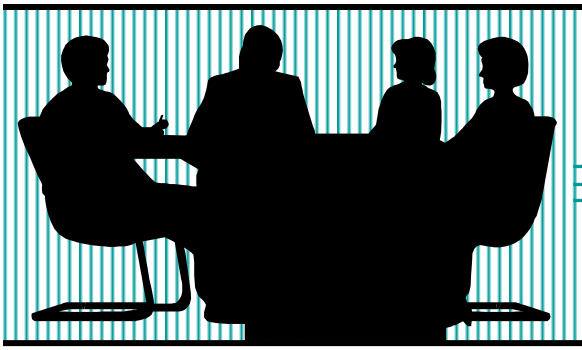

ADR NEWS

A publication of the Tennessee Alternative Dispute Resolution Commission

VOLUME 9, ISSUE 3 **SUMMER 2009**

Contacts

Tennessee Alternative Dispute Resolution Commission

- Hayden D. Lait, Esq.
  Chairperson, Memphis
- Harold D. Archibald, Esq.
  Memphis
- Allen S. Blair, Esq.
  Memphis
- Hon. Ben H. Cantrell
  Nashville
- J. Wallace Harvill, Esq.
  Centerville
- Tommy Lee Hulse
  Kingsport
- C. Suzanne Landers, Esq.
  Memphis
- Glenna M. Ramer, Esq.
  Chattanooga
- D. Bruce Shine, Esq.
  Kingsport
- Edward P. Silva, Esq.
  Franklin
- Howard H. Vogel, Esq.
  Knoxville

Supreme Court Liaison

- Justice William C. Koch, Jr.

Programs Manager

- Anne-Louise Wirthlin, Esq.

Programs Assistant

- Margaret D. Lamons

Send questions and comments to:

Tennessee ADR Commission
Administrative Office of the Courts
Nashville City Center, Suite 600
511 Union Street
Nashville, TN 37219
Phone: 615-741-2687
Fax: 615-741-6285
Email: **Anne.Louise.Wirthlin@tncourts.gov**
Web: **www.tncourts.gov**

Important Update

The 2009 ADRC Advanced Mediation Training has been moved to Lipscomb University. Registration materials will be sent via email in mid-August.

AOC Awards Mediation-Related Grant Funding

The Administrative Office of the Courts has awarded the 2009–2010 Parent Education and Mediation Fund (PEMF) and the Victim-Offender Reconciliation Program (VORP) grants. The PEMF grant is distributed for the specific purpose of funding the parenting plan requirements, including the costs of court-ordered mediation. In addition to the awards provided to the mediation centers, Rule 31 mediators can receive reimbursement for services provided in court-ordered mediations to indigent parties from the PEMF fund.

The VORP grant is distributed to mediation centers that provide alternatives to the courts for resolution of felony, misdemeanor, and juvenile delinquent disputes. VORP mediation centers provide mediation services free of charge to VORP participants. Thirteen mediation centers throughout the state received funding from one or both of the grants for the 2009–2010 fiscal year. Mediation centers provide an opportunity for Rule 31 mediators to volunteer their services.

For more information on either of the grant programs or to find out more information regarding a mediation center in your area, please contact Anne-Louise Wirthlin, the AOC Programs Manager, at 615-741-2687 ext. 288 or via email at **Anne.Louise.Wirthlin@tncourts.gov**.

Can the Tail Wag the Dog
Or How Both Sides of an Arbitration Can Lose

*by C. Suzanne Landers, Esq.**

So, it's your lucky day in Lawyer Land. You've got two sets of reasonable parties in a dispute with each other, and each party is represented by a reasonable lawyer who knows well the perils and pitfalls of litigation. And because everybody's so reasonable (or because a contract calls for it), you've all agreed to cut to the chase and participate in binding arbitration.

And not only have you agreed to binding arbitration, but you've taken it a step further and agreed that in the event that one of you is unhappy with the arbitrator's decision, then your recourse will be an appeal straight to the Court of Appeals, circumventing a trial at the trial court level, and you've set out in your contract (or consent order) that the Court of Appeals is to use the same standard of review as though the decision had actually been rendered by the trial court.

It's efficient, streamlined, simple, risk-limiting, and economical—all the stuff we ADR friendly lawyers like. But hold up a second—the Court of Appeals has had a little something to say on the matter, and they said it loud and clear in the case of *Pugh's Lawn Landscape Company, Inc. vs. Jaycon Development Corporation*, 2009 WL 1099270 (Tenn. Ct. App.). Here's what happened.

Pugh's Lawn & Landscape sued Jaycon Development alleging that Jaycon had breached a written agreement that existed between the two of them. After some limited discovery, the parties and lawyers all agreed to submit the matter to binding arbitration, and they crafted a consent order of reference to arbitration, which was entered with the trial court, that did three important things, none of which was required by the terms of the contract in dispute: It referred the matter to arbitration and named the specifically selected arbitrator; it set the date for the arbitration; and it used the following language to describe the appeal process that would be utilized in the event that a party was unhappy with the arbitrated result:

> **The parties agree that *(a)* any and all of findings, rulings or judgments issued by the arbitrator shall be appealable, using the same standards of review, as if the finding, ruling or judgment in question was issued by [the Circuit Court]; *(b)* that the agreement that the arbitrator's ruling is appealable was material consideration for the agreement of each party to submit this matter to arbitration; *(c)* each party agrees that if this matter is appealed, neither party will raise an issue on appeal that the arbitrator's ruling is not appealable, that an "arbitrary and capricious" standard of review is applicable due to the appeal arising out of an arbitration, or any other issues relating to the fact that the findings of facts and conclusions of law were reached by an arbitrator, as opposed to a Judge of Circuit Court.**

After a hearing before the arbitrator, the arbitrator rendered a ruling in favor of Jaycon, finding that Pugh's had to pay Jaycon $51,082.20 plus the attorneys' fees Jaycon had incurred in the arbitration. Jaycon then submitted the arbitrator's ruling to the trial court for confirmation. Pugh's did not file an objection of any nature to the request for confirmation presumably because everyone was prepared to travel up the road to the Court of Appeals under the procedure set out in their consent order. Thus, without objection, the

(Continued on page 3)

(Continued from page 2)

trial court confirmed the arbitrator's decision, and Pugh's then filed an appeal with the Court of Appeals. Neither party raised the appealability issue, and each party alleged substantive error in the arbitrator's decision.

After finding that the absence of a reference in the consent order to a specific statute or procedure governing the arbitration meant that the Tennessee Uniform Arbitration Act ("UAA") at T.C.A. Section 29-5-301 – 320 (2000) governed the situation, and then finding that the arbitration was in fact a binding procedure, the Court of Appeals tackled the question: "Can parties expand the scope of judicial review by contract or court order?"

First came a review of T.C.A. Section 29-5-301 – 320 (2000), which, in pertinent part, states that a party can ask a court to confirm, vacate or modify an arbitrator's award under very limited circumstances: if it was "procured by corruption, fraud, or other undue means," if there was evident partiality, corruption, or misconduct by an arbitrator; if an arbitrator exceeded his or her powers; if the arbitrator unreasonably failed to postpone a hearing, refused to hear evidence material to the controversy, or conducted the hearing in a way to substantially prejudice a party; or, if there was no arbitration agreement.

Then the Court of Appeals set out the restrictions imposed on a trial court under T.C.A. Section 29-5-313(a)(1)-(5) if it desired to "modify or correct" an arbitrator's ruling, and these restrictions allow a modification or correction only if there is an evident miscalculation of figures, a mis-description of a person, a mis-description of property, a decision by the arbitrator outside the powers granted to the arbitrator (provided that the merits of the matter are not affected), or the award by the arbitrator is imperfect as a matter of form and can be corrected without the merits of the matter being affected.

Since no objection to the requested confirmation of the arbitrator's ruling was filed, and since none of the foregoing errors had been committed by the arbitrator, the Court of Appeals found that the trial court had acted properly in doing that which it was required to do by statute—confirm the arbitrator's ruling.

The Court of Appeals then found that neither parties nor courts can expand the appellate review set out by our statutes. But why do they care, you might ask (as was successfully asked in California in the case of *Cable Connection, Inc. vs. DIRECTTV Inc.*, 190 P.3d 586 (Cal. 2008)[1]. Well, they care because the United States Supreme Court addressed the issue directly in a recent Federal Arbitration Act ("FAA") case, *Hall Street Assocs., L.L.C. vs. Mattel, Inc.*, 128 S.Ct. 1396 (2008), wherein the Supreme Court found that the provisions of the FAA (like the provisions of our UAA) governed the grounds for vacating or modifying an arbitration award, and any modifications and vacations outside the parameters set forth under the FAA were invalid, citing a simple concept: binding arbitrations are meant to be final, and allowing appellate process to proceed behind a binding arbitration defeated the core goal of binding arbitration.

So there you have it—whether you're crafting contracts or consent orders, the scope of appellate review is just that—the scope of appellate review, and the tail, as usual, cannot wag the dog.

[1] Here the California Supreme Court overruled its own precedent and permitted parties to agree to an expanded judicial review based upon the thought that by allowing parties to do this, the court was allowing the parties to protect themselves from "perhaps the weakening aspect of the arbitral process."

**C. Suzanne Landers is the senior lawyer at The Landers Firm, a firm focused solely on family law litigation, mediation, and arbitration in Memphis, Tennessee. Ms. Landers has served as a Commissioner on the ADR Commission since 2005. In each issue of the* ADR News, *a different member of the Commission will submit an article explaining the history of alternative dispute resolution in Tennessee or on a topic of importance to the mediation community.*

Minding the Intangibles in the Mediation Process: It's Not Always "Show Me the Money"

*by Joseph G. Jarret, Esq.**

As both a mediator and an attorney, I have experienced the frustration exuded by mediating parties who are represented by attorneys who refuse to explore non-cash forms of case resolution in the form of intangibles. In so doing, the key to a solution with which both sides can live is often compromised. Attorneys, or mediators for that matter, who make the mistake of viewing money damages as the only solution to settlement, inevitably miss possibilities that potentially could have left both sides infinitely more satisfied with the outcome of a specific session as well as the mediation process in general. Most experienced mediators will agree that mediation can effectively deal with intangible issues, such as the parties' expectations, perceptions, relationship issues, stress, and the like. For instance, consider a case involving elder mediation. The mediator can provide elder law attorneys with a resource to deal effectively with underlying intangible issues that our courts have neither the time nor interest in exploring, i.e., family values, family history and dynamics, issues of autonomy and safety, interpersonal conflict, quality-of-life choices, etc. The same holds true in the business context. Such intangibles as goodwill, know-how, knowledge, customer service, and satisfaction can be just as formidable a resolution factor as can money.

Our traditional adversarial process operates within a static framework that usually places a premium on the quantifiable (money, property, etc.), while simultaneously discounting the qualitative (interpersonal relationships, quality of life, etc.). One of the principal advantages of mediation then, is that it allows settlement discussions to go beyond the quantifiable, and, at times, it allows the parties to explore what truly matters to them. This is especially true when dealing with family law matters. In the divorce/child custody processes, emotions generally run high and fears, family histories, power struggles, and other intangibles are at play that, if left unaddressed, could serve to diminish the effectiveness of the mediation process. That is not to suggest, of course, that the mediator can hope to settle diverse mediation matters without money changing hands, but rather, that by ignoring the intangibles, we do so to our folly, and in essence, cheat the parties out of a fulfilling mediation experience.

Many mediators request the mediating parties to provide confidential statements outlining their respective positions so that the mediator may be better able to understand the matter and consequently conduct a better mediation session. More often than not, such statements fail to list intangible requests such as, "I'd like an apology" or, "I wish the other side would do things differently." You need only mediate a case involving law enforcement or a local government entity to come to the realization that often times, aggrieved citizens merely seek an apology, or better working conditions, or a change in public policy, none of which involves money changing hands.

In summary, although the majority of mediating parties do seek some kind of financial remuneration, the savvy mediator will take the time to determine whether intangibles exist that can serve to bring about resolution. Even when intangibles do not bring about a resolution, they can assist the mediator to fully appreciate the mental state of the mediating parties and the subtle dynamics of the issues at hand.

Joseph G. Jarret is a Federal and Rule 31 listed general civil mediator and an attorney serving Knox County as its Chief Deputy County Attorney. He has lectured across the country on various mediation issues and is the 2009 President of the Tennessee Valley Mediation Association, and a member of the Tennessee Association of Professional Mediators, the Tennessee Bar Association, and the ADR Section of the Knoxville Bar Association. Mr. Jarret is also an award-winning writer who has published over 85 articles in various professional journals and a former active duty United States Army Combat Arms Officer and Air Force Special Agent. He holds the juris doctorate degree, the masters in public administration degree, a bachelors degree, and a post-graduate certificate in public management. Joe Jarret can be reached at joe.jarret@knoxcounty.org.

Important ADRC Dates

September 9, 2009 ..... Rule 31 Mediator Applications Deadline for ADRC Review on 10/27/09

October 16, 2009 ..... ADRC Advanced Mediation Training Lipscomb University, Nashville

October 27, 2009 ..... ADR Commission Meeting Administrative Office of the Courts, Nashville

We Would Like to Hear From You!

The Administrative Office of the Courts gladly accepts articles from ADR professionals for publication in the *ADR News*. For more information, please contact Anne-Louise Wirthlin at **Anne.Louise.Wirthlin@tncourts.gov**.