

**The Governor's Council for Judicial Appointments**

**State of Tennessee**

***Application for Nomination to Judicial Office***

Name: Daniel Graham Boyd

Office Address: 115 East Main Street  
(including county) Rogersville, Hawkins County, Tennessee 37857

Office Phone: (423) 272-3619 Facsimile: (423) 272-5866

**INTRODUCTION**

The State of Tennessee Executive Order No. 41 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 questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the 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](http://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 original (unbound) completed application (*with ink signature*) and six (6) copies of the form and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with electronic or scanned signature via email to [debra.hayes@tncourts.gov](mailto:debra.hayes@tncourts.gov), or via another digital storage device such as flash drive or CD.

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

**PROFESSIONAL BACKGROUND AND WORK EXPERIENCE**

1. State your present employment.

I am employed at Boyd & Boyd, Attorneys, 115 East Main Street, Rogersville, Hawkins County, Tennessee 37857. I am also employed by Hawkins County as the Hawkins County Juvenile Judge.

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

I was licensed in 2003. My Board of Professional Responsibility Number is 022448.

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

I am licensed in the State of Tennessee only, B.P.R. # 022448. I was licensed on May 1, 2003 and I am currently active.

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

No.

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

I have been employed with Boyd & Boyd since graduation from law school. My practice has mainly centered on domestic relations, adoption, criminal matters, and personal injury suits.

I have also been employed as the Hawkins County Juvenile Judge since August, 2011. As Juvenile Judge, I have presided over cases involving dependency and neglect, delinquent and unruly children, parentage actions, and actions involving termination of parental rights.

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.

I have a vast area of practice, including civil practice and appellate work, criminal practice and appellate work, estate planning, probate, and property disputes. I presently am the Hawkins County E-911 District Board Attorney and the board attorney for Holston Electric Cooperative.

Domestic relations (divorce, child custody, adoptions) – 50%, criminal matters – 30%, personal injury – 10%, miscellaneous (estates, property, etc.) – 10%

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.

On any given day, I will find myself in a motions hearing in Chancery Court, then to Circuit for a motion hearing and all the while managing the Juvenile Court Office by handling a detention hearing on a juvenile or other three-day/72-hour hearing or Emergency Custody Petition.

I primarily have represented individuals involved in domestic relations issues regarding divorce and child custody. In the past 5-7 years, I have developed a solid practice in adoption work handling the filing of a Petition to Terminate Parental Rights and Adoption from the initial filing through the appellate level.

I have tried numerous cases at the state level and have handled several appeals in both the Court of Appeals and Court of Criminal Appeals. I have prepared all pleadings, memorandums, and other documents regarding these cases.

I have assisted my father in research, drafting pleadings, and trial preparation.

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

In recent years, a large part of my law practice has centered on adoptions and termination of parental rights cases. I have handled numerous termination of parental rights cases from the inception and initial filing of the case through the appellate process. Over the past 3-4 years, I have handled approximately 30 adoption cases ranging from uncontested DCS adoptions and step-parent adoptions to contested adoptions which required a full trial and appeal. On any adoption that I have tried and appealed, not one termination of parental rights case has been overturned.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I have served as the Hawkins County Juvenile Court Judge. In that position, I have presided over cases involving unruly or delinquent juveniles, cases involving dependency and neglect, establish of parentage, child custody, and termination of parental rights. At times, I have substituted as Hawkins County General Sessions Judge for Judge J. Todd Ross, in the event of unavailability or conflict and, in my capacity as Juvenile Judge, I have heard cases by interchange for the Sullivan County Juvenile Court Judges and Greene County Juvenile Court Judge.

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

Over the course of my law career, I have served as guardian ad litem numerous times in cases in Juvenile Court and Chancery Court. My role was to represent what I believed to be in the child(ren)'s best interests and to advocate for them in general. My role as guardian ad litem extended also to investigating conservatorship or other wards of the Court in matters involving issues of competency and for unknown or unavailable parties.

Further, I have served as the personal representative in estate matters, having been appointed by the court to administer estates.

I presently serve as a Representative Payee for a social security benefits recipient and have served in that capacity for approximately three (3) years.

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

I have grown up in this town and community and my father was a well-established attorney prior to my law career. As a result, I was exposed to many people and a wide variety of cases early on in my life and legal career. This exposure has given me a wide knowledge of issues regarding the practice of law.

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 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 attended undergraduate school at the University of Tennessee Knoxville from August, 1994 through December, 1998. I received a Bachelor of Arts degree with a major in Speech Communication.

I attended the Appalachian School of Law in Grundy, Virginia, from August, 1999 through May, 2002. I received a Juris Doctor degree. While attending the Appalachian School of Law, I made the Dean's List for the Fall Semester, 1999. I further served one (1) term on the school's Honor Court. The Honor Court's purpose was to handle disputes regarding students and potential violations of the school's honor system/code.

### PERSONAL INFORMATION

15. State your age and date of birth.

I am 38 years old. My date of birth is May 13, 1976.

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

Other than my three (3) years in Grundy, Virginia for law school, I have lived in the State of Tennessee my entire life.

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

Other than attending the University of Tennessee Knoxville, and the Appalachian School of Law in Grundy, Virginia, I have resided in Hawkins County, Tennessee, my entire life.

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

Hawkins 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 are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

No.

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

No.

22. Please state and provide relevant details regarding any formal complaints 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.

I have had two (2) instances where I was reported to the Tennessee Board of Professional Responsibility. Both were summarily dismissed.

The first complaint was filed January 19, 2006 with the Consumer Assistance Program by an individual whom my father and I represented in a criminal matter in Washington County, Tennessee. The Consumer Assistance Program process was not satisfactorily resolved and the matter referred to the Tennessee Board of Professional Responsibility. This individual became difficult to work with and due to his failure to keep court dates and contact with myself and my father with withdrew from representation. The issue became this individual's payment or non-payment of his attorneys' fees. He believed that he had overpaid us for our representation of

him. Upon providing an itemized statement of the work performed up to the date of withdraw it was determined that the complaint was without merit and was dismissed on October 30, 2006.

The second instance was filed on October 6, 2014 with the Consumer Assistance Program by a client to whom I was appointed in both Hawkins County General Sessions Court and Hawkins County Criminal Court. The complainant became dissatisfied with my representation of him and, in essence, requested the C.A.P. assist him obtaining other counsel. I promptly responded to the inquiry by the C.A.P. on October 21, 2014 and no further action was taken.

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.

I am a named defendant in the matter of People's Bank of East Tennessee v. John Cleveland, Cleveland & Cleveland, P.C. and First American Title Insurance Company and First American Title Insurance Company v. Phillip L. Boyd, Daniel G. Boyd and Boyd & Boyd, in the Circuit Court for Monroe County, Tennessee, Docket Number V11208P.

I am in partnership with my father, Phillip L. Boyd, in the firm of Boyd and Boyd. A title opinion was executed by my father in 1995 which resulted in a suit filed against the firm. I was not a member of the firm at the time the title opinion or title work was executed. The firm was added as a defendant after my law school graduation and the firm was formed.

As of January 29, 2015 the original action has been non-suited and entry of an Order reflecting same is pending.

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.

I am an active member of the Rogersville Presbyterian Church and currently serve as an Elder of the Session (the governing body of the church).

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

I have been a member of the Tennessee Bar Association since my admittance to the practice of law in 2003. I have not served as an officer in the Tennessee Bar Association.

I have further been an active member in the Hawkins County Bar Association since being admitted in the practice of law. I have served as the *de facto* treasurer for approximately eight (8) years. I served as the Hawkins County Bar Association's President for one (1) year in 2010.

I am on the investigative committee for the First District Board of Law Examiners and have been since 2014.

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

I have not received any honors, awards, or other recognition since graduation from law school.

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

I have not had any legal articles or books published.

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 have not taught any CLE seminar or other related courses.

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.

I have served as the Hawkins County Juvenile Court Judge since August 29, 2011. I was appointed to the position by the Hawkins County Commission after my predecessor was appointed to the Hawkins County General Sessions Court bench. After appointment, I was elected during the next regular election in 2012. I was re-elected during the 2014 election.

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

I have not been a registered lobbyist.

34. Attach to this questionnaire 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.

Please see the attached brief and motion with accompanying memorandum. Both represent 100% of my work.

### **ESSAYS/PERSONAL STATEMENTS**

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

I want to use my experience to ensure persons involved in the court system are treated fairly. I want to benefit others and ensure these individuals have a positive perspective of the legal system regardless of the outcome.

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)*

I have handled multiple *pro bono* cases during my law career. I regularly attempt to help the community by helping individuals with administrative problems regarding TennCare issues, advising and appearing in General Sessions Court matters involving detainer actions and misdemeanor criminal actions.

Recently, I completed an adoption for a set of grandparents whom had custody of their granddaughter for a significant amount of time. Due to their health issues and fixed income, they could not afford to pay an attorney to complete the pleadings and walk them through the process. I helped these individuals through the completion of the adoption process.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. *(150 words or less)*

I am seeking to be appointed to the Circuit Court for the Third Judicial District. This position was vacated by the death of the Honorable Michael A. Faulk. This position encompasses Greene, Hamblen, Hancock, and Hawkins Counties and primarily handles personal injury and other tort actions, domestic relations matters, and appeals from General Sessions and Juvenile Courts.

My experience to date as the Hawkins County Juvenile Judge gives me the ability to effectively, patiently, and adequately address the issues presented. Many of the domestic relations issues (i.e., child custody, parentage, etc.) mirror many of the same types of cases handled in Juvenile Court.

Over the past twelve (12) years, I have handled a multitude of matters in the Circuit Court. I have handled everything from simple, straight-forward uncontested divorces to complex personal injury actions involving multiple defendants. I, therefore, believe I have the knowledge and ability to assess and address the cases before me.

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 have participated in a local health initiative in Hawkins County called Pro Strength and Speed for approximately the past ten (10) years, helping to organize and facilitate the program each summer. This program is ongoing and I would continue to be involved in the organizing of this program to the extent I am able.

Additionally, I have coached Pop Warner and middle school football teams and have assisted coaching my children's athletic teams. Having two young children, both of whom show a great interest in athletics, I intend to remain involved in their athletics.

I will further continue my involvement with my church participating in the activities and outreaches in which the church participates.

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)*

My serving as Hawkins County Juvenile Judge and my experience in my law practice have taught me patience. I am able to understand that the legal process, many times, is an emotional one and litigants should be treated fairly with patience and respect.

I feel that I have the ability to relate to people and have a good rapport with my colleagues. This allows me to effectively insure that all parties and their counsel are treated fairly regardless of the outcome.

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. The ability to sacrifice personal opinion for what is right under the law is what makes the system work.

Many times throughout my legal career, I have been faced with facts which are in direct opposition to my personal beliefs. In advocating for my clients, it is paramount that I place the client's interests before my own, even if it flies in the face of my beliefs.

Recently, I was involved in a divorce action involving parenting issues. The father was employed and the mother was unemployed. The issue regarding the income tax exemption was raised regarding which parent should claim the minor children for income tax deduction purposes. The father insisted that, due to the fact he was employed, he should claim the minor children for income tax purposes. I instructed my client that the Child Support Guidelines and the law favor the fact the mother is receiving child support and, therefore, she claims the children for income tax purposes. The father, therefore, was unable to file the children on his income tax.

**REFERENCES**

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

A. Gregory W. Francisco FRANCISCO & HARR
B. Dr. Chris Calendine, Rural Health Services Consortium
C. Ms. Deborah Yeomans Legal Aid of East Tennessee
D. Sgt. William Collier Tennessee Highway Patrol
E. Mr. D. Bruce Shine Attorney at Law

**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 Circuit Court for the Third Judicial District 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 questionnaire with the Administrative Office of the Courts for distribution to the Council members.

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

Dated: January 29, 2015.

  
\_\_\_\_\_  
Signature

When completed, return this questionnaire to Debbie Hayes, 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**

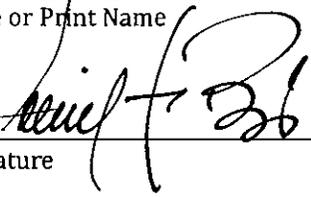
511 UNION STREET, SUITE 600  
NASHVILLE CITY CENTER  
NASHVILLE, TN 37219

**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.

Daniel G. Boyd  
Type or Print Name

  
Signature

January 29, 2013  
Date

022448  
BPR #

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


IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE  
NORTHEASTERN DIVISION

PHILLIP JENNINGS and wife )  
KARLA JENNINGS )

Plaintiffs )

vs. )

CAFÉ ENTERPRISES, INC. )

d/b/a FATZ CAFÉ )

JOHN W. ABBOTT CONSTRUCTION )

COMPANY, INC., GREENWOOD )

AMUSEMENT/SOUTHERN )

ENTERTAINMENT CORPORATION )

OF SOUTH CAROLINA, INC. )

and MIKE GRIFFITH d/b/a HI-TECH SATELLITE )

Defendants )

No. 2:06-cv-283

**MOTION TO REMAND**

Come the Plaintiffs, Phillip Jennings and wife, Karla Jennings, and move the Court to remand this case removed by the defendant, Mike Griffith d/b/a HI-Tech Satellite, for the following reasons:

1. This case was removed by defendant Mike Griffith d/b/a Hi-Tech Satellite pursuant to 28 U.S.C. § 1332 due to the facts that the amount of damages sued for exceeds the \$75,000.00 jurisdictional limit and Griffith claims diversity between the parties.

2. Plaintiffs aver that complete diversity does not exist between all parties involved. Plaintiffs would show that defendant Café Enterprises maintains a long-term leasehold interest in its present location in Greeneville, Tennessee. A copy of the lease is attached as an exhibit hereto. The lease is for a period of twenty (20) years; therefore, giving defendant Café

Enterprises a property interest in Tennessee and defeating the diversity claim made by defendant Griffith.

3. Further, the attempted removal by Mike Griffith d/b/a Hi-Tech Satellite violates 28 U.S.C. § 1446(b) in that it was not removed within the required thirty-day period after the original suit was filed. In support of this Motion to Remand, Plaintiffs attach as an exhibit hereto copies of service of process perfected on defendants Café Enterprises, Inc. d/b/a Fatz Café, John W. Abbott Construction Company, Inc., and Greenwood Amusement/Southern Entertainment Corporation of South Carolina, Inc. Plaintiffs likewise attach as an exhibit hereto a copy of process perfected on Defendant Mike Griffith d/b/a Hi-Tech Satellite on November 17, 2006.

4. Plaintiffs respectfully submit that the original defendant, Café Enterprises d/b/a Fatz Cafe, was served on November 30, 2005; subsequent defendants John W. Abbott Construction, Inc. was served on February 27, 2006 and Greenwood Amusement/Southern Entertainment Corporation of South Carolina, Inc. served on February 28, 2006. At all times since the commencement of this action, the damages sued for exceeded the \$75,000.00 jurisdictional limit for Federal Courts; however, no defendant raised the issue of diversity between the parties. Failure of these defendants to remove the case to United States District Court serves as a waiver of their right to remove the action and later added defendants are then barred from removing the case. Plaintiffs would further show that none of the other defendants have joined in the removal filed by defendant Griffith.

5. Plaintiffs aver that removal of this action is further time-barred by 28 U.S.C. § 1446(b). This section provides that a case “may not be removed on the basis of jurisdiction conferred by § 1332 . . . more than one year after commencement of the action.” Plaintiffs

would show that this action was commenced on November 23, 2005, with the filing of the initial complaint. On December 13, 2006, Defendant Griffith filed a Notice of Removal in this Court. Plaintiffs aver that more than one year has passed since the commencement of this action; therefore, the removal of this case is time-barred

6. Plaintiffs respectfully submit that defendant Griffith cannot seek to remove this case where the other defendants have been first served and failed to remove. Defendant Griffith is barred by other defendants' failure to timely file a notice to remove. Even though defendant Griffith has sought to remove within the thirty (30) day time period from the date that service of process was perfected on him, due to the other defendants' waiver of removal, the case is now non-removable and must be remanded to the Circuit Court for Greene County, Tennessee.

Wherefore, Plaintiffs request this Motion to Remand be granted and the case returned to the Circuit Court for Greene County, Tennessee.

**PHILLIP JENNINGS and wife,  
KARLA JENNINGS**

s/ Daniel G. Boyd

DANIEL G. BOYD [B.P.R. # 022448]  
Attorney for Plaintiffs  
BOYD & BOYD  
115 East Main Street  
P.O. Box 298  
Rogersville, TN 37857  
(423)272-3619

CERTIFICATE OF SERVICE

I, Daniel G. Boyd, Attorney for Plaintiffs, pursuant to Tennessee Rules of Civil Procedure, do hereby certify that on the 2nd day of January, 2007, a copy of the foregoing was served upon William A. Young, Esq., S. Morris Hadden, Esq., Dana C. Holloway, Esq., and Gary T. Dupler, Esq., by mailing same them at their last known post office addresses.

s/ Daniel G. Boyd  
Attorney for Plaintiffs

PREPARED BY: DAVID E HOOSE  
 Leatherwood Walker Tidd + Mann PC  
 300 E. McBee Avenue Suite 500  
 Greenville, S.C. 29601

BK/PG: 376A/1446-1453

05000441

JPGS : AL - LEASE	
LINBA BATCH: 19864	
11/14/2005 - 01:49 PM	
TALCH	3.00
MORTGAGE TAX	3.00
TRANSFER TAX	0.00
RECORDING FEE	40.00
IF FEE	2.00
REGISTER'S FEE	0.00
TOTAL AMOUNT	52.00

Received of Leatherwood etc  
 CHECK  CASH   
 MAIL  FILE   
SASE w/deed

STATE OF TENNESSEE, GREENE COUNTY

JOY RADER  
 REGISTER OF DEEDS

MEMORANDUM OF LEASE

STATE OF TENNESSEE )  
 )  
 COUNTY OF GREENE )

THIS MEMORANDUM OF LEASE made effective the 6<sup>th</sup> day of January, 2005, between TRYON N. SISSON and DOLORES A. SISSON, each an individual, having an address at 1279 Westwind Circle, Westlake, California 91361, collectively, as the Landlord, and CAFE ENTERPRISES, INC., a South Carolina limited liability company, having its principal place of business at 4324 Wade Hampton Boulevard, Suite B, Taylors, South Carolina 29687, as the Tenant.

WITNESSETH:

1. Demised Premises. Landlord has and does lease, let and demise to Tenant and Tenant has and does lease of and from Landlord, by virtue of that certain Lease Agreement, dated January 1<sup>st</sup>, 2005 and with an effective date of January 1<sup>st</sup>, 2005 (the "Commencement Date") by and between Landlord and Tenant (the "Lease"), all of that certain piece, parcel or lot of land, with building and improvements, situate, lying and being in Greene County, South Carolina, described more fully on Exhibit "A" attached hereto and made and part hereof (the "Premises").

1. Term of Lease. The Base Term of the Lease shall commence on the Effective Date and shall extend for a term consisting of twenty (20) years thereafter, expiring at midnight on December 31, 2024 (the "Base Term").

2. Tenant's First Right of Refusal. If, during the term of this Lease Agreement, Landlord receives any acceptable bona fide offer ("BFO") to buy the Premises, then before accepting the offer, Landlord shall give Tenant written notice of the BFO, which notice ("Landlord's Offer") shall constitute an offer to sell the Premises to Tenant on the terms of the BFO. Landlord's Offer shall state all details of the BFO in full. Not more than thirty (30) days following receipt of Landlord's Offer, Tenant shall give Landlord written notice accepting Landlord's Offer or rejecting it. If Tenant accepts Landlord's Offer, then, Landlord and Tenant shall have a period of fifteen (15) days in which to negotiate in good faith and to enter into a commercially reasonable contract of purchase and sale which will provide for the purchase of the Premises by Tenant in accordance with the terms of the BFO. At the time Tenant and Landlord execute the contract, Tenant must deliver a forfeitable cash deposit of \$50,000 to Landlord which will be applied to the purchase price if Tenant completes the purchase within three (3) months but will otherwise be forfeited by Tenant. If Tenant rejects Landlord's Offer or is unable to complete the attempted purchase of the Premises within three (3) months of acceptance, Landlord shall be free to accept the BFO and to sell the Premises, in accordance with the terms of the BFO, at any time within six (6) months following the date of Landlord's receipt of Tenant's rejection of Landlord's Offer. If Landlord has not completed said sale of the Premises within said six (6) month period, Landlord must once again follow the procedures outlined in this Paragraph if Landlord wishes to sell the Premises.

3. Use of the Premises. The Lease provides that the Tenant shall use the leased premises for purposes of operating a restaurant, including the sale of alcohol and all other incidental uses and provides that the Landlord warrants that there are no leases, restrictions or other agreements which prohibit Tenant's intended use of the leased premises.

4. Option to Extend Term. The Tenant has a right and option to extend said term for one (1) or more of four (4) additional consecutive periods of five (5) years each beyond the expiration of the primary term and according to the terms and conditions of the Lease. The failure by the Tenant to exercise any right to extend the term of the Lease in a timely manner shall render null and void the subsequent right or rights to extend the term.

5. Assignment and Subletting. Tenant, after receiving the prior written consent of Landlord in each instance, which consent shall not be unreasonably withheld, conditioned or delayed by Landlord, and at any time and from time to time during the Term of this Lease, or any renewal or extension hereof, and only for uses not prohibited by deed restriction or restrictive covenant, shall have the right to assign this Lease, or its rights hereunder, and/or to sublet all or any part of the Premises. Any assignment or sublease to an entity other than those set forth in the preceding sentence shall require the prior written consent of Landlord, which consent shall not be unreasonably withheld, conditioned or delayed by Landlord.

6. Other Provisions. This Memorandum of Lease is subject to all other provisions set forth in the Lease between Landlord and Tenant, which Lease is incorporated herein by specific reference. Capitalized terms used herein shall have the meaning as ascribed to them in the Lease.

IN WITNESS WHEREOF, the parties hereto have affixed their hands and seals on the day and year first above written.

SIGNED, SEALED AND DELIVERED  
THIS 16th DAY OF January 2005  
IN THE PRESENCE OF:

M. Menant, Notary Public  
\_\_\_\_\_

LANDLORD  
Tryon N. Sisson

TRYON N. SISSON  
Dolores A. Sisson  
DOLORES A. SISSON

SIGNED, SEALED AND DELIVERED  
THIS \_\_\_ DAY OF \_\_\_\_\_  
IN THE PRESENCE OF:

\_\_\_\_\_  
\_\_\_\_\_

TENANT  
CAFE ENTERPRISES, INC.

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

IN WITNESS WHEREOF, the parties hereto have affixed their hands and seals on the day and year first above written.

SIGNED, SEALED AND DELIVERED  
THIS \_\_\_\_\_ DAY OF \_\_\_\_\_,  
\_\_\_\_\_, IN THE PRESENCE OF:

\_\_\_\_\_  
\_\_\_\_\_

SIGNED, SEALED AND DELIVERED  
THIS 6<sup>th</sup> DAY OF January,  
2003, IN THE PRESENCE OF:

Patty Burg  
(as witness)  
\_\_\_\_\_

LANDLORD

\_\_\_\_\_  
TRYON N. SISSON

\_\_\_\_\_  
DOLORES A. SISSON

TENANT

CAFE ENTERPRISES, INC.

By: W. H. Burton

Name: William H. Burton  
Title: President

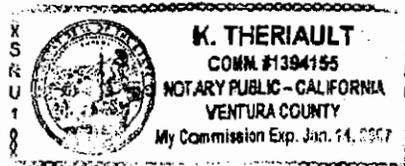
STATE OF California  
COUNTY OF Ventura

I, a Notary Public of the County and State aforesaid, certify that TRYONN, SISSON and DOLORES A. SISSON appeared before me this day and acknowledged the execution of the foregoing instrument. Witness my hand and official stamp or seal, this 6th day of January, 2005.

[Signature]

Notary Public

My Commission Expires: 1-14-07



STATE OF SOUTH CAROLINA )  
COUNTY OF GREENVILLE )

ACKNOWLEDGMENT

I, a Notary Public of the County and State aforesaid, certify that \_\_\_\_\_ personally came before me this day and acknowledged that (s)he is \_\_\_\_\_ of CAFE ENTERPRISES, INC., a South Carolina corporation, and that by authority duly given and as the act of the corporation, the foregoing instrument was signed in its name by its \_\_\_\_\_ Witness my hand and official stamp or seal, this \_\_\_\_\_ day of January, 2005.

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_

[Handwritten initials]  
2008

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

I, a Notary Public of the County and State aforesaid, certify that TRYON N. SISSON and DOLORES A. SISSON appeared before me this day and acknowledged the execution of the foregoing instrument. Witness my hand and official stamp or seal, this \_\_\_\_\_ day of January, 2005.

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_

STATE OF SOUTH CAROLINA )  
COUNTY OF GREENVILLE )

ACKNOWLEDGMENT

I, a Notary Public of the County and State aforesaid, certify that WILLIAM A. BURTON personally came before me this day and acknowledged that (s)he is President of CAFE ENTERPRISES, INC., a South Carolina corporation, and that by authority duly given and as the act of the corporation, the foregoing instrument was signed in its name by its President. Witness my hand and official stamp or seal, this 6<sup>th</sup> day of January, 2005.

Kimberly B. Davis  
Notary Public

My Commission Expires: 4/7/13



EXHIBIT A

Legal Description

Parcel 1

Being all of Lot 1, containing 1.3 acres, as shown on plat entitled "Jameson Inn" of record in the Register's Office for Greene County at Greeneville, Tennessee, in Plat Cabinet F, Slide 338.

Parcel 2

Easements for access, parking, utilities and drainage granted in the Declaration of Easements, Covenants and Restrictions of record in Book 313A, Page 979 of the said Register's Office.

114 5464 3550 0081 4523

Addressed to:

W. ABBOT  
 TRUCTION CO., INC.  
 1. LEXINGTON AVE.  
 EVILLE, NC 28801  
 2906 11:31 AM

**Signature**  
*Ronda Parker*  Agent  Addressee

**B. Received by (Printed Name)** *L. PARKER* **C. Date of Delivery** *2-27-06*

**D. Is delivery address different from item 1?**  Yes  No  
 If YES enter delivery address below:

**3. Service Type**  Certified

**4. Restricted Delivery? (Extra Fee)**  Yes

Code: PDK  
 Code2: 2/22/2006

3811 Domestic Return Receipt

Article Number

114 5464 3550 0081 4509

Addressed to:

ENWOOD AMUSEMENT/  
 THERN ENT CORP OF SC. INC.  
 BOX 1155  
 ENWOOD, SC 29648  
 /2006 11:31 AM

**COMPLETE THIS SECTION ON DELIVERY**

**Signature**  
 Agent  Addressee

**B. Received by (Printed Name)** *R. F. Love Jr.* **C. Date of Delivery** *2-28-06*

**D. Is delivery address different from item 1?**  Yes  No  
 If YES enter delivery address below:

**3. Service Type**  Certified

**4. Restricted Delivery? (Extra Fee)**  Yes

Code: PDK  
 Code2: 2/22/2006

3811 Domestic Return Receipt

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

**1. Article Addressed to:**  
*Safe Enterprises, Inc.*  
*IT Corporation System*  
*400 S. Gay Street, Ste. 2021*  
*Knoxville, TN 37929*

**COMPLETE THIS SECTION ON DELIVERY**

**A. Signature**  
 Agent  Addressee

**B. Received by (Printed Name)** *R. F. Love Jr.* **C. Date of Delivery** *NOV 30 \*\*\*\**

**D. Is delivery address different from item 1?**  Yes  No  
 If YES, enter delivery address below:

**3. Service Type**  
 Certified Mail  Express Mail  
 Registered  Return Receipt for Merchandise  
 Insured Mail  C.O.D.

**4. Restricted Delivery? (Extra Fee)**  Yes

**2. Article Number**  
 (Transfer from service label) **7004 2890 0000 1485 2200**

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE  
NORTHEASTERN DIVISION

PHILLIP JENNINGS and wife  
KARLA JENNINGS

Plaintiffs

vs.

CAFÉ ENTERPRISES, INC.  
d/b/a FATZ CAFÉ  
JOHN W. ABBOTT CONSTRUCTION  
COMPANY, INC., GREENWOOD  
AMUSEMENT/SOUTHERN  
ENTERTAINMENT CORPORATION  
OF SOUTH CAROLINA, INC.  
and MIKE GRIFFITH d/b/a HI-TECH SATELLITE

Defendants

No. 2:06-cv-283

**MEMORANDUM OF LAW IN SUPPORT OF**  
**PLAINTIFFS' MOTION TO REMAND**

**FACTS**

The plaintiffs herein allege that on or about June 11, 2005, Phillip Jennings, his wife and son entered Fatz Café restaurant located in Greeneville, Tennessee, for the purpose of eating a meal. Mr. Jennings was seated in the bar area of the restaurant eating his meal when a television set and the bracket which attached the television set to the wall became detached and fell on top Mr. Jennings' head.

The restaurant structure was constructed by defendant Abbott Construction and the television sets and brackets were installed by defendants Greenwood Amusement/Southern Entertainment Corporation of South Carolina, Inc. and Mike Griffith d/b/a Hi-Tech Satellite. Plaintiffs allege that all defendants were negligent in the placement of the television set, failing

to properly secure the television set to the wall, failing to inspect the mounting and bracketing and, further, failing to provide a secondary device to prevent the television set from falling.

On November 23, 2005, the plaintiffs timely filed suit alleging the negligent acts of defendant Café Enterprises, Inc. Defendant Café Enterprises was served with process on November 30, 2005, and subsequently named defendants Abbott Construction and Greenwood Amusement in its answer to the initial Complaint. Plaintiffs were allowed to and amended their complaint to add defendants Abbott and Greenwood in February, 2006. Defendant Abbott was served with process on February 27, 2006, and defendant Greenwood was served with process on February 28, 2006. At all times during the commencement of the action and after serving the initial defendants with process, the amount of damages sued for exceeded the \$75,000.00 jurisdictional limit for the federal court system and the residency of the parties had not changed. Further, no defendant had raised diversity as an issue.

While conducting discovery depositions, it was determined that defendant Mike Griffith d/b/a Hi-Tech Satellite installed at least one television set in the bar area of the Fatz Café in Greeneville. Plaintiff's then amended their complaint a second time to add Griffith as a defendant. Defendant Griffith was served with process on November 17, 2006. Thereafter, defendant Griffith filed a Notice of Removal to the United States District Court for the Eastern District of Tennessee on December 13, 2006.

At no time prior to adding defendant Griffith had the initial defendants (Fatz, Abbott, and Greenwood) sought to remove the action to federal court nor did any of the initial defendants join in defendant Griffith's attempt to remove this action. Further, one year had expired from commencement of the action on November 23, 2006 before defendant Griffith filed

a notice of removal. Plaintiffs submit the matter must be remanded to state court for those and other reasons contained in the Motion to Remand.

### LAW

1. Defendant Griffith cannot rely upon his filing of a notice of removal within the time period listed in 28 U.S.C. § 1446(b) and when other defendants did not attempt to remove or join in the removal.

The time requirement set forth in 28 U.S.C. § 1446(b) is mandatory, must be strictly complied with and strictly and narrowly construed. Hopkins Erecting Co., Inc. v Briarwood Apartments of Lexington, et al, 517 F.Supp. 243; Typh, Inc. v. Typhoon Fence of Pennsylvania, Inc., 461 F.Supp. 994; Hill b. Phillips, et al, 586 F.Supp. 944. Further, failure of one defendant to timely seek removal or to join in a notice of removal will defeat the removal as to all defendants. (Crompton v. Park Ward Motors, Inc., 477 F.Supp. 699; Perrin v. Walker, 385 F.Supp. 945).

The failure of a defendant which is the first served defendant to file a notice of removal within the thirty day period allowed by 28 U.S.C. § 1446(b) will subsequently deny later added defendants who attempt to remove the action the right to remove since the first served defendant cannot be included in the notice of removal. Balestrieri v. Bell Asbestos Mines, Ltd., 544 F.Supp. 528; Friedrich v. Whittaker Corp., 467 F.Supp. 405. Also, the failure of all defendants to join in the removal will defeat the removal of the action. Balestrieri v. Bell Asbestos Mines, Ltd. 467 F.Supp. at 529.

In the present action which was initiated on November 23, 2005, the initial defendant, Café Enterprises, a South Carolina Corporation, was served with process on November 30, 2005. Defendant Café Enterprises did not file a notice of removal although

damages sued for exceeded the \$75,000.00 jurisdictional limit for federal court. Further, the subsequent defendants, Abbott Construction and Greenwood Amusement, were served with process on February 27, 2006, and February 28, 2006, respectively. Neither of these defendants attempted to remove the action during the thirty-day period. The record also fails to show that all defendants have consented to or joined in Griffith's attempt at removal. Due to the initial defendants' waiving their right to removal and failure to join in Griffith's removal attempt, Griffith is now barred from removing the action to federal court.

Plaintiffs further assert that Griffith's removal attempt is time barred by 28 U.S.C. § 1446(b). This section provides that a case "may not be removed on the basis of jurisdiction conferred by § 1332 . . . more than one year after commencement of the action." This action was commenced on November 23, 2005, with the filing of the initial complaint and service of process on defendant Café Enterprises. Defendant Griffith did not seek to remove the action until December 13, 2006, which falls outside the one-year period set forth in § 1446(b). Defendant Griffith's failure to timely remove this action within the one-year period bars him from removing the action altogether. For these reasons, the plaintiffs believe this matter should be remanded and returned to the Circuit Court for Greene County, Tennessee.

2. Defendant Griffith cannot remove this action because complete diversity is lacking.

Defendant Griffith is seeking removal based upon 28 U.S.C. § 1332 asserting that diversity exists between all parties; however, plaintiffs assert that complete diversity is lacking. On its face, this action appears to be a classic case of diversity: Tennessee plaintiffs with North and South Carolina defendants. A closer look, however, reveals that Café Enterprises has a long term property interest in the state of Tennessee.

On January 6, 2005, Café Enterprises, Inc. entered into a 20 year lease with Tryon N. Sisson and Dolores A. Sisson for the purpose of owning and operating a Fatz Café restaurant in Greene County, Tennessee. The existence of this lease, the extended period of time and defendant Café Enterprises' property interest in Greene County removes the matter out of the Federal diversity jurisdiction and makes it strictly a state related action. The property interest, therefore, denies defendant Griffith the right to remove the action. *Hopkins Erecting Co., Inc. v. Briarwood Apartments of Lexington*, supra.

Due to this fact, this case does not meet the test of complete diversity and, therefore, this case should be remanded to the Circuit Court of Greene County, Tennessee.

#### **CONCLUSION**

Based on the foregoing reasons, plaintiffs submit that the proper forum for this action is in the Circuit Court for Greene County, Tennessee, where it was initiated and should be remanded immediately.

Respectfully submitted this 2nd day of January, 2007.

**PHILLIP JENNINGS and wife,  
KARLA JENNINGS**

s/ Daniel G. Boyd  
\_\_\_\_\_  
DANIEL G. BOYD [B.P.R. # 022448]  
Attorney for Plaintiffs  
BOYD & BOYD  
115 East Main Street  
P.O. Box 298  
Rogersville, TN 37857  
(423)272-3619

CERTIFICATE OF SERVICE

I, Daniel G. Boyd, Attorney for Plaintiffs, pursuant to *Tennessee Rules of Civil Procedure*, do hereby certify that on the 2nd day of January, 2007, a copy of the foregoing was served upon William A. Young, Esq., S. Morris Hadden, Esq., Dana C. Holloway, Esq., and Gary T. Dupler, Esq., by mailing same them at their last known post office addresses.

s/ Daniel G. Boyd  
Attorney for Plaintiffs

IN THE COURT OF APPEALS, EASTERN DIVISION  
SITTING AT KNOXVILLE, TENNESSEE

CARMAN EDWARDS )

Petitioner/Appellee )

vs. )

PAMELA DAUGHERTY )

Respondent/Appellant )

IN RE: TYLON L. D. )  
DOB: 08/17/2004 )

) C/A No.: E2010-01744-COA-R3-PT

) Hawkins County Chancery No.: A-306

**BRIEF OF APPELLEE**

DANIEL G. BOYD  
BOYD & BOYD  
115 East Main Street  
P.O. Box 298  
Rogersville, Tennessee 37857  
(423) 272-3619

**ORAL ARGUMENT REQUESTED**

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### III. ISSUES PRESENTED FOR REVIEW

1. The Trial Court did not err in denying Mother's Motion for Visitation.
2. The Trial Court did not err in finding Mother abandoned the minor child by willfully failing to visit the minor child for the four (4) month period preceding the filing of the Petition for Adoption.
3. The trial court correctly found by clear and convincing evidence Mother had willfully failed to provide support for the minor child during the four (4) month period prior to the filing of the Petition for Adoption.
4. The trial court correctly terminated Mother's parental rights by finding Mother abandoned the minor child by failing to rectify the situations that resulted in the removal of the minor child.
5. The trial court properly found Mother failed to substantially complete her permanency plan.
6. The trial court properly held it to be in the best interests of the minor child for Mother's parental rights to be terminated.

#### IV. STATEMENT OF THE CASE

The Hawkins County Juvenile Court adjudicated the minor child dependent and neglected on or about February 9, 2006, as a result of pending criminal charges against Mother in the Hawkins County General Sessions Court. (See *Ex. 3*). The Juvenile Court, contemporaneously, approved a Permanency Plan with a concurrent goal of reunification with parent/adoption. (See *Ex. 2*, p. 2). This plan was a one-year plan and included certain criteria and goals set forth for Mother to achieve to have the minor child returned to her. *Id.* As a result of the child being removed from Mother's care, custody and control, the State of Tennessee Department of Children's Services (D.C.S.) placed the minor child in foster care and in the home of the Petitioner, Carman Edwards ("Petitioner").

D.C.S. later filed a Petition to Establish Paternity on or about July 6, 2006, naming Quinton Wilker as the biological father. Mr. Wilker, incarcerated at the time of the trial on the merits, consented to the termination and waived his appearance at the trial through his attorney. (See *Ex. 1*).

For a period exceeding one year, Mother attempted to rectify the situations confronting her and regain custody of the minor child. Mother, however, continued to fail random drug screens performed by her D.C.S. case manager, failed to have suitable housing for the minor child, failed to properly comply with her probation and failed to pay child support. As a result, Petitioner sought legal advice and removed the action from the jurisdiction of the Hawkins County Juvenile Court and filed a Petition for Adoption seeking the termination of the biological parents' parental rights and adoption of the minor child. (See *T.R., Vol. 1, p. 1*). Contemporaneous with Petitioner's Petition

for adoption, Petitioner filed a Motion for Temporary Guardianship which was granted, placing the minor child in the legal guardianship of Petitioner.

#### V. STATEMENT OF THE FACTS

On or about October 14, 2005, Pamela Daugherty ("Mother") was arrested for various criminal charges: Possession of Scheduled II Controlled Substance (cocaine), possession of a firearm in the commission of a felony, possession of drug paraphernalia and child endangerment. As a result of Mother's arrest and the minor child's alleged involvement in the crimes, the Department of Children's Services ("D.C.S./Department") instituted a dependency and neglect action against Mother and placed the minor child in the custody of the Department. The Department, then, placed the minor child in the physical custody of Carman Edwards, a recognized foster placement. The Department, following procedure, devised a Permanency Plan, which outlined several actions to be fulfilled by Mother in obtaining custody of the minor child. The initial goal of the Permanency Plan was to reunify the minor child with his parent. The goals established for Mother were:

1. To resolve her criminal charges for possession of drug paraphernalia, schedule II, and exposing child to a firearm;
2. Provide a stable home;
3. Complete an A & D assessment;
4. Stable employment;
5. Parenting Assessment;
6. Stable transportation;
7. Mental health intake;
8. Search for minor child's father. Ex. 2.

Subsequent to Mother's arrest, Mother remained in the Hawkins County Jail for a period of approximately six (6) months until she made bond in March of 2006.

On or about May 1, 2006, Mother pled guilty to the charges of Possession of Scheduled II

Narcotics (cocaine), Possession of Drug Paraphernalia; the firearm charge and the reckless endangerment charge were dismissed. Mother received a sentence of eleven-months, twenty-nine days supervised probation, fines and court costs.

The child remained in the Department's custody for a period of approximately fifteen (15) months while Mother struggled to maintain a regular visitation schedule with the minor child, failed to maintain appropriate housing and transportation and failed to maintain an appropriate support system. All of these requirements were actions stated by the initial Permanency Plan ratified by the Hawkins County Juvenile Court on or about November 4, 2005. The length of time the child remained in the Department's custody and in the home of Petitioner coupled with the continued failure of Mother to fulfill the Permanency Plan requirements lead to Petitioner filing the Petition to Adopt in April of 2007. The Court further granted Petitioner's request to be appointed the minor child's legal guardian, removing custody of the minor child from the Department and placing the minor child in the custody of Petitioner.

A hearing on the merits was held on March 15, 2010, whereby the Court heard testimony from various witnesses and allowed supplemental depositions for proof to be taken as well as directing the attorneys to brief their closing arguments. Father, through his attorney, stipulated to the termination and, in essence, the adoption of the minor child by the Petitioner. As a result of the testimony heard in open Court, the supplemental depositions and the stipulation of Father to the termination of his parental rights, the trial court terminated both biological parents' parental rights.

## VI. ARGUMENT

### 1. The Trial Court did not err in denying Mother's Motion for Visitation.

The Mother, by and through counsel, filed a Motion for Visitation on August 17, 2007. (T.R., Vol. 1, p. 10). A hearing on Mother's motion was held on October 15, 2007, before the Honorable Thomas R. Frierson, II, whereby Mother's motion was not well taken and Mother was denied any court ordered visitation during the termination process. (T.R., Vol. 1, pp. 12-13). The Court, after oral argument, reviewing the technical record and applicable law, determined "the Petition for Adoption suspends all proceedings and, therefore, no visitation is appropriate at this time." Id.

Mother argues the trial court's denial of her Motion for Visitation infringed upon her constitutional rights; however, Mother's counsel, upon cross examination of the Guardian *ad Litem*, Deborah Yeomans, raised the issue that once a parent loses custody of his or her child through a dependent and neglect action, that parent loses his or her constitutional priority in regard to that child:

Q: Once the custody has been removed from mother through a dependency and neglect proceeding, they have then lost their constitutional priority in regard to that child for custody, correct?

A. Correct.

Trial Transcript, p. 106. Due to the removal of the child from Mother's custody as a result of the Juvenile Court finding the child to be dependent and neglected, Mother lost the constitutional right to custody *and* visitation privileges. Further, upon the Chancery Court's granting Petitioner's Motion for Temporary Guardianship, it becomes the preference of the child's guardian to determine with whom the child has contact.

It is also prudent to point out, while Mother may have had the privilege of visiting with the minor child during the Juvenile Court proceeding, Mother's visitation

was sporadic at best. Toni Jenkins, Mother's D.C.S. case manager, testified Mother attended approximately half of her scheduled visits:

Q. I should say, I guess, during, from March of 2006 when she bonded out until April of 2007?

A. From March, I am, I have between August, 2006 to March, 2007, she attended about half.

Q. Okay. How many were scheduled, do you recall?

A. I believe it was 19 or 20.

Q. Okay. And...

A. And she attended about 10 out of 20.

T.R., Vol. 2, p. 64. As a result of Mother's sporadic, irregular visitation, the trial court determined it not to be in the best interests of the minor child for visitation to occur. Further, the trial court's determining Mother should not enjoy visitation with the minor child during the pendency of the termination proceeding did not interfere with Mother's constitutional rights to custody of the minor child.

2. The Trial Court did not err in finding Mother abandoned the minor child by willfully failing to visit the minor child for the four (4) month period preceding the filing of the Petition for Adoption.

Petitioner alleged Mother abandoned the minor child by willfully failing to pay child support or make reasonable payments toward the support of the minor child pursuant to Tennessee Code Annotated § 36-1-102(1)(A). T.C.A. § 36-1-102(1)(A) provides:

For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or

have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child.

Our courts have determined "willfulness" is the critical element in determining whether or not a parent has abandoned a child. See *In Re: Audrey S.*, 182 S.W.3d 838 (2005). "Willful conduct consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent." *In re Mazzeo*, 131 F.3d 295, 299 (2d cir. 1997). Further, "[f]ailure to visit or support a child is 'willful' when a person is aware of his or her duty to visit or support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so." *In re M.J.B.*, 140 S.W.3d at 654.

Petitioner asserted Mother failed to maintain appropriate contact with the minor child during the time the child was in the custody of the Department, more specifically, the four (4) months preceding the filing of the Petition for Adoption. At trial Toni Jenkins, the DCS Case Manager for the minor child, testified out of the 20 scheduled visitations between the months of August, 2006 to March, 2007, Mother made only 10 of those visitations. *T.R.*, Vol. 2, page 64.

Out of the 10 visits Mother had during those months, the visits were not productive toward bonding the minor child. Ms. Patti Cline, the contract worker with Solutions who supervised the visits between Mother and the minor child, testified at length regarding Mother's inability to stay on task during the visitations. At one point, Ms. Cline testified, Ms. Cline had to make the minor child lunch due to the fact Mother was outside talking on the telephone. *Deposition of Patti Cline*, page 17. Ms. Cline reiterated Ms. Jenkins' testimony regarding Mother's inability to maintain consistent contact with the minor child and the contact Mother did have with the minor child was not productive.

Both Ms. Jenkins and Ms. Cline testified Mother routinely missed visits as a result of not having transportation. When asked on cross examination about the steps taken to help Mother obtain transportation to and from visits with the minor child, Ms. Jenkins testified she arranged for ETHRA to provide transportation at a low cost to Mother. T.R. Vol. 2, page 74. The cost to Mother for ETHRA transportation would have been \$18.00 round trip. Id., page 75. Mother, however, used what extra money she had to support and feed a large dog. Id. at page 159. Mother's testimony was she spent \$20.00 to \$30.00 on a dog when that money should have been used to pay for transportation to and from visits with the minor child. As a result of Mother choosing to support the dog, this constitutes a willful abandonment regarding Mother's failure to make scheduled visits due to lack of transportation. Mother admitted on cross examination to spending the money on the dog instead of transportation:

Q: And that's money that could have gone towards ETHRA, for the van, correct?

A: Yes.

Q: And that's a, that was money that you willfully spent for the dog instead of your son, correct?

A: Yes.

T.R., Vol. 2, page 161. Mother argues she could not afford the basics in life much less ETHRA transportation; however, Mother spent money towards a domestic animal instead of putting any extra money and effort into visiting with her son. Mother knew of her obligation to visit, had the means to visit and willfully made the conscious decision to

spend her extra money on her dog. As a result, Petitioner has shown by clear and convincing evidence Mother's parental right should be terminated.

3. The trial court correctly found by clear and convincing evidence Mother had willfully failed to provide support for the minor child during the four (4) month period prior to the filing of the Petition for Adoption.

Along with alleging Mother willfully failed to maintain visitation or contact with the minor child, Petitioner alleged Mother abandoned the minor child by willfully failing to support the minor child. As outlined above, “[w]illful conduct consists of acts or failure to act that are intentional or voluntary rather than accidental or inadvertent.” *In re Mazzeo*, 131 F.3d 295, 299 (2d Cir. 1997). Further, Tennessee courts have held that “the support of one’s children should not be conditioned upon whether one has been placed under a court order to do so.” *State v. Manier*, 1997 WL 675209 (Tenn. Ct. App. 1997). Parents are presumed to know the law and to know their obligations toward their children. See *In re M.L.P.*, 281 S.W.3d 387 (Tenn. 2009).

Mother asserts Petitioner did not show by clear and convincing evidence that Mother was employed consistently or that if she was not that it was willful. Petitioner contends Mother had the means to pay support and willfully failed to do so. Further, Petitioner contends she does not have to prove Mother “had any other sources of income at her disposal,” as asserted in Mother’s brief. Petitioner asserts she had to prove by clear and convincing evidence Mother had a duty to support the minor child.

In *In re Keri C.*, 2010 WL 4739706 (Tenn. Ct. App. 2010), this court upheld the finding of abandonment and the termination of Mother’s parental rights for willfully failing to provide support for the minor child. The Mother in *In re Keri C.* raised the issue that her failure to pay was not willful in that she went through periods of

“episodic unemployment.” *Id.* at 13. Mother acknowledged her duty to support and, although not employed the entire four (4) month period, but was employed during part of this period. *Id.* at 14. As a result, the court found she had the ability to pay some support and willfully failed to do so. *Id.*

In the case at bar, Mother raises this same argument: that her employment was not consistent or was “episodic” and that it was not willful. Mother fails to state in her brief, however, that she held several jobs. Mother was employed at Jeffery Chain and NASHUA. Mother, therefore, had the ability to pay at least some support and failed to do so. Further, Mother had the means to support a dog and willfully decided to support the dog instead of using the extra money to support her son. The trial court further held Mother was “gainfully employed and earning income.” *T.R.*, Vol. 1, p. 30.

As a result, Petitioner has proven by clear and convincing evidence Mother has abandoned the minor child by willfully failing to provide support for the minor child in the four (4) months preceding the filing of the Petition for Adoption.

4. The trial court correctly terminated Mother’s parental rights by finding Mother abandoned the minor child by failing to rectify the situations that resulted in the removal of the minor child.

Petitioner further alleged Mother abandoned the minor child pursuant to *Tennessee Code Annotated* § 36-1-102(1)(A)(ii). This section provides:

(ii) The child has been removed from the home of the parent(s) or guardian(s) as the result of a petition filed in the juvenile court in which the child was found to be a dependent and neglected child, as defined in § 37-1-102, and the child was placed in the custody of the department or a licensed child-placing agency, that the juvenile court found, or the court where the termination of parental rights petition is filed finds, that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child’s situation prevented reasonable efforts from being made prior to the child’s removal;

and for a period of four (4) months following the removal, the department or agency has made reasonable efforts to assist the parent(s) or guardian(s) to establish a suitable home for the child, but that the parent(s) or guardian(s) have made no reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date. The efforts of the department or agency to assist a parent or guardian in establishing a suitable home for the child may be found to be reasonable if such efforts exceed the efforts of the parent or guardian toward the same goal, when the parent or guardian is aware that the child is in the custody of the department;

Id.

The Hawkins County Juvenile Court found both probable cause and clear and convincing evidence to adjudicate the minor child as dependent and neglected. Upon placing the minor child into D.C.S. custody, the Department is under an obligation to provide reasonable efforts to the parents. "Reasonable efforts" are defined as the "exercise of reasonable care and diligence by the department to provide services related to meeting the needs of the child and the family." Tennessee Code Annotated § 37-1-166(g)(1). Courts are required to consider the following:

(1) the reasons for separating the parent from his child, (2) the parents' physical and mental abilities, (3) the resources available to the parents, (4) the parents' efforts to remedy the conditions that required the removal of the children, (5) the resources available to the Department, (6) the duration and extent of the parents' efforts to address the problems that caused the children's removal, and (7) the closeness of the fit between the conditions that led to the initial removal of the children, the requirements of the permanency plan and the Departments' efforts.

In re Tiffany B., 228 S.W.3d at 158.

Mother contends she has conquered any issue that she may have had with illegal drug use or possession of drug paraphernalia. Mother, however, fails to acknowledge or otherwise refute the drug screens admitted into evidence which show a

history of cocaine use. Mother relies on a hair follicle drug test administered on August 13, 2008. Mother, however, offered no proof to contest the drug screens administered by her case manager, Toni Jenkins. On six (6) different occasions, Mother failed drug tests and offered no acceptable explanation and did not refute their accuracy. Mother further never asked her attorney during the dependent and neglect action to seek alternate methods of drug testing to refute the accuracy of the tests administered by the Department.

Petitioner contends D.C.S. used reasonable efforts in assisting Mother. D.C.S. had Mother perform an Alcohol and Drug assessment and follow all recommendations. After completion of the assessment and the recommendations, Mother failed a drug screen and was asked to return to treatment to address her alcohol and drug issues. T.R., Vol. 1, pp. 39-40. Mother even went as far as to mislead her case manager by reporting she had an appointment for August 16, 2006, but no appointment was ever verified. T.R., Vol. 1, p. 40.

Petitioner further asserts D.C.S. used reasonable efforts in assisting Mother with her transportation issues. D.C.S. arranged for ETHRA services to transport Mother round trip to her visits at a low cost of \$18.00. Mother, however, used extra money to support a pet. T.R., Vol. 2, p. 161.

The trial court found for a period of four (4) months following the removal, the Department made reasonable efforts to assist Mother in establishing a suitable home for the child. T.R., Vol. 1, p. 32. Further, Mother failed to make reasonable efforts to provide a suitable home. Id. The trial court also found Mother, that time, demonstrated a lack of concern for the child to such a degree that it appeared

unlikely that she would be able to provide a suitable home for the child at an early date.

Id.

As a result, Petitioner has shown by clear and convincing evidence Mother has failed to rectify the reasons for removal and, therefore, has abandoned the minor child.

5. The trial court properly found Mother failed to substantially complete her permanency plan.

The implementation of a permanency plan is to aid in the goal of family reunification. In Re Valentine, 79 S.W.3d 539 (2002) outlines the nature of a permanency plan:

A permanency plan is a written plan for a child placed in foster care. The plan sets out requirements to achieve family reunification or other appropriate goals, such as adoption or permanent foster care. Tenn. Code Ann. §§ 37-2-402(8),-403(a)(1). The requirements must be stated in specific terms and must be reasonably related to the specified goal. Tenn. Code Ann. § 37-2-403(a)(2)(A). Within ninety (90) days of the date of foster care placement and no less often than every six (6) months thereafter, the plan is reviewed to assess, among other things, compliance with the requirements and project a likely date on which the goal of the plan will be achieved. Tenn. Code Ann. § 37-2-404(b).

Tennessee Code Annotated § 36-1-113(g)(2) provides a statutory ground for termination of parental rights where there has been substantial noncompliance by the parent with the statement of his or her responsibilities through the permanency plan. The trial court must find that the requirements of the permanency plan are “reasonable and related to remedying the conditions which necessitate foster care placement.” In Re Valentine, supra.

Upon the child coming into the Department’s custody, the Department devised a Permanency Plan for Mother to complete in order to have the child returned to

ner custody. A copy of this plan was made exhibit 2 to the trial. Ms. Jenkins testified Mother was, among other things, to maintain suitable dwelling for she and the minor child, maintain reliable transportation and have a reliable support system, complete an Alcohol and Drug Assessment and attend parenting classes. According to Ms. Jenkins, Mother completed the A & D Assessment on June 8, 2006. T.R., Vol. 1, page 35. Mother, however, failed to complete her parenting classes or never provided proof to Ms. Jenkins regarding completion of the parenting classes.

By her own testimony, Mother recognized one of her goals was to maintain reliable transportation. On cross-examination, Mother testified as follows:

Q: One of your goals in your Perm Plan that you signed in November of 2005 said that you would have reliable transportation and an adequate support system, am I correct?

A: That's right.

...

Q: You didn't have it, though, did you?

A: No.

Q: Okay. Even at the time of the filing of Ms. Edwards' Petition to Terminate and [to] adopt in April of 2007, you still didn't have that, am I correct?

A: No, I did not.

T.R., Vol. 2, p. 164.

Mother further failed to maintain suitable housing for her and the minor child. Testimony was uncontroverted that Mother initially lived with Phyllis Walker;

however, Ms. Walker's home was unsuitable for the minor child to live there. Mother then moved to a shop; however, Ms. Jenkins was unable to verify whether Mother was living there or not. After living in the shop, Mother moved to a mobile home on Bridle Way where she remained for a period of approximately seven months. Mother, though, failed to pay rent and, therefore, was forced to move from this location. After moving from the Bridle Way location, Mother moved back into the residence with Phyllis Walker and then failed to keep Ms. Jenkins abreast of where she was living. T.R., Vol. 2 p. 62. As a result of Mother's failing to maintain adequate housing, she failed to meet this goal of the Permanency Plan.

Lastly, Mother was to rectify all legal situations. Mother, however, has failed to rectify any of her legal troubles. Mother admitted to owing approximately \$750 to the Hawkins County General Sessions Court as a result of her convictions. Further, Mother admitted to owing Hamblen County General Sessions Court a substantial amount of money for fines and costs on previous convictions. Collective Exhibit 21.

Mother failed to substantially complete the goals set forth in the Permanency Plan and this, as a result, constitutes a ground for termination of her parental rights. Petitioner, therefore, has shown by clear and convincing evidence Mother has failed to substantially comply with the permanency plan and, therefore, Mother's parental rights should be terminated.

6. The trial court properly held it to be in the best interests of the minor child for Mother's parental rights to be terminated.

Lastly, Petitioner has shown it to be in the best interests of the minor child for the termination of Mother's parental rights to occur. Tennessee Code Annotated. § 36-1-113(i) provides this Court with the elements to consider when determining the best

interests of the child in termination cases. Tennessee Code Annotated § 36-1-113(i)

provides as follows:

(i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Petitioner has shown Mother has not maintained regular visitation or

contact nor a meaningful relationship with the minor child. Further, Mother has failed to adequately support the minor child and has a history of criminal behavior and drug use.

Mother, in her brief, lists nine (9) factors which she alleges negate the termination being in the best interests of the minor child. All factors listed by Mother, however, occurred *after* the filing of the Petition for Adoption. Mother consistently failed drug screens during the pendency of her case. Mother failed to obtain her driver's license until after the filing of the Petition. Mother's child support obligation became current only after the filing of the Petition.

It is further in the child's best interest for the termination to occur due to the fact that a change of caretakers and physical home environment is likely to have an adverse effect on the child's emotional well being. Mother stipulated to the fact Petitioner and the child are bonded as if Petitioner were the child's biological mother. Mother further stipulated Petitioner's house is appropriate for the child and Petitioner is financially capable of caring for the minor child. All matters and issues regarding the child's health have been and are properly addressed by Petitioner.

Petitioner, therefore, showed, and the trial court properly held, that it was in the best interests of the minor child for the termination of Mother's parental rights to occur.

## VII. CONCLUSION

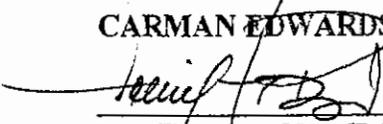
Based upon the foregoing, Petitioner asserts the trial court was proper in terminating the parental rights of Mother. Mother abandoned the minor child by willfully failing to maintain contact or visitation with the minor child. She further abandoned the minor child by willfully failing to provide support for the minor child, though she knew

she was under an obligation to pay support and had the means to pay at least some support. Mother, instead, used any extra money to support a dog rather than support her son. Mother failed to substantially comply with the permanency plan outlined for her. Mother completed only two (2) of the seven (7) goals outlined for her. Further, it is in the best interests of the minor child that the termination occur.

The trial court, therefore, properly determined by clear and convincing evidence that Mother's parental rights should be terminated.

Respectfully submitted this 22 day of December, 2010.

**CARMAN EDWARDS**

  
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CERTIFICATE OF SERVICE

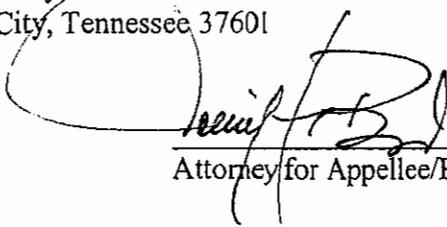
I, Daniel G. Boyd, Attorney for Appellee, pursuant to Tennessee Rules of Civil Procedure, to hereby certify that on the 20 day of December, 2010, a true and exact copy of the foregoing was mailed to the following at their last known post office addresses:

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