Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 26 November 2012

Name: **DOUGLAS R. BEIER**

Office Address: (including county) 818 West First North Street Morristown, TN 37814 (Hamblen County)

Office Phone: 423-587-2800 Facsimile: 423-587-2804

Email Address: [redacted]

Home Address: (including county) [redacted] (Hamblen County)

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

INTRODUCTION

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

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website http://www.tncourts.gov). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) ***and*** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit fourteen (14) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am a partner in the law firm of Evans and Beier, LLP

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

Licensed to practice law in Tennessee in 1977. BPR 5777

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.

No other states

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 involved in the practice of law as a sole practitioner since 1977. I was the Juvenile Court Judge for Hamblen County from 1982 to 1990.

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.

None

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 am a general practitioner. About 60% of my practice involves family law such as divorce, custody, juvenile and child support issues, and other matters of equity. Also included therein is the preparation of wills and various related estate matters such as probate and will contests. About 20% of my practice is devoted to personal injury matters. The remaining 20% is related to general trial practice, criminal defense and appellate work. Included in this breakdown is the time I spend in the office counseling and advising on these same matters.

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

The first several years of my legal career were heavily weighted towards criminal defense. Today, I spend more trying divorce and family matters. I have tried nearly one hundred jury trials and more than a thousand of bench trials. I have extensive experience arguing before the Court of Appeals and I have argued several cases before the Tennessee Supreme Court. I have defended 15 capital murder cases. I argue cases monthly in the Chancery Courts and Circuit Courts throughout East Tennessee. I also appear regularly in Juvenile and General Sessions Courts. My practice includes mediation and arbitration.

From 1982 until 1990, I was the Hamblen County Juvenile Court Judge. During those years, in addition to service on the bench, I helped develop several juvenile programs which are still in place today, including the first CASA (Court Appointed Special Advocate) program in the state. At that time, I hired and supervised the Youth Service Office, the Youth Shelter, the Juvenile Detention Facility, the probation office and the related programs for the court. I have also served as designated General Sessions Judge in the absence of the regular judge.

I have been privileged to argue an appeal in the Tennessee Supreme Court which held court in the Bradley County Courthouse as part of a legal education program for high school students.

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

I have tried 15 capital murder cases and I have tried several criminal cases which wound up in the Supreme Court. I have also tried several divorce cases which wound up in the Supreme Court as well.

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 was elected and served as the Hamblen County Juvenile Court Judge from 1982 until 1990. I have also served as the designated General Sessions Court Judge in the absence of the regular 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.

I have served in various Chancery and Juvenile Courts as a court-appointed guardian ad litem. I have also served as executor of several estates during probate.

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

I taught criminal law and criminal process as an adjunct professor at Walters State Community College in the 1980s. I have also spoken in the high schools and middle schools as both lawyer and judge on Law Day, Career Day and Awards Day. I also served as chairman of the Morristown Civil Service Commission for several years.

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

None

EDUCATION

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

I attended the University of Tennessee in Knoxville from 1970 to 1974 and graduated with honors. I attended the University of Tennessee College of Law from 1974 to 1977 where I got my law degree. I received the American Jurisprudence Award for excellent achievement in the study of criminal law and criminal process. I worked extensively in the law clinic and clerked for a local attorney.

PERSONAL INFORMATION

15. State your age and date of birth.

I am 61 years old; born December 12, 1951.

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

Since 1962 when my father moved our family from Michigan.

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

Since 1962.

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

Hamblen 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.

I have not served in the military.

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

No

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

No

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

I received a Private Informal Admonition in 1987. RE: File No. 5091-1-H (Letter dated December 7, 1987), which reads as follows:

Dear Mr. Beier:

In 1980 the Complainant, Robert Winstead, was divorced from his wife, Marsha. There was one child. You represented Mr. Winstead in this matter as well as in several related contempt charges. The fitness of Mr. Winstead as a parent was at issue.

After 1980 you no longer represented Mr. Winstead. During the new few years Mr. Winstead encountered some criminal difficulties for which other attorneys represented him. He also married Mr. Charlotte Chance. Mr. Chance had a previous marriage to Rhonda Chance. There were divorced in 1984. Ms. Chance obtained custody of the three children, Rhonda, Bruce, and Joey.

The domestic squabbles between Mr. Winstead and Ms. Chance continued after their divorce. There were several contempt proceedings and in 1985 (prior to Ms. Chance's marriage to Mr. Winstead) Mr. Chance hired you.

Ms. Chance had been living with Mr. Winstead during this time and by January 6, 1986 she was married to him. Mr. Winstead and Mr. Chance had gotten into several disputes resulting in criminal charges being placed against them for their fighting.

You filed a petition seeking a change of custody. The fitness of Mr. Winstead as a foster parent was at issue and Chancellor Inman discussed it in his opinion of January 6, 1986 changing the custody of Brian and Joey to Mr. Chance.

Troubles between Ms. Charlotte Chance Winstead and Mr. Chance have continued to the present day and you have continued to represent Mr. Chance in regard to them.

You serve as the Juvenile Judge of Hamblen County. During this period of time Rhonda Chance encountered juvenile problems. You recused yourself. C. Dwaine Evans was appointed to represent him. He was appointed by you. Mr. Evans shares office space, a secretary and some

expenses with you. You do not, however, share files or maintain a common filing system and are not a partnership, nor do you maintain the same letterhead. Mr. Evans was not apprised as to why you had recused yourself.

Your conduct violated Disciplinary Rules 5-101(A); 5-105(A) (B) & (D) of the Code of Professional Responsibility. Tennessee Supreme Court Rule 8 is mandatory and requires a minimum level of conduct. Any violation adversely reflects upon the professional reputation of all members of the Bar.

Rule 9, Section 4, of the Tennessee Supreme Court Rules on Disciplinary Enforcement sets out the type of discipline to be administered when misconduct has been determined. The Board of Professional Responsibility of the Supreme Court of Tennessee, with concurrence of a Hearing Committee member in your Disciplinary District, has found that your actions warrant a Private Informal Admonition, and with it your file will be closed.

Yours very truly,

Lance B. Bracy

Chief Disciplinary Counsel

I received a Private Reprimand in 2001. B.O.P.R. Docket No. 99-1097-1-H, which reads as follows:

PRIVATE REPRIMAND

A petition for Discipline has been filed as to Douglas R. Beier of Morristown. Mr. Beier and Disciplinary Counsel have entered into a settlement agreement relative to this Petition. The Agreement has been approved by both the Hearing Panel assigned this matter and by the Board of Professional Responsibility.

Respondent received $9,000 to be held in trust on behalf of his client, James F. Hansel. Respondent did not place said monies in a trust account as required by DR 9-102, but placed said monies in a desk drawer. Upon conclusion of Respondent's matter, Respondent refunded the money to Mr. Hansel, less the monies Mr. Hansel owed to Respondent in attorney's fees. Respondent did not misappropriate any of the money, nor did he convert any of the money to personal use.

Respondent has thereby violated DR9-102(A).

By the aforementioned facts, Mr. Douglas R. Beier has violated the Code of Professional Responsibility and should be reprimanded for these violations. This is a private reprimand and shall thereby remain confidential.

This the 19 day of January, 2001.

Richard Fisher, Chair

Board of Professional Responsibility

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 was divorced by agreement in Knox County in 1984. In 1992, I was the defendant in a malicious prosecution suit brought by a vindictive ex-husband of a client I represented in a divorce. The suit was later dismissed by the Plaintiff. (Robert Dale Cobb v. Douglas R. Beier, Hamblen County Circuit #92-CV-544). I was sued by a longstanding client in February, 2009 (Alvin Richard Harmon, Jr. v. Douglas R. Beier (Hamblen Circuit #09-CV-030) when the Notice of Appeal was not timely filed and the appeal of his child support obligation was denied. This suit has been the subject of my Motion For Summary Judgment pending since June 22, 2009.

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

I am a faithful member of the First Baptist Church of Morristown. I was secretary of the Habitat For Humanity and a board member from 2004-2008. I am a member of the board of directors of Hearts Of Christ Children's Ministry, a missionary organization located in Hamblen County and Belize. I am a member of the Hamblen County Republican Party.

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

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

limitation.

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

No

ACHIEVEMENTS

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

Hamblen County Bar Association (current) and Tennessee Bar Association (2005)

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

I received various awards for community service when I was the Juvenile Court Judge.

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

I have never been 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 taught criminal law and criminal process at Walters State Community College in the 1980s. I was a faculty/panelist in a CLE Seminar on Legal Ethics in 2007.

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 was elected the Hamblen County Juvenile Court Judge in 1982 and served until 1990. I ran for Third Judicial Circuit Court Judge in 1990 as an Independent. I carried Hamblen County but lost Circuit-wide and did not win the election.

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

No

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

I have attached a Motion For Summary Judgment and Brief and Argument and a brief I filed in the Court of Appeals. These were prepared solely by me.

ESSAYS/PERSONAL STATEMENTS

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

I have extensive trial experience in the Circuit Courts of East Tennessee. I have been litigating matters in the Circuit Courts of East Tennessee on a regular basis for 36 years. I try cases, both jury and nonjury on a regular basis. I also have extensive judicial experience.

We need a self-motivated, hard-working, experienced trial judge in this position. I believe I have demonstrated the ability to perform the tasks required of an effective Circuit Court jurist, including managing dockets, refereeing disputes between lawyers, hearing and ruling on evidence, trying cases, and managing jury trials. I believe I have demonstrated that I am honest, disciplined and wise. I have also demonstrated legal skill, a passion for the law and compassion for my clients. I have learned to assimilate, analyze and digest large volumes of information and apply the law to it. I have the judicial temperament and the personal and professional integrity to hold judicial office.

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

I represent both the wealthy and those less fortunate with equal vigor. I represent criminal defendants, juveniles and domestic clients pro bono or for a reduced fee on a regular basis. When I was Juvenile Court Judge we instituted and developed many programs designed to assist the poor children of Hamblen County and their families. Hamblen Adults Working For Kids (HAWK) is one example where we engaged the community in the affairs of impoverished children. I also represent immigrants, churches, pastors and worship leaders pro bono.

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

I am seeking the position of Circuit Judge for the Third Judicial District. We have three civil Circuit Judges in our District and the cases are divided among them. The kind of cases which fall under the jurisdiction of the Circuit Court are those types of cases which I handle regularly as a trial lawyer, both jury and nonjury. They include divorce, workers compensation, adoption, personal injury and medical malpractice. The Circuit Judges also need to work together and coordinate dockets, Court rules and other matters of administration. Additionally, there is also a need for the Circuit Judge to handle some criminal jurisdiction. I have extensive experience working with the Clerks and I have a good relationship with the other Circuit Judges. I also believe that trial attorneys generally make the best trial judges. For 36 years, I have been integrally involved with our trial courts and have managed a busy legal schedule. I believe I am qualified to hold Court from day one.

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 been an active member of various community organizations throughout my adult life, such as the Chamber of Commerce, the Rotary Club, the Rose Center Historical Society, and Habitat For Humanity. I am an active member of the First Baptist Church of Morristown, and have served on various committees and taught Sunday School. I served on the Morristown Civil Service Commission for many years. As the Juvenile Court Judge, I served on the Board of Directors for several organizations which we created, and was constantly in the schools, interacting with the students, parents and school administration. I have also spoken at the schools on Law Day, Career Day and Awards Day. I was the guest speaker on two occasions for the high school honors dinner. I have served many years on the Hamblen County Foster Care Review Board, the spouse abuse shelter board of directors and the youth shelter board of directors. I am also on the Board of Directors for Hearts of Christ Children's Ministry.

The Circuit Judge has a unique position in the community. I believe it is important for the community to know its judges and to see the courts in action, so that judicial respect is fostered. I also believe the Circuit Judge can assist the bar in its representation of clients through education, discussions and seminars. I intend to be fully engaged with the community and not retreat to the solace of the judicial chambers.

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

My father was a factory worker. He and my mother had five children, one income and one car. My parents were hard workers, strict disciplinarians and God-fearing Americans. My father was wounded in World War II. They instilled in us the love of God and country and traditional family values. They expected and fostered respectful children who were honest, disciplined, and hard workers. I lettered in three sports in high school, and graduated at the top of my class. I worked two and three jobs at a time when I was in college, and graduated with honors. I continued to work while I was in law school. Through scholarships and my own earnings, I graduated from law school debt-free. I began my own practice in my hometown where I had grown up and played high school football. I learned the practice of law through hard work and experience. I have been successful in that practice by the grace of God and perseverance.

I am self-disciplined. I have trained for and successfully completed ten marathons. I have held public office. I have been on many mission trips around the world, to Chile, Belize, China, Korea, Africa, and India. My wife and I have raised two successful adult children. Even with all of that, I have worked 50-60 hour work weeks for years.

I have the necessary temperament to be a trial judge. I have demonstrated that in my Juvenile Court years. I have experienced the law from both the bench and the bar. I have been divorced. I know how devastating and life-changing that can be. I have used my own personal experience to counsel others who go through that. I am 61 years old, young enough to serve with vigor and energy for many years, yet senior enough to exercise wisdom and judicial skill. I believe my experience and maturity have prepared me well for this position.

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)***

One of the first lessons I learned in life is that the law must be upheld regardless of whether I agree with it. My parents laid down the law and we followed it, regardless. When I went to law school, one of the recurring maxims throughout my education was that we are a nation based on laws and not on men. I believe that whole-heartedly. When the substance of the law has not been to my liking, I have worked to change it, not disregard it. I regularly represent people who are charged with crimes. Obviously, I disagree with criminal conduct and strongly believe in swift and just punishment for the guilty. That has not affected my zealous and often successful representation of many criminal defendants. I believe in the Constitutional rights of all people to equal justice under the law, including the right to effective legal representation.

REFERENCES

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

A. Dr. Dean Haun, President of the Tennessee Baptist Convention and Pastor of the First Baptist Church of Morristown. 504 W. First North Street, Morristown, TN 37814. Telephone 423-586-0522

B. Danny Thomas, Mayor of the City of Morristown. P. O. Box 1499, Morristown, TN 37816-1499. Telephone 423-581-0100

C. William Seale, General Counsel for Bush Brothers and Company, [redacted]

D. Honorable James E. Beckner, retired Criminal Court Judge, [redacted]

E. C. Berkeley Bell, Jr., District Attorney General for the Third Judicial District, 124 Austin St., Ste 3, Greeneville, TN 37745. Telephone 423-787-1450

AFFIRMATION CONCERNING APPLICATION

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

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

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

Dated: March 4, 2013.

s/Douglas R. Beier
Signature

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

TENNESSEE JUDICIAL NOMINATING COMMISSION

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

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

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which 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 Tennessee Judicial Nominating Commission to request and receive any such information and distribute it to the membership of the Judicial Nominating Commission and to the office of the Governor.

Douglas R. Beier
Type or Printed Name

s/Douglas R. Beier
Signature

March 4, 2013
Date

BPR #5777

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

APPLICATION OF DOUGLAS R. BEIER

FOR THE POSITION OF

JUDGE OF THE THIRD JUDICIAL CIRCUIT COURT

OF TENNESSEE

IN THE CHANCERY COURT OF GRAINGER COUNTY, TENNESSEE
SITTING AT RUTLEDGE

GERMAN CREEK RESORT, LLC,	§	
	§	
Plaintiff,	§	
	§	
Vs.	§	**No.: 09-039**
	§	
GERMAN CREEK CONDOMINIUMS - THE BLUFFS OWNERS' ASSOCIATION, INC., et al,	§	
	§	
Defendants.	§	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant, German Creek Condominiums-The Bluffs Owners' Association, Inc., by and through counsel, move this Honorable Court for an Order for Summary Judgment pursuant to Rule 56 of the Tennessee Rules of Civil Procedure. Defendants are entitled to summary judgment as there are no genuine issues of material fact as is shown in the pleadings, documents and Affidavits attached and it is entitled to Judgment as a matter of law.

In support of its Motion, Defendant relies upon the pleadings, documents and upon the accompanying Statement of Material Facts and Affidavits.

Respectfully,

GERMAN CREEK CONDOMINIUMS—
THE BLUFFS OWNERS' ASSOCIATION, INC., et al

BY: _____

DOUGLAS R. BEIER (BPR #5777)
Attorney for Defendant
P.O. Box 1754
Morristown, TN 37816-1754
(423) 587-2800

CERTIFICATE OF SERVICE

I, Douglas R. Beier, Attorney for Defendants, do hereby certify that I have served a true and exact copy of the foregoing by placing same in the U.S. mail, postage prepaid, addressed to Scott A. Hodge, Attorney for Plaintiff , this the _____ day of _____, 2010.

_____

DOUGLAS R. BEIER

IN THE CHANCERY COURT OF GRAINGER COUNTY, TENNESSEE
SITTING AT RUTLEDGE

GERMAN CREEK RESORT, LLC,	§	
	§	
Plaintiff,	§	
Vs.	§	**No.: 09-039**
	§	
GERMAN CREEK CONDOMINIUMS - THE BLUFFS OWNERS' ASSOCIATION, INC., et al,	§	
	§	
Defendants.	§	

STATEMENT OF UNDISPUTED MATERIAL FACTS OF GERMAN CREEK CONDOMINIUMS—THE BLUFFS OWNERS' ASSOCIATION, INC.

German Creek Condominiums – The Bluffs Owners' Association, Inc. ("OWNERS' ASSOCIATION") submits the following Statement Of Undisputed Material Facts in support of its Motion For Summary Judgment:

1. The Condominium Master Deed for German Creek Condominiums—The Bluffs ("Master Deed") was recorded December 29, 2006 in Instrument Book 282, Page 404 in the Register's Office, Grainger County, Tennessee (Exhibit A).
2. According to the Master Deed and Bylaws which govern "Owners", German Creek Resort, LLC (the Plaintiff herein and hereinafter referred to as **"GCR, LLC"**) is the "Declarant".
3. The Master Deed provides at page 2 the definition of "Declarant Control Period":

   "Declarant Control Period": The period of time during which the Declarant or a Declarant-Related Entity owns any portion of the Condominium, has the unilateral right to subject additional property to the Condominium pursuant to this Master Deed, or has any outstanding warranty obligations related to the Condominium. The Declarant may, but shall not be obligated to, unilaterally relinquish its rights under this Master Deed and terminate the Declarant Control Period by recording a written instrument in the Public Records."

4. The Master Deed provides at Article 20: DECLARANT RIGHTS:

"20.1 Right to Appoint and Remove Directors. The Declarant shall have the right to appoint and remove any member or members of the Board of Directors of the Association subject to such limitations as set forth below. The Declarant's authority to appoint and remove members of the Board of Directors of the Association shall expire on the first to occur of the following:
(a) The expiration or earlier termination of the Declarant Control Period; or
(b) The date on which the Declarant voluntarily relinquishes such right by executing and recording an amendment to this Master Deed, which shall become effective as specified in such amendment.

5. On March 14, 2008 by Quitclaim Deed recorded in Book 295, page 187 of the Register's Office for Grainger County, Tennessee, GCR, LLC conveyed all right, title and interest in the 21 condominium units it owned to GCR Partnership (a third party). (Deed Attached as Exhibit B)
6. On March 14, 2008 GCR Partnership gave a Promissory Note and Deed of Trust to GreenBank secured by the 21 units. This was amended by an Amendment To Deed of Trust and Security Agreement of September 23, 2008 (Exhibit C).
7. GCR Partnership failed to pay GreenBank, defaulting on the Note and Deed of Trust. As a result, GreenBank foreclosed on the 21 units by foreclosure sale conducted October 22, 2008.
8. GreenBank purchased the 21 units at foreclosure sale and secured record ownership by Successor Trustees Deed dated November 5, 2008 (recorded in Deed Book 301, page 1191). (Deed Attached as Exhibit D)
9. As of March 14, 2008 at the earliest but no later than October 22, 2008, Declarant's Control Period had terminated and Plaintiff no longer had any rights under Article 20.

10. Alternatively and in addition to the above, on April 10, 2008, the Board of Directors appointed by the Declarant during the Declarant Control Period, resigned, leaving "Owners" without a Board and unilaterally relinquished its rights under the Master Deed and terminated the Declarant Control Period, although it did not formally record any written instrument in the Public Records.
11. The Closing Agreement of March 14, 2008 wherein GCR, LLC ("Developer") purchased its interest herein, provided in Paragraph 1: "Even though Developer will be responsible for the operations of the Bluffs Association until the Bluffs Assocation is "turned over" to the Unit owners in accordance with the terms of the Master Deed for the Bluffs Condominium, Developer has delegated such obligation to GCR, Partnership, a Tennessee general partnership, which will effect the "turn over". (Copy Attached as Exhibit E). The "turn over" was in fact effected.
12. Defendant received and Corporate records reflect the following letter which was received from Ward Whelchel on September 10, 2008:

    "Virginia (Collier): I apologize for being tardy in getting back to you. Attached please find minutes of the Annual Meeting of Homeowners followed by the Board of Directors, both of which were held on April 10, 2008. Also attached is the resignation of Mike (Dionas) and I as officers of HOA which I failed to include when I sent you the Resignation from the Board of Directors. Tammy Dionas was not an officer nor director.

    What needs to happen now is for you to send out notices for another homeowners meeting wherein you will elect a new Board of Directors. Following that

homeowners meeting, the newly elected Board of Directors will need to elect a President and Secretary for the coming year." (Email letter Attached as Exhibit F)

13. Upon the termination of the Declarant Control Period, the resignation of the Declarant Board and the unilateral relinquishment of its rights and pursuant to the Master Deed and Bylaws, an election of a successor Board of Directors by eligible voting homeowners was conducted on September 21, 2008. Jeff Collier, Doug McLaughlin and Kathy Taylor were elected as the Board of Directors and are continuing to act in that capacity to date.
14. After March 14, April 10 or September 21, "Declarant" no longer had authority, standing and interest to appoint an Owners' Board of Directors.
15. The "Declarant Control Period" is defined in pertinent part as "The period of time during which the Declarant or Declarant-Related Entity owns any portion of the Condominium…" It was terminated ("shall expire on the first to occur of the following: (a) The expiration or earlier termination of the Declarant Control Period) when:

    (a) Plaintiff transferred all right, title and interest in the Condominiums to Partnership by Unit Quitclaim Deed dated March 14, 2008 (recorded in Book 295, page 187); or

    (b) Foreclosure sale by GreenBank on October 22, 2008 resulting in a Successor Trustees Deed dated November 5, 2008 conveying all of its right, title and interest to GreenBank.

16. From September 21, 2008 until April 6, 2009, the Owners Board acted as the Board of Directors. Plaintiff did not claim to nor select Board of Directors until April 6, 2009 when it sent the Homeowners a letter claiming same. (Letter Attached as Exhibit G)
17. By its actions and conduct, upon which Defendants and the Association have relied, the Declarant Board surrendered and waived any right, title or interest it may have had, may have or may have in the future in the Declarant Control Period.
18. By its actions and conduct and the resignation and termination of the Declarant Board upon which Defendants and the Association relied, this Plaintiff should be estopped to deny that the Declarant Control Period has not expired or has not been terminated.
19. On April 16, 2008, GRC, LLC entered a contract with German Creek Management Company, Inc., to manage the condominiums for 5 years for $72,000 per year, more than twice a normal and reasonable management fee and much greater than the interim managers fee of $2,600 per month. In addition, it leased the office in the clubhouse for 10 years, until March 31, 2007 at $100 per year, plus an option for an additional 10 years at the same $100 per year. (Contract Attached as Exhibit H)
20. The above contract provides in Paragraph 20, "The principals in the Management Company are not affiliated with German Creek Resort LLC, the developer of the Condominium." They, in fact, are. James Figuerado, Jr. is the Chief Manager of German Creek Resort, LLC as is shown on the signatory page of the Closing

Agreement dated March 14, 2008. (Copy Attached as Exhibit I). Jim Figuerado is the President of German Creek Management Company, Inc. as shown on the signatory page dated April 16, 2008 (Copy Attached as Exhibit J).

21. The conduct and terms set out above in Paragraphs 19 and 20 show that the contract was not an "arms length contract" nor did Plaintiff's predecessor act in good faith in its fiduciary capacity for the Owners.

22. As a further indication that Plaintiff herein is not acting in good faith in a fiduciary capacity nor for the benefit of the Homeowners, Plaintiff has filed an amendment to the Master Deed withdrawing the "Clubhouse Tract" from the development (the clubhouse tract also includes the swimming pool). (Exhibit K and L). The Homeowners who have purchased these units have rights to same which have been conveyed with the purchase of their unit deeds. (Exhibit M). In addition, mortgage holders have also taken a security interest in this property as well (Exhibit N).

GERMAN CREEK CONDOMINIUMS-
THE BLUFFS OWNERS ASSOCIATION, INC.

BY: _____

DOUGLAS R. BEIER (BPR #5777)
Attorney for Defendants
P.O. Box 1754
Morristown, TN 37816-1754
(423) 587-2800

CERTIFICATE OF SERVICE

I, Douglas R. Beier, Attorney for Defendants do hereby certify that I have served a true and exact copy of the foregoing by placing same in the U.S. mail, postage prepaid, addressed to Scott A. Hodge, Attorney for Plaintiff, this the _____ day of _____, 2010.

_____

DOUGLAS R. BEIER

IN THE CHANCERY COURT OF GRAINGER COUNTY, TENNESSEE
SITTING AT RUTLEDGE

GERMAN CREEK RESORT, LLC,	§	
	§	
Plaintiff,	§	
Vs.	§	**No.: 09-039**
	§	
GERMAN CREEK CONDOMINIUMS - THE BLUFFS OWNERS' ASSOCIATION, INC., et al,	§	
	§	
Defendants.	§	

BRIEF AND ARGUMENT IN SUPPORT OF OWNER'S MOTION FOR SUMMARY JUDGMENT

ISSUE:

HAS THE RESPONSIBILITY FOR THE OPERATION OF THE ASSOCIATION BEEN TURNED OVER TO OWNERS/IS THE "DECLARANT CONTROL PERIOD" STILL IN EFFECT?

This is a Court of equity. ***Gibson's Suits in Chancery***, Eighth Edition, states:

Maxims of Adjudication Generally Considered.

In the adjudication of the questions that arise in Equity it is seldom that any statute is determinative, and frequently no decision of our appellate courts is applicable. Consequently, the Chancellor may rely on the rules of practice and pleading, and the maxims and principles of Law and Equity as his guides.

The principal maxims on which the Chancellor acts in adjudicating an equitable matter are the following, which might be designated as:

"TWELVE TABLES OF EQUITY"

1. Equity acts upon the person (forcing him to do what conscience requires).
2. Equity will not suffer a wrong without a remedy.
3. Equity imputes an intention to fulfill an obligation.
4. Equity acts specifically, and not by way of compensation.
5. Equity regards that as done which ought to be done.
6. Equity requires him who seeks Equity to do Equity

7. Equity regards the beneficiary as the real owner.
8. Equity delights to do complete justice, and not by halves.
9. Equity acts for those disabled to act for themselves.
10. Equity looks to the intent rather than to the form.
11. Equity delights in equality.
12. Equity requires diligence, clean hands and good faith.

Specifically applicable to the issues in this case are the principles that:

1. Equity looks to the intent rather than to the form.

2. Equity regards as done which in good conscience ought to have been done.

3. Equity regards as done that which ought to be done.

1 and 2: EQUITY LOOKS TO THE INTENT RATHER THAN TO THE FORM; AND EQUITY REGARDS THAT AS DONE WHICH IN GOOD CONSCIENCE OUGHT TO HAVE BEEN DONE

Equity Looks to the Intent rather Than to the Form. This maxim is related to another which is: *Equity regards that as done which in good conscience ought to have been done*, for it is only by looking at the *intent*, rather than at the *form*, of a transaction that Equity can treat as done what ought to have been done. The two maxims act together to aid each other. With the further help of the maxim: *Equity imputes an intention to fulfill an obligation,* a Court of Chancery will not only hold a resulting trustee, or a constructive trustee, liable as such, but will impute to him an *intention* to act as such, regardless of the form of the transfer, or conveyance.

Equity does not heed forms, but strives to reach the substance of things and to ascertain, uphold and enforce rights and duties which spring from the real relations and the actual transactions of the parties. Looking to the intent rather than to the form, whenever a penalty is designed merely to secure the payment of a given sum of money, or the performance of some act, Equity will relieve the obligor from the penalty, upon his paying the debt, or the actual damages resulting from his default. If it is sought to forfeit a lease for nonpayment of rent, or for breach of some, but not all, of the covenants contained in the lease, and the lessor can be adequately compensated for the breach of the contract, Equity will regard the forfeiture clause as merely a means of securing the observance of the contract, and a Court of Chancery will relieve from the forfeiture. Looking at the intent rather than at the form of the contract, Equity will consider the forfeiture clauses in mortgages and trust deeds as merely means of enforcing the payment

of the money contracted to be paid, and will relieve from forfeitures incurred, upon the payment of the debt. Equity will also, upon parole evidence, convert an absolute deed into a mortgage, and unless prohibited by some statute, will set up and enforce the real contract of the parties, regardless of the form, or of the want of form. Equity looks not at the outward form, but to the inward substance of every transaction, referring to principles and disregarding ceremonies, looking upon forms as made for justice, and not justice made for forms. Where there is substance for the Court to act on, the want of form will be disregarded, because Equity regards substance and not ceremonies. This is true not only in adjudicating the equities of the parties, but is true in matters of pleading also. If the complaint makes out a case for relief, any want of formality, or any misnomer of the complaint, or any eccentricity of phraseology, will not defeat the plaintiff's right to relief on the facts alleged and proved. If the necessary parties are before the Court, and a case for relief is alleged and proved, the fact that parties are made plaintiffs who should have been made defendants, or vice versa, will not prevent the Court from decreeing according to the equities of the parties. This is so even when persons under disability are to be affected by the decrees. The fact that the proper facts are alleged, and the proper parties are before the Court, is substance; the *manner* of alleging the facts and the position of the parties in the action is ceremony. ***Gibson's***, §2.10 (supra).

3. EQUITY REGARDS THAT AS DONE WHICH

OUGHT TO BE DONE:

2.12. Equity Regards That as Done Which Ought to Be Done. In a Court of Chancery *ought to be becomes is*; and whatever a party ought to do, or ought to have done, in reference to property of another, will ordinarily be regarded as *done.* The rights of the parties will be adjudicated as though, in fact, it *had been done.* This maxim is far-reaching in its operation, and full of benefit consequences; the doctrines and rules creating and defining equitable estates or interests being, in a great measure, derived from it.

As between the party *by* whom, and the party *for* whom, an act ought, in good conscience, to be done, or to have been done, Equity will consider it as *done.* For the purpose of reaching exact justice, Equity will frequently consider that property has assumed certain forms with which it ought in justice to be stamped, or that parties have performed certain duties which they, in justice, ought to fulfill; and will regulate the ownership of estates and interests accordingly. In such matters another maxim is sometimes invoked: *Equity regards the substance, not the form of things*, thus:

1. The vendor of land is regarded in Equity as the owner of the purchase money, and the vendee is looked upon as the owner of the land.
2. The purchaser of a possible interest in land becomes the equitable owner of the interest.
3. The sale of a chattel not yet in existence, or not yet the property of the seller, becomes effective in Equity as soon as the thing comes into existence, or becomes the property of the seller.
4. The assignment of the thing in action gives the assignee all the rights of the assignor.

5. In general, whenever a party, for a valuable consideration transfers, or contracts to transfer, any interest in any property, or in any rights of property, a Court of Chancery places the assignee, or vendee, in the shoes of the vendor as to all the interests and rights transferred, or agreed to be transferred.

   Equity will regard that as done which the purchaser ought to have done, that is, will regard the purchaser as holding the legal title for the benefit of the party who was entitled to the purchase money, and will decree accordingly when: (1) an agent invests his principal's money in land, and takes title in his own name; or (2) a partner uses partnership funds to buy land in his own name; or (3) when a guardian uses his ward's funds in the purchase of property in his own name; or (4) when an executor, administrator, or any other trustee, uses trust money to buy property in his own name. When a party acquires the legal title to property by fraud, he will be decreed to hold it as trustee for his vendor. Where an act is prevented from being done by fraud, Equity will consider the act as done, or in order to avoid the effects of the fraud. Where a widow is prevented by fraud from dissenting to a will, Equity will give her all the rights she would have acquired by a dissent filed in due time. If a son pretends to destroy the deeds to enable his father to devise the lands, but destroys only copies, Equity will treat the deeds as destroyed. Equity, treating that as done which ought to have been done, will consider land redeemed when the redeemer has done all that was required of him, and the purchaser refuses to reconvey, or to take the redemption money. This maxim is nearly allied to another maxim: *No one can take advantage of his own wrong.* To prevent a party deriving advantage from his own wrong, Equity regards that as done which, in good reason and good conscience, ought to have been done. Agreements based on a valuable consideration are, in Equity, considered, in the interests of the person entitled to their performance, as performed, and performed at the time when, and in the manner in which, they ought to have been performed. The same consequences attach to the agreement as though it had actually been performed, so that the party in default shall not benefit by his wrong, nor the other party suffer thereby.

   In reference to agreements the maxim is sometimes stated thus: *What is agreed to be done is considered as done,* and sometimes thus, *Equity treats that as done which is agreed to be done upon sufficient considerations.* It must be borne in mind that this maxim seeks no more than to enforce an equitable obligation. There must be a right on one side and a corresponding duty on the other side. Equity does not regard as done what *might* have been done, or what *could* have been done, but what *ought,* in good reason and good conscience, to have been done. Nor does this rule operate in favor of anyone except him who has the equitable right to have the act performed, and those standing in his shoes; nor does it operate against anyone except him upon whom the duty has devolved, and upon those who stand in his place. ***Gibson's***, §2.12 (supra).

1. According to the Master Deed and Bylaws which govern "Owners", German Creek Resort, LLC (the Plaintiff herein and hereinafter referred to as **"GCR, LLC"**) is the "Declarant".

2. The Master Deed provides at page 2 the definition of "Declarant Control Period":

   "Declarant Control Period": The period of time during which the Declarant or a Declarant-Related Entity owns any portion of the Condominium, has the unilateral right to subject additional property to the Condominium pursuant to this Master Deed, or has any outstanding warranty obligations related to the Condominium. The Declarant may, but shall not be obligated to, unilaterally relinquish its rights under this Master Deed and terminate the Declarant Control Period by recording a written instrument in the Public Records."

3. The Master Deed provides at Article 20: DECLARANT RIGHTS:

   "20.1 Right to Appoint and Remove Directors. The Declarant shall have the right to appoint and remove any member or members of the Board of Directors of the Association subject to such limitations as set forth below. The Declarant's authority to appoint and remove members of the Board of Directors of the Association shall expire on the first to occur of the following:
   (a) The expiration or earlier termination of the Declarant Control Period; or
   (b) The date on which the Declarant voluntarily relinquishes such right by executing and recording an amendment to this Master Deed, which shall become effective as specified in such amendment.

4. On March 14, 2008 by Quitclaim Deed recorded in Book 295, page 187 of the Register's Office for Grainger County, Tennessee, GCR, LLC conveyed all right, title and interest in the 21 condominium units it owned to GCR Partnership (a third party).

5. On March 14, 2008 GCR Partnership gave a Promissory Note and Deed of Trust to GreenBank secured by the 21 units. This was amended by an Amendment To Deed of Trust and Security Agreement of September 23, 2008.

6. GCR Partnership failed to pay GreenBank, defaulting on the Note and Deed of Trust. As a result, GreenBank foreclosed on the 21 units by foreclosure sale conducted October 22, 2008.
7. GreenBank purchased the 21 units at foreclosure sale and secured record ownership by Successor Trustees Deed dated November 5, 2008 (recorded in Deed Book 301, page 1191).
8. As of March 14, 2008 at the earliest but no later than October 22, 2008, Declarant's Control Period had terminated and Plaintiff no longer had any rights under Article 20.
9. Alternatively and in addition to the above, on April 10, 2008, the Board of Directors appointed by the Declarant during the Declarant Control Period, resigned, leaving "Owners" without a Board and unilaterally relinquished its rights under the Master Deed and terminated the Declarant Control Period, although it did not formally record any written instrument in the Public Records.
10. The Closing Agreement of March 14, 2008 wherein GCR, LLC ("Developer") purchased its interest herein, provided in Paragraph 1: "Even though Developer will be responsible for the operations of the Bluffs Association until the Bluffs Association is "turned over" to the Unit owners in accordance with the terms of the Master Deed for the Bluffs Condominium, Developer has delegated such obligation to GCR, Partnership, a Tennessee general partnership, which will effect the "turn over". The "turn over" was delegated and in fact effected, although there was no recording of written instrument in the public records.
11. Defendant received and Corporate records reflect the following letter which was received from Ward Whelchel on September 10, 2008:

"Virginia (Collier): I apologize for being tardy in getting back to you. Attached please find minutes of the Annual Meeting of Homeowners followed by the Board of Directors, both of which were held on April 10, 2008. Also attached is the resignation of Mike (Dionas) and I as officers of HOA which I failed to include when I sent you the Resignation from the Board of Directors. Tammy Dionas was not an officer nor director.

What needs to happen now is for you to send out notices for another homeowners meeting wherein you will elect a new Board of Directors. Following that homeowners meeting, the newly elected Board of Directors will need to elect a President and Secretary for the coming year."

12. Upon the termination of the Declarant Control Period, the resignation of the Declarant Board and the unilateral relinquishment of its rights and pursuant to the Master Deed and Bylaws, an election of a successor Board of Directors by eligible voting homeowners was conducted on September 21, 2008. Jeff Collier, Doug McLaughlin and Kathy Taylor were elected as the Board of Directors and are continuing to act in that capacity to date.
13. After March 14, April 10 or September 21, "Declarant" no longer had authority, standing and interest to appoint an Owners' Board of Directors and the turnover was delegated to GCR Partnership to effect the turnover.
14. The "Declarant Control Period" is defined in pertinent part as "The period of time during which the Declarant or Declarant-Related Entity owns any portion of the Condominium…" It was terminated ("shall expire on the first to occur of the

following: (a) The expiration or earlier termination of the Declarant Control Period) when:

(a) Plaintiff transferred all right, title and interest in the Condominiums to GCR Partnership by Unit Quitclaim Deed dated March 14, 2008 (recorded in Book 295, page 187); or

(b) Foreclosure sale by GreenBank on October 22, 2008 resulting in a Successor Trustees Deed dated November 5, 2008 conveying all of its right, title and interest to GreenBank.

(c) The turnover was effected by GCR, Partnership which is an obligation. Developer had delegated under its March 14, 2008 agreement. "GCR" did not retain any rights to deny the turnover after that date.

15. By its actions and conduct, upon which Defendants and the Association have relied, the Declarant Board surrendered and waived any right, title or interest it may have had, may have or may have in the future in the Declarant Control Period.
16. By its actions and conduct and the resignation and termination of the Declarant Board upon which Defendants and the Association relied, this Plaintiff should be estopped to deny that the Declarant Control Period has not expired or has not been terminated and equity should regard that as done which ought to have been done.
17. On April 16, 2008, GRC, LLC entered a contract with German Creek Management Company, Inc., to manage the condominiums for 5 years for $72,000 per year, more than twice a normal and reasonable management fee and much greater than the interim managers fee of $2,600 per month. In addition, it leased the office in the

clubhouse for 10 years, until March 31, 2007 at $100 per year, plus an option for an additional 10 years at the same $100 per year.

18. The above contract provides in Paragraph 20, "The principals in the Management Company are not affiliated with German Creek Resort LLC, the developer of the Condominium." They, in fact, are. James Figuerado, Jr. is the Chief Manager of German Creek Resort, LLC as is shown on the signatory page of the Closing Agreement dated March 14, 2008. Jim Figuerado is the President of German Creek Management Company, Inc. as shown on the signatory page dated April 16, 2008. German Creek Management has sued the Homeowners Association for $360,000 (Case #08-146).
19. The conduct and terms set out above in Paragraphs 19 and 20 show that the contract was not an "arms length contract" nor did Plaintiff's predecessor act in good faith in its fiduciary capacity for the Owners.
20. As a further indication that Plaintiff herein is not acting in good faith in a fiduciary capacity nor for the benefit of the Homeowners, Plaintiff has filed an amendment to the Master Deed withdrawing the "Clubhouse Tract" from the development (the clubhouse tract also includes the swimming pool). The Homeowners who have purchased these units have rights to same which have been conveyed with the purchase of their unit deeds. In addition, mortgage holders have also taken a security interest in this property as well.
21. None of the actions of Owners impair the rights of Declarant or interfere with Declarant's commercial activities or with the development of, construction on, or

marketing of any portion of the Condominium or in German Creek Resort, or diminish the level of services being provided by the Association.

22. In fact, all of Owner's actions improve the association, while all of Declarant's actions have detrimentally affected the Association's and Development's best interests.

GERMAN CREEK CONDOMINIUMS-
THE BLUFFS OWNERS ASSOCIATION, INC.

BY: _____

DOUGLAS R. BEIER (BPR #5777)
Attorney for Defendants
P.O. Box 1754
Morristown, TN 37816-1754
(423) 587-2800

CERTIFICATE OF SERVICE

I, Douglas R. Beier, Attorney for Defendants do hereby certify that I have served a true and exact copy of the foregoing via facsimile to Scott A. Hodge, Attorney for Plaintiff, this the _____ day of _____, 2010.

_____
DOUGLAS R. BEIER

IN THE COURT OF APPEALS FOR THE EASTERN DISTRICT OF TENNESSEE SITTING AT KNOXVILLE

CYNTHIA LEE BRATTON,	§	
	§	
Plaintiff/Appellant,	§	
Vs.	§	**No. E2002-00432-COA-R3-CV**
	§	**Hamblen County Chancery Court**
MICHAEL WAYNE BRATTON,	§	
	§	
Defendant/Appellee.	§	

APPEAL AS OF RIGHT

REPLY BRIEF OF APPELLANT

Douglas R. Beier, BPR #5777
Attorney for Plaintiff/Appellant
P. O. Box 1754
Morristown, Tennessee 37816-1754
(423) 587-2800

ORAL ARGUMENT REQUESTED

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RESPONSE TO APPELLEE'S STATEMENT OF THE FACTS

Appellee's Statement of the Facts is not an accurate statement of the facts as contemplated by TRAP 27(6). Appellee sets out only his argument about his testimony, all of which was disputed and most of all of which was rejected by the Trial Court.

Appellee's Statement specifically ignores all of the expenditures Appellee has made for his paramour. It fails to list his income at the time of the trial which was $541,023 and would have the Court believe that his real income is only $267,336 because it was the average net income over the years 1997, 1998 and 1999. Obviously, Appellee's ability to pay would be measured by his real income of $541,023 and not some arbitrary average figure which has no bearing on his ability to pay. Appellee testified he was making more money this year (II, 239).

In addition, and similarly misleading, Appellee contends that in 1998, Wife's gross income from commissions exceeded $121,300 in 1998. In 1998, two years prior to the divorce, her real estate corporation had a taxable income of only $7,672 (III, 76) not the $121,300 suggested by Appellee, which was the gross figure on the tax return. In 1999, the corporation lost $34,207 (III, 76), and it lost money again in 2000.

REPLY TO APPELLEE'S RESPONSE REGARDING THE POST-NUPTIAL AGREEMENT

A. THERE IS ADEQUATE AND SUFFICIENT CONSIDERATION FOR PARAGRAPH 2 OF THE POST-NUPTIAL CONTRACT.

Appellee argues that "[t]he Wife admitted on cross-examination that she knew at the time of the marriage, more than a year before the contract was signed, that she had no intention of attending dental school". (Appellee's brief at p. 9) This is misleading and does not accurately state the testimony.

The testimony is accurately set out herein in Appellant's brief:

> Q. What was the discussion with regard to your pursuing a dental career and his pursuing a medical career and marriage?
> A. Our discussion was mostly that he would like me to give up my pursuit of a dental career and be a full-time homemaker and housewife for him and his children – well, our child, my child at the time, and any future children that we had.
> Q. And what was your response?
> A. That I couldn't do that, because I just came out of a marriage and was left penniless and I wasn't going to do that again.
> Q. And what was his response?
> A. He said, "I will guarantee you that will never happen." And I said, "How can you do that?" And he said, "I will have a legal, binding contract drawn up and I guarantee you that I won't even cause a divorce. There has never been a divorce in my family and I am certainly not going to be the first."
> And we talked about what the particulars of the agreement would be. And it was 50 percent of his future income if I would give up my pursuit of a dental career.
> Q. And what were you doing to pursue a dental career?
> A. Well, I was just in the very early stages, because I just started UT in April. And so I was just actually taking one class at that time that was required by Dr. Brown, who I worked for in the Department of Biology.
> Q. Did you believe his promise?
> A. Yes.
> Q. Was it put in writing prior to your marriage?
> A. No.
> Q. All right. So you married on what day?

A. June 26, 1982.
Q. Now, how did it come up again that an agreement is dated in August; how did it come back?
A. We were just having a discussion and I said, "Well, you know, we didn't do our agreement and I'm thinking about going to dental school." And he sat down and said, "I said I'll do it and I'll do it. I will write you that agreement if you promise not to go to dental school." And he sat sown and when he came to the 50 percent, he said: "I don't care if I put 50, 60, 70, 80 or 90 in here. It is a moot point and I am never going to divorce you or be the cause of a divorce."
Q. Let me show you a letter and see if you can identify this.
(The witness reviews a document.)
Q. Can you identify this letter?
A. Yes.
Q. Whose hand is that written in?
A. Michael's.
Q. What is the date on that letter?
A. June 27, 1983.
Q. All right.
MR. BEIER: And, Your Honor, I would like to mark this letter as the next EXHIBIT.
THE COURT: So admitted.
(Thereupon, the 6/27/83 letter was marked and filed as EXHIBIT 3.)
Q. Mrs. Bratton, if you would, read the letter dated June 27, 1983.
A. "I, Michael W. Bratton, being of sound mind and being married to Cynthia L. Bratton, hereby promise never to be the cause of a divorce between us. In the event that I do not fulfill my promise, I will give Cindy 50 percent of our future – our present belongings and 50 percent of my net future earnings. Michael W. Bratton, 6/27/83."
Q. Now, that wasn't the only thing that was written, though, was it?
A. No.
Q. How did this property settlement agreement come into being?
A. He contacted an attorney.
Q. Let me show you this. It is titled: Property Settlement Agreement, and it is dated August 26, 1983. Do you recognize this?
A. Yes, I do.
Q. And on page 2, there are two signatures?
A. Yes.
Q. Whose signatures appear on there?
A. Michael Wayne Bratton first, and Cynthia L. Bratton second.
Q. Okay.
MR. BEIER: Your Honor, I would like to make this EXHIBIT 4.
THE COURT: So admitted.

(Thereupon, the 8/26/83 Property Settlement Agreement was marked and filed as EXHIBIT 4.)

Q. Mrs. Bratton, tell the Court how you got – how this agreement came about.

A. Well, he told me that he wanted to write me this to show me his love for me because I was giving up a dental career.

Q. And who took it to a lawyer?

A. He did.

Q. Is his brother a lawyer?

A. Yes, sir.

Q. Did his brother do this?

A. I thought he did originally, but I found out since, he didn't.

Q. And when you got it, did you sign it?

A. Yes, sir.

Q. And it is notarized. It looks like the Notary is the same day, but different notaries. Do you know who notarized – how that happened?

A. I believe he had it notarized first and brought it to me and then had me notarized and I gave it back to him.

Q. And the Paragraph 5 says that you each had opportunity to have counsel?

A. Yes.

Q. That you understand your rights have been described, fully explained, and the legal effect of the agreement has been fully explained?

A. Yes.

Q. So, he brought it from the lawyer's office?

A. Yes.

Q. What was the purpose in getting an agreement like that or having an agreement like this?

A. It was to guarantee my future income due to the fact that I gave up a dental career, to protect me, only to protect me.

Q. From what?

A. From the very circumstances that we are here today, getting divorced and not having the income that I would have as a dentist. (III, 52-58)

On cross-examination, she was asked this question and gave this answer:

Q. And you decided – When you decided to marry him or at least by the time you all got married, that, you were not going to go to dental school; is that correct?

A. Yes (III, 143).

It is obvious that the reason she was not going to go to dental school was Appellee's promise, first made prior to their marriage and then memorialized in writing after their marriage. The matter of the writing came up again after the marriage as she stated, because she told Appellee again that "we didn't do our agreement and I'm thinking about going to dental school; and he sat down and said: "I said I'll do it and I'll do it. I will write you that agreement if you promise not to go to dental school". (III, 54). Contrary to Appellee's statement, her testimony was that she had every intention of attending dental school, until Appellee followed through with their oral agreement and it was memorialized in written form after their marriage. For Appellee to suggest that she had no intention of attending dental school is not supported by any of the evidence.

The Trial Court essentially determined that the parties had made an oral prenuptial agreement which was memorialized in writing after the marriage, stating "[u]pon the parties' marriage, Ms. Bratton chose to forego her career as a dentist in order to support Dr. Bratton's medical career, as well as to serve as homemaker and primary caregiver for the parties' children" (II, 163). Such a conclusion would obviously support a finding of consideration for the parties' agreement. Contrary to the Trial Court's conclusion that the promises of the parties under separate paragraphs are not interdependent and to not relate to the same subject matter, it is apparent that they are interdependent and do relate to the same subject matter, i.e. a divorce caused by Husband's conduct and his financial obligations to Wife upon such event. The consideration recited for the entire contract is the same consideration which supports both promises contained in paragraphs 1 and 2: "the mutual

benefits accruing to the respective parties and other good and valuable consideration, received or to be received by each of the parties hereto…" (Exhibit 1). There is obviously benefit to the promisor and a detriment to or obligation upon the promisee sufficient to constitute consideration flowing to both parties and to support a binding contract. Such consideration existed at the time the oral prenuptial agreement was made and it existed at the time that same agreement was memorialized in writing and executed post-nuptially. The Trial Court found this consideration existed to support paragraph 1 (I, 67). Appellant respectfully submits that the Court erred in failing to find that same consideration for paragraph 2 which was Wife's agreement to forego the pursuit of a dental career in order to support Husband's medical career, as well as serve as a homemaker and primary caregiver for the parties' children. The Trial Court indeed did find it to be the case that she did forego her dental career to support his medical career (II, 163). Such consideration is more than adequate to support a contract. Eg. **Book-Mart of Florida, Inc. v. National Book Warehouse**, 917 S.W.2d 691 (Tenn. App. 1995) holding that benefit received by one party of "entering into a relationship which can inure to the benefit of both parties" was adequate consideration to support a contract. Also, consideration may be nothing more than reciprocal promises. **Rodgers v. Southern Newspapers, Inc.**, 379 S.W.2d 797 (Tenn., 1964). It is clear that there were reciprocal promises in this case. Wife promised to "forego the pursuit of a dental career in order to support Husband's medical career"; Husband promised to "pay to Wife, one-half of all of Husband's net gross income (after deduction for state and federal income taxes)".

Appellee states that paragraph 2 "presents a strikingly different situation" from paragraph 1, but in truth, there is no substantial difference. Appellee states that the provisions of paragraph 2 contain absolutely no evidence, upon its face, if any consideration flowing from Wife from Husband. However, this is no different than paragraph 1. The consideration for both is that stated in the recitation "the mutual benefits accruing to the respective parties and other good and valuable consideration, received or to be received by each of the parties hereto". To support the enforcement of a contract, it is not necessary that the consideration be listed specifically and in detail as long as it exists. Eg., **Fuller v. McCallum & Robinson**, 118 S.W.2d 1028 (Tenn. App., 1937) holding that where the true consideration is not set out, but instead the contract recites the consideration as a nominal sum and other valuable consideration, it is always permissible to prove the actual consideration. The general rule is that a recital in a written instrument as to the payment of or receipt of the consideration is not conclusive, is merely in the nature of a receipt and may be contradicted, modified or explained, 32A CJS Evidence §953. Whether it is considered an oral prenuptial agreement which later was reduced to writing or whether it is considered only as a postnuptial agreement, it is supported by consideration in its entirety and should be interpreted and enforced as any other contract. **Minor v. Minor**, 863 SW2d 51 (Tenn. App., 1993); **In re: Estate of Wiseman**, 889 SW2d 215 (Tenn. App., 1994) . It is also noted that there is no severability clause in the agreement so the consideration for one paragraph would appear to support the consideration for the other also. If its good enough for paragraph 1 as the Court found, it is equally adequate for paragraph 2.

Appellee alleges further that should this Court find valuable consideration was in fact provided by Wife, she breached the contract because she did not "remain a homemaker when she pursued and accepted employment outside the home". The only testimony in the record indicates that Wife gave up on the pursuit of a dental career in order to support her husband and raise the family. Nothing in the written agreement prohibited Wife from employment outside the home, so that would not constitute a breach of contract. The overwhelming evidence is to the contrary and the Trial Court found that "[d]uring the marriage and continuing post-separation, Ms. Bratton has been the primary caregiver for the children, taking a greater responsibility for performing parenting responsibilities relating to the day to day needs of the children" (II, 156).

Wife testified that she moved with Appellee when he was sent to San Diego by the Navy (III, 59), that there were extended periods when he was not home and was overseas and that he was on call every other night, so he did not even come home (III, 60). She "dabbled in real estate" only a few hours while her daughter was in day care (III, 61). They were also sent to Jacksonville, and she did not do anything outside of the home in Florida and for the two years there, did nothing but care for the family (III, 62). In 1995, they moved to Morristown and she again dabbled in real estate, only when the children were in school (III, 63). Obviously she was never able to pursue a professional career, with the constant moves, the demands of raising the children and providing a home so that Appellee's practice could flourish. Dr. Bratton even testified to a statement he made on a video tape that he had been

married for 11 years and wanted to thank his Wife "for dealing with the job, three children, running a household, and putting up with a tired, grumpy orthopedic resident" (II, 263).

Appellee's argument that Wife breached the contract is not consistent with the position he has taken throughout the trial. See Answer and Counterclaim (I, 30-32) and remarks of counsel (IV, 286-295). "A party in the Appellate Court will not be permitted or heard to assume a position contrary to and inconsistent with the position he took in the Trial Court" **Clement v. Nichols**, 209 S.W.2d 23, 24 (Tenn., 1948).

Appellee's argument that the oral agreement violates the statute of frauds has no application in this case. The agreement of the parties was subsequently reduced to writing and therefore, the statute does not apply.

(B) THE ENFORCEMENT OF THE WRITTEN CONTRACT SEVENTEEN YEARS AFTER ITS EXECUTION IS NOT UNREASONABLE

Appellee attempts to infuse into this agreement a statute of limitations on its enforcement. Appellee argues that since the parties failed to include a specified time for its termination, the court must interpret the contract to provide that it extends for a "reasonable period of time" only. Such an argument misses the most obvious points about duration of this agreement. It is apparent from the agreement itself that it was intended to extend the responsibilities thereunder for the parties' lifetimes, and it was intended that Dr. Bratton would not be the cause of a divorce for the life of their marriage. It is a lifetime agreement for support and an agreement which is intended to apply throughout the life of their marriage. It is intended to have the same duration as those prenuptial agreements which have been upheld and enforced as valid and binding agreements upon eventual divorce, no matter when the divorce occurs. Appellant can find no cases in which the Courts have refused to enforce a prenuptial agreement because it extends for "a reasonable period of time" only. There is no way to anticipate upon entering such agreements when a divorce may occur and to ask the Court to read into their enforcement a requirement that they be valid only for a certain period of time would radically change both the agreement and the law concerning such agreements. The parties contemplated an enforceable agreement <u>if ever</u> or <u>whenever</u> Dr. Bratton would be the cause of a divorce.

There is nothing unreasonable in enforcing the agreement after seventeen years of marriage. A reasonable period of time does depend on the subject matter of the contract, in this case, a divorce, upon the situation of the parties at its execution and upon the intention of

the parties and circumstances attending performance. **Minor v. Minor**, 863 SW2d 51 (Tenn. App., 1993). "What constitutes a reasonable period within which to act is to be performed where a contract is silent upon the subject depends on the subject matter of the contract, the situation of the parties, their intention, in what they contemplated at the time the contract was made, and the circumstances attending the performance. **Minor** at 54 citing 17 Am. Jr.2d Contracts §479. This is the very situation contemplated at the time of its execution. The children are mostly grown, the Doctor is now making more money, Wife has gotten older and the Doctor is now having an affair with his nurse. It can hardly be stated that enforcing the agreement would produce an unconscionable and unintended result. In fact, enforcing the agreement would produce the very result which was intended and which was addressed by the agreement. There is nothing unconscionable about Appellee's having to live with the results of his agreement and splitting his income with his wife when she has performed her part of the bargain and given up her career. If Appellee could avoid his contractual promise simply because of the passage of time, Appellant would have given up her career for nothing, fully performing her end of the whole contract. Appellee will never have to fulfill his. As the **Minor** court noted, "the law does not favor the destruction of contracts for uncertainty, particularly where one of the parties has performed his part of the contract." **Minor**, at 54, citing **Apco Amusement Co., Inc. v. Wilkins Family Restaurants of America, Inc.** 673 SW2d 523, 528 (Tenn. App., 1984).

The **Minor** case is clearly distinguishable and not on point. In that case, the issue for the Court was a reconciliation agreement twelve years after its making. The Court did not believe it reasonable that the parties could be reconciling for 12 years under those terms, and held it unreasonable to enforce it after they had resumed their marriage for that length of time

and after circumstances had greatly changed since its execution. The Minors were now 75 and 62 years of age respectively. The marital estate had significantly increased and the agreement made no provision for the distribution of the after-acquired property. In refusing to enforce the agreement which would have limited Mr. Minor's payments to $2,000 per month, the Court did not opine it reasonable to use that figure which did not consider the party's present circumstances, the Wife's needs and Husband's ability to pay. It is necessary in those circumstances to read into such a reconciliation agreement a reasonable time period, since reconciliation agreements are by their very nature temporary, to terminate either upon successful reconciliation or failed reconciliation and divorce. The **Minor** court said "(w)e do not intend to convey that a reconciliation agreement must set out an expiration date. To the contrary, the added pressure of meeting a specific deadline could conceivably be a detriment to reconciliation and therefore, contrary to public policy. Nevertheless, a reasonable time is implied in such an agreement" **Minor,** at 55. There is nothing unreasonable in enforcing this agreement, in this case, at this time.

C. **THE PROPERTY SETTLEMENT AGREEMENT IS NOT VOID AS AGAINST PUBLIC POLICY.**

Enforcement of the agreement is not void as against public policy. Contrary to Appellee's argument, Appellee's child support would be computed based on his gross income, which is easily understood as the income he actually receives after Wife receives her one-half of the net gross income. It is noteworthy that even if the Court considers only one-half of Dr. Bratton's most recent yearly income, he still has income of $270,511.50 (1/2 of $541,023) from which to pay child support. According to the Trial Court's order which applied the greatest figure allowed under the child support guidelines, he is only paying child support on gross income of $180,000. He would have an additional $90,000 from which he would pay no child support. Additionally, his financial obligation for child support will reduce to 21% at his son's majority and to zero upon his daughter's 18th birthday in three years. Appellee obviously would have a substantial income as well as great incentive to continue and advance his career.

Appellee again argues that future enforcement of this agreement would require Wife to stop working as a real estate agent. As has been previously pointed out, nothing in this agreement prohibits or restricts Wife from such activities. There has never been any suggestion by Appellee that that was their agreement, and the written terms of the agreement do not proscribe it either. There is nothing here in the enforcement of the parties' agreement which is against the public policy of this state.

II THE TRIAL COURT DID NOT ERR NOR ABUSE ITS DISCRETION IN AWARDING ALIMONY

These arguments are made in the alternative in the event his Court declines to enforce the parties' post-nuptial agreement.

Appellee believes that the trial court's findings of fact and conclusions with respect to the award of alimony are to be reviewed by this Court on appeal de novo upon the record, "accompanied by a presumption of correctness of the finding, unless the preponderance of the evidence is otherwise" TRAP 13(d). Appellee disagrees that this Court should apply a different standard, since the trial court's construction of T.C.A. §36-5-101 is not at issue. Certainly the application of the alimony statute has been raised as an issue by Appellee, but the trial court did not construe or interpret the statute. A trial court has wide discretion in awarding alimony and appellate review of the trial court's findings of fact is de novo upon the record accompanied by a presumption of correctness of the findings. **Robertson v. Robertson**, 76 SW3d 377 (Tenn. 2002).

A review of the Trial Court's Memorandum Opinion on this issue reveals that the Court framed the issue as follows: "Is Plaintiff entitled to an award of spousal support (?)" (II, 153). It then sought to apply the criteria set out in T.C.A. §36-5-101 upon which the court may make an order for suitable support and maintenance. The Court did not engage in any analysis nor determination of the construction of the statute itself, but instead listed the relevant factors set out therein and applied them to the facts and circumstances of this case:

SPOUSAL SUPPORT

> Ms. Bratton has requested spousal support in this action in the nature of periodic payments, COBRA coverage and attorneys fees. Tennessee Code Annotated Section 36-5-101 sets for the criteria upon which the court may make an order for suitable support and maintenance. Tennessee Code Annotated Section 36-5-101

provides that the court may consider rehabilitative support, alimony in solido, and alimony in futuro. The statute lists a number of relevant factors to be considered in arriving at an award of support. In applying T.C.A. 36-5-101(d) our courts have said "the most common factors considered by the courts are: (1) the need of the innocent spouse; (2) the fault of the obligor spouse; and (3) the obligor spouse's ability to provide support and maintenance", **Bull v. Bull**, 729 S.W.2d 673 (1987); **Hawkins v. Hawkins**, 883 S.W.2d (1994). If one spouse is economically disadvantaged compared to the other, the courts are generally inclined to provide some type of support, **Batson v. Batson**, supra.

In the rehabilitative alimony statute, the legislature has demonstrated a preference for an award of rehabilitative alimony to rehabilitate an economically disadvantaged spouse, **Crabtree v. Crabtree**, 16. S.W.3d 356 (2000). Alimony in futuro should be awarded only when the trial court finds that "economic rehabilitation is not feasible and long term support is necessary", **Self v. Self**, 861 S.W.2d 360 (1993). An award of rehabilitative alimony must be predicated upon a finding that the recipient can be economically rehabilitated, T.C.A. 36-5-101; **Crabtree**, supra. "In marriages of long duration where a spouse is economically disadvantaged vis-à-vis the other spouse, the party's standard of living should be the measuring stick by which and against which a court determines whether or not an individual can be rehabilitated", **Robertson v. Robertson**, 2000 W.L. 1211314 (Tenn. App., 2000). The Court in **Robertson** provided the following instructive analysis for trial courts confronting the issue of whether an economically disadvantaged spouse may be rehabilitated:

> We recognize that the Supreme Court in **Crabtree** suggested that not every economically disadvantaged spouse is "entitled to be placed in the same financial condition occupied prior to the divorce." S.W.3d at 359-60. We do not mean to suggest otherwise. The fact that one cannot be rehabilitated to an economic station in life approximating his or her pre-divorce standard of living does not necessarily mean that said individual is entitled to spousal support in an amount that will exactly reach that standard. The proof may reflect that a requesting spouse can be rehabilitated to a standard of living that is reasonable in relation to the one enjoyed by that party prior to the divorce. In any event, the appropriate answer to the rehabilitation question depends upon a careful weighing of all of the factors set forth at T.C.A. §36-5-101(d)(1)(A)(L). When these factors are considered, a court may determine that the other party does not have the resources to pay all of the necessary support, or that the requesting spouse's relative fault is such as to militate against an award of any or all of the needed support, or, for any one or more of a number of other reasons, that the other party should not be ordered to pay the full amount of support that is required to reach a reasonable approximation of the requesting spouse's former standard of living; but we believe the only fair reading of the statute is that the inquiry as to whether a requesting spouse can be rehabilitated must be viewed in the context of "the standard of living of the parties established during the marriage". T.C.A. §36-5-101(d)(1)(I). To find a different measuring stick is

to graft onto the statute an economic status that is not expressly stated or otherwise suggested in the statutory scheme.

Upon the parties' marriage, Ms. Bratton chose to forego her career as a dentist in order to support Dr. Bratton's medical career, as well as to serve as homemaker and primary caregiver for the parties' children. Ms. Bratton is presently licensed as a real estate broker but as previously noted her business attempts have proven financially unsuccessful.

The evidence preponderates that Ms. Bratton cannot be rehabilitated when viewed in the context of "the standard of living the parties established during the marriage", T.C.A. 36-5-101(d)(1)(I). Ms. Bratton has had little income during the marriage which will entitle her to social security credit on her own account. When her previous standard of living is used as a measuring stick, the standard of living that Ms. Bratton can achieve on her own cannot be considered a reasonable one. The evidence clearly supports a finding that for Ms. Bratton rehabilitation is not feasible and long term support is necessary.

Considering all applicable factors, including Ms. Bratton's need for future financial support, Dr. Bratton's marital fault and his ability to provide support and maintenance, this Court concludes that he shall pay to Ms. Bratton the amount of $10,500.00 per month until her death or remarriage; see **Sherrill v. Sherrill**, 831 S.W.2d 293 (1992). Further, Dr. Bratton shall be responsible for maintaining health care coverage for Ms. Bratton through COBRA for a period of 18 months following the entry of the Final Decree (II, 162-163).

In **Robertson**, the Supreme Court, citing **Crabtree v. Crabtree**, 16 SW3d 356 (Tenn. 2003), held that if rehabilitation is not feasible and long-term support is necessary, then the trial court may grant an award of alimony in futuro. The trial court made a specific finding that "the evidence clearly supports a finding that for Ms. Bratton rehabilitation is not feasible and long term support is necessary". Such is the case here upon facts which are very different from those presented in **Robertson**. Mr. Robertson had comparatively little income and Mrs. Robertson had comparatively less financial need. She was also a teacher and had a teacher's income. Here, Dr. Bratton has a half-million dollar income and Mrs. Bratton has none. With any award of spousal support, the two most important factors considered are the need of the disadvantaged spouse and the obligor spouse's ability to pay. **Burlew v. Burlew**, 40 SW3d 465 (Tenn. 2001). Her rehabilitation is not feasible and her long-term support is necessary. Trial Courts should not refrain from awarding long-term support when appropriate under the enumerated statutory factors. **Robertson,** id.

It is obvious that the trial court considered all of the factors of T.C.A. 36-5-101(d)(1) and not solely the marital standard of living. The Court analyzed the education and careers of the parties: "(u)pon the parties' marriage, Ms. Bratton chose to forego her career as a dentist in order to support Dr. Bratton's medical career". The trial court analyzed the extent to which each party made such tangible and intangible contributions to the marriage as monetary and homemaker contributions as well. The court also considered the relative education and training of each party. It considered Wife's opportunity to secure further education and training. The trial court considered the relative fault of the parties finding that "(t)he evidence supports a determination that during the marriage, Dr. Bratton committed inappropriate marital conduct in the nature of adultery". The marriage is one of long duration and this is

obviously a trial court consideration as well. The trial court considered the financial resources of each party. Also, the court considered and weighed the standard of living of the parties established during the marriage and the doctor's income of $551,521.

The application of this statute and the factors analyzed and applied to the facts and circumstances clearly support the trial court's award. The trial court also considered properly the needs of the innocent wife, the fault of Dr. Bratton and his ability to provide support and maintenance. **Bull v. Bull**, 729 S.W.2d 673 (1987); **Hawkins v. Hawkins**, 883 SW2d 622 (1994).

By either standard of review, the trial court's award is clearly appropriate, whether it be with the presumption of correctness or even upon a de novo review. Dr. Bratton has a successful practice and income in excess of one-half million dollars per year. As the trial court noted, Appellant has not been successful in her real estate pursuits, finding that "Ms. Bratton is presently licensed as a real estate broker, but as previously noted her business attempts have proved financial unsuccessful". The Court noted that her business lost $34,000 in 1999. It further noted that "Ms. Bratton has had little income during the marriage that would entitle her to social security credit on her own account".

Appellee would have this Court ascribe some fanciful income to Appellant based on speculation and projected figures which bear no correlation to the truth, experience or reality. Even in the year 1998, her income was only about $7,000. She does not have the ability to support herself.

A trial court has wide latitude in setting alimony, and appellate courts are not inclined to "second guess" the trial court's decision absent a manifest abuse of discretion. **Robertson**, id; **Goodman v. Goodman** 8 SW3d 293 (Tenn. 2000). Appellee continues to understate his

real income, proferring as his income a 3 year average (1997, 1998 and 1999) which does not include his 2000 income and which bears no relationship to his true income at the time of the divorce. Dr. Bratton's true income is $551,521, not the $267,336 which Appellee suggests, and the trial court so found. The Trial Court concluded that "(c)onsidering all applicable factors, including Ms. Bratton's need for future financial support, Dr. Bratton's marital fault and his ability to pay support and maintenance, this Court concludes that he shall pay Ms. Bratton the amount of $10,500 per month until her death or remarriage". Such an order was appropriate and should not be disturbed on appeal.

III **THE TRIAL COURT DID NOT ERR IN ITS DIVISION OF THE MARITAL ESTATE**

A. The Trial Court did not err in its division of assets and debts.

As stated by Appellee, the Trial Court held that portion of the parties' post-nuptial agreement mandating an equal division of property to be valid and enforceable (I, 67). However, he complains in his brief that it was erroneous for the Court to divide the marital debt as it did, because that manner of division of the debt results in a lesser net marital estate being awarded to him. Appellee seeks to add terms and provisions to the agreement which do not exist. The entire agreement which the court found valid as stated in paragraph 1 is as follows:

> In the event the Husband is guilty of statutory grounds for divorce under the statues of the state the parties are domiciled and the Wife institutes divorce proceedings in the state courts of such state, all property jointly owned by the parties, real, personal, or mixed, shall be divided equally between the parties.

There is no language in the agreement with respect to marital debt. It is obviously not a subject of the agreement. There is nothing explicit, nor implicit in the agreement which supports Appellee's contention that he is entitled to have the marital debts divided in such a way as to give him an equal net marital estate. For this Court to so find would interject into the agreement and impose on the parties terms and conditions which are not part of any agreement and which were not contemplated at the time of its execution. The Trial Court enforced this aspect of the agreement to the letter. Appellant does not believe that the case of **Soloman v. Murray**, 2002 W.L. 31319767 (Tenn. App.) stands for the proposition he claims. In **Soloman**, the Court made no mention of division of marital debt. It simply divided the

parties' property using the net equity of the assets as their value. That is a far different proposition than suggested by Appellee. In the instant case, the trial court did use the net equity approach in dividing the value of the assets as seen in its opinion: "former marital home (equity) $40,674"; "engagement ring (equity) $5,000"; "1997 Ford Expedition (equity) $21,000". The marital debts divided here have nothing to do with the net equity of the assets divided. They are totally and completely separate. There is nothing more to this part of the contract. Marital debts, not being a part of the agreement, are thus subject to equitable division by the court in the same manner as marital property is, absent an enforceable agreement to the contrary. See **Cutsinger v. Cutsinger**, 917 SW2d 238 (Tenn. App., 1995). Marital debts are those debts incurred during the marriage for the joint benefit of the parties or those directly traceable to the acquisition of marital property. **Mondelli v. Howard**, 780 S.W.2d 769 (Tenn. App. 1995). In dividing marital debt, courts should consider the following factors: (1) the debt's purpose; (2) which party incurred the debt; (3) which party benefited from incurring the debt; and (4) which party is best able to repay the debt. **Id.** Based on the great disparity in the parties' incomes alone, Appellee is clearly in a better position to repay more of the debt. The primary debt which Husband has to repay is $140,000 he incurred to purchase a medical practice when they moved to Morristown. It is not inequitable for him to be required to pay that. Wife should not be onerated with paying any portion of his debts for his medical practice. The evidence does not preponderate against an equitable division of the debts as ordered by the trial court.

B. The Trial Court did not err in including the A.G. Edwards Investment Account as a Marital Asset.

The Trial Court did not err in including all of the parties' assets in its equal division of same in accordance with the post-nuptial agreement. The remaining funds in the A.G. Edwards account were clearly marital assets and thus subject to division in accordance with their agreement. Any failure to include them would result in the non-enforcement of the parties' agreement.

Trial courts have broad discretion in dividing the marital estate in a divorce case. **Fisher v. Fisher**, 648 S.W.2d 244 (Tenn. 1983). Their decisions are entitled to great weight on appeal, **Edwards vs. Edwards**, 501 S.W.2d 283 (Tenn. Ct. App. 1973) and are presumed to be correct unless the evidence preponderates otherwise. **Hardin v. Hardin**, 689 S.W.2d 152 (Tenn. Ct. App. 1983).

Tennessee Code Annotated 36-4-121(b) defines "marital property" as "all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce or up to the date of the legal separation hearing unless equity would require another evaluation date and owned by either or both spouses as of the date of filing of a complaint for divorce or complaint for legal separation, except in the case of fraudulent conveyance in anticipation of filing, and including any property to which a right was acquired up to the date of the final divorce hearing or the date of legal separation hearing unless equity would require another evaluation date, and valued as of a date as reasonably possible to the final divorce hearing date or the date of the legal separation hearing".

Tennessee's distribution of marital property statute embodies equitable distribution principles. In determining what is equitable on a case by case basis, the trial court is to consider a number of relevant factors set out in T.C.A. 36-4-121(c):

> (1) The duration of the marriage;
>
> (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
>
> (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
>
> (4) The relative ability of each party for future acquisitions of capital assets and income;
>
> (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
>
> (6) The value of the separate property of each party;
>
> (7) The estate of each party at the time of the marriage;
>
> (8) The economic circumstances of each party at the time the division of property is to become effective.
>
> (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
>
> (10) The amount of social security benefits available to each spouse; and
>
> (11) Such other factors as are necessary to consider the equities between the parties.

Although the Court must consider each of these factors, ownership of marital property is presumed to be equal until proven otherwise. **Cutsinger v. Cutsinger**, 917 S.W.2d 238 (Tenn. App. 1995). Courts are given wide latitude in determining what is an equitable

division of marital property. **Brown vs. Brown**, 913 S.W.2d 163 (Tenn. App. 1994); **Barnhill v. Barnhill**, 826 S.W.2d 443 (Tenn. App. 1991).

The Trial Court properly divided the marital assets and liabilities in accordance with the equities of the case. There is no error here. Appellant argues that this Court should re-weigh the factors which the Court used in its determination. However, he failed to show how a re-weighing would constitute evidence which preponderates against the Trial Court's decision. The parties were married 17 years; Husband's income and earning capacity is now far greater than that of Wife; she has greater financial needs while he is now in a position of relative financial comfort; Appellee received the benefit of a good caretaker for the children while he developed and pursued the success of his medical career; and the economic circumstances of Appellee are much more favorable than those of Appellee.

The evidence clearly showed that these were all of the funds remaining in the parties' brokerage account and that when Husband reduced his support of the family, Wife had had to expend the other funds on living expenses and there was nothing left of these funds. The trial court found this to be the case by the preponderance of the evidence.

The Trial Court also correctly required Husband to pay Wife $3,839.93 due to decreases in the values of the assets because of stock market fluctuations. On the date of trial, May 15, 2000, the Court used the then current market values of $17,702 and $27,421 for the A.G. Edwards' account in making an even division of the marital assets to Wife. There was an additional $4,615 awarded to Husband from the IRA account. The assets were under the sole control and in the exclusive possession of Husband. He did not immediately transfer these assets to Wife and as a result, when he finally did transfer them to her, they had diminished in value due to market declines. The court readjusted the division of the property

reflecting the actual value of the assets awarded to Wife at the time they were actually transferred to her by Husband. The Order of the Court was modified in a hearing on September 6, 2001 to reflect the values of the accounts as $11,128 and $18,878 (II, 201). This was done of necessity in order to reflect their actual values and to assure a further adjustment in the property division so as to maintain an even division in accordance with their agreement. Husband delayed and refused to transfer the funds until September 18, 2001 at which time he transferred $9,433 instead of $11,128 and $16,773 instead of $18,878, a total difference of $3,839 (II, 209). After a hearing on January 15, 2002 an Order was entered by the Court (II, 227) requiring Husband to pay to Wife $3,839.93 which sum constituted the deficiency between the A.G. Edwards funds the Court awarded Wife and the amount she actually received from Husband in transfer. The Court again did this in order to enforce the parties' agreement to divide all assets equally. While the market fluctuations may have been beyond his control, the transfer of the funds to Wife was solely in his control and until he did so, he bore the risk of their declining value. The Court had awarded Wife $11,128 and $18,878, and when he did not transfer that to her, but instead transferred $3,839 less, he was properly assessed with the difference in the figures used by the Trial Judge.

CONCLUSION

The decision of the Trial Court granting Appellee partial summary judgment should be reversed and the matter remanded with instructions to enforce the Property Settlement Agreement and award Appellant one-half of Appellee's future income. In the alternative and should the Court decline to do so, the decision of the Trial Court should be affirmed and the costs of this cause taxed to Appellee.

CERTIFICATE OF SERVICE

I, Douglas R. Beier, Attorney for Plaintiff/Appellant, do hereby certify that I have served a true and exact copy of the foregoing document by placing same in the U. S. Mail, proper postage prepaid, to Sarah Y. Sheppeard, Attorney for Appellee, this the _____ day of _____, 2002.

_____
DOUGLAS R. BEIER