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The Discovery Rule in Conversion of Personal Property Cases

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The Legal Profession: The More Things Change, the More They Stay the Same

The largest, most ornate framed document on my office wall does not even bear my name. It is a law license from the Supreme Court of the State of Kansas dated June 20, 1929. The recipient was my grandfather, Harold Lee (“Hal”) Sheppeard.

After my family moved to Tennessee when I was age six, we would visit my grandparents for a week every summer in the teeming metropolis of Clay Center, Kansas, a town of about 5,000 people. My earliest recollections of Hal the attorney involved trips to his office on the town square, where he practiced for decades with his best friend. I knew he went to the office every weekday, just as my non-attorney father did in Knoxville. I had no idea what either of them did at “the office.”

One day, when I was about seven, I was at Hal’s office when a farmer stopped by. He profusely thanked my grandfather, reached into the bib pocket of his overalls, retrieved the largest roll of cash my little girl eyes had ever seen, and peeled off some bills for Hal. After he left, I asked why he had given Hal money. He replied, “Because I solved a big problem for him. That’s my job, to try to solve people’s problems.”

As I grew older, I came to understand more about the judicial process, although I pictured every trial being just like the Perry Mason show on television, but with Hal as the star. Reflecting back on the man I knew, he was kind and hardworking, a caring family man and a fun grandfather. Practicing law seemed like a pretty good way to make a living.

Then I learned more of his story. Hal was the first in his family to attend college and law school. He planned to return to his home county and hang out a shingle. But the Great Depression began in 1929, just about the time he was licensed. He took the best job he could find, selling tractors in Sweetwater Texas, for several years until it became financially feasible to return home to Clay County and establish a law practice. At times, the practice was challenging, both emotionally and financially.

My grandfather died nine years after my law school graduation. We had some wonderful conversations about the practice of law, including his advice on how to try a law suit and how to cope with the stress of our profession. At the time, I thought the practice of law had

continued on page 4
changed dramatically since his day. After all, we had copiers instead of carbon paper, fax machines and computers, and online legal research. Through the magic of the latter, I was recently able to review some opinions of the Kansas Supreme Court in which Hal was an attorney, cases like you or I might handle today.

And then it hit me. Our profession has evolved in those 90 years since Hal was licensed, but our core purpose remains the same. We help people solve problems. And in the process, our jobs can be difficult, both emotionally and financially. From his experience I also learned that a rough start to a career is only the beginning. Work-life balance is important. It’s a profession, but only a job, all at the same time. Practice law with people you like and respect.

So why did I hang his license on my wall after his death 30 years ago? Well, it is more detailed than a Tennessee license, reading in part as follows:

[W]hereupon in open Court he took an oath that he will support and bear true allegiance to the constitution of the United States and the constitution of the State . . . , that he will neither delay nor deny any man his right through malice for lucre, or from any unworthy desire; that he will not knowingly foster or promote, or give his assent to any fraudulent, groundless or unjust suit; that he will neither do, nor consent to the doing of, any falsehood in court; and that he will discharge his duties as an attorney and counsellor of the Supreme Court of the State . . . with fidelity both to the court and to his cause, and to the best of his knowledge and ability.

In 1929, those were good words for a lawyer to live by. In 2019, they still are. 

— David Smart, Lexington, Kentucky

COLUMN BRINGS HISTORY TO LIFE

This letter was written to Russell Fowler about his regular TBJ column, “History’s Verdict.”

You are so amazing — bringing history to life. Your writing is so wonderful and personal, reminding us that intersection of our Supreme Court and politics goes back more than a century.

Thank you for all you do for our profession and our justice system.

— Marcia Eason, Chattanooga
YOU NEED TO KNOW

FOR THE RECORD

YOU NEED TO KNOW

FOR THE RECORD

YOUR TBA
Applications Due Soon for 2019 Public Service Academy
The TBA is now accepting applications for its second annual Public Service Academy, a bipartisan training fellowship to provide attorneys with the tools to run for local political office. It takes place over the course of two weekends in the fall, during which fellows will hear speakers discuss topics like strategy, campaign finance, work-life balance and more. The 2019 co-chairs of the program are Knoxville attorney Tasha Blakney and Clarksville attorney Joel Wallace. In 2018, the TBA launched the program and trained its inaugural class of 29 attorneys. Several are running for office now.

Applications are due Aug. 7.

TBA Debuts New Podcast Network
The Tennessee Bar Association Podcast Network launched in July with the premiere of two shows — SideBar and BarBuzz.

SideBar is a magazine podcast featuring compelling stories from attorneys across the state. BarBuzz is a monthly rundown of TBA news and upcoming events at the local and state bar levels. Both shows are now available on Spotify, Apple Podcasts, Google Play, Stitcher, TuneIn and the TBA’s website. Simply search the show title or “Tennessee Bar Association” wherever you listen to podcasts.

Do you have a story lead you’d like to submit for a future episode? Contact Kate Prince at kprince@tnbar.org.

COURTS

Supreme Court Amends Rule 13
Following the passage of Senate Bill 559/House Bill 628, the Tennessee Supreme Court has amended Sections 1 and 2 of Rule 13 of the Tennessee Annotated Code.

Section 1 concerns the right to counsel and procedure for appointment of counsel, while Section 2 deals with compensation of counsel in non-capital cases.

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TBA President Sarah Sheppeard, center, Tennessee Supreme Court Chief Justice Jeffrey Bivins and Justice Connie Clark attended the unveiling of the LSC’s Opioid Task Force Report. Photos by Liz Todaro.

Members of LSC’s Opioid Task Force and other leaders from the legal community gathered at the Tennessee Supreme Court for the release of the group’s report. Speakers included Chief Justice Jeffery Bivins, Administrative Office of the Courts Director Deborah Taylor Tate and West Tennessee Legal Services Executive Director Catherine Clayton.

Legal Services Corporation released its Opioid Task Force Report this summer at the Tennessee Supreme Court in Nashville. The report provides background on the opioid epidemic and addresses the intersection of civil legal aid and the need for coordinated responses to this crisis. Speakers included Chief Justice Jeff Bivins and Tennessee Courts Director Deborah Taylor Tate. Tate served as a member of the LSC task force and is the co-chair of the National Judicial Opioid Task Force.

Bivins and others praised the report and highlighted the need for a collaborative response to the opioid crisis, including a focus on the civil legal issues that arise for individuals and families affected by opioid use.

The report focuses on how the opioid epidemic has impacted legal aid organizations. “It was creating remarkable problems for our grantees,” LSC Board Member Victor B. Maddox said, referring to the dozens of civil legal aid offices dispersed throughout the nation that receive funding from the LSC. “This public health crisis has created and continues to create a civil legal aid crisis for survivors and communities related to issues such as child support, custody, health benefits, domestic violence, elder and child abuse, housing, employment and others.”

OPIOID TASK FORCE REPORT SHOWS IMPACT ON LEGAL AID ORGANIZATIONS
The University of Memphis in July named Katharine Traylor Schaffzin as the new dean of the University of Memphis Cecil C. Humphreys School of Law. She has been with the University of Memphis since 2009, most recently serving as Interim Dean of Memphis Law over the past year. Schaffzin is the first woman in the history of the law school to serve as dean. There are now two women of six law school deans in Tennessee.

LMU Praised for ‘Reimagining Legal Education’ Lincoln Memorial University’s Duncan School of Law gets a shout-out in a recent issue of SE Texas Record, for its practical approach as “an unusual school that offers a sharp contrast to the prevailing model.” Mark Pulliam writes about LMU’s attraction for non-traditional students, which emphasizes “skills-based instruction, and seeks to train lawyers who will service the legal needs of ordinary people in rural areas of the state, primarily as solo practitioners or attorneys working at small firms.”

CIVICS EDUCATION Eastern District Adds User-Friendly Website to Civics Education Efforts The U.S. District Court for the Eastern District of Tennessee has a new, community-oriented website focusing on topics of interest to the public.
Three attorneys previously with the Middle Tennessee law firm of Bone McAllister Norton have joined the Nashville office of Burr & Forman. Alex Little, left, who joins the firm as a partner, will lead a new white collar criminal defense team. Before entering private practice, he was an assistant U.S. attorney in Nashville and Washington, D.C. Emily Mack, who also joins the firm as a partner, will practice in the areas of labor and employment, education law and complex litigation. Zack Lawson joins the firm as an associate. He will focus on criminal defense, government investigations, appeals, victims’ rights and complex litigation.

Kyle M. Wiggins was recently named division vice-president and associate chief counsel of Kindred Rehabilitation Services, a division of Kindred Healthcare LLC, headquartered in Louisville, Kentucky. Wiggins has served as senior director and operations counsel for Kindred since June 2015. Wiggins is a 2004 graduate of the University of Memphis School of Law and previously worked in the Memphis offices of Lewis, Thomason, King, Krieg & Waldrop and Baker, Donelson, Bearman, Caldwell & Berkowitz. Wiggins was a 2012 member of the TBA Leadership Law class.

The global law firm of Greenberg Traurig has opened an office in Nashville. The firm will maintain an insurance regulatory and transactions practice in its first Tennessee location. The office is located at 150 4th Ave. N. 20th Floor, Nashville 37219 and can be reached at 615-324-7400 or www.gtlaw.com/en/locations/nashville.

Bass, Berry & Sims has expanded its Labor & Employment Practice Group with the addition of Timothy B. McConnell to chair the group. McConnell is a 2012 member of the TBA Leadership Law class.

University General Counsel Audrey Anderson to chair the group. Anderson will practice in the firm’s Nashville and Washington, D.C., offices and lead a multidisciplinary team of attorneys in a range of legal matters for academic institutions. She previously served as vice chancellor, general counsel and university secretary at Vanderbilt for more than five years.

Andrew Battle Sanders has joined the Memphis law firm of Stites & Harbison as counsel in the Business Litigation and Trust & Estate Planning groups. Sanders has more than 13 years of experience handling business litigation matters, trust and probate litigation, breach of fiduciary matters and creditors’ rights litigation. Sanders is also a Veterans Administration accredited attorney. He previously owned his own law practice from 2011 to earlier this year.

The Tennessee Judicial Conference recently announced new members of its Executive Committee. TBA members among the group are Court of Criminal Appeals Judge Timothy Easter, who completed his service as president of the conference and now is past president; 26th Judicial District Circuit Court Judge Roy B. Morgan Jr., who is president-elect; 10th Judicial District Criminal Court Judge Sandra N.C. Donaghy who is treasurer; Sixth Judicial District Circuit Court judges Kristi M. Davis and Deborah C. Stevens who will serve as next year’s convention co-chairs; and 20th Judicial District Chancellor Anne Martin who is a hospitality co-chair.

To submit career moves, awards, appointments and other notable achievements to Success!, TBA members may go to the online submission form at www.tba.org/success. Your entry will appear online at www.tba.org/success/news after approval, and in the next available print edition. News is subject to editing and pictures are used on a space-available basis. Save photos as a tiff or jpeg (with no compression), minimum resolution 200 dpi, and at least 1”x1.5”.

Success! is compiled by Stacey Shrader Joslin and Linda Murphy. If you have questions, contact Linda at lmurphy@tnbar.org. For information on paid advertisements, please contact Stacey at advertising@tnbar.org.
Nashville, has been selected to serve as council member-at-large with the ABA Health Law Section. Powell will serve a three-year term. The section is the voice of the national health law bar, with 10,600 members from across the United States. Powell practices primarily in the areas of health care, commercial transactions, securities and general corporate law.

Legal Aid of East Tennessee (LAET) has been awarded a 1.1 million grant from the Tennessee Legal Initiatives Fund (TLIF) to establish a Mental Health Law Partnership in Knoxville with the Helen Ross McNabb Center. The partnership will allow the groups to address legal issues that impact the health outcomes of patients at the center. The Tennessee Bar Foundation manages the TLIF fund, which was created from the proceeds of a consumer relief settlement between the Department of Justice and Bank of America. The Tennessee Bar Foundation manages the proceeds of a settlement between the Department of Justice and Bank of America.

The partnership will allow the groups to address legal issues that impact the health outcomes of patients at the center. The Tennessee Bar Foundation manages the TLIF fund, which was created from the proceeds of a consumer relief settlement between the Department of Justice and Bank of America.

Fuller IV has joined the Nashville office of Leitner, Williams, Dooley & Napolitan, where he will focus on general civil defense. Fuller earned his law degree from the University of Mississippi School of Law in 2018. At Ole Miss, he was a member of the Business Law Network as well the University of Mississippi Business Law Forum journal, and served as a judicial intern for Judge Timothy C. Batten Sr. of the U.S. District Court for the Northern District of Georgia.

Knoxville lawyer David M. Eldridge was installed as chair of the Tennessee Bar Foundation at the organization’s annual membership meeting in Nashville. He will serve one year. Eldridge was first elected to the foundation board as an East Tennessee trustee in 2012. He previously served as a member and later as chair of the Grant Review Committee and Membership Selection Committee. Eldridge practices criminal defense law at Eldridge & Blakney, which he founded in 2003.

Brittany Thomas Faith, an attorney with Grant, Konvalinka & Harrison’s Immigration Practice Group in Chattanooga, and Bailey Schiemeyer, an attorney with Elder Law of East Tennessee in Knoxville, were named to the American Bar Association’s 40 under 40 On the Rise list. The program provides national recognition for ABA young lawyer members who exemplify a broad range of high achievement, innovation, vision, leadership and legal and community service.

Faith also recently was elected chair of the American Immigration Lawyers Association Mid-South Chapter as well as the association’s executive committee. The mid-south group is comprised of lawyers in Arkansas, Kentucky, Louisiana, Mississippi and Tennessee. The chapter will hold its annual fall conference in Chattanooga this coming October.

The Tennessee Intellectual Property Law Association recently announced its 2019 officers. TBA members among the group are Vice President Phil Walker with Bradley Arant Boult Cummings in Nashville; Treasurer Seth Ogden with Patterson Intellectual Property Law in Nashville; Past President Gary Montle with Patterson Intellectual Property in Nashville; and members at large A.J. Bahou with Waller Lansden Dortch & Davis in Nashville and Peter Brewer with Thrive IP in Knoxville.

Courtney Lutz has joined the Nashville office of Bone McAlister Norton, where she will focus on commercial litigation as well as personal injury, legal and medical malpractice, premises liability, entertainment law, criminal defense and divorces. Prior to joining the firm, Lutz practiced at Leitner, Williams, Dooley & Napolitan where she handled personal injury and professional liability lawsuits. A graduate of the Belmont University College of Law, Lutz is also an avid musician and travels with a family gospel band when not practicing law.

Class action plaintiffs’ attorney John Spragens and his father David Spragens have formed Spragens Law. Both previously practiced with Lieff Cabraser Heimann & Bernstein. The younger Spragens once worked as a reporter and aide to U.S. Rep. Jim Cooper before practicing at Bass, Berry & Sims and Lieff Cabraser. David is a former prosecutor, defense attorney and nonprofit executive. The new firm will represent consumers, whistleblowers and victims of abuse, discrimination, medical malpractice, serious injury and wrongful death. The
new office is located at 1200 16th Ave. S., Nashville 37212 and can be reached at 615-983-8900, info@spragenslaw.com or www.spragenslaw.com.

University of Tennessee College of Law alumnus Carl Colloms has committed $1.15 million to provide scholarships for law students from southeast Tennessee. The gift will grow the Judge Carl E. Colloms Scholarship endowment to one of the largest in college history. Colloms, a Charleston, Tennessee, native, began his career as a solo practitioner in 1966. He later served as a county attorney for more than five years and was the youngest county leader in the state during his term as mayor of Bradley County.

Attorneys Donna Mikel and Doug Hamill have opened a new law firm. Mikel & Hamill PLLC will focus on serving individuals and businesses needing employment law advice and representation. Formerly with Burnette, Dobson & Pinchak in Chattanooga, Mikel and Hamill have a combined 35 years of experience practicing employment law in federal and state court. The new office is located at 620 Lindsay St., Ste 200, Chattanooga 37403, and can be reached at 423-541-5400 or https://mhemploymentlaw.com.

Legal technology consulting firm LogicForce has named Gulam Zade as its new CEO. Zade previously served as the company’s general counsel and oversaw sales and human resources functions. He joined LogicForce in 2014. LogicForce was founded in 1995 and has worked with hundreds of law firms around the country.

Members of the new Board of Judicial Conduct were named on July 1. TBA members among the group are 11th Judicial District Chancellor Jeffrey M. Aterton, Stewart County General Sessions and Juvenile Court Judge G. Andrew Brigham, and Benton County General Sessions Judge John Whitworth.

PASSAGES
Roane County attorney J. Polk Cooley died June 19 at the age of 93. A Rockwood native, Cooley practiced law for 72 years, almost all of it in Roane County. He served in World War II in the U.S. Navy Corps and after being discharged took advantage of the GI Bill to attend the University of Tennessee College of Law. After passing the bar exam, one of his first cases was serving as co-counsel to Howard Baker Sr. and his son, future U.S. Sen. Howard Baker Jr., to help his own father, John Lewis Cooley, avoid a murder conviction. He later returned to Rockwood to practice law with Lloyd McCluen, handling debt collections, title research, civil litigation, criminal defense and divorce cases. In lieu of flowers, the family requests that donations be made to First Christian Church, 328 W. Rockwood St., Rockwood, TN 37854.

Longtime Chattanooga attorney John D. Mcmahan died June 2 after a battle with cancer. He was 67. McMahan grew up in Texas and Memphis, eventually attending the University of Tennessee College of Law, where he graduated in 1975. Shortly after, he moved to Chattanooga, where he practiced law for 35 years. McMahan was the founding managing partner of McMahan Law Firm, was on the National Board of Trial Advocacy and served as a diplomate on the American Board of Professional Liability Attorneys. In lieu of flowers, the family suggests donations be made to the Community Hospice of Jacksonville (www.choosecommunityhospice.com), National Pan/Can Association (www.pancan.org) or The HEAL Foundation (www.healaustismnow.org).

Henderson Judge Lloyd Tatum died June 5 at the age of 93. A native of Jackson, Tatum served as a radio operator for the U.S. Army Air Corps during World War II before he attended Cumberland School of Law. He graduated in 1948. Tatum served in the FBI for a short time before opening his law office in Henderson, where he practiced for 25 years. In 1976, he was appointed to the Tennessee Court of Criminal Appeals by Gov. Ray Blanton, serving there until 1986. He later served as a senior judge on the court. Donations in memory of Tatum may be made to the American Cancer Society (donate3.cancer.org), Alzheimer’s Association (act.alz.org) or Grace Baptist Church, 15 Southview Dr., Pinson, TN 38366.
YOU NEED TO KNOW
LICENSURE & DISCIPLINE

DISABILITY INACTIVE
The Tennessee Supreme Court transferred the law license of Shelby County lawyer Gilbert Henry Jacobson to disability inactive status on June 18. Jacobson may not practice law while inactive. He may return to the practice of law after reinstatement, which requires a showing of clear and convincing evidence that the disability has been removed and he is fit to resume the practice of law.

DISABILITY STATUS REMOVED
On May 15, Williamson County lawyer Patrick Michael Kelley petitioned the Tennessee Supreme Court for reinstatement, after having been moved to disability inactive status on May 30, 2018. On June 17, the court removed the disability status but determined that Kelley’s law license would remain inactive until resolution of pending disciplinary proceedings and completion of outstanding continuing legal education requirements.

REINSTATED
Knox County lawyer Charles Edward Daniel was reinstated to the practice of law on June 18. Daniel had been suspended by the Tennessee Supreme Court for three years on June 8, 2018, with one year to be served on active suspension and the remaining two years to be served on probation. Daniel filed a petition for reinstatement on April 2. The Board of Professional Responsibility found that the petition was satisfactory. The court agreed and issued the reinstatement order on June 18 with an effective date of June 5.

Shelby County lawyer Tamara B. McKinnon was placed on inactive status in May 2014. She recently petitioned the Tennessee Supreme Court to reinstate her law license. The Board of Professional Responsibility found that the petition was satisfactory. The court issued the reinstatement order on June 17.

The Tennessee Supreme Court transferred the law license of Davidson County lawyer Lovemore Nyashadzase Gororo from disability inactive status to active status on June 6. Gororo was placed on disability inactive status in September 2018. He filed a petition for reinstatement on April 23.

The Tennessee Supreme Court reinstated Hamilton County lawyer Steven M. Hodgen to the practice of law. Hodgen had been on inactive status since April 2014. The court filed the order on June 18 with an effective date of June 5.

Shelby County lawyer Michael Kelley was removed and he is fit to resume the practice of law after reinstatement, which requires a showing of clear and convincing evidence that the disability has been removed and he is fit to resume the practice of law.

DISCIPLINARY Disbarred
Knox County lawyer Loring Edwin Justice was disbarred from the practice of law on July 2 for actions taken while representing a plaintiff in a federal personal injury case. After the defendant in the case failed to disclose a witness, the trial court ordered the defendant to pay the attorney’s fees and costs the plaintiff incurred in locating and deposing the witness. When Justice submitted an itemization of the fees to the court, he falsely claimed a paralegal’s work as his own, falsely stated that he kept contemporaneous time records, and falsely attested to the accuracy of the fees in both a written declaration and in testimony before the court. The federal court also found that Justice requested “grossly exaggerated and unreasonable” fees for work beyond the scope of the case. After investigating the matter, the Board of Professional Responsibility determined that Justice’s actions violated Rules of Professional Conduct 1.5(a), 3.3(a), 3.4(b) and 8.4(a) and (c). The board recommended that Justice be suspended for one year and be required to obtain 12 additional hours of continuing legal education. Justice appealed that recommendation to the Tennessee Supreme Court, which affirmed the findings of fact but rejected the proposed suspension, imposing disbarment instead. Justice then appealed to the Tennessee Supreme Court, which affirmed the Chancery Court’s decision in all respects.

The Tennessee Supreme Court disbarred Davidson County lawyer Judson Wheeler Phillips from the practice of law on June 5. According to the Board of Professional Responsibility, Phillips consented to disbarment because he could not successfully defend himself on charges alleged in 41 pending disciplinary complaints. Phillips was previously disbarred on Aug. 24, 2018, and has not been reinstated from that

Compiled by Stacey Shrader Joslin from information provided by the Board of Professional Responsibility of the Tennessee Supreme Court. Licensure and disciplinary notices are included in this publication as a member service. The official record of an attorney’s status is maintained by the board. Current information about a particular attorney may be found on the board’s website at www.tbpr.org/for-the-public/online-attorney-directory.
controlled substance, Felner received judicial diversion and was placed on two years of supervised probation. The court determined that these actions violated Rule of Professional Conduct 8.4(b) and conditioned the probationary period on five requirements. Felner must (1) contact the Tennessee Lawyer’s Assistance Program within 30 days for assessment; (2) comply with any recommended monitoring agreement; (3) comply with the terms and conditions of the criminal court probation; (4) pay all assessed costs within 90 days; and (5) incur no new complaints of misconduct.

Dickson County lawyer Jackie Lynn Garton was suspended from the practice of law on May 29. The Tennessee Supreme Court took the action based on Garton’s guilty plea to the serious crimes of wire fraud, aggravated identity theft and tax fraud in the case of United States of America v. Jackie Lynn Garton. The matter has been referred to the Board of Professional Responsibility to determine the extent of the final discipline.

On June 5, the Tennessee Supreme Court suspended Knox County lawyer James Lester Kennedy from the practice of law for three years. The court determined that Kennedy knowingly made appearances in Knox County Probate Court and filed pleadings in cases pending in New York and Pennsylvania without informing the courts that he had been suspended for one year on July 20, 2017. The court also found that Kennedy failed to provide substantive responses to requests for information about the disciplinary complaint. The court determined that his conduct violated Rules of Professional Conduct 3.3, 5.5, 8.1 and 8.4(a), (c), (d) and (g).

CENSURED

Hawkins County lawyer Daniel Graham Boyd received a public censure from the Tennessee Supreme Court on June 25. The Board of Professional Responsibility recommended, and the court accepted, that Boyd failed to diligently represent his clients and adequately communicate with them in a boundary line dispute. Boyd agreed to a conditional guilty plea admitting that his actions violated Rules of Professional Conduct 1.3, 1.4, 3.2 and 8.4(a).

Shelby County lawyer Summer M. Rhoden received a public censure from the Tennessee Supreme Court on July 1 after pleading guilty to a misdemeanor charge. In 2017, Rhoden’s son was charged with first-degree murder. He appeared at Rhoden’s home the same day but she delayed contacting law enforcement or facilitating his surrender until the following morning. Rhoden was charged as an accessory after the fact as a result of this delay. The court determined that her actions violated Rule of Professional Conduct 8.4(b).

Rutherford Count lawyer James Radford Smith received a public censure from the Tennessee Supreme Court on July 1 after multiple ethical violations while representing a client in a pending petition for post-conviction relief. During the representation, Smith failed to (1) obtain consent from his client before accepting fees from a third party; (2) maintain good communication with his client; (3) file an amended petition by the deadline; and (4) file an appeal by the deadline. After completing representation, Smith decided to close his law office. He did not return the client file, which was inadvertently destroyed by the moving company hired to help Smith vacate the office. The court found that Smith had failed to specify the client files and other office documents that needed to be preserved. His actions were determined to violate Rules of Professional Conduct 1.1, 1.3, 1.4(a), 1.8(f), 1.15 and 3.2.

Administrative Suspensions

Notice of attorneys suspended for, and reinstated from, administrative violations — including failure to pay the Board of Professional Responsibility licensing and inactive fees, file the required IOLTA report, comply with continuing legal education requirements, and pay the Tennessee professional privilege tax — is on the TBA website at www.tba.org/directory-listing/administrative-suspension-lists.
For centuries statutes of limitation have been an integral part of our laws. They are designed to accomplish the public policy of preventing undue delay in bringing claims so that risks of injustice caused by missing evidence and faded memories can be averted.

Over the years, the Tennessee General Assembly and the courts have carved out various exceptions to statutes of limitation to prevent unduly harsh or unjust results. One such exception is the discovery rule, which is employed to prevent the accrual of the statute of limitations until a plaintiff discovers a cause of action exists. Cases involving conversion of personal property often present a battleground for dueling public policies where the statute of limitations is at issue.

‘The Banjo Case’
One such case involved the theft of a valuable antique Gibson banjo in Nashville and its recovery more than 30 years later. On the late autumn evening of Oct. 9, 1986, the Wildwood Girls bluegrass band had finished a performance at the Grand Ole Opry in Nashville and left their instruments in their tour van so they could
visit a local music venue in the city where several other bands were playing that evening. When the Wildwood Girls returned to their van after the show, they discovered that the van had been broken into and that their instruments had been stolen. Among the instruments that were taken was a rare and valuable 1929 Gibson Mastertone “RB6” banjo that belonged to band member Kim Koskella.

An acquaintance of the band that helped drive the van on their tour reported the theft to the local authorities. The serial number of the Gibson banjo was included in the police report. Although at least one of the other instruments was eventually recovered, the Gibson Mastertone banjo was not found. It had vanished along with Ms. Koskella’s hopes of ever finding it.

Twenty-six years later, on Sept. 25, 2013, the Gibson banjo showed up on a Facebook post made by professional banjo musician Charlie Cushman. Mr. Cushman had agreed to help a long-time acquaintance sell the banjo along with its Mark Leaf case in exchange for a commission and they agreed on a sales price of $16,000. Given Mr. Cushman’s excellent reputation in the music industry, he agreed to serve as a broker for the sale because he had no reason to suspect that the current owner of the banjo — a professional stage hand whom Mr. Cushman had known for years — was not its true owner. The banjo’s current owner at that time, Mr. Doug Brown, had purchased the banjo in 1989 from a fellow stagehand, who told him — falsely as it turned out — that he received the banjo from his deceased grandfather from Washington, D.C.

A banjo aficionado, Ken Orban, came across Charlie Cushman’s Facebook post and became interested in purchasing the banjo. To get feedback as to value of the banjo, on Oct. 15, 2013, Mr. Orban posted pictures of the banjo and its serial number on a website used by banjo enthusiasts called “banjohangout.org.” Three days later, Mr. Cushman made another Facebook post stating that the banjo was still available for sale and posted a picture of the banjo.

On Nov. 3, 2013, the owner of the banjo at the time of its theft, Ms. Kim Terpening (formerly Koskella), became Facebook “friends” with Charlie Cushman. At that time, the banjo was still being offered for sale on Mr. Cushman’s Facebook page. Probably because she had despaired of any hope that the intact banjo could be found, Ms. Terpening did not notice the photographs and description of the banjo posted on Mr. Cushman’s Facebook page. She was only a couple of clicks away from finding her long-lost Gibson banjo, but ironically, she did not look through the listings and photographs of high-value banjos on Mr. Cushman’s page.

After negotiating with Mr. Cushman on the price, Mr. Orban purchased the banjo from Mr. Cushman on Nov. 21, 2013. Mr. Orban was proud of his new banjo, because it was such a rare find. In addition to posting photographs of the banjo on the banjohangout.org website, he frequently played the banjo at public events and even displayed the banjo at an annual banjo festival called “Banjothon” every year. Although Ms. Terpening could have located the Facebook posts of the banjo on Mr. Cushman’s page or the posts from Ken Orban on the banjohangout.org site, it was not until over three years later on July 22, 2017, that Ms. Terpening found Mr. Orban’s Oct. 15, 2013, post on banjohangout.org after searching archived threads on the website.

On July 24, 2017, Mr. Orban received a Facebook “friend request” from Kim Terpening. At that time he did not know that Ms. Terpening was the owner of the banjo at one time or that the banjo had been stolen from the Wildwood Girls tour van in 1986. Ms. Terpening’s friend request was accompanied by a message that stated “I am having a Gibson banjo reproduction made and was wondering if I could get some photos of your RB6 for my luthier.”
DUELING BANJO CLAIMS
continued from page 13

to work with.” Mr. Orban openly shared details about the banjo with Ms. Terpening and told her that he was having it serviced at a banjo shop in Kentucky, but Ms. Terpening kept quiet about her ownership interest in the banjo.

On Aug. 10, 2017, Ms. Terpening traveled to the shop where Mr. Orban was having the banjo serviced. The owner of the banjo shop allowed Ms. Terpening to see the banjo after she told him that she was a prior owner of the banjo. More than 30 years after the banjo was stolen from the Wildwood Girls’ tour van, Ms. Terpening finally found the long-lost banjo and she was determined to get it back, so she filed an action to recover personal property and obtained an ex parte writ of possession against Mr. Orban on Aug. 24, 2017.

Mr. Orban was shocked when he learned that he was required to turn over the banjo because an ex parte writ of possession had been entered against him. After all, Mr. Orban had owned the banjo for nearly four years by that time and had no clue that there was any outstanding claim of ownership to the banjo when he purchased it. Not even Kim Terpening had told him that she owned the banjo.1

The Statute of Limitations, the Discovery Rule and Fraudulent Concealment

Tennessee has a three-year statute of limitations that governs claims for the conversion of personal property.2 Strong public policies underlie statutes of limitation. The Tennessee Supreme Court has explained that “[a]ll statutes of limitations are intended to ensure fairness and justice. Such statutes prevent undue delay in filing lawsuits and thereby ensure that evidence is preserved and facts are not obscured by the lapse of time or the defective memory or death of a witness.”3 Accordingly, there is a substantial risk of injustice where a plaintiff unduly delays in bringing its claims. Essentially, the evidentiary reliability of the claims is diminished to the prejudice of a defendant. However, the strict application of statutes of limitations can also impose harsh and oppressive results upon plaintiffs whose delay was not occasioned by their own inattention.4 This led to the adoption of the discovery rule by the Tennessee Supreme Court in the 1974 case of Teeters v. Currey.5 Although the court in Teeters limited the application of the discovery rule to medical malpractice cases, since that time the doctrine has been employed by Tennessee courts in a variety of causes of action. In the 2002 case of Pero’s Steak & Spaghetti House v. Lee, the Tennessee Supreme Court proclaimed that “[i]t is now well-established that, where applicable, the discovery rule is an equitable exception that tolls the running of the statute of limitations until the plaintiff knows, or in the exercise of reasonable care and diligence, should know that an injury has been sustained.”6

The discovery rule relates to the core operation of a statute of limitations because it prevents the accrual of the cause of action that starts the running of the clock for the limitations period. The Tennessee Supreme Court has recently explained that “[u]nder the current discovery rule, a cause of action accrues … not only when the plaintiff has actual knowledge of a claim, but also when the plaintiff has actual knowledge of facts sufficient to put a reasonable person on notice that he [or she] has suffered an injury as a result of wrongful conduct.”7

A related doctrine is tolling of the statute of limitations based on a defendant’s fraudulent concealment of the cause of action. The Tennessee Supreme Court has explained that the following elements must be proven by a plaintiff who seeks to toll the statute of limitations based on fraudulent concealment:

[T]o establish fraudulent concealment, a plaintiff must prove the following:
(1) that the defendant took affirmative action to conceal the cause of action or remained silent and failed to disclose material facts despite a duty to do so;
(2) that the plaintiff could not have discovered the cause of action despite exercising reasonable care and diligence;
(3) that the defendant had knowledge of the facts giving rise to the cause of action; and
(4) that the defendant concealed material facts from the plaintiff by withholding information or making use of some device to mislead the plaintiff, or by failing to disclose information when he or she had a duty to do so.8

In order to successfully toll the statute of limitations, the plaintiff must prove each of the above elements. It is worth noting that the fraudulent concealment rule includes a discovery rule element: “that the plaintiff could not have discovered the cause of action despite exercising reasonable care and diligence.” Accordingly, to avail themselves of the benefit of tolling the statute of limitations, plaintiffs relying on the fraudulent...
concealment doctrine must show that their cause of action passes muster under the discovery rule in addition to the remaining elements. Therefore, it would seem that if a plaintiff needs only to rely on the discovery rule to prevent the accrual of the statute of limitations, then it would seldom be necessary to rely upon tolling based on fraudulent concealment — rendering the remaining elements of the rule mere surplusage.

The discovery rule is not universally applicable and its application has been excluded in certain types of cases. For example, in Pero’s Steak and Spaghetti House v. Lee, the Tennessee Supreme Court declined to apply the discovery rule to a claim of conversion involving negotiable instruments. The court in Pero’s ruled that “the nature of the tort of conversion militates against application of the discovery rule” and that “[a]bsent fraudulent concealment, three years should be more than ample time for a plaintiff to discover a conversion claim. Extending the statute by application of the discovery rule would place defendants in the untenable position of having to defend against stale claims.”

Although the court’s ruling in Pero’s was limited to cases of conversion involving negotiable instruments, the court’s ruling could find application in other types of conversion cases.

In the wake of the court’s ruling in Pero’s, the learned Donald F. Paine perceived the potentially broad application of the court’s ruling to other conversion cases in his Paine on Procedure column, “The Statute of Limitations for Conversion of Personal Property.” Mr. Paine concluded that “the three-year limitations period begins to run at the time of the defendant’s conversion rather than the time of plaintiff’s discovery unless the plaintiff can prove defendant’s fraudulent concealment.”

Since the time of Don Paine’s 2009 article on the application of the discovery rule to conversion cases, the Tennessee Supreme Court has not ruled on the application of the doctrine in another conversion case; however, the court in the January 2019 case of Individual Healthcare Specialists Inc. v. BlueCross BlueShield of Tenn. Inc. may have signaled that the application of the Pero’s ruling is limited to claims for conversion of negotiable instruments.11

What about the Gibson Banjo?
Mr. Orban and Ms. Terpening’s duel for the Gibson banjo was fought vigorously through the General Sessions Court and on appeal in Hamilton County Circuit Court where Mr. Orban filed a motion for summary judgment requesting that the court dismiss Ms. Terpening’s claim of conversion based on the application of the three-year statute of limitations and laches.12 The key summary judgment evidence before the court included among other items, Charlie Cushman’s Facebook posts showing detailed photographs of the Gibson banjo and its detailed description, and Mr. Orban’s public posts about the banjo on banjohangout.org, which also included photographs of the banjo and its serial number.

Mr. Orban argued that more than 30 years had passed by the time Ms. Terpening filed suit and that the very nature of the tort of conversion required a strict application of the statute of limitations as indicated by the Tennessee Supreme Court in Pero’s. Mr. Orban further argued that even if the discovery rule were applied, Ms. Terpening with the exercise of reasonable diligence could have easily discovered her cause of action within the three-year limitations period based on the public posts made online by her Facebook friend Charlie Cushman and the posts made on the internet by Mr. Orban, which included photographs and detailed information about the banjo, including its serial number. Applying the discovery rule to the case, the trial court allowed Ms. Terpening’s claim to survive summary judgment.13 Ultimately, Mr. Orban decided to voluntarily dismiss his appeal. The duel was over and Mr. Orban and Ms. Terpening struck a truce as fellow banjo musicians.

Conclusion
The Terpening v. Orban case shows that in conversion claims involving an innocent purchaser of converted property it is possible to have two innocent parties before the court and that in those cases the court is faced with the very difficult task of deciding who gets to keep the property. It remains to be seen whether Don Paine’s prediction of a general prohibition of the discovery rule in conversion cases (other than where fraudulent concealment is shown) will become settled law in Tennessee. However, the Terpening v. Orban case also illustrates how broadly the discovery rule can be applied by courts to the detriment of persons who purchase property without notice of any inadequacy of title in the seller. It is the author’s opinion that in conversion of personal property cases, the discovery rule can undermine the important public policy objectives embodied by statutes of limitation. The dueling public policies of statutes of limitation and claimants’ rights to recovery are more fairly balanced with the application of the fraudulent concealment rule, which includes the discovery rule as one of its elements.

In addition, a statute of repose to govern conversion of personal property claims would prevent long delays by plaintiffs in bringing their causes of action, incentivize claimants to diligently investigate their causes of action and clear title to personal property where property is purchased by an innocent party. The Tennessee Supreme Court has explained that statutes of repose are distinguishable from statutes of limitation because “statutes of repose are substantive and extinguish both the right and the remedy while statutes of limitation are procedural, extinguishing only the remedy.”14 Tennessee does not currently have a statute of repose that applies to claims involving the conversion of personal property. A statute of repose that limits causes of action for conversion of personal property after ten years from the date that the property was converted would provide a substantial period of time for plaintiffs to discover their cause of action. And to protect plaintiffs from defendants who conceal the property (or the cause of action) during the limitations period, the statute could include a tolling exception for fraudulent concealment that embodies the elements set forth by the Tennessee Supreme Court. continued on page 16
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More Information


Dueling Banjo Claims

DARALD J. SCHAEFFER is an attorney at Wooden Law Firm PC in Chattanooga. His practice areas include business law, civil litigation, estate planning and estate administration. He earned his undergraduate degree in accounting from Lee University and is a graduate of Regent University School of Law. He can be contacted at daraldschaffer@woodenlaw.com.

NOTES

1. The author’s firm, Wooden Law Firm PC in Chattanooga, had the opportunity to represent Mr. Orban to defend his rights to the ownership of the banjo.
4. See Individual Healthcare Specialists Inc. v. BlueCross BlueShield of Tenn. Inc., 566 S.W.3d 671, 709-10 (Tenn. 2019) (discussing the adoption of the discovery rule in Tennessee “in response to the ‘harsh and oppressive’ results of the traditional accrual rule in circumstances in which the injured party was unaware of the injury”).
5. Teeters v. Currey, 518 S.W.2d 512, 516-17 (Tenn. 1974).
6. Pero’s, 90 S.W.3d at 621.
8. Pero’s, 90 S.W.3d at 625.
9. Id. at 624.
11. Individual Healthcare Specialists Inc., 566 S.W.3d at 710 (stating “[t]his Court has declined to apply the discovery rule to actions for defamation, or to claims for conversion of negotiable instruments, despite the fact that [i]t[he] discovery rule may very well be harsh in certain cases”) (internal citations omitted).
## Upcoming Programs

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### Faculty Highlight

#### STEWART HARRIS

Stewart Harris is the associate director of the Abraham Lincoln Institute for the Study of Leadership and Public Policy at Lincoln Memorial University, where he also teaches constitutional law. Harris previously worked for the federal government, where he spent four years on Capitol Hill advising the Army Corps of Engineers on civil works projects throughout the continental United States; also drafting congressional testimony for the assistant secretary of the Army for Civil Works. He subsequently worked for a large private law firm before establishing his own practice in Florida where he concentrated on environmental, civil rights and First Amendment law. Harris, in cooperation with Robert H. Smith Center for the Constitution at Montpelier, created a public radio show, *Your Weekly Constitutional*, which is produced at WETS-FM, the NPR affiliate in Johnson City, Tennessee, and syndicated nationally.

Harris will be presenting at the Tennessee FastTrack in Knoxville on Aug. 23.

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Speakers: Timothy Chinaris, Sean Martin

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Speakers: David Anthony, Jarred Johnson, I’Ashea Myles-Dihigo, Gray Waldron, Griffin Dunham, Lauren Poole
Producer: Nathan Lybarger

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September 20 in Nashville, Tennessee Bar Center
Program: 9 a.m. – 4:15 p.m.
Credit: 1 Dual, 5 General

$265 Section Members
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For attorneys interested in: Tax Law
This year’s tax forum will have several substantive sessions focusing on trust taxation, qualified opportunity zones, sales tax, international tax, OBI and attorney well-being.

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**COOKEVILLE**
October 1, 2019

**CLARKSVILLE**
September 12, 2019

**KINGSPORT**
September 24, 2019

**MURFREESBORO**
TBD

**COOKEVILLE**
October 1, 2019

**COLUMBIA**
October 22, 2019

**DYERSBURG**
October 23, 2019

**CHATTANOOGA**
October 25, 2019

**MURFREESBORO**
TBD

Stay tuned for more information! visit [cle.tba.org](http://cle.tba.org) for the latest.
19th Annual Health Law Primer

October 16 in Nashville, Tennessee Bar Center
1 - 5:15 p.m.
Credit: 4 General

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For attorneys interested in: Health Law
For newer health law practitioners, this program provides a general health law overview and discussion of hot topics by experienced health care leaders. Sessions provide practical tips to identify and avoid the pitfalls of real life situations in the heavily regulated health care industry.

Speaker: J.D. Thomas

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October 17 & 18 in Franklin
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Thursday, October 17, 8 a.m.-5 p.m.
Friday, October 18, 8 a.m.-4:30 p.m.
Credit: 3 Dual, 12 General

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This program is sponsored by Baker Donaldson, Carnahan Group, Health Care Appraisers, Horne LLP, LBMC, London Amburn and Sherrard Roe Voigt & Harbison.

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Student Loans and Bankruptcy

Undue Hardship Is a Difficult Standard to Meet in Tennessee

By Mary Beth Ausbrooks & Samuel R. Henninger

Student loans weigh heavy on many. Borrowers owe nearly $30,000 on average, and Americans collectively owe $1.5 trillion in student loan debt.¹ For some borrowers, bankruptcy may offer relief. But for most in Tennessee, bankruptcy is currently not a viable option to help borrowers rid themselves of burdensome student loan debt.

Discharge in Bankruptcy

The most common bankruptcy filings are under chapter 7 or chapter 13. One of the most valuable aspects of bankruptcy is the discharge. After a debtor fulfills the requirements under chapter 7 or chapter 13, she may receive a discharge. In short, if a debt is discharged, a debtor will no longer have a legal obligation to repay it.

Some of the most common forms of dischargeable debt arise from credit cards and medical bills. For example, after a debtor receives a discharge on her credit card debt, the bankruptcy court enforces an injunction against the credit card company from collecting on that debt.

If the company violates the discharge injunction, the bankruptcy court may sanction the company by placing it in civil contempt.

But not all debts are dischargeable. Section 523 of the Bankruptcy Code lists 19 categories of debt that are not dischargeable — or nondischargeable. Some forms of nondischargeable debt arise from money obtained by fraud, from a domestic support obligation, or from willful and malicious injury by the debtor. One of these categories, described in section 523(a)(8), covers debt that arises from student loans. But this category

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contains a qualification not found in any of the other eighteen categories: the debt may be dischargeable if “excepting such debt from discharge ... would impose an undue hardship on the debtor and the debtor’s dependents.”

Student Loans in Bankruptcy

Before 1976, federal law never prohibited the discharge of student loans. With the Bankruptcy Reform Act of 1978, Congress codified section 523(a)(8) of the Bankruptcy Code. In 1985, the Southern District of New York decided one of the most important cases involving section 523(a)(8): Brunner v. New York State Higher Education Services Corp. (In re Brunner), 46 B.R. 752 (S.D.N.Y. 1985). This case is so important because it developed a test for undue hardship that has since been adopted by most of the courts of appeals.

In this case, the debtor filed for personal bankruptcy about seven months after receiving a master’s degree in social work. She sought to receive a discharge of about $9,000 in student loans. At a hearing before the bankruptcy court, she explained that her poor financial circumstances and unsuccessful efforts at finding a job following graduation warranted a discharge. The bankruptcy court issued a decision discharging Brunner's student loans. The district court, however, reversed. In doing so, the district court adopted the following standard for undue hardship (a standard that Brunner failed to meet):

[T]he district court adopted a standard for “undue hardship” requiring a three-part showing: (1) that the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.

Law in Tennessee

In 2005, the Sixth Circuit joined other circuits in adopting the Brunner test for undue hardship. In that case, a 48-year-old pastor who was married with three children sought a discharge of about $40,000 in student loans. His family of five had annual income of less than $10,000 for two years before filing for bankruptcy. After applying the test, the Sixth Circuit found that the pastor failed to qualify for undue-hardship discharge of his student loans. The court determined that his education (bachelor’s and master’s degrees) and experience (salesman and audio engineer) obligated him to seek higher-paying work before claiming undue hardship. In brief, undue hardship is a difficult standard to meet in Tennessee.

Two more cases before the Sixth Circuit help to illustrate this principle. In the first case, decided shortly after the court adopted the Brunner test, the debtor sought a discharge of about $84,000 in student loans. The basis for her undue hardship was her loss of appetite, which she claimed made it impossible for her to return to work. The debtor contended that she lost her sense of taste because of the anesthetics that she received during colorectal surgery. Because the evidence failed to demonstrate that the debtor could not return to work, the court reversed the bankruptcy court’s partial discharge. In the second case, the debtor sought a discharge of about $121,000. The debtor had an annual salary of $26,000, and her husband made $42,000 per year. The court noted that she paid for private elementary school tuition and bought a new minivan (with monthly payments of $420) after filing for bankruptcy. Even though the debtor was facing maternity leave and the added cost of a growing family, the court found that the debtor failed to meet the undue-hardship standard.

Since the Sixth Circuit adopted the Brunner test, it has affirmed only one undue-harshship discharge of student loans. This occurred in the In re Barrett case. Debtor Thomas Barrett owed nearly $95,000 in student loans. Before filing for bankruptcy, his extensive medical issues included the following diagnoses: mononucleosis, pars planitis (a disease of the retina, which is also an autoimmune condition) and Hodgkin’s disease at the highest level (stage IVB). After filing for bankruptcy, Barrett was diagnosed with avascular necrosis, which causes a person’s bones to die because of limited blood supply. At trial before the bankruptcy court, Barrett testified about his extensive pain medication: 40 milligrams of OxyContin three times per day, 10 milligrams of Oxycodone four times per day, and two milligrams of hydromorphone four times per day. Because of the pain in his right shoulder, Barrett testified, he was unable to hold a coffee cup with his right hand.

Recent reported decisions at the bankruptcy appellate panel (BAP) and bankruptcy court level further establish how rare the undue-hardship discharge is in this jurisdiction. In a 2018 case before the BAP of the Sixth Circuit (a level between the bankruptcy court and appellate court), a parolee sought to discharge student loans that were used to obtain an architectural drafting certificate. The court concluded that remaining on parole throughout a repayment period was insufficient for an undue-hardship discharge. A few years before that case, a bankruptcy court in Tennessee decided an issue of undue hardship with a debtor who owed about $14,000 in student loans and was about 30 credits shy of graduating with a bachelor’s degree. Even though the debtor reported income of about $15,000 the year he filed for bankruptcy, the court refused to grant him an undue-hardship discharge. The 25-year-old debtor’s proven potential to earn much more money later in his life, the court concluded, demonstrated a lack of the requisite hopelessness to qualify for an undue-hardship discharge.

In sum, if you seek to discharge student loans in bankruptcy in Tennessee, you must make an exceedingly compelling case to prevail. Short of an extensive history of medical ailments to the point where you can no longer hold a coffee cup without immense pain, you are
unlikely to make a viable case for an undue-hardship discharge of student loans.

Recent Developments
Around the Country
A bankruptcy court in Colorado recently found that private loans that provide an educational benefit are not covered by section 523(a)(8). In other words, a debtor need not meet the high burden of proving undue hardship to discharge private student loans. Citing bankruptcy decisions from California, Maryland, New York, Pennsylvania and Texas, the court referred to this as the “trending” view. First, the court relied on a plain reading of the provision to conclude that a debtor with private loans for educational purposes — unlike a debtor with scholarships and stipends — may discharge those private loans without demonstrating undue hardship. Second, the court relied on legislative history to support its conclusion. Because the provision was enacted to guard against the contemplated insolvency of government education loan programs, the court contended that the provision was not intended to cover private loans for educational benefit.

To find that section 523(a)(8) does not cover private loans that provide an educational benefit, the court principally relied on a recent decision from a bankruptcy court in the Eastern District of New York. In that case, the debtor sought to discharge a $15,000 bar loan (CitiAssist Bar Exam Loan) from Citibank. As in the above decision from Colorado, the debtor sought to discharge the debt not on the basis that it imposed an undue hardship but on the basis that it did not fall under the statute’s definition of “educational benefit.” The court concluded that an educational benefit under the statute must refer to something similar to a scholarship or a stipend. Because the words “scholarship” and “stipend” are listed with the phrase “educational benefit” in the specific prong of the statute, the court relied on a canon of statutory construction to find that each word presumptively has a similar reading. And as the above Colorado court did, this court found that the legislative history supported its conclusion. More bankruptcy courts around the country may soon adopt this “trending” view of private student loans.

Another approach that debtors might consider is to seek an undue-hardship discharge on the student loan’s interest. In a recent decision from a bankruptcy court in Kansas, which was subsequently affirmed by the district court, the debtor sought a discharge of student loans that she took to attend community college. She originally borrowed about $17,000 about 30 years ago. Even though she paid nearly $15,000 toward the loan, her amount owed had risen to about $67,000 by the time of the decision. Everything she had paid went toward paying down the interest on the loan. Because the debtor had no realistic prospects of earning significantly more money, the court found that paying the accrued interest would be impossible for the debtor. The court concluded that requiring the debtor to pay the remaining interest on the loan would impose an undue discharge. In short, the court discharged the interest but not the principal.

In May, the United States Congress got involved too. A bipartisan group of senators and representatives introduced the Student Borrower Bankruptcy Relief Act of 2019. Several presidential candidates co-sponsored the bill, including Kamala Harris, Amy Klobuchar, Bernie Sanders and Elizabeth Warren. The bill seeks to do one thing: strike paragraph (8) from section 523(a). In other words, the bill would eliminate the special exception to discharge that the Bankruptcy Code provides for student loans. If the bill is enacted, debtors in bankruptcy would be able to discharge their student loans in the same way that they discharge other unsecured loans such as credit card debt. Debtors would no longer be required to demonstrate that paying their student loans would impose an undue hardship on them and their dependents. The above Brunner test and case law interpreting it would become obsolete. If the bill passes, debtors would be able to discharge student loan debt much more easily.

Earlier this year as well, an influential commission recommended its own changes to the way that student loans are dealt with in bankruptcy. The commission was put together by the American Bankruptcy Institute, one of the most prominent associations of bankruptcy professionals in the nation. The commission’s 274-page report addressed a wide variety of consumer bankruptcy issues, from the racial disparity in chapter 13 filings in cities such as Chicago and Memphis to the redaction of mental health information in bankruptcy court filings. But the very first issue addressed by the commission was student loans. In contrast to the above bills simple deletion of section 523(a)(8), the commission’s continued on page 20
suggested changes to the Bankruptcy Code were more measured. Instead of entirely deleting the subsection and its undue-hardship standard, the commission revised it. Indeed, under the commission’s proposed version of section 523(a)(8), the undue-discharge standard would only apply to student loans made, insured, or guaranteed by a governmental unit (not private loans).

CONCLUSION
Student loan debt among Americans has more than tripled since the Great Recession. In 2006, outstanding student loan debt was less than $500 billion. Today, it has risen to more than $1.5 trillion. Because of the special treatment that student loans receive under the Bankruptcy Code, debtors must overcome a substantial burden to discharge them. The undue-hardship standard leaves few debtors across the country with the ability to discharge their student loans. Case law suggests that, in Tennessee and across the Sixth Circuit, a debtor will struggle to meet the undue-hardship standard unless she has an extensive history of medical issues and lives in a near-permanent state of intense pain. Few debtors qualify. But recent bankruptcy decisions across the country, proposed federal legislation, and an influential commission’s report provide hope that more debtors may be able to discharge their student loans in the future. 

NOTES
3 Developments Enhance Tennessee’s Drive to Be a Top Trust Situs

In the last two decades, Tennessee trust laws have changed dramatically. Some changes were intended to give Tennessee residents greater flexibility, while others were designed to attract money from out-of-state grantors. As a result, Tennessee is often ranked among the top states for trust laws.

Three recent developments enhance Tennessee’s reputation, both for Tennessee residents and for nonresidents considering creating a trust situs in Tennessee.

Kaestner and State Income Tax
In a unanimous opinion issued on June 21, 2019, the U.S. Supreme Court in Kaestner held that the State of North Carolina violated the Due Process Clause of the Fourteenth Amendment by taxing the accumulated income in a trust where the only connection to North Carolina was the primary beneficiary's residence in that state.

The Kaestner trust was created by a New York resident, under New York law, with a New York trustee, with trust records in New York. The successor trustee was a Connecticut resident, and the custodian of assets was in Massachusetts. The only connection to North Carolina was that the primary beneficiary had moved there after the trust was executed. The trustee had total discretion over the timing and amount of any distributions and had made no distributions to the beneficiary in the years in question, accumulating all the income in the trust. The North Carolina Department of Revenue assessed tax of over $1.3 million on such income. The trustee paid the tax under protest and filed in state court for a refund. The trial court, court of appeals, and state supreme court all found that the taxation violated the Due Process Clause.

The Supreme Court affirmed, holding that there must be “some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax.” The court recognized that each component of a trust relationship needed to be evaluated separately. “In sum, when assessing a state tax remised on the in-state residency of a constituent of a trust — whether beneficiary, settlor, or trustee — the Due Process Clause demands attention to the particular relationship between the resident and the trust assets that the State seeks to tax. Because each individual fulfills different functions in the creation and continuation of the trust, the specific features of that relationship sufficient to sustain a tax may vary depending on whether the resident is a settlor, beneficiary, or trustee.” Ultimately, it held that the residence of the beneficiary alone did not supply the minimum connection to the state to sustain the tax, since the beneficiary lacked “control, possession, or enjoyment of the trust assets,” with no right to demand any distributions or to direct any investments.

There are at least two important applications of Kaestner to Tennessee trusts. continued on page 22
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First, the Tennessee Hall Income Tax, which like North Carolina looks solely to the residence of the beneficiary as the basis for taxation of trust income,7 may no longer tax undistributed trust income where the only Tennessee connection is the residence of the beneficiary. Trusts that have previously paid the Hall tax solely on this basis, without other minimum contacts with Tennessee, may file for refunds if within the statute of limitations.

Second, and far more importantly, only a few states do not tax trusts,8 which makes those states attractive as trust residences when there are sufficient contacts with one of those states. The Tennessee Hall Income Tax will be fully repealed effective Jan. 1, 2021. By soon becoming one of only nine states (and the only state in the southeast besides Florida) not to tax trusts, Tennessee may even more likely become a haven for trusts created by out-of-state grantors.

Special Purpose Entities (SPEs) as Trust Protectors
In 2013, the Tennessee Uniform Trust Code (TUTC) was amended to add language about the use of Trust Protectors and Trust Advisors (hereinafter “Protectors”)9 in Tennessee trusts,10 explicitly making such Protectors fiduciaries.12 Only an individual or a corporate fiduciary could serve as a Protector.

But who would ever want to serve? Although Protectors have the same right to reasonable fees as trustees,13 the body of law on Protectors’ fiduciary duties is far less settled, potentially creating greater exposure to liability. Individuals could rarely if ever obtain individual liability insurance, other than attorneys or accountants.

Effective May 10, 2019, a Protector may be an LLC, to be known as a “Special Purpose Entity” (SPE), if it meets certain requirements.14 The trustee of the trust must be a Tennessee corporate trustee, but the LLC may consist of one or more individuals. Such an LLC may be only thinly capitalized, or perhaps have no capital at all, thus effectively reducing the risk of liability for breach of fiduciary duty. It may also provide continuity in the event of an individual Protector’s death or disability. The cost is an initial fee of $1,000 to the Department of Financial Institutions plus an annual renewal fee of $1,000. In the context of the Kaestner decision discussed above, where it may be desirable for state income tax purposes to maintain exclusively Tennessee connections to the extent possible, a Tennessee SPE would give Tennessee resident status to nonresident Protectors.

Nonjudicial Modification of an Irrevocable Trust: Goodbye, Claflin?
Prior to adoption of the Tennessee Uniform Trust Code (TUTC) in 2004, an irrevocable trust could not be modified or terminated without a court order. A limit on any such action was the Claflin15 doctrine, that a court may not modify or terminate an irrevocable trust, even if all beneficiaries consent, unless the modification or termination would not be contrary to a material purpose of the trust.

A useful tool under the TUTC as initially enacted was greater flexibility to modify existing irrevocable trusts. If the grantor were still alive, no court order was required as long as the grantor did not object after receiving notice, since the grantor could decide for himself whether there was any material purpose. If the grantor were deceased, however, a modification still required a court order and the application of the Claflin doctrine.

Effective May 10, 2019, if the grantor is deceased, a trust in Tennessee may be modified without court order by the unanimous agreement of the trustee and all qualified beneficiaries, “if such modification does not violate a material purpose of the trust.”16 In other words, the trustee and beneficiaries may now determine for themselves, by unanimous vote, whether there remains any material purpose that would be violated by the modification. This risks putting the fox in charge of the hen house.

A draftsman for a concerned grantor might try to alleviate this concern by including a clause prohibiting any modification without a court order and satisfaction of the Claflin doctrine. However, after the grantor’s death, the trustee theoretically could unilaterally “decant”17 the trust to another trust that does not contain such a prohibition, without any participation by the beneficiaries, providing cover for an end run around the grantor’s explicit desire. Or following the trend in increased flexibility and power by trust beneficiaries, there may be further amendments to Tennessee trust law that increase the ability to modify, despite a grantor’s express wishes to the contrary. Ultimately, grantors’ dead hands may be losing their grip. □

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NOTES
1. Examples of Tennessee trust law changes include adoption of the Uniform Trust Code (2004); decanting power (2004); extension of the rule against perpetuities period to 360 years (2007); Tennessee Investment Services Trusts (i.e., domestic asset-protection trusts) (2007); communi- ty-property trusts (2010); directed trusts (2013); trust protectors and trust advisors (2013); and tenancy-by-the-entirety trusts (2014).
2. It is fascinating that many of the changes to Tennessee trust law have either originated or been endorsed by the Tennessee Bankers Association, which promotes its role in doing so. In some states, bankers’ associations have actively fought these kinds of changes, concerned that such laws increase

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Foreclosing on Meth Houses: Buyer Beware

State and national efforts to curb the opioid epidemic have put ongoing angst about the health and financial devastation associated with methamphetamine production and use on the news cycle’s back burner.

For home buyers and sellers and their lenders, the sometimes invisible meth problem continues to plague those who have unknowingly moved into a house or mobile home contaminated by meth, and for lenders who may wonder how or whether to foreclose on properties where there is a chance of contamination.

There are two specific areas of drug lab clean-up, generally referred to as “removal” and “remediation.” Removal occurs after law enforcement discovers and seizes a laboratory. Law enforcement secures and assesses meth lab sites and then identifies and disposes of drug manufacturing equipment and chemicals. Removal is performed by certified professionals who are trained to handle and dispose of hazardous waste. Remediation comes after the site has been identified and addresses the residual contamination that exists after the manufacturing equipment and chemicals have been removed.

In almost all jurisdictions, the burden for clean-up of “meth labs” and dwellings contaminated by the mere smoking of meth lies squarely on the owner of the property in every jurisdiction. Some states have adopted clean-up protocols and maintain a database of companies qualified to perform those protocols. Remediation is not inexpensive, and some homeowners and foreclosing lenders have found that it is less expensive to trash the trailer or raze the house rather than try to cure the problem. When the dwelling is a brick and mortar residence or other substantial building with value, however, clean-up may be less expensive than abandoning the property.

The Environmental Protection Agency has adopted Voluntary Guidelines for Methamphetamine Laboratory Cleanup, a downloadable booklet that details remediation sequences and techniques, item- and material-specific best practices, and sampling procedures. The EPA estimates that clean-up of a meth lab can cost between $5,000 and $50,000, depending on variables.

Some states, including Tennessee, have adopted clean-up response and documentation guidance for properties quarantined because of clandestine meth lab activities.

Many people are unaware that the dangers lurking in a dwelling where meth has “just been smoked” can be as hazardous to the health of residents as if meth had actually been cooked on the premises. It is easier to determine the location of a drug lab than to discover whether the residents of a dwelling have been smoking. The drug’s vapors seep into walls, carpets and ducts, and leave the home uninhabitable. The effects can be fatal to anyone exposed, but are particularly hazardous to those with existing health issues, the elderly and children. A home in a high-end area is just as dangerous as a mobile crack house if someone has smoked meth on the premises.

Much has been written about how a buyer can screen a home before the purchase to help assure it is safe. While professional testing is ideal and can cost around $500, there are also first step screening kits available at low cost that will provide some information. A positive reading shows that a place has a problem and more testing is required, but a negative reading doesn’t assure that the house is clean.

Banks do all they can to minimize the costs associated with foreclosure, but if a lender wants to be as sure as it can be that

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the institution is not taking ownership of a contaminated piece of real estate, some level of testing prior to foreclosure may be prudent. The potential financial and reputational risk to the lender that forecloses on contaminated property and then sells it will never be worth the relatively small cost of being sure that no one has smoked or cooked meth on the premises.

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creditor protection and are therefore against
their own interests. In other states, such as	Tennessee, the bankers have promoted
these changes to attract out-of-state capital
to their trust departments, a tradeoff against
potential loan losses in other departments of the
bank.

3. For example, see the oft-cited state	rankings by Steven J. Oshins, Esq., of Las	Vegas, Nevada, at www.oshins.com, where
Tennessee currently ranks third for dynasty
trusts, third for decanting, and tied for fifth
for domestic asset protection trusts.

4. N.C. Dept of Revenue v. Kimberley Rice
Kaestner 1992 Family Tr., No. 18-457 (U.S.
June 21, 2019).

5. Id., slip op. at 5

6. Id., slip op. at 10. The court affirmed,
consistent with prior precedents, the right
to a state to tax trust income based on (1) an
actual distribution to an in-state resident, (2)
the in-state residence of a trustee, or (3) the	situs of trust administration. After Kaestner,
it is questionable whether a state may tax
income based solely on either (1) the mere
residence of the grantor of the trust or (2)
a statement in the trust instrument that the
law of a certain state governs.


8. The seven states with no income tax
are Alaska, Florida, Nevada, South Dako-
ta, Texas, Washington and Wyoming. New	Hampshire’s income tax does not tax trusts.
Tennessee will join those other eight states on
Jan. 1, 2021, when the Hall Income Tax is
to be fully repealed after a phase-out period. Tenn.

9. An example illustrates the significance.
The highest state income tax rate in the
country is 13.3%, in California. California	law explicitly looks, inter alia, to the trustee’s
residence to establish a minimum contact for
income tax purposes. Cal. Rev. & Tax Code §
17742. Capital gains from sales of stocks and
other intangible assets are included in the
state definition of income. Cal. Rev. & Tax
Code § 25125(c). Assume that a trust has no	California contacts other than a California
resident trustee, that there are no substi-
tual contacts with other states, that the trust
incurs a $1 million capital gain and does not
distribute it to the beneficiaries, and that the
trust is in a maximum tax bracket. The	California income tax on the gain would be	$133,000, in addition to any federal income
tax. If the trustee had been a Tennessee
resident, the state income tax would be zero,
partly because Tennessee does not current-
tly tax capital gains (only dividends and
interest) and partly because after 2020, the	Tennessee income tax will be fully repealed.
However, beware that various contacts with
other states on account of real property or
asset management could make accumulated
trust income taxable in more than one state,
so careful review of all facts and circum-
stances is necessary. A chart summarizing
each state’s law governing taxability in each
of the 50 states and D.C. can be found at

The concept of Trust Protectors and Trust
Advisors (two names for the same office)
originated in the 1980s when grantors
created offshore trusts and needed some
independent person to have certain powers
superior to the trustee, without actually be-
ing a trustee. The concept was then seen as
useful for a much broader range of purposes
in domestic trusts, such as replacing trustees
easily, or voting interests in a family busi-
ness. Tenn. Code Ann. § 35-15-1201(a) con-
tains a lengthy non-exclusive list of potential
powers of a Protector, many of which powers
are amazingly broad. Few state Protector
statutes contain such a list.

11. This amendment was made in con-
junction with a series of amendments to
the TUTC creating the concept of “direct-
ed trusts” (Tenn. Code Ann. § 35-15-710, et seq.), where fiduciary duties could be
divided among parties, and a party not
participating in a particular activity became
an “excluded fiduciary” (Tenn. Code Ann. §
35-15-103(12)) as to that activity.


Tennessee is only the second state to adopt
an SPE statute, the first being South Dakota
Per Christopher M. Reimer, “The Undiscovered
Country: Wyoming’s Emergence as a
Leading Trust Situs Jurisdiction,” 11 Wyo.
Law Review 165 (2011), at least four other
states permit unregulated SPE’s, namely Alas-
ka, Delaware, Nevada and Wyoming.

1889). The holding of this Massachusetts
Supreme Court case was adopted almost
universally among states and included in the
Uniform Trust Code.


Love of Law Overcomes Cultural Shock

When Leticia Mason’s husband was transferred by his employer Caterpillar Financial from Mexico City to Nashville, Leticia wasn’t worried. They didn’t have children then and as a lawyer she knew she could get a job; they saw it as an adventure. “I didn’t give it a big thought,” she says. “When a lawyer moves from the U.S. to Mexico he may not be able to go to the courts but would be able to get a good job, making money as an attorney.”

She was practicing corporate law in Mexico with the antitrust division of the Mexican government, with a law degree plus a masters in corporate law. But upon arrival she learned it didn’t work that way here.

“It was a shock and very discouraging,” she says. She found out that she could not practice, so she applied to take the bar exam. “I was so naive. They didn’t let me take the bar — they said ‘Where is your bachelor’s degree?’” She hadn’t known the U.S. requirements. In Mexico, a person goes straight from high school to five years of law school.

“No one was interested in me.” So she worked in an immigration law firm as a paralegal. “All those years of law school … It was very hard for me. Constantly they would tell me, ‘Stop talking like a lawyer; you’re not a lawyer.’” She got so tired of hearing that she decided to do whatever she had to do to be a lawyer again.

“I don’t want anyone to ever tell me again I’m not a lawyer.”

She applied and was admitted to Nashville School of Law in 2002, while also by that time working as a Spanish interpreter in Davidson County Criminal Courts, which she loved doing.

She loved law school too. “I learned the system; it is very different from Mexico.” She explains that Mexican law is based on Roman law: “Everything is codified; there is case law but not as much as here.” Mason also says she couldn’t believe “that a neighbor would sue a neighbor or a daughter would sue a mother-in-law. Those don’t happen in Mexico because no one has the money to do that.” She had an adjustment to make culturally, especially in personal injury cases, that “it’s okay to get money from this. I would think, ‘It’s an accident, so how could you get money from that?’ That kind of thinking, that it’s okay to ask for money even if it wasn’t anyone’s fault, is very different.”

And while juggling both law school and her job as an interpreter, she became pregnant with a son and then a year and a half later, with her daughter.

“My husband would come home from work and I would leave for school,” she laughs about their routine. “It is a four-year program, but I finished in six.”

“I never studied so much in my life before the bar exam — for two months, eight hours every day! I didn’t want to fail because I thought, ‘I’m not doing this again!’”

Back when she was a court interpreter, she had met an attorney in private practice, Glenn Funk. After she passed the bar (first try, and don’t forget it was not in her native language) and was licensed, he offered her a job. Most of her clients were Hispanic or from other foreign countries. Her practice today is mostly criminal, immigration and some family law: “In the U.S. my market is Spanish speakers, not corporate like it was in Mexico,” she says. Another challenge she still faces today is her accent: “Some people don’t care, but some people don’t like it.”

Three years into her law practice, her husband was again transferred, this time to Santiago, Chile. She soon learned that if she was going to practice law there she would have to go back to law school again.

“I said NO to that.” Instead, she volunteered her time and settled in to the life of a stay-at-home mom, helping her kids, then six and seven, navigate the new country.

When they moved back to Nashville three years later, she contacted Funk, who was then the District Attorney. He hired her, which is where she worked for about four years, in a part-time position in General Sessions Court. Then earlier this year a friend she had met in law school, Joseph Fuson, asked her to come work at Freeman & Fuson, which she did. “It was super hard to leave the DA’s office,” she says. “I appreciate the opportunity he gave me.”

Mason, now 46, shies away from the idea that she overcame a lot to be a lawyer in the U.S. “It’s not a big deal,” she insists. Although many people in her path were kind to her in her quest, notably the NSL law dean and several judges, she didn’t have a lot of help to figure out the system.

“I did what I had to do — just me and the internet and telephone,” she says, pausing. “Well, now that I think about it, I guess it is a big deal.”

— Suzanne Craig Robertson

Suzanne Robertson is editor of the Tennessee Bar Journal. Hat tip to Stacey Shrader Joslin for this story idea.
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