, shall be subject to assignment, alienation, pledge, attachment or claims of creditors of such beneficiary, including the claims of any divorced spouse for alimony or support payments, and may not otherwise be voluntarily or involuntarily alienated or encumbered by such beneficiary.

I have executed my Will consisting of this page and the preceding three pages on June 7, 2006, and pursuant to Tennessee Code Annotated §32-2-110, I request the attesting witnesses to make the Affidavit set out below.

Lualice Smith Dodd
Lualice Smith Dodd

ATTESTING WITNESSES' SIGNATURES

Gay Clement
Jana Bryant

ADDRESSES

So. Fulton, In
Woodland Mills, In

STATE OF TENNESSEE
COUNTY OF OBION

We, the undersigned, make oath that the foregoing Will was signed by Lualice Smith Dodd, who published it as her Will, in our sight and presence, and we at her request and in her sight and presence and in the sight and presence of each other signed our names as attesting witnesses on the day the Will is dated, and we further make oath that Lualice Smith Dodd was of sound mind and was not acting under the fraud, duress or undue influence of any person and that we and Lualice Smith Dodd are all at least 18 years old.

Gay Clement

Jana Bryant

Sworn to and subscribed before me on June 7, 2006.

John L. Warner, Jr.

John L. Warner, Jr.,
Notary Public, My commission Expires: 5-27-2007

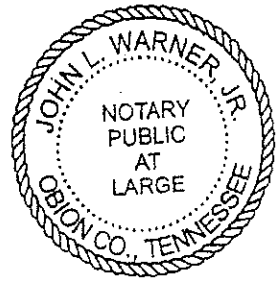


Exhibit B

Exhibit C

IN THE CIRCUIT COURT FOR RUTHERFORD COUNTY, TENNESSEE
AT MURFREESBORO

IN RE: THE ESTATE OF LUALICE
SMITH DODD, DECEASED,
DAVID DODD HOUSTON, and
GLENDA ALICE HOUSTON CAUDLE,

PLAINTIFFS / CONTESTANTS,

VS.

CASE NO.: 69,746

JURY DEMAND

CREEDA FAYE DODD WRIGHT,

DEFENDANT / EXECUTRIX.

PLAINTIFF'S RESPONSE TO DEFENDANT'S FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFFS FROM
DEFENDANTS

Comes, Defendant, Creeda Faye Dodd Wright, and answers Defendant's interrogatories as follows:

PREFATORY STATEMENT

These responses are accurate as of the date made. Defendant's investigation and discovery are continuing, therefore Defendant cannot exclude the possibility she may obtain more complete or additional information in the future. Defendant makes the following responses subject to, and without waiving, the specific conditions and objections contained in the

individual responses and in any General Objections stated following the responses set forth below. Furthermore, Defendant makes these responses without adopting in any way the terms and phrases defined or used in Plaintiff's Interrogatories. When Defendant uses terms or phrases in these responses, those terms and phrases should be given either the meaning set forth by Defendant or, if Defendant gives no specific definition, the ordinary meanings of such words or phrases.

GENERAL OBJECTIONS

This Defendant's undersigned counsel objects to each and every Interrogatory to the extent it calls for the production of privileged information or documents, including information or documents protected by the attorney/client privilege, investigative privilege, consulting expert exemption, information or documents containing or pertaining to work product and documents prepared in anticipation of litigation or trial. This Defendant's counsel further objects to each and every Interrogatory to the extent it seeks the disclosure of the identities of, or any work generated by, non-testifying consulting experts retained by or at the direction of this Defendant's attorneys in anticipation or preparation for this and/or other threatened or pending litigation or in connection with the rendering of legal advice to this Defendant. No restatement of, or failure to restate, any specific objection in the context of these answers shall be construed to imply a waiver of any unstated privilege or objections addressed by this General Objection.

Each response herein below is subject to all objections as to competence, relevance, materiality, propriety, admissibility and any and all other objections and grounds to which the same statement would be subject if delivered in live testimony in Court. All such objections and

grounds are expressly reserved by this Defendant and may be interposed at the time of trial wherein conjunction with other uses of the responses.

INTERROGATORY NO. 1: Identify the person who is answering these questions for proponent.

ANSWER:

Creeda Faye Dodd Wright

INTERROGATORY NO. 2: Identify each physician who treated Lualice Smith Dodd for any condition within five years before the date of her death.

ANSWER:

- | | |
|--|--------------------|
| 1. Dr. Bruno, St. Thomas Rutherford, Murfreesboro, TN | 10-11-11 |
| 2. Dr. Jerry Sullivan, Union City, TN | 01-17-06, 01-25-06 |
| 3. Dr. William James, Union City, TN | 04-15-08 |
| 4. Dr. Mark Fowler, Union City, TN | 04-21-08 |
| 5. Dr. Charles Denaburg, Union City, TN | 08-19-08 |
| 6. Dr. Chundura, Northside Health Care, Murfreesboro, TN | 06-01-11 |

Other physician records may be available at these facilities:

1. St. Thomas Rutherford, Murfreesboro, TN
2. The Jackson Hearing Center, Jackson, TN
3. Jackson Madison County General Hospital, Jackson, TN
4. Baptist Memorial Hospital, Union City, TN
5. Gray Clinic, Kenton, TN
6. Greenbrier Meadows, Martin, TN
7. Etheridge House, Union City, TN
8. The Eye Clinic, Jackson, TN
9. St. Thomas West, Nashville, TN
10. Podiatry Clinic of Jackson, Jackson, TN
11. Adams Place, Murfreesboro, TN
12. Northside Health Care, Murfreesboro, TN
13. Kenton Drug Co., Kenton, TN

INTERROGATORY NO. 22: Identify any communications between Lualice Smith Dodd and the persons who witnessed her will or any alleged will or codicil concerning the execution of the will or codicil.

ANSWER:

I was not privy to the communications between my mother and the witnesses to her will.

INTERROGATORY NO. 23: Identify any communications between Lualice Smith Dodd and any other person prior to the date of execution of the purported holographic codicil concerning the terms of the codicil, including inclusion or exclusion of any person from sharing in legacies in the will.

ANSWER:

I was not privy to any communications regarding the holographic codicil herein.

INTERROGATORY NO. 24: Did you have any communications with Lualice Smith Dodd within six years before her death relating to the provisions of Lualice Smith Dodd's will or any purported codicil? If so, list the following:

- (a) Identify the communication;
- (b) The date of each communication;
- (c) The place where the communication occurred;
- (d) The persons who were present when the communication was made;
- (e) A summary of what was said to Lualice Smith Dodd and what Lualice Smith Dodd said.

ANSWER:

No.

INTERROGATORY NO. 25: Did you have any communications with Lualice Smith Dodd within six years before her death relating to a transfer of any of her property to you? If so, list the following:

- (a) Identify the communication;
- (b) The date of each communication;
- (c) The place where the communication occurred;
- (d) The persons who were present when the communication was made;
- (e) A summary of what you said to Lualice Smith Dodd and what Lualice Smith Dodd said to you.

STATE OF TENNESSEE

COUNTY OF ~~OBION~~ *Rutherford*

CREEDA FAYE DODD WRIGHT, being duly sworn, makes oath that she has read the foregoing Answers to Interrogatories and Requests for Production of Documents and the information contained is true and correct to the best of her knowledge, information and belief.

Creeda D. Wright

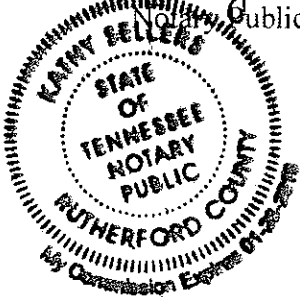
Creeda Faye Dodd Wright

Subscribed and sworn to before me this the 4 day of May, 2016.

Kathy Sellers

Notary Public

My commission expires: Jan 28, 2019



Certificate of Service

I hereby certify that I have served a copy of the foregoing upon the Honorable John M. Miles, 511 South Third Street, P.O. Box 8, Union City, TN 38281, via U.S. Regular Mail, postage prepaid, this the 12th day of ~~May~~ *July*, 2016.

Ree A. J.

J. Russell Nixon

IN THE CIRCUIT COURT FOR RUTHERFORD COUNTY, TENNESSEE
AT MURFREESBORO

**IN RE: THE ESTATE OF LUALICE
SMITH DODD, DECEASED,
DAVID DODD HOUSTON, and
GLENDA ALICE HOUSTON CAUDLE,**

PLAINTIFFS / CONTESTANTS,

VS.

**CASE NO.: 69,746
JURY DEMAND**

CREEDA FAYE DODD WRIGHT,

DEFENDANT / EXECUTOR.

SUPPLEMENTAL STATEMENT OF UNDISPUTED MATERIAL FACTS

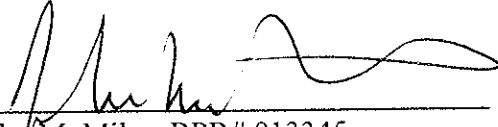
1. The document submitted by the Defendant as an alleged holographic codicil is not signed by the decedent as required by TCA § 32-1-105.

Please see the Affidavit of Joann Ray attached hereto as Exhibit 1, and the Affidavit of Jackie Zaricor attached hereto as Exhibit 2.

2. There is no evidence of any communication between anyone and the Decedent regarding the witnessing or execution of the alleged codicil, nor is there any information regarding any communications between the decedent and any other person prior to the date of the execution of the alleged codicil concerning its terms, including the inclusion or exclusion of any person sharing in the legacies of the will.

Defendant, Creeda Faye Dodd Wright's, answer to Interrogatories to numbers 22, 23, and 24, which are attached hereto as Exhibit 3.

RESPECTFULLY SUBMITTED,



John M. Miles, BPR# 013345

Attorney for Plaintiffs

511 S. Third St.

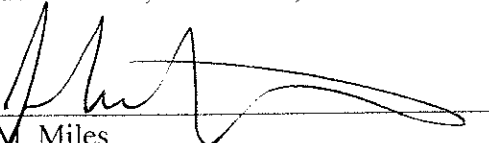
P.O. Box 8

Union City, TN 38281

(731) 885-1234

Certificate of Service

I hereby certify a copy of this Notice of Contest has been served upon the Honorable J. Russell Nixon, Attorney for Estate, 111 N. Maple St., Murfreesboro, TN 37130, via U.S. Mail, postage prepaid this the 30 day of March, 2018.



John M. Miles

Exhibit 1

**IN THE CIRCUIT COURT FOR RUTHERFORD COUNTY, TENNESSEE
AT MURFREESBORO**

**IN RE: THE ESTATE OF LUALICE
SMITH DODD, DECEASED,
DAVID DODD HOUSTON, and
GLENDA ALICE HOUSTON CAUDLE,**

PLAINTIFFS / CONTESTANTS,

VS.

**CASE NO.: 69,746
JURY DEMAND**

CREEDA FAYE DODD WRIGHT,

DEFENDANT / EXECUTOR.

AFFIDAVIT

COMES NOW Joann Ray of Kenton, Obion County, Tennessee, and for purposes of making oath states:

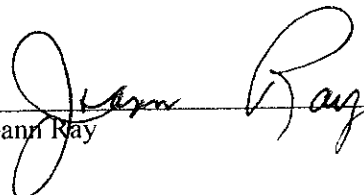
1. I am over the age of eighteen (18), am not suffering under any disability or incapacity and provide this statement for the purposes contained herein.
2. The statements made in this affidavit are true and correct to the best of my knowledge, information and belief.
3. I have examined the document, a copy of which is attached hereto, which I understand was offered as a codicil to the will of Lualice Smith Dodd. I have known Mrs. Dodd for many years and am familiar with her handwriting. I have also reviewed the prior affidavit that I signed in this matter.
4. While I remain of the opinion that the document is entirely in her handwriting, the document does not bear her signature.

5. I realize that the prior affidavit included language that the document bore her signature; however, frankly, I did not study the document at that time or contemplate the meaning or significance of the term "signature" based upon the common meaning of that word.

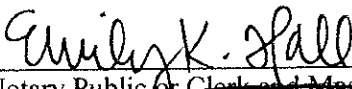
6. I recognize that her name is included in the caption at the top of the document and that her name is written in her handwriting, but it is not my opinion that that carries the weight or significance of a signature indicating her acceptance of the document. In other words, that document is not signed by Mrs. Dodd.

7. It is also my opinion that Lualice Smith Dodd would have made some provision for Glenda Caudle in any last will and testament.

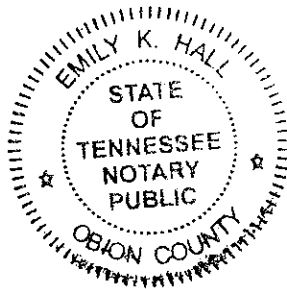
8. Further affiant saith not.


Joann Ray

SWORN TO AND SUBSCRIBED before me this 3rd day of November 2017.


Notary Public or Clerk and Master

My Commission Expires: 7/24/2018



Exec. 1:00 P.M. July 21-2007

Last will of Lualice Smith Dodd - Age 95

To my granddaughter Glenda Alice Houston Caudle
& give

To my grand son David Dodd Houston I give

To my only living child, Creeda Faye Dodd Wright
I give all my remaining worldly assets, every thing
money, Home, house & lot in Union City, In., all
investments, all furniture, all personal items
such as clothes, jewelry, etc.

Exhibit 2

**IN THE CIRCUIT COURT FOR RUTHERFORD COUNTY, TENNESSEE
AT MURFREESBORO**

**IN RE: THE ESTATE OF LUALICE
SMITH DODD, DECEASED,
DAVID DODD HOUSTON, and
GLENDA ALICE HOUSTON CAUDLE,**

PLAINTIFFS / CONTESTANTS,

VS.

**CASE NO.: 69,746
JURY DEMAND**

CREEDA FAYE DODD WRIGHT,

DEFENDANT / EXECUTOR.

AFFIDAVIT

COMES NOW Jackie Zaricor of Kenton, Obion County, Tennessee, and for purposes of making oath states:

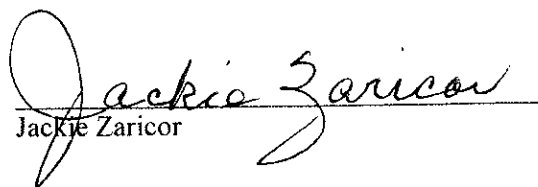
1. I am over the age of eighteen (18), am not suffering under any disability or incapacity and provide this statement for the purposes contained herein.
2. The statements made in this affidavit are true and correct to the best of my knowledge, information and belief.
3. I have examined the document, a copy of which is attached hereto, which I understand was offered as a codicil to the will of Lualice Smith Dodd. I have known Mrs. Dodd for many years and am familiar with her handwriting. I have also examined the prior affidavit that I signed in this matter.
4. While I remain of the opinion that the document is entirely in the handwriting of Lualice Smith Dodd, the document does not bear her signature.

5. I realize that the prior affidavit included language that the document bore her signature; however, frankly, I did not study the document at that time or contemplate the meaning or significance of the term "signature" based upon the common meaning of that word.

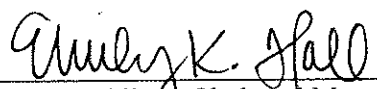
6. I recognize that her name is included in the caption at the top of the document and that her name is written in her handwriting, but it is not my opinion that that carries the weight or significance of a signature indicating her acceptance of the document. In other words, the document is not signed by Mrs. Dodd.

7. It is also my opinion that it would not be Mrs. Dodd's wish in any last will and testament that a provision not be made for either of her grandchildren, David Houston or Glenda Caudle.

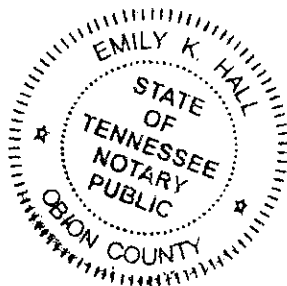
8. Further affiant saith not.


Jackie Zaricor

SWORN TO AND SUBSCRIBED before me this 3rd day of November 2017.


Notary Public of ~~Clerk and Master~~

My Commission Expires: 7/24/2018



Exec. 1:00 P.M. July 31-2007

Last Will of LuAlice Smith Dodd - Age 95

To my granddaughter Glenda Alice Houston Gaudle
I give

To my grand son David Dodd Houston I give

To my only living child, Creeda Faye Dodd Wright
I give all my remaining worldly assets, everything
money, (Home, house + lot in Union City, In.) all
investments, all furniture, all personal items
such as clothes, jewelry etc.

Exhibit 3

IN THE CIRCUIT COURT FOR RUTHERFORD COUNTY, TENNESSEE
AT MURFREESBORO

IN RE: THE ESTATE OF LUALICE
SMITH DODD, DECEASED,
DAVID DODD HOUSTON, and
GLENDA ALICE HOUSTON CAUDLE,

PLAINTIFFS / CONTESTANTS,

VS.

CASE NO.: 69,746

JURY DEMAND

CREEDA FAYE DODD WRIGHT,

DEFENDANT / EXECUTRIX.

PLAINTIFF'S RESPONSE TO DEFENDANT'S FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFFS FROM
DEFENDANTS

Comes, Defendant, Creeda Faye Dodd Wright, and answers Defendant's interrogatories as follows:

PREFATORY STATEMENT

These responses are accurate as of the date made. Defendant's investigation and discovery are continuing, therefore Defendant cannot exclude the possibility she may obtain more complete or additional information in the future. Defendant makes the following responses subject to, and without waiving, the specific conditions and objections contained in the

individual responses and in any General Objections stated following the responses set forth below. Furthermore, Defendant makes these responses without adopting in any way the terms and phrases defined or used in Plaintiff's Interrogatories. When Defendant uses terms or phrases in these responses, those terms and phrases should be given either the meaning set forth by Defendant or, if Defendant gives no specific definition, the ordinary meanings of such words or phrases.

GENERAL OBJECTIONS

This Defendant's undersigned counsel objects to each and every Interrogatory to the extent it calls for the production of privileged information or documents, including information or documents protected by the attorney/client privilege, investigative privilege, consulting expert exemption, information or documents containing or pertaining to work product and documents prepared in anticipation of litigation or trial. This Defendant's counsel further objects to each and every Interrogatory to the extent it seeks the disclosure of the identities of, or any work generated by, non-testifying consulting experts retained by or at the direction of this Defendant's attorneys in anticipation or preparation for this and/or other threatened or pending litigation or in connection with the rendering of legal advice to this Defendant. No restatement of, or failure to restate, any specific objection in the context of these answers shall be construed to imply a waiver of any unstated privilege or objections addressed by this General Objection.

Each response herein below is subject to all objections as to competence, relevance, materiality, propriety, admissibility and any and all other objections and grounds to which the same statement would be subject if delivered in live testimony in Court. All such objections and

grounds are expressly reserved by this Defendant and may be interposed at the time of trial wherein conjunction with other uses of the responses.

INTERROGATORY NO. 1: Identify the person who is answering these questions for proponent.

ANSWER:

Creeda Faye Dodd Wright

INTERROGATORY NO. 2: Identify each physician who treated Lualice Smith Dodd for any condition within five years before the date of her death.

ANSWER:

- | | |
|--|--------------------|
| 1. Dr. Bruno, St. Thomas Rutherford, Murfreesboro, TN | 10-11-11 |
| 2. Dr. Jerry Sullivan, Union City, TN | 01-17-06, 01-25-06 |
| 3. Dr. William James, Union City, TN | 04-15-08 |
| 4. Dr. Mark Fowler, Union City, TN | 04-21-08 |
| 5. Dr. Charles Denaburg, Union City, TN | 08-19-08 |
| 6. Dr. Chundura, Northside Health Care, Murfreesboro, TN | 06-01-11 |

Other physician records may be available at these facilities:

1. St. Thomas Rutherford, Murfreesboro, TN
2. The Jackson Hearing Center, Jackson, TN
3. Jackson Madison County General Hospital, Jackson, TN
4. Baptist Memorial Hospital, Union City, TN
5. Gray Clinic, Kenton, TN
6. Greenbrier Meadows, Martin, TN
7. Etheridge House, Union City, TN
8. The Eye Clinic, Jackson, TN
9. St. Thomas West, Nashville, TN
10. Podiatry Clinic of Jackson, Jackson, TN
11. Adams Place, Murfreesboro, TN
12. Northside Health Care, Murfreesboro, TN
13. Kenton Drug Co., Kenton, TN

INTERROGATORY NO. 22: Identify any communications between Lualice Smith Dodd and the persons who witnessed her will or any alleged will or codicil concerning the execution of the will or codicil.

ANSWER:

I was not privy to the communications between my mother and the witnesses to her will.

INTERROGATORY NO. 23: Identify any communications between Lualice Smith Dodd and any other person prior to the date of execution of the purported holographic codicil concerning the terms of the codicil, including inclusion or exclusion of any person from sharing in legacies in the will.

ANSWER:

I was not privy to any communications regarding the holographic codicil herein.

INTERROGATORY NO. 24: Did you have any communications with Lualice Smith Dodd within six years before her death relating to the provisions of Lualice Smith Dodd's will or any purported codicil? If so, list the following:

- (a) Identify the communication;
- (b) The date of each communication;
- (c) The place where the communication occurred;
- (d) The persons who were present when the communication was made;
- (e) A summary of what was said to Lualice Smith Dodd and what Lualice Smith Dodd said.

ANSWER:

No.

INTERROGATORY NO. 25: Did you have any communications with Lualice Smith Dodd within six years before her death relating to a transfer of any of her property to you? If so, list the following:

- (a) Identify the communication;
- (b) The date of each communication;
- (c) The place where the communication occurred;
- (d) The persons who were present when the communication was made;
- (e) A summary of what you said to Lualice Smith Dodd and what Lualice Smith Dodd said to you.

STATE OF TENNESSEE

COUNTY OF ~~OBION~~ *Rutherford*

CREEDA FAYE DODD WRIGHT, being duly sworn, makes oath that she has read the foregoing Answers to Interrogatories and Requests for Production of Documents and the information contained is true and correct to the best of her knowledge, information and belief.

Creeda F. Wright

Creeda Faye Dodd Wright

Subscribed and sworn to before me this the 4 day of May, 2016.

Kathy Sellers

Notary Public

My commission expires: Jan 28, 2019



Certificate of Service

I hereby certify that I have served a copy of the foregoing upon the Honorable John M. Miles, 511 South Third Street, P.O. Box 8, Union City, TN 38281, via U.S. Regular Mail, postage prepaid, this the 12th day of ~~May~~ *July*, 2016.

Ree Nixon

J. Russell Nixon

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AMENDMENT ONE

**Prepared by: John Miles, Attorney
P.O. Box 8
Union City, TN 38281
(731) 885-1234**

Those voting in the November 2014 election will find a ballot initiative called “Amendment One”, which is a proposed Amendment to the Tennessee Constitution to allow some limited regulation of abortions. I have attached a copy of the proposed amendment. The purpose of this memorandum is to provide information so that the voters can make an informed decision on this important amendment.

I believe that the founders of our nation desired that Americans would be informed as to current events especially politics. They believed that if America is to prosper as a free society, and the people and the States were to govern themselves with the influence of a very limited central government, knowledge of the issues was critical.

“If a nation expects to be ignorant – and free – in a state of civilization, it expects what never was and never will be.”

“No one more sincerely wishes the spread of information among mankind more than I do, and none has greater confidence in its effects toward supporting a free and good government.” – Thomas Jefferson.

Article XI, Section 3 of the Tennessee Constitution governs amendments. As you might imagine, it is difficult by design to amend the Tennessee Constitution, and requires an initial proposal in the State House or Senate, which must be agreed to by the majority of both houses, and the amendment is then referred to the next General Assembly. Prior to this second vote, a six month publication period is required as well as approval by two thirds of all members of each elected house. The final step in that process is to place the initiative on the ballot at the next General Election in which a Governor is to be chosen.

Amendment I has passed all of these rigorous initial steps, but now will require a majority approval of all voters voting for Governor in November. In other words, the number of people approving Amendment I must equal 50% of all the votes cast for Governor plus 1 vote.

More information can be found at this website: <http://voteyestn.org/index.html>

The following is an overview of the subject matter in order that you can better understand the issue:

Under our federal rule which was initially established in Roe v. Wade and subsequently modified by Planned Parenthood v. Casey, the Supreme Court of the United States has held that a woman has a right to terminate her pregnancy before viability without undue interference from the State. This is sometimes referred to as the “undue burden” standard. Under this interpretation of the federal constitution, the State has the power to regulate abortions as long as the law does not unduly burden the woman’s right to terminate her pregnancy, and the State may restrict abortions after viability as long as the law contains exceptions for pregnancies that endanger the woman’s life or health.

In an effort to place some reasonable regulation on abortion in Tennessee that would be consistent with this federal rule, our legislature passed some limited regulation requiring for example a two day waiting period prior to an abortion, a physician consultation, and the requirement that in second and third trimester abortions be performed in a hospital.

A Tennessee Supreme Court decision which was rendered in 2000, in the case of Planned Parenthood v. Sundquist, struck down all of these regulations and imposed a “strict scrutiny analysis” on any regulation of abortion in Tennessee. As a consequence, Tennessee has become a destination state for abortions given that its regulation of abortions is less strict than some of the neighboring states. In 2008 23.7% of Tennessee abortions were sought by women residing out of state.

E. Riley Anderson, Chief Justice at the time, authored the opinion in Planned Parenthood v. Sundquist, and in it he held:

“The concept of ordered liberty embodied in our constitution requires our finding that a woman’s right to legally terminate her pregnancy is fundamental.”

By using this language, he elevated a woman’s right to terminate her pregnancy to what we often consider God-given rights such as our right to raise our children or enter into lawful marriages. By elevating this right to a fundamental right, any regulation of abortion in Tennessee must pass a “strict scrutiny analysis”. Under a “strict scrutiny analysis”, any regulation must be narrowly tailored to protect a compelling State interest. Using this standard, the Court went on to strike all of the

contested regulations of abortion including the two day waiting period, requirement for consultation with a physician, and requirement for hospitalization in second and third trimester abortions.

It might also shock some to learn that in striking these regulations, the Tennessee Supreme Court justified its decision in part based upon the language of Article I, Section 2 of the Tennessee Constitution which states “the doctrine on non-resistance to arbitrary power and oppression is absurd, slavish and destructive to the good and happiness of mankind.” One might wonder how facilitating abortion advances the good and happiness of mankind, particularly that of the unborn. One would think that the language of Article I, Section 2 of the Tennessee Constitution would ordinarily be reserved for conduct consistent with freedom fighters such as Rosa Parks or others, who peacefully resisted arbitrary power and oppression. Nevertheless, the Tennessee Supreme Court used this language in supporting its decision to strike these regulations.

Attached hereto is a copy of the proposed Amendment. I hope this information will be helpful to anyone reading this in deciding whether or not to support this amendment. The “Sundquist” decision is the “law of the land” in Tennessee right now. Pro-Life individuals will understandably regret that it will take a constitutional amendment to allow for some reasonable regulation of abortion consistent with federal law, but that is exactly where we find ourselves. If you are a prolife individual, you will likely want to vote “yes” on Amendment One.

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
WESTERN SECTION**

FLOYD LEE PERRY, JR.,

PETITIONER/APPELLANT,

VS.

**CASE NO. W2013-00901-CCA-R3-PC
(No. 8-438 from the Circuit Court of
Obion County, Tennessee at Union City
William B. Acree, Jr., Circuit Judge)**

STATE OF TENNESSEE,

RESPONDENT/APPELLEE.

BRIEF OF THE APPELLANT, FLOYD LEE PERRY, JR.

**John M. Miles, BPR No. 013345
Attorney for Appellant
511 S. Third Street
P. O. Box 2041
Union City TN 38281
901-885-1234**

**ORAL ARGUMENTS REQUESTED
PURSUANT TO T.R.A.P. 35(a)**

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LEGEND OF ABBREVIATIONS

Petitioner = The Defendant/Appellant, Floyd Lee Perry

Trial Court = The Honorable William B. Acree, Jr., Judge Obion County Circuit Court in Union City, Tennessee

Vol. I = All citations to the technical record which is found in Volume I of the Record on Appeal

Vol. II = All citations to the technical record which is found in Volume II of the Record on Appeal

Vol. III = All citations to the record from the hearing which is found in Volume III of the Record on Appeal

JURISDICTIONAL STATEMENT

This case comes to this Honorable Court by the authority of Tennessee Code Annotated § 40-30-116 and Rule 3 (b) of the Tennessee Rules of Appellate Procedure.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Where the jurors were given no opportunity to consider the mitigating qualities of youth or any other special circumstances relating to the Defendant who was a juvenile at the time the offense was committed, and where, upon conviction, the only possible result was a sentence of life with the possibility of parole (which in Tennessee results in the mandatory imposition of a fifty one (51) year sentence) does such a conviction violate the Eighth Amendment prohibition against cruel and inhuman punishment under the new precedent established in the case of *Miller v. Alabama*, 132 S.Ct. 2455, 183 L.Ed. 2d 407 (2012), or some logical extension thereof?

STATEMENT OF THE CASE

The Petitioner brings this post-conviction relief petition based upon the rulings in *Miller v. Alabama* and *Jackson v. Hobbs*, 132 S.Ct. 2455, 183 L.Ed. 2d 407 (2012), which as set forth in his petition for post-conviction relief, establish a new understanding of the Eighth Amendment as it relates to punishment for juvenile offenders.

Since this case is decided purely on the technical record which establishes the nature of the Defendant's conviction, its procedural history, pleadings and jury instructions, no testimony was adduced at the hearing on the petition, and a statement of the case in this matter consists primarily of the procedural history, which we set forth next in the Statement of the Facts.

STATEMENT OF THE FACTS

On October 6, 1998, an Obion County Grand Jury indicted the Defendant Floyd Lee Perry for first degree murder, felony murder, and especially aggravated robbery, all of which were alleged to have occurred on April 16, 1998. As the Defendant was a juvenile at the time of the alleged offense, the issue was initially submitted to the Obion County Juvenile Court as to whether or not he should be tried as an adult, and, after a hearing on that issue on June 18, 1998, the Obion County Juvenile Court ordered that the Defendant be tried as an adult and that an abstract of the record from the Juvenile Court be prepared for transfer to the Obion County Circuit Court. [Vol. I, p. 1 through 6].

Among the information from the Juvenile Court record is a prior psychological evaluation dated October 24, 1994, which indicated among other things that the Defendant had an I.Q. of 80 and verified him as learning disabled. The Defendant's date of birth is August 14, 1980, and at the time of that evaluation, he was 14 year old, ninth grader from Tigrett High School. [Vol. I, p. 8]. Other information in the report indicated that the Defendant was affected by minimal brain dysfunction and/or attention deficit disorder and was receiving 15 hours per week special education assistance [Vol. I, p. 9]. The Juvenile Court ordered a competency evaluation which found that the Defendant was competent to stand trial, and that he was not criminally insane. That report reflected an I.Q. score of 89 and stated that he was not suffering from a severe mental disease or defect. [Vol. I, p.15]. As part of that evaluation, a referral was made to Timber Springs for diagnosis and recommendations. Among those recommendations were that if Mr. Perry was "found innocent" of the charges against him, he should receive treatment in a short-term alcohol and drug abuse program. [Vol. I, p. 19].

Prior to trial, counsel for the Defendant moved the Court to instruct the jury on the definition of a life sentence under Tennessee law. In particular, a life sentence under Tennessee law would mean that the Defendant would not be eligible for parole until he had served at least 85 percent of a 60 year sentence or approximately 51 years [Vol. I, p. 31]. Defendant also moved that the Court instruct the jury that life without parole would mean that the Defendant would spend the remainder of his natural life incarcerated with no release eligibility [Vol. I, p. 35]. Defense counsel moved for an order to deny the State the authority to seek a life sentence without parole arguing that to do so would be an unconstitutional infringement of the juvenile defendant's rights to due process and equal protection under the U.S. Constitution and the Constitution of the State of Tennessee [Vol. I, p. 36].

Included in the Court's instructions (after a restatement of the crime of first degree murder) was the following instruction: "the punishment for the offense is life imprisonment, life imprisonment without the possibility of parole, or death by electrocution. The State, however, is not seeking the death penalty or life imprisonment without the possibility of parole and, therefore, should you return a verdict of guilty, the Court will impose a life sentence." [Vol. I, p. 87]. There is no indication in the record that the Judge instructed the jury (as had been requested by defense counsel) that life without parole would result in approximately 51 years in prison day for day.

On February 24, 1999, the jury found the Defendant not guilty of first degree murder but guilty of second degree murder under Count One of the indictment, guilty of first degree felony murder under Count Two of the indictment, and guilty of especially aggravated robbery under Count Three of the Indictment [Vol. I, p. 38-39].

On October 23, 2000, the Court of Criminal Appeals upheld the convictions of the trial court [Vol. I, p. 130]. On May 21, 2001, Tennessee Supreme Court denied Defendant's application for permission to appeal [Vol. I, 143].

Mr. Perry filed a post-conviction writ which was amended after appointment of counsel [Vol. I, 144]. After a hearing, the Court denied the petition for post-conviction relief and entered an order accordingly on August 23, 2002 [Vol. II, p. 159]. An appeal was had on the post-conviction writ; however, that judgment was affirmed on January 21, 2004, and permission to appeal denied May 24, 2004 [Vol. II, 179].

On August 7, 2012, Defendant filed a petition to reopen his post-conviction relief petition based upon the holdings in *Miller v. Alabama* and *Jackson v. Hobbs*, 132 S.Ct. 2455, 183 L.Ed. 2d 407 (2012), arguing that these Supreme Court rulings established a constitutional right which was not recognized as existing at the time of trial [Vol. II, p. 179-180]. Trial court found a colorable claim, appointed John Miles as attorney for Mr. Perry, and ordered the Attorney General to file an answer [Vol. II, p.186 through 188]. In its answer, the State alleged that Petitioner had not established a basis for reopening his petition and denied that the holding in *Miller v. Alabama* was applicable to Petitioner's case [Vol. II, p. 189 through 193].

After a hearing, the Court took the matter under advisement and on March 26, 2013, entered its Order denying post-conviction relief. The State had argued in its answer that the petition did not establish a new constitutional right which was not in existence at the time Defendant was sentenced, but rather was an extension of a constitutional right recognized in *Graham v. Florida*, 130 S.Ct. 2011 (2010), 176 L.Ed. 2d 825 [Vol. II, p. 218-219]. The Court disagreed and found that *Miller v. Alabama* did indeed establish a new constitutional right for

juveniles who have been convicted of homicide offenses in that they cannot be subject to a mandatory sentence of life without the possibility of parole. In its ruling, the Court went on to hold that the petition was timely and filed within one (1) year of the *Miller* decision. [Vol. II, p. 219].

Next, the Court took up an issue raised by the State relying on *Craig v. Cain*, 2013 W.L. 69128 (5th Circuit, Louisiana 213). In reliance on that case, the prosecution argued that *Miller v. Alabama* could not be applied retroactively in a collateral attack on the Defendant's sentence. The Court rejected this argument and found that the plain language in T.C.A. § 40-30-122 allowed an attack upon a conviction based upon a newly established constitutional right. [Vol. II, p. 219].

Lastly, the Court dealt with the issue of whether the holding in *Miller* applied to the case at bar or whether a logical extension thereof could be made given that, while the Defendant did not receive life without parole, a life sentence in Tennessee consists of a mandatory fifty one (51) years in prison. The Court commented that, while it did not disagree that fifty one (51) years might effectively consist of a life sentence, the Court nevertheless did not have the authority to grant the Petitioner post-conviction relief absent some clearly established precedent [Vol. II, p. 219].

Volume III, though referred to as Transcript of the Evidence, is simply a transcript of the argument put forth by counsel for the petitioner and for the State since no testimony was presented [Vol. III].

STATEMENT OF THE LAW

Tennessee Code Annotated § 37-1-134 provides that after a petition has been filed alleging delinquency based on conduct that is designated a crime under the laws of the State of Tennessee and before a hearing on the petition on the merits, the Juvenile Court may transfer the child to the Sheriff of the county to be held according to the law and dealt with as an adult in the criminal court of competent jurisdiction. In such case, the disposition of the child shall be as if the child were an adult as long as the child is sixteen (16) years of age, or more, at the time of the alleged conduct and such child is charged with the offence of first degree murder, second degree murder, aggravated robbery, especially aggravated robbery or a number of other enumerated offences. Under Tennessee law, the only difference in the treatment of a child so transferred into the adult system is that the District Attorney General may not seek, nor may any child so transferred receive a sentence of death for the offense.

In its decision of *Roper vs. Simmons*, 543 U.S. 551 (2005), 125 S.Ct., 1183, 161 L. Ed. 2d 1, the Supreme Court of the United States has held that the death penalty for juvenile offenders is an unconstitutional deprivation of their rights under the Eighth Amendment of the United States Constitution. In the *Roper* decision, the Supreme Court recognized the greater capacity for rehabilitation, the lack of the ability of juveniles to appreciate the consequences of their conduct and a recognition that they are more susceptible to peer pressure, among other considerations, *Roper*, 543 U.S. 551, at 569. The logic of recognizing a divergence in treatment based upon the mental development of defendants had been recognized in the Supreme Court decision of *Atkins vs. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), which held the death penalty unconstitutional for “mentally retarded” defendants. In *Atkins*, the Court held that the

punishment needs to match the blameworthiness of a defendant. *Atkins vs. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 2251.

We now have a different sentencing paradigm when sentencing juvenile offenders. In the case of *Graham vs. Florida*, 130 S.Ct. 2011 (2010), the Court recognized greater developmental research as had been presented since *Roper* with regard to the functioning of the juvenile brain. In particular the part of the brain used for executive decision making is that part of the brain that develops last. The Court in *Graham* recognized that sentencing schemes have to take into consideration the differences between the mental development of a juvenile and that of an adult. *Graham v. Florida*, 130 S.Ct. 2011, 2031 (2010). For example, the case of *JDB vs. North Carolina* involved a thirteen (13) year old special needs child who had been interrogated by a uniformed officer in the presence of other school authority figures. In *JDB*, the Court held that youth status matters with respect to constitutional issues, and the Court ruled that under the Fourth Amendment we now have a different standard for juveniles and that the child's age properly informs the Miranda custody analysis. *JDB vs. North Carolina* 131 S.Ct. 2394, 2399.

We now have the case of *Miller vs. Alabama*, 132 S.Ct. 2455; 183 L.Ed.2d 407, which was relied upon by the Petitioner in this matter. In *Miller* the Court ruled that sentencing schemes that do not take into account the fact that child offenders are different are unconstitutional. *Miller v. Alabama*, 132 S.Ct. 2455, 2466-2468. The companion case of *Jackson vs. Hobbs* (the Arkansas case) is particularly important when examining the rights of your Petitioner, Floyd Lee Perry. In the Arkansas case, the Defendant, Jackson, was a juvenile and was convicted based upon the felony murder rule. In that case, the Defendant, Jackson, did not kill anyone, there was no requirement for the jury to determine that he had intent to kill. Nevertheless, he received a

mandatory life without parole sentence under a sentencing scheme that provided the jury and the judge with no other alternative. *Jackson v. Hobbs*, 132 S.Ct. 2455, 2477.

Extremely important in the case before the Court is the ruling in *Miller* wherein the Court held that a sentencer must have the ability to consider the mitigating qualities of youth. The Court held that the status of youth is more than a chronological fact. It is a time of immaturity, irresponsibility, impetuosity and recklessness. It is a moment and condition of life when a person may be most susceptible to influence and psychological damage, and its signature qualities are all transient. *Miller v. Alabama*, 132 S.Ct. 2455, 2468. Justice Kagan stated in her opinion that, just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in assessing his culpability. *Id.*

ARGUMENT

In this case before the Court, the only sentencing alternative for Mr. Perry, as per jury instruction, was life in prison. Application of T.C.A. § 40-35-101(h)(2)(i)(1) to a life sentence results in the defendant serving 51 years before any possibility of parole. The most important aspect of the *Miller* decision as it relates to the Petitioner, Floyd Lee Perry, is the Court's finding that a sentencer must have the ability to consider the mitigating qualities of youth, that youth is more than a chronological fact, that youth is a time of immaturity, irresponsibility, impetuosity and recklessness. In *Miller*, the Court found that youth is a moment and condition of life when a person may be most susceptible to influence and psychological damage, and that its signature qualities are transient. *Miller v. Alabama*, 132 S.Ct. 2455, 2468. Since these factors, and the background of the mental and emotional development of a youthful defendant must be duly considered in assessing his culpability, the question remains, "does the mandatory aspect of life, albeit with the possibility of parole after 51 years, as it applied to the Defendant, Floyd Lee Perry, remain constitutional under our 8th Amendment prohibition against cruel and unusual punishment, particularly when there is no consideration given to the "mitigating qualities of youth" as is now required after *Miller vs. Alabama*?" Additionally, there is no indication that any consideration was given by the jury or could have been given to Floyd Perry's low IQ, his other mental dysfunctions or use as a youth of alcohol and drugs.

CONCLUSION

As this case is clearly a homicide case and *Graham* was a non-homicide case, your Petitioner's request for relief is timely. We respectfully submit to the Court that, as in this case, the jurors had no alternative other than to impose a 51 year sentence on your petitioner and the sentencer had no alternative or opportunity to consider mitigating qualities of youth, or any other special circumstances relating to Floyd Perry. Additionally, we submit that there is not meaningful distinction under the reasoning of *Miller* between life without the possibility of parole and a sentence of at least 51 years under Tennessee law. Accordingly, the judgment should be rendered void pursuant to TCA § 40-30-111.

THIS the _____ day of September, 2013.

Respectfully submitted,

BY: _____
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion upon Honorable Robert E. Cooper, Jr., Attorney General of the State of Tennessee, by forwarding a copy of same to the Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37243-0485, and the Honorable Tommy Thomas, District Attorney General, P.O. Box 218, Union City, Tennessee 38281, by the mails of the United States, postage prepaid, this _____ day of September, 2013.

Attorney