LEGAL ISSUES
FOR
COUNTY TRUSTEES

prepared for

THE UNIVERSITY OF TENNESSEE
CENTER FOR GOVERNMENT TRAINING

prepared by

THE UNIVERSITY OF TENNESSEE
COUNTY TECHNICAL ASSISTANCE SERVICE

in cooperation with the
COUNTY OFFICIALS ASSOCIATION OF TENNESSEE
and the
TENNESSEE COUNTY SERVICES ASSOCIATION

PARTICIPANT MANUAL
Revised July 2001

LETTER TO PARTICIPANTS

Welcome! We are pleased that you are participating in this training program sponsored by The University of Tennessee's County Technical Assistance Service and Center for Government Training. You are to be commended for your interest in improving your job skills through continuing education.

The field of local government is a challenging one. It requires current job knowledge and constant skill refinement in order to provide the public with the best service possible. This training will provide beneficial information and you will leave better equipped to meet the demands of your position.

In addition to this course, there are a variety of programs and seminars throughout Tennessee for local and state government officials. Certificate training programs are key components of our local government training effort. These programs are designed specifically for county officials or municipal officials. We encourage you to learn more about these certificate training programs and to consider what they have to offer. Not only do the courses in these programs help to keep you informed about recent developments, increase your understanding of local government issues and sharpen your specific job skills, they also provide an opportunity to discuss issues and share ideas with other local government officials.

The University of Tennessee and its agencies stress quality education and practical training to help you in your daily operations. In order to better serve your needs, we solicit your input. Your comments and suggestions are important to us. We also welcome your suggestions on topics for future courses.

Education is a life-long process. We applaud your efforts and your commitment to professional development.

Sincerely,

J. Rodney Carmical
Executive Director
County Technical Assistance Service

Ron Gibson
Executive Director
Center for Government Training

TO THE PARTICIPANTS

1. The seminar belongs to you, and its success rests largely with you.

2. Enter into the discussion enthusiastically.

3. Give freely of your experiences.

4. Confine your discussion to the issues being addressed.

5. Say what you think; be honest.

6. Only one person should talk at a time. Be considerate by avoiding private conversations while someone else is speaking.

7. Listen attentively to the discussion.

8. Be patient with other members.

9. Appreciate the other person's point of view.

10. Be prompt and regular in attendance.

INTRODUCTION

This particular course in Phase II of the County Officials Certificate Training Program is office specific. In Phase I you probably attended a course on Legal Issues pertinent to county officials generally. As you may recall, that course emphasized the fact that county governments and county officials derive their authority from legislative grants to the county or official as embodied in public acts codified in the Tennessee Code Annotated or in private acts applicable to a particular county. A large portion of this course will deal with the nature of the office of trustee, its primary duties and relationships with other offices and the trustee's deputies and assistants, most of which is determined by the general statutory law. Since many of the duties of the trustee's office are financial in nature, this course has been developed so as not to repeat topics taught in the Level II Financial Issues for Trustees. The primary topic regarding duties dealt with in this course is the collection of current and delinquent property taxes.

This course will also deal with matters that the trustee should be informed of in order to prevent problems in such areas as personnel practices, conflicts of interest, and other activities which may result in liability losses to the county or officeholder or both. However, most personnel issues, especially those involving federal legislation, will be dealt with in a separate course.

The course will conclude with a short, 20-question, multiple choice examination which is required at the Phase II level in order for credit to be earned.

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I. DESCRIPTION OF THE OFFICE

CHAPTER CONTENTS

Legal Qualifications of the Trustee
Method of Election and Term of Office
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I. DESCRIPTION OF THE OFFICE

Legal Qualifications of the Trustee

The basis for the office of county trustee lies in Article 7, Section 1 of the Tennessee Constitution:

> *The qualified voters of each county shall elect for terms of four years a legislative body, a county executive, a Sheriff, **a Trustee**, a Register, a County Clerk and an Assessor of Property. (emphasis supplied)*

The office of trustee therefore has the status of a constitutional office. The Tennessee Constitution does not define qualifications or duties for the office of trustee; this function is performed by the General Assembly (Legislature). Since the trustee is a constitutional officer, the General Assembly may not abolish the office or totally change its character, but may specify duties and qualifications which are not inconsistent with the state or federal constitutions.[1]

Residence. The trustee must reside within the county of election during the entire tenure (term) of office. Since issues regarding residency frequently arise, not only in connection with trustees but also with other public officials, the General Assembly has passed the following guidelines to determine residence (2-2-122):

- *The residence of a person is that place in which a person's habitation is fixed, and to which, whenever absent, that person has a definite intention to return.*

- *A change of residence is generally made only by the act of removal joined with the intent to remain in another place. There can be only one residence.*

- *A person does not become a resident of a place solely by intending to make it the residence. There must be appropriate action consistent with the intention.*

- *A person does not lose residence if, with the definite intention of returning, the person leaves home and goes to another country, state, or place within this state for temporary purposes, even if of years duration.*

- *The place where a married person's spouse and family have their habitation is presumed to be the person's place of residence, but a married person who takes up or continues abode with the intention of remaining at a place other than where the person's family resides is a resident where the person abides.*

- *A person may be a resident of a place regardless of the nature of the habitation, whether house or apartment, mobile home or public institution, owned or rented.*

- *A person does not gain or lose residence solely by reason of the person's presence or absence while employed in the service of the United States or of this state, or while a student at an institution of learning, or while kept in an institution at public expense, or while confined in a public prison or while living on a military reservation.*

- *No member of the armed forces of the United States, or the member's spouse or dependent, is a resident of this state solely by reason of being stationed in this state.*

The following factors, among other relevant ones, may be considered in the determination of where a person is a resident:

- *Possession, acquisition, or surrender of inhabitable property.*

- *Location of occupation.*

- *Place of licensing or registration of personal property.*

- *Place of payment of taxes which are governed by residence.*

- *Purpose of presence in a particular place.*

- *Place of licensing activities, such as driving.*

Special rules apply for state inmates in a half-way house and for residents of farms split by county boundary lines (2-2-122).

Basically, then, residence for election purposes is defined as the physical presence of a person with intention to make a place the person's residence. This definition, along with the factors discussed above, may also be used by the courts in determining residence for other purposes.

General Qualifications. There are no special requirements to hold the office of trustee; only the general qualifications to hold office apply. All persons over the age of eighteen years[2] who are citizens of the United States and Tennessee, and who reside within and are qualified voters of the county they represent,[3] are qualified to hold the office of county trustee, except the following:

1. *Those convicted of offering or giving a bribe, or larceny, or any other offense declared infamous by law, unless those persons have been restored to citizenship;*

2. *Those against whom there is an unpaid judgment for moneys received by them in an official capacity, due to the United States, Tennessee, or any county;*

3. *Those who are defaulters to the treasury at the time of election (such an election is void);*

4. *Soldiers, seamen, marines, airmen, in the regular United States Navy, Army, or Air Force; and*

5. *Members of Congress, and persons holding any office of profit or trust under any foreign power, other state, or the United States (8-18-101).*

A crime declared infamous by law basically means a felony or a crime for which the punishment includes disenfranchisement (loss of the right to vote). Also, any person previously convicted of certain criminal offenses involving misconduct in office is to be removed and disqualified from holding that or another office for ten years from the date of conviction (39-16-401 *et seq.*). Any disqualified person who takes office is guilty of a misdemeanor (8-18-102).

Method of Election and Term of Office

The trustee is elected by the county's qualified voters for a four year term beginning on September 1 of the year of election and continuing until a vacancy occurs or until a successor is elected and qualified (8-11-101; TENN. CONST., art. vii, § 1). Elections are held at the regular August election immediately preceding the beginning of a full term (2-3-202). There is no limitation on the number of terms a trustee may serve.

Under Tennessee Code Annotated, Section 2-5-101(f)(5), a candidate for the trustee's office is prohibited from running for any other countywide office on the same ballot. This statute provides:

> *No candidate, whether independent or represented by a political party, may be permitted to submit and have accepted by any election commission, more than one (1) qualifying petition, or otherwise qualify and be nominated, or have such candidate's name anywhere appear on any ballot for any election or primary, wherein such candidate is attempting to be qualified for and nominated or elected to more than one (1) state office as described in either § 2-13-202(1) [Governor], (2) [former Public Service Commissioner, now deleted] or (3) [Member of the General Assembly] or in Article VI of the Constitution of Tennessee [Offices pertaining to the judicial department of the state] or more than one (1) constitutional county office described in Article VII, § 1 of the Constitution of Tennessee [county legislative body, county executive, sheriff, trustee, register, county clerk, assessor of property] or any other county wide office, voted on by voters during any primary or general election.*

When it is not prohibited by statute, a candidate for the trustee's office may also run for an office other than a countywide office at the same election, even though the person may not be able to serve in both capacities if elected. Article 2, Section 26 of the Tennessee Constitution provides:

> *No Judge of any Court of law or equity, Secretary of State, Attorney General, Register, Clerk of any court of Record, or person holding any office under the authority of the United States, shall have a seat in the General Assembly; nor shall any person in this State hold more than one lucrative office at the same time; provided, that no appointment in the Militia, or the office of Justice of the Peace, shall be considered a lucrative office, or operative as a disqualification to a seat in either House of the General Assembly.*

The Attorney General has issued several opinions over the years interpreting Article 2, Section 26. For example, the Attorney General has opined that Article 2, Section 26 does not prohibit a person from seeking the office of state senator and assessor at the same time, but that person could not hold both offices if elected to both of them.[4]

Oaths of Office

The trustee must take the following oath to support the constitutions of Tennessee and the United States and to faithfully perform the duties of the office:

> *I do solemnly swear that I will perform with fidelity the duties of the office to which I have been elected (or appointed, as the case may be) and which I am about to assume and to support the constitutions of Tennessee and of the United States. (8-18-111)*

This oath of office may be administered by the county executive, the county clerk, or a judge of any court of record in the county. It may be administered any time after the election is certified or, for an appointed officer, any time after the appointment is made (8-18-109).

Additionally, at the time of executing bonds, the trustee must take and subscribe to the following oath before the county clerk or county executive:

> *I do solemnly swear that I will faithfully collect and account for all taxes for my county, or cause the same to be done, according to law, and that I will use all lawful means in my power to find out and assess such property as may not have been assessed for taxation in my county, and return a list of the same on settlement. (67-5-1901(a))*

Oaths must be in writing and signed by the person taking it. A certificate must accompany the oath, signed by the officer administering it, which specifies the day and the year the oath was taken (8-18-107). The oath and the certificate

must be filed with the county clerk, who endorses the day and year of filing and signs the endorsement (8-18-109). Any trustee who fails to take and file the required oaths is guilty of a misdemeanor (8-18-113).

Bond Requirements

Amount of Bond. The minimum amount of the official bond executed by the trustee for each term of office is determined from the amount of revenues handled by the trustee during the last fiscal year audited by the Comptroller or from the last Comptroller-approved audit which was prepared by certified public accountants. If the official bond is executed by a surety company authorized to do business in Tennessee (corporate surety), the minimum amount will be based on revenues as follows (8-11-103):

1. Less than $50,000 -- base bond of $5,000;
2. From $50,000 to $500,000 -- an amount equal to 10% of the funds collected by the office;
3. 5% of the excess of $500,000 to $1,000,000 shall be added;
4. 3% of the excess of $1,000,000 to $3,000,000 shall be added;
5. 2% of the excess of $3,000,000 shall be added.

The amounts in items two through five above are cumulative. If the official bond of a trustee is executed by personal sureties, the minimum amount of the bond is based on revenues as follows:

1. Less than $50,000 -- a base bond of $5,000;
2. From $50,000 to $500,000 -- an amount equal to 20% of the funds collected by the office;
3. 10% of the excess of $500,000 to $1,000,000 shall be added;
4. 6% of the excess of $1,000,000 to $3,000,000 shall be added;
5. 4% of the excess of $3,000,000 shall be added.

Amounts indicated in items two through five are cumulative. As is obvious, the minimum bond is doubled when personal sureties are used. County officials are prohibited from being sureties for other county officials (8-19-108; 8-19-109). The amounts stated above are only minimums; the county legislative body may require the trustee to execute a bond in a higher amount (8-11-103; 8-11-102).

Form of Bond. An official bond is an instrument which requires the sureties to pay up to a specified amount of money if the trustee fails to perform certain acts or performs wrongful and injurious acts under the color of office. Bonds constitute a written promise made by the trustee to:

(1) perform all of the duties of the office;

(2) pay over to authorized persons all funds received in an official capacity;

(3) keep all records required by law;

(4) turn over to the successor all records, money, and property of the office; and

(5) refrain from anything that is illegal, improper, or harmful while acting in an official capacity.

Any person who is injured by the failure of the trustee to keep this promise may collect from the trustee's sureties (8-19-111; 8-19-301). It is important to know that a bond protects the state, the county, and the citizens in the event the trustee fails to perform his or her duties properly. The bond does not protect the trustee from liability. If a payment is made under the bond, the trustee's sureties may have a right to recover the amount paid from the trustee. This action against the trustee by the sureties is known as subrogation.

The form of official bonds is prescribed by the Comptroller and approved by the Attorney General (8-19-101). Blank copies of official bonds are available from the Comptroller of the Treasury, Division of Local Finance. Bonds must be conditioned in the following manner (8-19-111):

That if the said ______________________________ (principal) shall:

1. *Faithfully perform the duties of the office of ___________________________ of________________ County during such person's term of office or continuance therein; and*

2. *Pay over to the persons authorized by law to receive them, all moneys, properties, or things of value that may come into such principal's hands during such principal's term of office or continuance therein without fraud or delay, and shall faithfully and safely keep all records in such principal's official capacity, and at the expiration of the term, or in case of resignation or removal from office, shall turn over to the successor all records and property which have come into such principal's hands, then this obligation shall be null and void; otherwise to remain in full force and effect.*

Some counties use "blanket bonds" for all of the county officeholders. Even so, the trustee is ultimately responsible for securing his or her bond and should take steps to ensure that the bond is properly executed, approved, and filed.

Filing of Bonds. Official bonds are required to be filed in the office of the Comptroller or Secretary of State within forty days after election or within twenty days after the term of the office legally begins (8-19-115). Official bonds are also recorded in the office of the register of deeds (8-19-103). Generally, the county clerk presents the bond to the register for recording and then sends the original bond to the Comptroller's office. The register maintains a special record book for the official bonds of the trustee and other county officials (8-19-104).

The county legislative body must examine the solvency of the trustee's bond. If the bond is insufficient, the county legislative body must notify the trustee and require new or additional security for an amount which in the judgment of the county legislative body is sufficient to cover the county’s revenues. If the trustee does not give the required bond or security on or before the ensuing county legislative body session, then the county legislative body has the duty and the power to declare the office vacant and to elect a successor trustee. The successor must enter into a bond for the remainder of the term for which elected (8-11-103).

Cost of Bonds. The county pays the premiums and registration fees for official bonds (8-19-106).

Penalty for Failure to File Bond. If any officer required by law to give bond fails to file in the proper office within the time prescribed, he or she must vacate the office (8-19-117). It is the officer's duty in whose office the bond is required to be filed to certify immediately the failure to give bond, and then the vacancy must be filled (8-19-117). In addition, an officer is guilty of a Class C misdemeanor if he or she is required to give bond and performs any official act before the bond is approved and filed (8-19-119).

If a complaint is filed alleging the failure of a county officer to enter into an official bond as required by law, the circuit court clerk or the clerk and master having jurisdiction issues a summons which is served, together with a copy of the complaint, upon the county officer (8-19-205). If the official fails or refuses to execute the required bond after receiving a copy of the complaint and after a hearing before the court, the court will enter a judgment declaring the office vacant, and the vacancy will be filled according to law (8-19-206).

Compensation and Employees

The Legislature sets the minimum compensation of the trustee according to county population classes. Tennessee Code Annotated, Section 8-24-102, classifies counties according to population and sets the minimum salary payable to trustees and certain other county officials in each population class. This statute classifies trustees with county clerks, registers of deeds and

clerks of court as “general officers”. The county legislative body determines the salary of these general officers each year in an amount equal to or greater than the statutory minimum. If the count legislative body takes no action, then the salary for the general officers is the statutory minimum amount. These general officers must be paid the same amount each year, except for an educational incentive payment which the county legislative body may pay in an annual amount up to $3000 minus any state educational incentive paid to officials (and employees) who have received a certificate as a certified public administrator under the county officials certificate training program (5-1-310). Each July 1, the minimum salary schedule of the trustee and other county general officers will be increased by a dollar amount equal to the average annualized general percentage increase in state employee’s compensation during the prior fiscal year applied to the county with the median population for all counties, subject to a five percent (5%) cap on the increase in any one fiscal year. This cap on the annual increase in the minimum salary schedule does not limit the authority of the county legislative body to provide a salary for trustees and other county officers above the minimum level. If the county legislative body wishes to take action to pay officials in excess of the statutory minimum compensation levels, this must be done through a resolution which is scheduled to appear on the posted agenda for the county legislative body meeting.

Fee or Non-Fee Office - Budgeting Salary or Payover (8-24-104). Two methods exist for using and accounting for fees and commissions received by the trustee and other county officials. Under the older system, called the "fee system," the official transfers to the county general fund on a quarterly basis all of the fees, commissions, and charges collected in the preceding quarter in excess of the amount required to pay salaries of the officer, deputies, and assistants and the necessary office expenses. Under this system the official may retain fees in an amount equal to three times the monthly salary total.

If the fees collected by the officer are insufficient to pay all of the salaries and office expenses, the county legislative body must make up the shortfall (8-24-107). The county legislative body does not need to appropriate funds for the salaries and office expenses unless the fees are inadequate. Any surplus or excess commissions are remitted to the county general fund on a quarterly basis.

The county legislative body may adopt an alternative system for any of the fee officers of the county, including the trustee, or all of them (except the sheriff who is always under this second system). Under the alternative system, sometimes called the "salary system," the trustee or other official makes monthly payments to the county general fund for all of the fees, commissions, and charges collected. In return the county legislative body is required to pay the trustee's salary, the salaries of the deputies and assistants, and the authorized expenses of the office from the general fund in twelve equal

monthly installments, regardless of the fees received by the office. This alternative system may be adopted by the county legislative body for one or more county offices. It is not necessary for all offices to operate under the same system.

Deputies and Assistants. Under both the fee and the salary systems the hiring and compensation of deputies and assistants can be determined by court decree (8-20-101 *et seq.*). When the trustee is unable to conduct the business of the office by devoting his or her entire working time thereto, the trustee may file a sworn petition in chancery court (with the clerk and master) in the county to obtain a chancery court decree to employ deputies and assistants. The petition should be prepared by an attorney. The petition should set forth the facts showing the necessity for deputies and assistants, the number required and the salary that should be paid to each (8-20-101). The trustee must name the county executive as the defendant in the petition. A copy of the petition is served on the county executive, who files an answer within five days either admitting or denying the allegations, or making the answer he or she deems advisable. The chancery court must promptly hold a hearing on the petition, and may allow or disallow the petition in whole or in part, may allow the entire number of deputies or assistants asked for, or a lesser number, and may allow salaries as set out in the application, or lower salaries (8-20-102). The order or decree fixing the number of deputies and assistants may be changed by increasing or decreasing the number of deputies and their salaries, by application to the court in the same manner, or the trustee without formal application may decrease the number of deputies and assistants and their salaries where facts justify such action (8-20-104). The costs incurred in connection with the suit are paid out of the fees collected by the trustee’s office (8-20-107).

The number of deputies and assistants and their compensation also may be established by a letter of agreement (8-20-101). If the trustee agrees with the number and amounts set forth in the budget adopted by the county legislative body, the trustee can enter into a letter of agreement with the county executive. This document is filed with the Chancery Court where the salary suit would have been filed, but there are no litigation taxes, attorneys' fees or court costs associated with the filing of a letter of agreement. This method can be used regardless of whether the trustee is under the fee system or the salary system.

The trustee has the power to employ and discharge employees. The court decree or letter of agreement merely sets the maximum number and maximum compensation of the employees. It is the trustee’s duty to reduce the number of deputies and assistants and/or their salaries when it can reasonably be done (8-20-105).

The compensation for deputies and assistants established by court decree or letter of agreement must be sufficient to comply with the Federal Fair Labor Standards Act (FLSA) and its minimum wage and overtime provisions. In general, nonexempt employees must receive overtime compensation at the rate of one and one-half their regular rate of pay for all hours worked in excess of 40 in a week. Compensatory time off is allowed in lieu of overtime compensation, but the employee must receive one and one-half hours off for each hour worked in excess of 40, and as a general rule, an employee may not accrue more than 240 hours of compensatory time. These and other laws regulating personnel matters are discussed in greater detail in another course dealing with personnel responsibilities.

Expense Accounts. The county legislative body may (*or may not*) by resolution elect to pay the expenses of salaried officials, and may promulgate rules specifying how expenses will be reimbursed and what expenses are reimbursable. In counties providing reimbursement, the county executive prescribes forms, examines expense reports or vouchers to assure items are legally reimbursable and properly filed, and forwards proper expense reports to the disbursing officer (usually the trustee) for payment. In counties with populations of 100,000 or more, salaried county officials, including the trustee, must be reimbursed for the actual expenses incurred as an incident to holding office, including but not limited to lodging while away on official business and travel on official business, both within and outside the county. The county legislative body in these counties may, by resolution, determine what other expenses are reimbursable (8-26-112).

Before any expenses can be reimbursed, the official must submit accurate, itemized expense accounts, showing the date and amount of each item and the purpose for which the item was expended. The official must also take an oath stating that the expense account is correct and that it was actually incurred in the performance of an official duty. Receipts should be obtained and attached to the expense voucher whenever practical; vouchers are required to be numbered and referred to by number. (8-26-109). Making a false oath on an expense account is perjury (8-26-111).

Automobiles. Based on population class, some counties, including those with populations of 100,000 or greater, may also provide automobiles or monthly car allowances to the county officials described above (8-26-113).

Vacancies

Causes of Vacancies (8-48-101). A trustee's office, as well as other public offices, is vacated for the following reasons:

1. Death;

2. Resignation, when permitted[5];

3. Removal of residency from the county of election;

4. A decision of a competent tribunal declaring the election void, the appointment void, or the office vacant;

5. The sentencing of the incumbent by a competent tribunal in Tennessee or any other state to the penitentiary, subject to restoration if the judgment is reversed, but not if pardoned; or

6. An adjudication of insanity.

Of course, if a trustee is ousted, fails to give bond, or fails to take the required oath, a vacancy occurs.

Procedure to Fill a Vacancy in the Office of Trustee. As with most other county offices, vacancies in the office of trustee are filled temporarily by the county legislative body. The person elected to fill the vacancy serves until the next countywide election occurring after the vacancy (5-1-104). Vacancies must be filled at a public meeting, with at least ten days' notice to the members of the county legislative body (5-5-113) and at least one week's notice in a newspaper of general circulation in the county (5-5-114). The notice must specify the office to be filled and the date, time, and place of the meeting. Nominations must be taken from the public at the meeting (5-5-115). When a vacancy occurs, it is the duty of the county clerk to give notice to the county legislative body; however, the county legislative body does not have to wait until the clerk gives such notice to act, but can act on information from other sources (8-48-108). A majority of all members of the county legislative body is necessary to constitute a quorum for the purpose of holding such an election (5-5-109(a)), as well as for transacting other business.

If a county legislative body member accepts the nomination as a candidate for the office of trustee, or any other county office when the office is being filled by the county legislative body (a vacancy, for example), that county legislative body member is automatically disqualified to continue in the office of legislative body member and a vacancy exists. If the county legislative body member does not win the election to fill the vacancy, then that former member can be elected to fill the vacancy created by the member's nomination to the county office, but the office of county legislative body member has to be filled according to the statutory provision relating to vacancies on the body (5-5-115).

Temporary Vacancies for Military Service. When a county official enters into military service, a temporary vacancy exists (8-48-201), which, except for the office of clerk and master, is filled temporarily by the county legislative

body (8-48-205). The official is entitled to resume the office upon return from military service if the term has not expired (8-48-202). If the official does not return prior to the expiration of the official's term of office, a successor is elected at the regular election. The person chosen by the county legislative body to fill the temporary vacancy must take the required oaths of office and post the required bond. The appointee receives the same salary and has the same powers and duties as the regular officeholder (8-48-208), but may not remove employees appointed by the regular official (8-48-209). Of course, the appointee must have the legal qualifications to hold office.

Temporary Successors. If the office of trustee becomes vacant due to death, resignation, or removal, the duties of the trustee are to be temporarily discharged by the chief deputy or by the deputy designated in writing by the trustee (8-11-111). This deputy serves until a successor is appointed by the county legislative body. The law also provides for temporary successors in several other county offices. It is important to note that this law only applies to the duties of the office and not to the office itself.

Vacancies and Collection of Taxes. If a trustee moves out of the state without accounting for state and county taxes, or a trustee dies shortly before or during the time appointed for collection of taxes so that a successor cannot be appointed in time to collect the taxes, that officer's sureties may go before the county legislative body and explain the circumstances. It is then the duty of the county legislative body to make a record of this proof and to pass a resolution authorizing the sureties, or any one of them, to collect taxes and any arrearage. This action vests the surety with the power to collect taxes, including the right to distrain and sell property for delinquent taxes (67-1-1629).

Campaigns and Elections

Campaign Contribution Limits Act of 1995 (1995 Public Chapter 531). In 1995 the state legislature enacted limits on campaign contribution amounts for state and local offices; previous law required disclosure of contributions (see section below), but imposed no limits on amounts. Beginning January 1, 1996, candidates for local offices may not exceed the following dollar limits on contributions made by individuals and multi-candidate political campaign committees (PACS): individual contribution - $1,000; PAC (except for political party PACS) - $5,000; total contributions from PACS (except political party PACS) - $75,000; total contributions from political party PACS - $20,000; and candidate's personal funds - $20,000 (although such limits on personal contributions are of questionable constitutionality). There are other limits on statewide offices (2-10-302).

These limitations apply for each election; general, special, primary, and run-off elections are all figured separately. With some restrictions, surplus funds a candidate has raised in one election campaign which are transferred to another campaign fund of the candidate are not included. A loan a candidate obtains from a financial institution is also discluded from the limits.

In addition to limitations on dollar amounts, there are also restrictions on the timing of contributions and fundraisers: generally, state officeholders and candidates for statewide offices may not accept or solicit contributions during the time of the legislative session. Furthermore, a PAC (except a political party PAC) may not make a contribution to a candidate for state or local office within ten days of the election date.

Contributions made or accepted in excess of these limits will not result in penalties if the funds are returned within sixty days of receipt. Violations can result in a maximum civil penalty of $10,000 or 115% of the amount of the prohibited contribution, whichever is greater (2-10-308).

Campaign Financial Disclosure Act of 1980. The Campaign Financial Disclosure Act of 1980 requires trustees and other candidates for public office to disclose certain information regarding campaign contributions and expenditures. Candidates for part-time offices paying less that $100 per month, whose expenditures do not exceed $500, are exempt from these requirements (2-10-101).

Contributions are broadly defined as "any advance, conveyance, deposit, distribution, transfer of funds, loan, loan guaranty, personal funds of a candidate, payment, gift, pledge or subscription, of money or like thing of value, and any contract, agreement, promise or other obligation, whether or not legally enforceable, made for the purpose of influencing a measure, or nomination for election or the election of any person for public office or for the purpose of defraying any expenses of an officeholder incurred in connection with the performance of the officeholder's duties, responsibilities or constituent services." (2-10-102). "Expenditure" is defined as "a purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value made for the purpose of influencing a measure or the nomination for election or election of any person to public office. . . . [and] also includes the use of campaign funds by an officeholder for the furtherance of the office of the officeholder." (2-10-102).

Before a candidate can receive any contributions or make any expenditures, the name and address of the political treasurer must be certified to the county election commission for local elections, or the registry of election finance for state races. The candidate may serve as political treasurer, or may appoint another person to serve. If a candidate files this designation more than one year before the election, then financial reports must be filed each February 1

through the year of the election. However, this annual report need not be filed if the reporting date falls within sixty days of a report otherwise required by the Act. (2-10-105).

Candidates must report all contributions received and expenditures made, as well as the dates of the receipts and expenditures, prior to each election, and again after each election. For primary elections, the report must encompass the first contribution received and expenditure made through the tenth day before the primary election. For regular and special elections, the report includes all contributions and expenditures from the last day included in the prior report, or if no prior report has been filed, from the first contribution received and expenditure made through the tenth day before the election. An independent candidate for an office which has a primary election must file all primary reports even though the independent candidate is not included on the ballot in the primary. Each of these reports must be filed no later than seven days before the election. No later than forty-eight days after each election, the candidate must report all contributions and expenditures from the date of the last report through the forty-fifth day after the election. If this statement has a zero balance, this is considered the final statement and no additional reports are required. The candidate is required to keep for one year after the election all records used to complete the reports. (2-10-105).

In addition to the financial transactions shown in these regular statements, substantial contributions or loans received within ten days of any election must also be reported. In a state election this means that any transfer of funds over $5,000 must be reported within seventy-two hours to the registry of election finance. Any amount over $2,500 in a local race triggers the requirements of this section and must be reported to the county election commission. The report is to be submitted on forms furnished by the registry, and should include the following information: amount, date contributed, date received, description and valuation of in-kind contributions, and for a loan, the name and address of lender, name of recipient, and details of any security agreement for the loan's repayment. (2-10-105).

Financial statements submitted under the Act must contain specified information about all income and expenditures during the period covered by the report. If neither expenditures nor contributions exceeded $1,000 during this time period, the report may simply state that fact. Otherwise the report should list separately any single contribution or expenditure over $100, including full name, address, date of receipt, and, for expenditures, purpose. Contributions of $100 or less are to be totaled and listed together, as are expenditures of this amount, though the latter are to be grouped by category. "In kind contributions," those other than money, are to be listed separately, though once again those of $100 or less are to be totaled. The registry of election finance has more specific information regarding in kind contributions. (2-10-107).

When a candidate or political campaign committee desires to close out a campaign account, it may file a statement to that effect at any time; however, the statement must show no unexpended balance, continuing obligations, or deficits (2-10-107). A candidate may close out a campaign account by transferring any remaining funds to another campaign fund and commencing annual filings on that account (2-10-106). Other permissible uses for unexpended campaign funds include returning the funds to contributors, transferring them to the political party, contributing them to an education trust fund or other specified tax-exempt organization, and using them to defray costs necessitated by the office. Additional uses are authorized where a candidate dies in office and has unexpended funds (2-10-114). At no time are campaign funds the personal property of the candidate, and they are not available to satisfy any debts other than campaign obligations (2-10-106). The candidate must decide upon the allocation of remaining campaign funds within sixty days after the election (2-10-114).

All campaign financial statements are available for public inspection, either at the registry of campaign finance for state elections (2-10-206), or the county election commission in local races (2-10-103). Anyone wishing to make an inspection must provide name, address, and whom he or she represents, if anyone else, and must provide identification evidence. A record of this information must be made and forwarded to the candidate within three days of the inspection (2-10-111). Any registered voter who believes information has been omitted or misstated may file a sworn complaint with the registry of election finance (state elections) or the district attorney general where the voter resides (local elections). However, anyone who knowingly files a false complaint or one for harassment purposes is liable for civil penalties and attorneys' fees (2-10-108). The registry of election finance or the district attorney general is responsible for investigating complaints and seeking injunctions to enforce these provisions (2-10-109).

Civil penalties may also be assessed against a candidate who fails to file a required report or who files it late. These fines range from $25 to $10,000 or more, depending upon the circumstances. (2-10-110).

Conflict of Interest Disclosures. Each candidate for public office is required to file a disclosure statement regarding possible conflicts of interest. Items listed in this report include the following: major sources of income over $1,000, investments over $5,000, all lobbying activities, subject areas in which professional services are rendered, bankruptcy adjudication, non-business loans in excess of $1,000 (with certain exceptions), and any other information the candidate wishes to disclose. The statement includes not only the interests held by the candidate, but also those of his or her spouse and minor children. (8-50-502).

Candidates in local races must file the conflict of interest statement with the county election commission in the county of the candidate's residence, while state race candidates file with the registry of election finance. Statements must be filed in the appropriate office within thirty days after the qualifying deadline for the desired office. The disclosure must be written on the form prescribed by the registry of election finance and must be signed by one attesting witness. The statement becomes a public record after it is filed. (8-50-501). As with improper financial disclosure, failure to report possible conflicts of interest can result in civil penalties. (8-50-505, 2-10-110).

[1] *Robinson v. Briley, 374 S.W.2d 382 (Tenn. App. 1963).*

[2] *Op. Tenn. Att'y Gen. 84-203 (June 21, 1984) regarding a candidate whose birthday occurs twelve days after an election.*

[3] *Op. Tenn. Att'y Gen. 86-03 (January 14, 1986) regarding definitions of the terms "residents" and "citizens".*

[4] *Op. Tenn. Att'y Gen. U90-61 (March 29,1990); see also Op. Tenn. Att'y Gen. 90-11 (February 6, 1990), which opines that the prohibition against holding two lucrative offices is only applicable to state offices.*

[5] *See Op. Tenn. Att'y Gen. U89-122 (October 24, 1989), relative to acceptance of resignations.*

II. POWERS AND DUTIES

CHAPTER CONTENTS

Basic Duties
Financial Responsibilities
Statutory Commissions
Penalties for Failure to Perform Duties
Records
Association Dues

II. POWERS AND DUTIES

Basic Duties

The county trustee has three major functions: (1) collecting the county's property taxes; (2) accounting for and disbursing county funds (including proper apportionment and determination of fund availability); and (3) investing temporarily idle county funds. The first of these duties, collection of property taxes, is dealt with in detail in the following chapter. The second and third primary responsibilities both relate to financial matters and are covered in detail in another Level II course, Financial Issues for County Trustees, developed and presented by The University of Tennessee's Center for Government Training.

According to statute (8-11-104), the trustee's basic duties include the following:

1. Collect all state and county taxes on property;[1]

2. Keep a fair and regular account of all the money received;

3. Receive the county's bills;

4. Keep a successive warrant book, or a book showing all bills received, ruled in columns, showing the number, payee or holder, date of the day of presentation, and amount of the bill;

5. Pay the legal demands (just claims) immediately if there are unappropriated funds sufficient to do so; otherwise, to deliver the demand to the owner endorsed, and pay it in numerical order (Interest might be due if so contracted by the county legislative body, but only until there are funds in the county treasury to make payment.);[2]

6. Keep fair and regular accounts of such payments;

7. Furnish the county executive with any papers and vouchers necessary for perfecting any settlement with any person who is accountable for county revenue; and

8. On going out of office:

   (a) Deliver all books and papers of the office to the successor, especially the book showing warrants payable; and

(b) Make settlement with the county executive and pay over the balance of funds remaining to the successor in office, making duplicate receipts (one of which is delivered to the county clerk to be recorded in the revenue docket).

Financial Responsibilities

Interaction with Other Officials. The trustee's office has significant interaction with almost every other department and official. The trustee's involvement as county treasurer, issuing checks and county warrants, results in day-to-day contact with other departments. Also, as receiving agent for fees generated by other offices, the trustee is necessarily involved to some extent in the operation of these other county offices. Additionally, the trustee interacts with other officials involved with the investment of idle county funds.

County Treasurer. Acting as treasurer for the county, the trustee receives and pays out county funds. Legislation passed in 1996 prohibits any official, including the trustee, from requiring or encouraging checks to be payable to the official in his or her own name, rather than the name of the governmental entity, the office, or the official's name and title (9-1-117).

As mentioned above, other officials receiving funds turn over some or all of these to the trustee. Under the fee system, discussed in Chapter 1, excess fees and commissions from fee officers, including the clerk and master, the county clerk, court clerks, and the register, are turned over to the trustee and become part of the county's revenue (county general fund). The trustee's excess commissions likewise become part of the county general fund (8-22-103). These excess commissions are paid over quarterly on the tenth of January, April, July, and September. The trustee must keep an accurate account of the commissions and transfer excess commissions of the trustee's office from the office commission account to the general fund by these quarterly dates (8-22-104).

As soon as possible after the quarterly dates, the trustee files a sworn report with the county executive showing the funds received from the other county offices and the excess commissions transferred by the trustee to the general fund. The trustee also files a sworn, itemized monthly statement with the county executive (8-22-104). If an official's salary is supplemented from county funds (in order to receive the statutory salary), that official must keep records and make an annual report of collections to the county executive. Filing such a report is a prerequisite to receiving the county funds since supplementary compensation is computed on the basis of the report (8-22-104; 8-24-106).

As discussed above, the county legislative body may choose to operate under the salary system instead of the fee system, paying salaries and expenses of an office and requiring all fees to be turned over monthly to the trustee. Sheriff's offices always turn over all fees to the trustee and do not operate using the fees collected. The sheriff's fees received by the trustee are held in the general fund of the county in a separate designated account. The trustee reports these funds at each regular meeting of the county legislative body, a report which is retained as a permanent record (8-22-113). Trustees also handle the accounting for drug fund monies, for which special accounts must be maintained (53-11-415).

Optional Checking System. As a result of legislation enacted in 1992 (5-8-210), county trustees have authority to switch from the traditional warrant system to a checking system for disbursing county funds. The trustee may adopt the checking system by giving at least thirty days' notice to each official authorized to sign checks. Under this system the county trustee must certify that funds are available to pay checks before they are released, thereby preventing department heads from issuing disbursement warrants when cash is unavailable in the account. Anyone who signs or issues a check without the required certification is subject to removal from office and personal liability for any improperly disbursed funds.

Official Bank Account (5-8-207). Every county official handling public funds is required to maintain an official bank account in a bank or banks within Tennessee and to deposit all funds within three days of receipt. All disbursements are to be made by consecutively numbered warrants or checks drawn on the official account(s). It is a misdemeanor to fail to comply with these requirements.

Annual Financial Report. In addition to the specific reporting requirements discussed elsewhere, the trustee, as well as other county officials, must submit an annual financial report after the end of the fiscal year (5-8-505). This report must be filed before the first Monday in September upon a form provided by the comptroller, and must be filed with the county executive and the county clerk, who provides copies to each member of the county legislative body (67-5-1902). A trustee who fails to file the financial report is not allowed any commissions (67-5-1902). These financial reports are no longer required to be published in the newspaper.

Statutory Commissions

Trustees receive a commission, for the benefit of the county, for receiving and disbursing funds. However, trustees may not demand or receive any compensation not specified by law (8-21-101), and may not receive any authorized commission until the duty or service for which it is granted has

been performed, unless specifically allowed by law (8-21-102). It is the duty of the courts to decide, upon application by the trustee, any question regarding proper compensation, thereby protecting a trustee acting pursuant to the decision (8-21-105). The compensation of the county trustee for receiving and paying over to the rightful authorities all moneys received is listed in the chart below (8-11-110):

1. State, County and Municipal Revenue:

    A. Sums up to $10,000 . . . . 6%
    B. Sums above $10,000 and up to $20,000 . . . . 4%
    C. Sums above $20,000 . . . . 2%

2. County Offices:

    A. Money collected from county officers on fees 1%
    B. Money turned over by clerks of the courts and other collecting officers 1%

3. Schools:

    A. Money on the school fund received from the state 1%

    B. From federal school lunch program funds handled by the trustee (however, this amount may be paid out of school funds or county general purpose funds if county legislative body so votes) . . . . ¼%

4. Highways:

    For handling county aid funds (54-4-103) 1%

5. Special District Funds:

    A. Watershed Districts
        1) For collection of assessments in watershed districts (69-7-139) 1%
        2) For collection of ad valorem taxes in watershed districts (69-7-145) 1%

    B. Drainage and Levee Districts
        1) For collection of assessments in drainage and levee districts (69-6-110; 69-6-835) 2%
        2) Certified statements, per 100 words (69-6-835) $1

3) For receiving money from the sale of bonds and warrants (69-6-931) . . . . ½%
4) For paying out money from the sale of bonds and warrants (69-6-931) . . . . ½%

C. Road Improvement Districts
1) For collecting and paying out assessments in a road improvement district (54-12-111; 54-12-424) . . 2%
2) Certified statements, per 100 words, for road improvement district (54-12-424) $1
3) For receiving money from the sale of bonds and warrants (54-12-425) . . . . ½%
4) For paying out money from the sale of bonds and warrants (54-12-425) . . . . ½%

6. Inquest Proceedings

Disposition of effects found on a dead body (38-5-119 through 38-5-121) 3%

The trustee is entitled to collect a different percentage for collection of municipal taxes upon a negotiated basis pursuant to an approved intergovernmental agreement (8-11-110).

Exemptions. The trustee is not entitled to any commission on money turned over by the trustee’s predecessor in office, money borrowed for county use, or money received from proceeds of bond sales. The trustee also receives no commission when the county legislative body, by resolution, elects to have the state spend county aid money. After such a decision, the legislative body may later elect to receive the funds, in which case the trustee once again receives compensation for handling them.[3] Finally, the trustee is not entitled to any compensation for handling funds paid by the state to the county or to a local education agency for the purpose of funding employees' social security contribution for teachers (8-11-110(g)).

Penalties for Failure to Perform Duties

If the trustee refuses to pay any county warrant or legal demand, it is a misdemeanor for which the trustee may be removed from office unless such disbursement would have exhausted the funds on hand (8-11-105). The trustee's sureties (on the trustee's bond) may be held liable if the county suffers losses as a result of the trustee’s failure to pay money owing by the county or to collect money due to the county (8-11-106). This is also true if the trustee pays claims in the wrong priority.[4]

If a trustee fails to charge or collect from those liable, and if by using reasonable diligence could have collected fees, commissions, or other compensation to which the county is entitled, or if the trustee fails to present the statement of receipts, then the trustee will be held liable to the county for the amount which should have been collected. This amount will be charged to the trustee and will be deducted from the trustee's salary or will be collected from the trustee as a personal debt (8-22-105). A trustee who makes or conspires with anyone, in any manner, to make a false or incorrect exhibit of receipts, statement of expenses, or statement of fact required under the statutes relating to accounting for fees, is guilty of a felony and upon conviction may be fined and imprisoned (8-22-106).

If the trustee fails or refuses to furnish the county executive with any vouchers or papers deemed necessary by the county executive for perfecting any settlement with any person accountable for county revenue, refuses to receive county warrants in payment of county taxes, or refuses to settle or pay as required by law, the circuit court, upon motion, will impose a $500 forfeiture upon the trustee (8-11-108). This forfeiture could be paid from the surety on the trustee's bond. According to this provision the trustee is required to accept a county warrant as payment for county taxes.

A trustee who, upon going out of office, fails to pay over the balance of revenue to the new trustee shall be liable, as are the sureties on the trustee's bond, on motion of the district attorney before the circuit court (8-11-109).

Records[5]

Public Records. All records of the office of trustee are open to the public for inspection and copying unless specifically made confidential by statute (10-7-503). The trustee is authorized to charge members of the public a reasonable fee for copying these records (10-7-506). Any person denied access to a public record can file a petition in the chancery court to obtain access; if the trustee willfully refuses to disclose a public record, knowing it to be such, the government can be assessed costs and attorneys fees (10-7-505).

There are specific statutes requiring confidentiality of state tax information. The general statute (67-1-1702) provides:

> *Returns and tax information shall be confidential, and except as authorized by this part no officer or employee of the state of Tennessee and no other person (or officer or employee thereof) who has or had access to returns or tax information under any provision of law shall disclose any return or tax information obtained by such officer or employee in any manner in connection with such officer's or employee's*

service as such officer or employee, or obtained pursuant to the provisions of this part, or obtained otherwise.

Violation of this confidentiality statute is a criminal offense. Because the statute makes reference to "tax information" and "returns" which are defined with reference to taxes collected by or on behalf of the state (67-1-1701), there has been some confusion over the release of tax information which is purely local, such as hotel/motel tax. However, the Tennessee Attorney General has issued an opinion that information regarding local hotel/motel taxes is subject to the state confidentiality statute.[6] The opinion further states that officials are not permitted to disclose tax information to non-governmental third parties without written authorization from the affected taxpayers, unless the information can be disclosed in a form which cannot be used to identify particular taxpayers. In addition to the general statute, confidentiality provisions also are found within the statutes pertaining to business taxes (67-4-722).

Certain employee records are confidential. These records would include unpublished telephone numbers, bank account information, social security numbers and driver's license information for the employee and members of the employee's immediate family or household. Where this confidential information is part of a file or document that would otherwise be public information (such as compensation records) the confidential information must be redacted so that the public may still have access to the non-confidential portions of the file or document (10-7-504).

Records on Computer Media. In 1993, the records law was amended to authorize the trustee and other governmental officials to maintain on a computer any information required to be kept as a record, instead of maintaining bound books or paper records, but only if certain standards are met (10-7-121). The standards for maintaining records on computer media are:

(1) The information must be available for public inspection, unless it is a confidential record according to law;

(2) Due care must be taken to maintain the information that is a public record during the time required for retention;

(3) All daily information generated and stored in the computer must be copied daily to computer storage media, and all copied storage media over one week old must be stored at another location; and

(4) The official must be able to provide a paper copy of the information when

needed or when requested by a member of the public. (10-7-121).

Records Disposition. Trustees are required to produce and maintain a large number of records, resulting in storage problems which require a disposal method for old and obsolete records. In recognition of the problems that counties encounter with records disposition, the General Assembly has created a statutory framework for the storage or disposition of county records (10-7-401 *et seq.*). This statutory scheme divides records according to whether they are temporary "working papers" or records of permanent value and then provides rules for each type. The schedules of retention and/or disposition for records of the office of trustee are set out in the manual *County Records Manual for the Trustee,* published by The University of Tennessee, County Technical Assistance Service (10-7-404).

Each county is required to establish a County Public Records Commission to oversee the storage or disposal process; in some cases original permanent records which have been reproduced or microfilmed may be destroyed with approval of the Commission (10-7-404). The County Public Records Commission has the authority to promulgate reasonable rules and regulations pertaining to the making, filing, storing, exhibiting, and copying of records (10-7-404).

<u>Association Dues</u>

The county legislative body is authorized to appropriate funds for dues to associations of particular county officeholders or associations made up of groups of officeholders. If the county legislative body appropriates funds to pay dues for the county executive, the county highway superintendent, or the members of the county legislative body, then they are also required to appropriate sufficient funds to pay the annual dues, up to $100 in at least one association, for the trustee as well as other county officials upon their request. The county legislative body is authorized to appropriate more than $100, in its discretion. None of the money appropriated can be used for lobbying activities (as defined in 3-6-102) for the purpose of influencing legislation relative to benefits or salaries of the association's members. (5-9-111).

[1] *This is an old statute enacted at a time when there was a state property tax.*

[2] *Davidson County v. Olwill, 72 Tenn. 28 (1879).*

[3] *According to 67-6-712, the trustee in Shelby County will not receive compensation for receiving and distributing local sales tax revenue if the county legislative body adopts this rule by a* b *vote. Also, trustees in Knox County do not receive such compensation,*

regardless of action by the county legislative body.

[4] *Howard v. Horner, 30 Tenn. 532 (1851).*

[5] *County Records Manual for the County Trustee, The University of Tennessee, County Technical Assistance Service (June 1985 Revised Edition).*

[6] *Op. Tenn. Att'y Gen. U94-059 (March 24, 1994).*

III. COLLECTION OF PROPERTY TAXES

CHAPTER CONTENTS

Classification of Property
Assessment
Exemptions and Tax Relief
The Tax Levy
Collection of Current Property Taxes
Collection of Delinquent Property Taxes
Miscellaneous Matters

III. COLLECTION OF PROPERTY TAXES

The primary source of revenue in most counties is the ad valorem property tax. This tax, based on value, is imposed directly upon property, and the tax generally follows the property even if it is sold or transferred to a different owner (67-5-2102).[1] The county trustee plays a major role in the collection of this tax.

Article 2, Section 28 of the Tennessee Constitution is the basic constitutional authorization to tax; it provides that counties and municipalities are authorized to levy a property tax on all property, real, personal, or mixed, based on the value of the property. Pursuant to this constitutional authorization, the General Assembly enacted Tennessee Code Annotated, Section 67-5-101, which provides that all real and personal property shall be assessed for taxation for state, county, and municipal purposes, except for the property declared exempt. In addition, the General Assembly has enacted legislation to enforce the power to tax, to declare certain property as exempt from taxation, and to determine various methods of ascertaining "fair market value." Counties (67-5-102) and municipalities (67-5-103) are authorized by the General Assembly to levy taxes on real property (67-5-801 *et seq.*), tangible personal property (67-5-901 *et seq.*), intangible personal property (67-5-1101 *et seq.*, 67-5-1201 *et seq.*), and public utility property (67-5-1301 *et seq.*) within their boundaries.[2] The taxing power is legislative and therefore cannot be delegated except as the Constitution authorizes.[3]

Statutes imposing taxes are construed in favor of a taxpayer and strictly construed against the taxing authority. In other words, ambiguities in interpretation of taxing statutes are construed against the county.[4] In spite of this rule of statutory construction, however, the court must give full scope to the legislative intent and apply a rule of construction that will not defeat the plain purpose of the statute.[5]

While the Tennessee Constitution mandates taxation according to value, the General Assembly determines the proper method for ascertaining value to insure uniform and equal taxation. In order to further the constitutional mandate, the legislature has defined value, for property tax purposes, to be fair market value, basically meaning the price the property would bring if it were voluntarily sold by an informed buyer to an informed seller, each acting sensibly and without undue pressure (67-5-601; TENN. CONST., art. ii §§ 28, 29). The uniformity requirement means that the tax burden is to be applied equally to nonexempt property within a constitutional classification in order to achieve uniformity in rate, valuation, and assessment (67-5-503).[6] The requirement does not mandate that a uniform amount of tax be paid by each citizen, but it does require consistent dates of maturity and application of interest, penalties, and costs.[7] Tax increment financing is not in violation of this uniformity provision.[8] Uniformity within the property classifications

established by Article 2, Section 28 of the Tennessee Constitution is affected by the Commerce Clause of the Federal Constitution, which, among other things, prohibits local tax discrimination against certain railroad and common carrier property.[9]

Taxes are distinguished from fees by the purposes for which they are imposed: a tax is to raise revenue, while a fee is to regulate.[10] Taxes are also different from special assessments, in that taxes are imposed for a general or public good while a special assessment is for a special project or improvement and is based on the advantages accruing to the burdened property in consequence of the improvement.[11]

Imposition of property taxes involves four primary steps: (1) classification of property into types so the proper rate can be applied, (2) assessment of property value, (3) levy of the tax, and (4) collection. Since the trustee is primarily involved only in the fourth step, the other three will be treated in a summary fashion. For more detail of these areas see the manual entitled *County Property Tax Manual*, published by the County Technical Assistance Service.

Classifications of Property

The Tennessee Constitution provides that property is to be divided into three classes for purposes of taxation: real property, tangible personal property, and intangible personal property (TENN. CONST., art. ii, § 28; 67-5-503).

Real Property. Real property is further divided into four subclassifications and assessed at a percentage of value as follows (67-5-801(a)):

1.	Public Utility	55%
2.	Industrial and Commercial	40%
3.	Residential	25%
4.	Farm Property	25%

If a parcel of real property is used for more than one purpose so that different assessment percentages apply, the tax is apportioned among the different uses according to guidelines established by rules and regulations of the state board of equalization (67-5-801(b)). If a parcel of real property is vacant, unused, or held for use, it is classified according to its immediate most suitable economic use, taking into consideration certain statutory factors (67-5-801(c)(1)). A leasehold is considered real property and is taxable as such, but only if the lessors/owner's interest is exempt (67-5-502(d)). Real property not falling within any of the definitions and classifications set forth above will be classified and assessed as farm or residential property (67-5-801(c)(2)).

Perfection in the classification system for the ad valorem tax is neither required nor attainable. For example, the constitutionality of taxing real property containing two or more rental units based on 40% of its value as industrial and commercial property while taxing real property containing one rental unit based on 25% of its value as residential property has been upheld as a reasonable classification even though some discrimination exists.[12] While the legislature may have discretion in classifying property, it must use a reasonable basis that is not arbitrary or capricious.[13]

Mobile homes used for commercial, industrial, or residential purposes are assessed as real property improvements to land. Special rules apply to mobile homes situated in a mobile home park (67-5-802).

Present Use Valuation. Although most property is classified and assessed according to its most suitable economic use, there are a few exceptions in which property is taxed according to its current use. For example, the concept of taxation based on present use valuation has been extended to certain residential property (67-5-601): property which is used solely for residential purposes, which is occupied by the owner for a period of at least 25 years, and which is zoned for commercial use is to be assessed based on its value for residential purposes. As a result of recent legislation, present use valuation also extends to a lineal descendent of the owner (1997 Public Chapter 195). A maximum of five acres is eligible for this treatment, and the owner must occupy the residence at least nine months out of the year.

Greenbelt Property. A similar treatment is available for greenbelt property. Under the Agricultural, Forest, and Open Space Land Act (67-5-1001 *et seq.*), also known as the Greenbelt Law, owners of land qualifying as agricultural, forest, or open space property may have it specially classified based on its current use, not its potential for conversion to another, higher value use. There is a limitation of 1500 acres per owner (67-5-1008), and a minimum requirement of at least fifteen acres except for open space land, which cannot be less than three acres (67-5-1004). Greenbelt status is obtained by application to the assessor, who uses a statutory formula for determining the special value (67-5-1008). The greenbelt classification is recorded in the office of the county register of deeds (67-5-1008(b)(1)).

If the property later becomes unqualified for greenbelt treatment by virtue of a disqualification for greenbelt treatment or withdrawal of land from the classification, then the county may recapture a portion of the tax savings by a “roll-back” provision (67-5-1008), which encompasses the preceding three years for agricultural and forest land and the preceding five years for open space land. The rollback tax is computed according to the amount of taxes saved by the difference in present use value assessment and the value assessment normally used (67-5-1008(d)).[14]

The seller is liable for the roll-back taxes if, as a result of the sale itself, the property no longer qualifies under the greenbelt provisions; if a buyer converts the property from a permissible greenbelt use after the sale takes place, the buyer is liable for any roll-back tax. There is also a lien against the land for unpaid roll-back taxes, a lien which can be enforced against the land even though the seller is primarily liable on the debt. If the seller dies, then the estate of the seller is liable for the rollback taxes (67-5-1008(f)).[15] The seller is not liable for roll-back taxes when the land is taken pursuant to eminent domain or other involuntary proceeding (except a tax sale). Also, if as a result of an involuntary proceeding, the acreage falls below the minimum required, the owner at the time of the taking, as well as that owner's lineal descendants, may continue to receive greenbelt treatment for the remaining property. In these cases, the agency or body doing the taking will be liable for the roll-back taxes (67-5-1008(e)).[16]

Rollback taxes are payable from the date written notice is provided by the assessor, and are not delinquent until March 1 the following year. Rollback taxes are a first lien on the property similar to other property taxes and a personal responsibility of the current owner or seller. Liability for rollback taxes may be appealed to the state board of equalization by March 1 of the year following notice. (67-5-1008).

Tangible Personal Property. Tangible personal property, except inventories and unused property, is classified according to its use and assessed at a percentage of its value as follows (67-5-901(a)):[17]

1.	Public Utility	55%
2.	Industrial and Commercial	30%
3.	All Other Tangible Personal Property	5%

Tangible personal property not in use is classified according to its immediate most suitable use, with consideration of such factors as normal use, past use, and classification of the real property on which it is located (67-5-901(a)(3)(B)). Leased personal property in the possession of the lessee is classified and assessed according to the use of the lessee (67-5-901(b)).

Assessment

The county assessor of property has the duty to determine the value of all property, including mineral rights and taxable leaseholds, other than public utility property valued by the Comptroller of the Treasury (67-5-502(1); 67-5-1301). The assessor must assess and place a value on all property in the county by May 20 of the tax year, although the date of valuation is as of January 1, except for adjustments due to improvements or damage to property. (67-5-504, 67-5-603). Assessors are required to maintain the

property tax maps of the county and to keep current indexes of taxpayers, including a description of the property on the tax books sufficient to identify it (67-5-804 through 67-5-806). The obligation to pay taxes is not avoided by the failure of an assessor to make an assessment.[18]

Correction of Erroneous Assessments (67-5-509). The assessor of property is to certify a corrected or revised assessment whenever there has been an error or omission in the listing, description, classification, or assessed value of property or any other error or omission in the tax rolls. The assessor's certification is made to the trustee, or city tax collector in the case of city taxes, reciting the facts and reasons for the revised assessment. The trustee then collects the taxes on the revised assessment. If the tax has already been paid prior to the assessor's certification of the corrected assessment, then the trustee refunds the overpaid tax within sixty days after receipt of the assessor's certification.

Correction of assessments must be requested by the taxpayer or initiated by the assessor prior to March 1, no more than the second year following the tax year for which the correction is to be made. For example, correction of an erroneous assessment for the 1999 tax year would have to be initiated before March 1 of 2001. If additional taxes are due as a result of the corrected assessment, they are not delinquent until sixty days after the date notice of the corrected assessment is sent to the taxpayer. Once suit has been filed to collect delinquent taxes, the assessment and levy are deemed valid and are not subject to correction. If the assessor does not correct an error in an assessment within thirty days after the request, or if the correction results in an increase in an assessment, the taxpayer may appeal directly to the state board of equalization. A defect in assessment, levy, or tax procedure will not affect the validity of any of these unless it results in a denial of minimum constitutional guarantees.

The only errors or omissions which can be corrected are those involving obvious clerical mistakes apparent from the face of the official tax and assessment records and which involve no judgment or discretion by the assessor. These do not include clerical mistakes in tax reports or schedules filed by a taxpayer nor matters of opinion. Examples of correctable mistakes include the name and address of an owner, the location or physical description of the property, misplacement of a decimal point, mathematical miscalculation, errors of classification, and duplicate assessments (67-5-509).

Back Assessment or Reassessment (67-1-1001. *et seq.*). "Back assessment" means the assessment of property which has been omitted from or totally escaped taxation. Back assessment encompasses property, including land or improvements, not identified or included in the valuation of property. The Code allows for "reassessment" when property has been assessed at less than its actual cash value by reason of connivance, fraud,

deception, misrepresentation, misstatement, or omission of the property owner or his or her agent. As a general rule, back assessment or reassessment must be initiated prior to September 1 of the year following the tax year for which the original assessment was made. Additional taxes due as the result of a back assessment or reassessment shall not be deemed delinquent until sixty days after the date notice of the back assessment or reassessment is sent to the taxpayer. However, if the omission or under-assessment has resulted from failure of the taxpayer to file the required reporting schedule, from actual fraud or fraudulent misrepresentation, or from collusion between the property owner and the assessor, back assessment or reassessment is extended to three years from September 1 of the tax year for which the original assessment was made. In this case, any taxes due shall become delinquent as of the date of delinquency of the original assessment. Additionally, the issuance of a notice of tangible personal property audit by the assessor tolls the running of the deadline during the period of the audit from the issuance of the notice until issuance of the audit findings. (67-1-1005).

Although formerly the trustee had responsibility for conducting back assessment or reassessment proceedings, now that duty lies with the county board of equalization. Either proceeding may be initiated by the assessor of property, the trustee, a chief administrative officer of a tax jurisdiction in which the property is located, any citizen or taxpayer of the state, or any state tax agent. One of these parties files a sworn written complaint with the county assessor of property, who then transmits the complaint to the county board of equalization for a decision. A person initiating a complaint, other than a public official, may be required to post a bond (67-1-1005). The decision of the county board of equalization, which may be appealed to the state board of equalization, has the force of a judgement against the person liable for the taxes (67-1-1007).

When a trustee collects back assessments and reassessments, he or she must keep a book to enter all property which is assessed, with a description of the property and the taxes collected. Upon final settlement with the county legislative body, the trustee must file a copy of the listing, under oath, stating that the copy is a true and perfect list of these taxes which he or she has collected. The trustee should report the amount of taxes collected to the county legislative body as "picked up" taxes at the same time the lists of errors are reported, with descriptions and locations of the property. The county clerk must certify copies of the report to officers with whom, by law, the trustee must settle. The trustee must account for these taxes in making final settlements of accounts (67-1-1011).

Innocent purchasers are protected from a back assessment or reassessment of inadequately assessed real property by a bona fide sale, although this provision does not apply to property that has totally escaped taxation. The taxes are a liability against the person owning the real property at the time of

the inadequate assessment. The burden of proving a bona fide sale is on the person owning the real property at the time of back assessment or reassessment (67-1-1004).

In the event that property is inadvertently under-assessed by the assessor, the property is not subject to a reassessment if there has been no connivance or fraud by the taxpayer, except, of course, for land totally escaping taxation (67-1-1003). The presumption of fraud, declared by the statute to arise from a grossly inadequate assessment, is not conclusive, but rebuttable.[19] "Connivance" means some conscious conduct by the taxpayer similar to but short of actual fraud which caused or induced the low assessment. Where property has been assessed below its actual cash value by the regularly constituted assessing authorities, failure of the taxpayer to report the under-assessment, even though the property is grossly under assessed, does not constitute connivance nor afford a basis of reassessment. Mere acquiescence in failure to report the under-assessment and in paying the under-assessment is not sufficient action to constitute fraud.[20] However, failure of the property owner to obtain a required building permit or to file a required written report would be grounds for reassessment, if that failure caused the property to be under assessed.[21]

Assessing Improvements (67-5-603). In determining the value of a piece of property the assessor is required to take into account real property improvements which are either damaged or constructed upon the property during the course of the year. The basic rule provides for adjustments in the amount of property tax owed in the year the improvement is destroyed or constructed, prorating the tax for the difference in value before and after the change in the improvement. If the status of an improvement has changed by September 1 of any year, an adjustment to the assessment of the property is mandatory, and can be made until the trustee relinquishes control of the tax roll after making the annual settlement of the trustee's accounts on the first Monday of September each ear. For property on which delinquent taxes are owing, adjustment can be made until suit has been filed to collect the delinquent taxes (67-5-1902).

Reappraisal (67-5-1601 *et seq.*). Reappraisal must be completed either in four, five, or six year cycles. In counties on a six year cycle, the first five years are used for on-site review, followed by a revaluation in the sixth year. In the third year, there must be an updating of all real property values if the overall level of appraisal for the jurisdiction is less that 90% of fair market value. Even if the jurisdiction as a whole meets the 90% level, there must be an update of subgroups which do not fall within 10% of the jurisdictional appraisal level.
Instead of the six year cycle, a county may opt for either a four or five year reappraisal schedule. Although few counties have chosen the four year option, it is available with the approval of the State Board of Equalization.

Under this plan, on-site review is to be accomplished in the first three years, followed by a revaluation in the fourth year.

A third option was passed in 1997 (1997 Public Chapter 318), which allows the assessor, with approval of the county legislative body, to choose a continuous five year cycle comprised on an on-site review of each parcel over a four year period, followed by revaluation in the fifth year. Counties adopting either of these latter alternatives are not required to update or index values as must be done on the six year cycle. These statutes also contain requirements for state reappraisal grants, planning, public notice and hearings, and noncompliance sanctions (67-5-1601 *et seq.*).[22]

Assessing Tangible Personal Property (67-5-901 *et seq.*). As discussed earlier, property taxes must be paid only for personal property used or held for use in the business or profession of the taxpayer. This property is to be reported before March 1 of each year on a schedule provided by the assessor. Leased personal property in the possession of the lessee is to be classified and assessed according to the use of the lessee, in the absence of an agreement for payment in lieu of taxes. As discussed earlier, non-business tangible personal property is legislatively presumed to have no value and therefore is not subject to the tax.

Damaged Tangible Personal Property (67-5-606) If after January 1 and before September 1 of any year, commercial and industrial tangible personal property is destroyed, demolished or substantially damaged by fire, flood, wind or any disaster certified by the federal emergency management agency (FEMA), and is not restored and no commercial and industrial tangible personal property is operated in its place before September 1 of that year, then the assessor will prorate the assessment of the commercial and industrial tangible personal property for the portion of the year prior to the date of the destruction or substantial damage. The trustee will collect the personal property taxes on the basis of the revised or corrected assessment as prorated by the assessor.

Appeals. The county board of equalization is the first level of administrative appeal for all complaints regarding the assessment, classification, and valuation of property for tax purposes, with authority to alter any of these (67-5-1402). The board is composed of five members chosen by the county legislative body who serve terms of two years, although there are some population class exceptions (67-1-401). The board begins meeting on June 1 of each year and remains in session as long as necessary, up to a maximum number of days. An aggrieved taxpayer must appear before the county board of equalization prior to its final adjournment, or any objection to assessment is waived (67-5-1401).

The State Board of Equalization is the next level of appeal. To maintain an appeal the taxpayer must pay the taxes which would be due if the taxpayer is successful in the appeal, as well as any delinquent taxes on the property (67-5-1512). These appeals are heard initially by a hearing examiner, subject to a right of appeal to the Assessment Appeals Commission (67-5-1502). After a decision by the Assessment Appeals Commission, a taxpayer may request full-board review by the State Board of Equalization, or the state board may review on its own initiative (67-5-1502). Appeals of back assessments and reassessments, which can be initiated by state, county, or taxpayer, are also heard by the State Board of Equalization (67-1-1005). A final action of the state board is subject to a *de novo* appeal in the chancery court (67-5-1511).

Interest and penalties are not imposed during the time a taxpayer is pursuing an appeal, whether before the county or the state board of equalization, except in limited circumstances (67-5-1512). When, as a result of this appeals process, a county has been ordered to make a refund of property taxes, the trustee needs no specific appropriation, but may pay the refund and any interest due from taxes collected from the year or years to which the refund relates. However, if those funds have been disbursed, then the trustee may use current collections prior to the allocation of revenue to the various county funds (67-5-1512).

Reporting Refunds. Refunds of over $10, except those to corporations, must be reported to the IRS on Form 1099-G. For payments ordered by the state board of equalization, the state board will provide a revised Form W-9 to persons and entities to which a tax refund is ordered. The recipient should then bring this completed Form W-9 to the trustee, who makes the refund. For refunds other than those ordered by the State Board of Equalization and for persons or entities forgetting to bring the Form W-9 provided to them by the state board, the trustee should provide the Form W-9 for completion prior to making the refund. While the trustee may not be able to refuse to make the refund, the trustee is supposed to withhold 20% from the property tax refund and remit it to the IRS using Form 941 if the taxpayer refuses to complete the Form W-9. In either case, the refund will be reported to the IRS by February 28 of the year following the year the tax refund is made.

Forms 1099-G are required to be filed with the recipient by January 31 of the year following the year payment is made. These must be filed with the IRS by February 28 with transmittal Form 1096. Failure to file these forms can result in penalties imposed by the IRS. The IRS requires copies of these forms to be kept for four years.

If the trustee files two hundred and fifty or more Forms 1099, then magnetic media reporting (3½ inch or 5¼ inch diskettes or magnetic tape) must be used; all offices with the same employer identification number would probably

be lumped together for determining the number of forms filed. Waivers of this magnetic media reporting requirement are due before November 30 and are made on Form 8508, Request for Waiver From Filing Information Returns on Magnetic Media. Application for this type of filing is made on Form 4419, Application for Filing Information Returns on Magnetic Media, from the IRS Martinsburg Computer Center. For more information, see the Instructions to Form 1099, published by the IRS.

Exemptions and Tax Relief

The Tennessee Constitution authorizes the state legislature to exempt certain types of property from taxation and to provide tax relief for stated classes of taxpayers (TENN. CONST., art. ii, § 28). In general, exempt property includes governmental property, growing crops, property owned by certain educational, religious, charitable, or nonprofit institutions, and other specific statutory exceptions (67-5-201 *et seq.*).[23]

The legislature has also provided authority for tax relief programs in which the state pays a portion of the county property taxes due on residences of qualified taxpayers. The program authorizes payment, or reimbursement of taxes already paid, for both the elderly and the disabled on the first $15,000 of the full market value of the residence, provided the taxpayer's annual income from all sources does not exceed the income limit established each year by the General Assembly (67-5-702, 67-5-703). For disabled veterans, as defined by the statute, payment is made on the first $140,000 of the residence's value (67-5-704).

Under previous law a voucher system was used to obtain tax relief credit. Former law required the applicant to request a credit voucher from the state Division of Property Assessments and then present the voucher to the trustee, who received reimbursement from the state. The application should be made directly to the collecting official (usually the trustee) on within 35 days after the delinquency date on a form provided by the State Board of Equalization. (67-1-701). The collecting official makes a preliminary determination of eligibility and may allow credit for the anticipated amount if the applicant appears eligible and pays the remainder of the taxes due. The official then forwards the application along with evidence of the credit to the Division of Property Assessments, which authorizes payment to the jurisdiction. However, if credit was erroneously given and paid by the state, the state may recover the payment from the jurisdiction. The county may then collect that amount from the applicant as property taxes; it becomes delinquent sixty days from the date the applicant is notified (67-5-701).

The county legislative body may provide for additional amounts of relief to taxpayers qualified under these statutes, but the relief may not exceed the

total taxes actually paid (67-5-701). Another option is a tax deferral program for elderly and disabled owners which counties and municipalities may provide (7-64-104; 7-64-201 *et seq.*), although few counties have implemented this plan. Finally, counties may also provide direct financial assistance to low income elderly residents (5-9-112). These funds are appropriated annually according to guidelines developed by the county legislative body.

The Tax Levy

The county legislative body sets the property tax rate, applicable throughout the county, on the first Monday in July or as soon after that date as is practicable (67-5-510). This rate applies beginning January 1 and is assessed to the owner of record as of that date (67-5-2101). The county legislative body may adopt a tax rate before adopting a budget (67-1-601). Some counties do not adopt a budget and set a tax rate until some time after July. In these cases the counties are able to continue operations by the adoption of a continuation budget which remains effective until another budget is passed. However, the county legislative body must adopt a budget by October 1 in order to continue receiving state school funds (49-3-316).

Certified Tax Rate (67-5-1701)**.** Before the county legislative body can set a property tax rate for the county, the tax assessor is required to certify to that body the total assessed value of taxable property in the county, including the total assessed value of all new construction and improvements not included on the previous assessment roll, and the assessed value of deletions from the assessment roll. The county legislative body must then certify a tax rate which will provide the same revenue which was generated by the tax the previous year. For the purpose of calculating the certified rate, the county legislative body must use the taxable value appearing on the roll exclusive of taxable value of properties appearing for the first time on the assessment roll.[24] Recent legislation authorizes the county legislative body to adjust the calculation, according to a method approved by the State Board of Equalization, to reflect extraordinary assessment changes anticipated to result from appeals. If in the following year the estimate proves to have been excessive, the Board will determine a recapture rate (1997 Public Chapter 218).

The State Board of Equalization is authorized to establish policies providing a procedure or formula for calculating the certified tax rate. Prior to final determination of the certified tax rate by the county legislative body, a proposed certified tax rate, including supporting calculations, must be submitted to the executive secretary of the State Board of Equalization for review. The executive secretary has fifteen days to report on the rate, after which time the county legislative body must finally determine the certified tax

rate; this rate may be adjusted in accordance with the executive secretary's report (67-5-1701).

To Levy a Rate in Excess of the Certified Rate. Several steps must be completed before a rate in excess of the certified rate may be adopted: (1) the county legislative body must advertise its intent to exceed the certified rate in a newspaper of general circulation in the county; (2) the county executive must furnish the State Board of Equalization with an affidavit of publication within thirty days after the publication; (3) a public hearing must be held on the issue; and (4) a resolution to levy a tax rate in excess of the certified rate must be adopted (67-5-1702).[25] However, these notice requirements do not apply to increases required by a reduction of the assessment roll by the state or county boards of equalization (67-5-1703).

Special School District Provisions (67-5-1704). There are particular provisions applicable to special school districts in reappraisal years, although there are exceptions to this rule for counties of the first, second, or third class. Under this statute, the trustee is required to calculate and certify an adjusted certified tax rate after certification of assessed values by the assessor. This rate is calculated without the inclusion of new construction, improvements, and deletions; the trustee must use the taxable value appearing on the roll exclusive of the taxable value of the properties appearing for the first time. The trustee then certifies this adjusted tax rate to the school board of the special school district within a reasonable time following the general reappraisal, and must post the adjusted tax rate at each school within the special school district, at the appropriate courthouse, and at one other public building within the county. If additional revenue is required in a special school district following this general reappraisal and adjustment to the tax rate, the general assembly must, by general law or private act, set the tax rate for the special school district at a level which will generate the ad valorem revenue necessary for the district.[26]

Use of Tax Revenues. A tax may only be used for the purposes for which it is levied and must be equal and uniform throughout the county.[27] A county general purpose levy is defined as a levy for all county purposes except roads, bridges, schools, debt service, and sinking funds, as well as levies pursuant to special tax laws (67-5-102).

Collection of Current Property Taxes by the Trustee

Tax Roll (67-5-807). As mentioned earlier, one of the trustee's primary functions is the collection of all property taxes levied by the county and by municipalities within the county, unless a municipality collects its own taxes (67-5-1801). The trustee's role in this process begins with the tax roll, which is prepared by the assessor or the county clerk and is delivered to the trustee

on or before the first Monday in October of each year (67-5-807). The trustee then collects the tax amounts shown in the tax roll.

There are specific statutory requirements for the tax roll (67-5-807), but briefly stated, it must be a bound or loose-leaf book, or unit tax ledger cards, arranged by districts or their subdivisions. It must be ruled to show names of owners in alphabetical order or by parcel numbers and must also contain information regarding lots, blocks, and acreage. Each piece of property must be described and valued, with property located inside municipalities separated from other county property. Personal property values are also listed under appropriate headings. Another column entry indicates taxes, which are calculated from the assessment values according to the rate set by the county legislative body. However, county officials may maintain such records on computer storage media instead of bound or loose-leaf books if proper standards are maintained as noted earlier (10-7-121).

The tax roll entries may be altered to reflect changes in the status of property as, for example, acquisition by an entity which is exempt from taxation (67-5-201), revisions due to damaged or incomplete improvements (67-5-603), roll back taxes on land previously classified as agricultural, forest, or open space lands (67-5-1008), or actions of the State Board of Equalization (67-5-1510). Notice of these revisions is usually provided to the trustee by the assessor in the form of a certificate of correction (67-5-509), or by a certificate of assessment from the State Board of Equalization (67-5-1512).

Tax Due Date. Property taxes imposed by counties are due and payable on the first Monday of October of the tax year (67-1-702). Municipal property taxes collected by the trustee are also due and payable on this date. However, when a municipal charter has provided for a consolidation of functions and offices, then the trustee, with the approval of the county legislative body, may establish another municipal due date to maintain existing municipal fiscal policies (67-1-701).

Payment of Taxes. Property taxes are paid to the trustee at the trustee's office at the county seat, although the trustee has authority to designate other collection sites, including a bank. Procedures for such a designation are included in the Tennessee Code (67-5-1801),[28] and require the trustee to establish an account with the bank for the deposit of property taxes. In order to pay at the bank, the taxpayer must show evidence of the amount owed. The bank may not accept delinquent taxes and must provide a deposit form to the taxpayer which states that the bank is acting as agent for the trustee. The bank then furnishes a daily accounting to the trustee, who must check amounts deposited and owed before issuing a tax receipt to the taxpayer.

<u>Tax Statements</u>. The use of tax bills or mailed statements indicating the amount of currently payable taxes is not specifically authorized or required of

the trustee except for statutory authorization in counties with consolidated forms of government (7-3-203)). Owners of land are presumed to know taxes are due without demand or personal notice.[29] Nevertheless, tax statements are almost uniformly used as a very effective way to remind taxpayers of their obligations to pay property taxes. This widespread use of mailed tax statements has been recognized in legislation dealing with notices of delinquent taxes, which requires these notices to be mailed with tax statements (67-5-2402). A county cannot include other charges on the property tax bill unless there is specific statutory authority, as is the case, for example, with solid waste special assessments (67-5-103).

Currency and Partial Payments. The trustee is required to accept constitutional and lawful U.S. currency or warrants on the state treasury in the hands of a person to whom they were issued and unpaid, U.S. coins, U.S. legal tender notes, and federal reserve notes (67-1-704(a)). The trustee may also receive payment by check, money order, credit card or debit card. The county legislative body is authorized by resolution to waive the processing fee that is otherwise added to the amount collected when payment is by credit card or debit card. (9-1-108).

Although previously only counties listed by population class were authorized to accept partial payments(67-5-1801), now as a result of legislation in 1997 trustees in all counties may accept partial payment of property taxes (1997 Public Chapter 187).[30] Any partial payment of taxes does not release the tax lien on the property, except to the extent of the partial payment; the trustee has the duty to accept the balance as if no partial payment has been made.[31] As a result of recent legislation, any county which implements a partial payment program after April 19, 1995, must submit a plan to the Comptroller of the Treasury before accepting any partial payments. This plan must indicate that the county has the accounting technology necessary for the program; it must also show that any increased costs will be met within existing resources or that the program has been approved by the county legislative body (67-5-1801).

Nonpayment of Checks. Trustees accepting checks may encounter problems with nonpayment. If checks are not paid, the taxpayer is still liable for the payment of the tax as well as all legal penalties and interest (9-1-108; 9-1-109). A "bad" check may be pursued under civil provisions (47-29-101) or under criminal provisions (39-14-121) of the Code but not under both provisions. A trustee or other official who receives a bad check may contact the office of the district attorney. If a check is not paid, most trustees void the receipt and proceed as if no check were tendered.

Date of Receipt (67-1-107). Any tax payment which is transmitted by U.S. mail to the trustee is deemed filed and received of the date on the postmark, or if the postmark is illegible, erroneous, or omitted, on the date the payment

was mailed, if that date can be established by competent evidence. Also, if the payment is postmarked no more than twenty-four hours after the last date for timely payment, it is to be accepted as if timely filed.

Part Ownership. Whenever a property owner owns an undivided interest in a specific portion of any property assessed to another, that part owner may pay the taxes on his or her portion and receive a receipt for payment in full for that share of the taxes. Prior to accepting such a payment, the trustee must be satisfied that the value placed on each portion is a correct relative valuation, either by agreement of the owners or by a certificate from the assessor stating that the assessor has fixed the valuation of that particular portion (67-5-1805). If the remainder is unpaid and the property later goes to a tax sale, the interest sold would be the tenant in common's undivided interest. A life tenant in possession is deemed the owner and is liable for the assessed taxes which accrue during that tenancy; taxes are not prorated between a life tenant and the remainder interest.[32]

Current and Delinquent Taxes. As a result of legislation passed in 1995, trustees were not allowed to accept current real property taxes if there were delinquent taxes outstanding on the property (1995 Public Chapter 259; 67-5-1801). However, that statute was again amended in 1996 to allow the trustee to adopt such a policy, although now the trustee is not required to do so (1996 Public Chapter 787).

Receipts (67-1-704). The trustee is required to issue a numbered and dated receipt, printed or written in ink or indelible pencil, for all property taxes paid by each taxpayer. This receipt must show the amount of the county tax levy and must show separately any state amounts; however, if receipts are mechanically produced, these amounts may be omitted (unless the taxpayer specifically requests that the information be placed on the receipt). The county legislative body is required to furnish a sufficient number of tax receipts, in duplicate book form, numbered consecutively from one; the receipts must display the year for which the taxes are due in large figures, not less than one inch deep. The trustee must account for each blank receipt in the final settlement account. When required, the trustee is to provide the county legislative body with duplicate receipts which are to be filed with the county clerk for reference.

The trustee is prohibited from charging taxpayers or others for any statement, certificate, or receipt of taxes, except for the fees and costs authorized for the collection of delinquent taxes (67-1-705). Also, it is a misdemeanor for the trustee to collect higher tax amounts than is directed by law (67-1-706).

Early Payment and Discounts for Early Payment. The county trustee may accept property taxes any time after July 10 if so authorized by resolution of

the county legislative body and if the tax rates are set and the tax rolls and receipts are prepared (67-1-702).

Additionally, counties and municipalities are authorized to provide, by ordinance or resolution, for a discount of taxes under one of two possible statutory systems. First, the county may provide a discount of 2% for taxes paid within thirty days of the tax due date (in other words, between October 1 and October 31) and/or for a discount of 1% for taxes paid more than thirty days, but within sixty days of the tax due date (between November 1 and November 30). Under the alternative method there is a discount of 3% for taxes paid by the end of July, 2% by the end of August, and 1% by the end of September. Although former law required mortgage holders to take advantage of these discounts and to notify customers of their availability, the current statute explicitly states that this is no longer the case (67-5-1804). Another recent statutory change removes the provision which stated that taxpayers receiving tax relief, such as the elderly, disabled, and disabled veterans (discussed above), were ineligible to receive early payment discounts (67-5-1804(a)).

Delinquency Date. Property taxes collected by the trustee are delinquent on the first day of March following the tax due date. For example, 2001 taxes are due and payable on the first Monday in October of 2001 and delinquent on March 1, 2002 (67-5-2010). The trustee is required to continue collection of delinquent taxes, as well as of penalty and interest, until the time the delinquent taxes are turned over to the delinquent tax attorney for collection (67-5-2008). Special provisions may apply to persons in military service under the Soldier's and Sailor's Civil Relief Act (50 U.S.C.A. 560) as well as under state law (67-5-2011); if the latter section applies in a particular case, the Commissioner of Revenue will give notice to the trustee. Special interest rates may also apply when the Federal Deposit Insurance Corporation owes the property taxes under 12 U.S.C.A. 1825(b)(3).

Penalty and Interest. On the first day of March following the tax due date, a penalty of ½% and interest of 1% are added to delinquent county and municipal taxes collected by the trustee. These penalty and interest amounts are thereafter added to delinquent taxes on the first day of each succeeding month until the taxes are paid (67-5-2010). There is no statutory authority which would authorize the trustee to waive accrued penalty and interest. Courts, using equitable powers, may relieve a taxpayer of interest and penalty under certain conditions; however, a taxpayer's inability to pay because of financial misfortune will not excuse the imposition of penalty and interest on the unpaid taxes.[33] As mentioned earlier, specific statutory provisions may affect imposition of penalty and interest for those in the military (50 U.S.C.A. 560) and for property transactions involving the Federal Deposit Insurance Corporation (12 U.S.C.A. 1825(b)(3)).

As discussed above, municipal property taxes become delinquent on the delinquency date established by charter or other applicable law. Like county taxes, municipal property taxes not paid on or before the established delinquency date accrue a penalty of ½% and interest of 1% for each month the taxes remain delinquent (67-5-2010).

If a county is undergoing a countywide reappraisal and the values established by the reappraisal program are not turned over to the county by October 1 of the tax year, no penalty and interest may be collected until five months after the date the tax roll is completed. The assessor is required to provide the trustee with written notification which specifically states the date that the tax roll was delivered to the trustee so that the five month period can be determined (67-5-1608).

Settlement of Taxes (67-5-1902). On or before the tenth day of each month, the trustee makes settlement for all taxes collected during the preceding month by reporting to the county executive (and the treasurer of any municipality) and by paying over the taxes collected to the proper account (i.e. the account for which the tax was levied, since a tax can only be lawfully spent for the purpose for which it was levied). These monthly settlements are included in the minutes of the county legislative body and specify credits allowed to the trustee (not including the trustee's compensation). Then, as discussed in the preceding chapter, the trustee files a complete annual report on or before the first Monday in September with the county executive and the county clerk, who provides copies to the county commission. A trustee who fails to make the statement is not allowed any commissions. Upon settling the office's accounts with the county executive, the trustee gets credit for commissions and all legal disbursements (67-5-1905).

Report of Delinquent Taxes and Double Assessments (67-5-1903). In addition to the annual financial report required in September, the trustee is also required to submit a report, verified by affidavit, to the county legislative body during its July term. This report lists all delinquent taxpayers and double assessments in the county, with the amounts due from each. After submission of the report, the trustee is allowed a credit for double assessments and for taxes reported insolvent or delinquent, if the county legislative body is satisfied that the taxes are uncollectible due to reasons other than the failure of the trustee to collect them. The trustee is not allowed a credit for items the county legislative body feels are inaccurate. All items which the county legislative body does not allow as a credit are charged against the trustee or the trustee's surety (67-5-1903).[34]

Refunds of Tax Payments. Taxes collected by the trustee are held in trust for the public, and therefore any disbursement, including refunds of overpaid taxes, must be made in strict compliance with statutory authority. The trustee is authorized to make refunds of tax overpayments only upon receipt of

certification from the assessor that the original assessment was in error. This refund must be made within sixty days after the receipt of certification from the assessor, and can be made even though the taxes were not paid under protest. If the trustee receives the certification prior to the receipt of the tax payment, the taxes must be collected only on the corrected assessment (67-5-509).

Tax payments, even overpayments, which are voluntarily made cannot be recovered by the taxpayer. A payment is voluntary unless made pursuant to an immediate and urgent necessity for making the payment. Payment made due to mistake of law or its application is a voluntary payment and cannot be recovered.[35]

Collection of Delinquent Taxes

Delinquent Tax Deputies and Delinquent Tax List (67-5-2001). The trustee is authorized to appoint the deputies necessary to collect delinquent taxes, who must take the oaths required of the trustee (8-18-112; 67-5-1901). The official bond of the trustee is held liable for the acts of these deputies, as well as for the actions of any constable or deputy sheriff who collects delinquent taxes. However, the trustee may require these officials to post a bond securing the faithful performance of their duties before turning over the delinquent tax list to them.

The trustee is required to prepare a list of delinquent taxpayers which is then turned over to the delinquent tax deputies for collection. This list must contain a description of the property and the amount of taxes due from each taxpayer. For real property, the list must identify the current owner and the owner's last known mailing address, if the owner can be identified; in these cases, there is no need to identify any former owners of the real property. However, identification of the current owner on the delinquent tax list does not alter the liability of the owner of the property as of January 1 of the tax year.

Deputies who have not received copies of the delinquent tax list have no authority to collect delinquent taxes.[36] Deputies who have received copies of the list are to collect delinquent taxes, make periodic settlements of the amounts collected, make final settlement, and return the delinquent tax list to the trustee by January 1 of the following year (67-5-2006).

The trustee has the discretion to publish the delinquent tax list in one or more county newspapers (67-5-2002). Trustees who decide to publish the list must give it to the newspapers at least twenty days before it is turned over to the delinquent tax attorney. However, failure of any taxpayer's name to appear on a delinquent tax list publication, or the publication of incorrect information, is not a defense to any suit for tax collection (67-5-2002).

The trustee is not entitled to compensation for the preparation of the delinquent tax list. Delinquent tax deputies also receive no additional fees for making collections; their compensation consists of salaries paid to deputies in accordance with T.C.A. Title 8, Chapter 20, or to trustees in accordance with T.C.A. Title 8, Chapter 24. However, in a levy or garnishment proceeding, a deputy is to receive the fees allowed by law in such cases; these fees are to be taxed as a part of the costs of collection. Postage and office expenses incurred by the trustee or deputies in collecting delinquent taxes are to be paid from the fees of the trustee. The county is not liable for costs where no collection is made by the deputy. (67-5-2007).

Collection of Delinquent Personal Property Taxes. For many years, numerous counties in Tennessee did not collect personal property taxes, action based on a statutory presumption that personal property owned and used in a business subject to the business tax (67-4-101 *et seq.*) had no value.[37] Federal legislation designed to prevent discrimination against public utilities has resulted in decisions that personal property tax (67-5-1301 *et seq.*) cannot be assessed against public utilities in any county where the personal property of businesses is presumed to have no value.[38] As noted earlier, however, statutory authorization for treating non-business tangible personal property as if it has no value has been upheld as constitutional by the Tennessee Supreme Court.[39]

Distress Warrants. There are several methods by which the trustee may choose to collect delinquent personal property taxes, one of which is through use of a distress warrant. All delinquent personal property taxes may be immediately collected by the county trustee, with the assistance of the delinquent tax attorney, if the trustee so requests. The trustee's tax books, as well as the delinquent lists furnished to deputy trustees, sheriffs, constables, or the delinquent tax attorney, have the force and effect of a judgment and execution from a court of record. These documents provide authority for the officers or delinquent tax attorney to distrain (seize) and sell a sufficient amount of the personal property to satisfy the delinquent taxes, interest, penalties, costs, and attorney's fees. The delinquent personal property taxes may be immediately collected by distraint (seizure through the use of a distress warrant) and sale of any personal property on which delinquent personal property taxes are owing (67-5-2003).

Pre-Seizure Notice. Prior to distraint (seizure) of any personal property, the trustee, deputy trustee, or delinquent tax attorney must give not less than ten days' written notice of the intended seizure by any of these methods: (1) delivering the notice in person; (2) leaving the notice at the dwelling place or usual place of business of the taxpayer; or (3) mailing the notice to the taxpayer's last known address.

Sale of Personal Property. Additional notice must also be provided after seizure and at least ten days before the sale. The time and place of the sale of personalty must be given by advertisement posted in three public places in the county, one of which is to be at the courthouse door. In addition, at least ten days' written notice of the sale must be given to the taxpayer by any of the methods outlined above. The officers conducting the sale must have the personal property present when it is sold, and must be allowed to retain (in addition to the taxes, interest, penalties, costs, and attorney's fees) all commissions, costs, and necessary expenses of removing and keeping the property distrained, including expenses of seizure, preservation, and storage of the property. If a delinquent tax attorney assists the trustee with the seizure and sale of the personalty, the attorney is entitled to attorneys fees. (67-5-2003; 67-5-2410).

Suits to Collect Delinquent Personal Property Taxes. Another method of collection is through inclusion of delinquent personal property taxes in the delinquent tax suit. The trustee may turn over the delinquent tax list thirty days after the taxes become delinquent to the tax attorney for inclusion in the suit to collect the prior year's delinquent real property taxes or as a separate lawsuit. This alternative may be used without prior issuance of a distress warrant. In the event the trustee turns over the delinquent list prior to the mailing of the current year's tax bill (which will include notice of delinquent taxes from the previous year), the trustee is required to forward written notice of the suit to collect delinquent taxes by first class mail to the last known property owner at least ten days before the delinquent list is turned over to the delinquent tax attorney.

A judgment obtained against a delinquent taxpayer may be enforced as a lien on the property, or as any other judgment, including garnishment or sale of property by the sheriff. If this procedure is used, the trustee is also authorized, as with real property tax records, to turn over records to the court clerk. (67-5-2003(g)).

Garnishments. In addition to the distress warrant procedure or a lawsuit, the trustee may have garnishments issued against the taxpayer, to be returned to any general sessions court in the district where the taxpayer resides, or any circuit or chancery court. (67-5-2004).[40]

Transfer of Business Liability (67-5-513). Another effective collection device requires any taxpayer who sells or terminates a business to notify the assessor and pay all outstanding personal property taxes within fifteen days of the sale or termination. The buyer must withhold sufficient funds from the purchase price to pay the tax liability, retaining those funds until the seller produces a certificate of compliance from the assessor and receipts from the trustee for the payment of all taxes. If the buyer does not withhold this amount, the buyer also becomes liable for the unpaid taxes.[41] This provision

greatly aids in the collection of personal property taxes, since the buyer who has failed to comply with its requirements can serve as an additional source of funds to satisfy the tax obligation of the seller.

Security Interest Sales. If any individual, partnership, joint venture, corporation, or other legal entity owns tangible or intangible personal property assessable by the county assessor or other authority and then sells the personalty, the party possessing the security interest must withhold from the proceeds of the sale an amount sufficient to satisfy the personal property taxes (47-9-101 *et seq.*). A party selling the property who fails to withhold such amount is personally liable to the trustee for these personal property taxes (67-5-2003).

Collection of Delinquent Real Property Taxes. The trustee also has responsibilities concerning the collection of delinquent real property taxes.

Tax Lien. To aid in the collection of real property taxes, there exists a lien on the property to secure payment of the tax. The lien for taxes becomes a first lien on the real estate as of January 1 of the tax year, and takes priority over pre-existing liens on the real estate (67-5-2101; 67-5-2102); the tax lien is superior to mortgage liens, regardless of whether the taxes accrue before or after the execution of the mortgage. However, this first lien may be superseded by prefiled federal tax liens.[42]

While real estate contracts may alter liability between the parties to the contract, the owner as of January 1 is responsible for payment of the tax for the entire year.[43] The tax lien attaches to all the fee (all interests in the land) and exists even if the owner is unknown or the land has been assessed in a wrong name. A lien for taxes assessed against a leasehold interest in real property or against any improvements on real property held by a tax-exempt owner extends only to the leasehold interest (67-5-2102).

In addition to the lien, property taxes are also a personal debt of the property owner as of January 1; if taxes are delinquent, they may be collected by suit as any other debt. The claims for the debt and for enforcement of the lien may be joined (67-5-2101). However, for a variety of reasons delinquent taxes on real property are most often collected through sale of the land.

Notices Prior to Tax Suit. Prior to the commencement of legal proceedings to sell real property for delinquent taxes, the trustee has several important notification responsibilities. The completion of these is vital, since the validity of the subsequent enforcement proceedings depends upon strict compliance with statutory requirements.

Notice of Delinquent Taxes on Current Bill (67-5-2402). With each year's current tax bill the trustee is required to include a notice of any tax delinquency on that property. The notice should read as follows:

Notice of Delinquent Taxes

> *In addition to this amount, you owe back taxes. Contact this office immediately or your property may be sold.*

____
County Trustee

This notice should be sent to all property owners on the trustee's list of delinquent taxpayers as well as those appearing on the list of owners whose property is subject to a delinquent tax lawsuit; the appropriate court clerk must provide this list to the trustee between June 1 and July 1 of each year (67-5-2403).

Publication of Notice of Intent to File Suit (67-5-2401). The trustee must also publish the following notice before the lawsuit is filed:

> *You are advised that after February 1, additional penalties and costs will be imposed in consequence of suits to be filed for enforcement of the lien for taxes against land; until the filing of such suits, taxes may be paid at my office.*

____
County Trustee

This notice must appear in one or more county newspapers, at least once a week for two consecutive weeks in January. The county pays the publication cost. If there is no newspaper published in the county, this notice must be posted at the courthouse.

Notice of Nonpossessory Interest (67-5-2502). Under previous law the owner of a non-possessory interest in real property was required to file a statement of that interest annually with the assessor, or waive any right to notice of a delinquent tax suit or sale. In 1996 the General Assembly deleted that requirement (1996 Public Chapter 787). Consequently, the trustee no longer has the duty to publish an annual notice regarding this former provision. The new law specifies that the delinquent tax attorney is to make a reasonable search for those owners and give them notice of the proceedings, receiving a reasonable fee set by the court for this service.

<u>Certificate for Timber Cutting</u> (67-5-2301 *et seq.*). In order to insure the collection of delinquent taxes on timberland, anyone who cuts or removes timber must first obtain a certificate from the trustee stating that no delinquent taxes exist on that land. A timber cutter who fails to obtain the certificate is liable for any delinquent taxes on the property; any equipment used to cut the

timber is subject to the lien for taxes. The trustee, the county executive, and the delinquent tax attorney are required to enforce this liability, and are authorized to obtain an injunction to prevent the unauthorized cutting or removal of any timber.

Return of Delinquent Tax List. After the trustee has received the delinquent tax list back from the deputies, has made settlement with them, and has published the notices discussed above, the trustee must deliver a list of all unpaid taxes to the delinquent tax attorney (67-5-2006; 67-5-2405). The trustee may accept payment for delinquent taxes until the suit is filed (67-5-2008).

Delinquent Tax Attorney. The delinquent tax attorney is chosen by the county trustee with the approval of the county executive (67-5-2404). The county trustee may not serve as county delinquent tax attorney because the trustee has a large role in setting compensation for the delinquent tax attorney.[44] Only one attorney each year is to be appointed to collect the delinquent taxes shown on the delinquent tax lists prepared for that year regardless of whether the county has two register's offices.[45]

In most counties the compensation for the delinquent tax attorney is determined in advance through negotiations between the trustee and the attorney, subject to the approval of the county legislative body (67-5-2404). In these counties,[46] the amount of compensation cannot exceed 10% of all delinquent land taxes collected by the attorney.[47] In the remaining counties, and in counties with metropolitan forms of government, there is no limit; however, in those counties a 10% penalty is added to the taxes upon the filing of the suit to provide compensation to the delinquent tax attorney (67-5-2410). The 10% penalty is computed on the base amount of delinquent taxes, not including accrued interest and penalties (67-5-2410).[48] The delinquent tax attorney is not entitled to compensation until the tax suits for the year have been filed.[49]

If the trustee and county executive fail to employ a delinquent tax attorney to initiate the delinquent tax lawsuit in a timely manner, the district attorney general has the duty to employ an attorney or bring a mandamus action to compel the trustee and county executive to retain an attorney to institute the lawsuit. Additionally, if the delinquent tax attorney fails to prosecute the delinquent tax lawsuit to a sale of the properties involved within five years of the filing of the suit, the trustee or county executive may request that the court remove the attorney, unless an explanation for the delay is provided. The removal terminates the attorney's lien for compensation. (67-5-2406; 67-5-2408).

Tax Suit (67-5-2405). After February 1 and before April 1, the delinquent tax attorney must file suit in chancery or circuit court of the county to collect

delinquent property taxes due the county or municipalities, as well as penalties, interest, and costs. The suit should include no less than twenty-five delinquent taxpayers, if there are that many, and may name all the delinquent taxpayers in the county. This action is to be afforded priority by the court. All suits are to be prosecuted according to the rules of the courts of chancery (67-5-2414). After the suit is filed, the trustee submits a list of uncollected taxes to the county legislative body and receives credit for any taxes included in the lawsuit (67-5-2407). Any defendant may have the case dismissed as to his or her property by paying the amount of taxes due plus interest, penalty, and court costs (67-5-2411).

There is no authority for the court to delay collection proceedings against property owners even though it would be in the county's best interest to allow the delinquent taxpayers additional time to pay their taxes. The court also has no authority to order taxes, interest, penalties, and other charges to be paid on an installment basis.[50] Tax suit complaints, once filed, may be amended according to the Rules of Civil Procedure to cure descriptions, add parties, join new owners, and other matters.

Fees and Expenses of Tax Suit (67-5-2410). There is no litigation tax in delinquent tax suits. However, in addition to the 10% penalty for expenses of prosecuting the suit, clerk's and sheriff's statutory fees are added, as are other court-ordered clerk's fees for basic services; the sheriff is to receive a $7.50 fee for service of process on each defendant when the sheriff serves the summons. Additional expenses ordered by the court, including but not limited to title examination fees, extra publication costs, survey fees, or other necessary costs, are considered as part of the court costs for purposes of the tax suit. If necessary to the prompt dispatch of suits, the court may order paid out of delinquent tax money on hand all reasonable expenses of prosecuting these suits in addition to that otherwise provided.

Notice. Each defendant named in the tax suit must be served by one of the methods authorized in the Rules of Civil Procedure; these methods include constructive service of process, or publication. However, the Constitution requires that defendants be given the **best** notice possible, which has been defined as that "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[51] Under this definition, constructive notice (publication) probably will not satisfy due process requirements when the identity of the property owner is readily ascertainable by the taxing authorities. However, Tennessee statutes specifically state that personal service of process on the defendant is unnecessary; the notice may be sent by certified or registered mail, return receipt requested (67-5-2415). Where the taxpayer is not properly before the court either by lack of notice or inadequate description, the resulting sale is a nullity and may be challenged.[52]

The trustee's records are important since they may be relied upon when finding names, addresses, and property descriptions for notices in tax suits.

In addition to this notice of the tax suit which is provided to defendants, an advertisement of the tax sale must be published in a newspaper or on printed handbills before the sale is held (67-5-2502). This advertisement sets out the names of property owners, a description of the property, and the amount of the judgment against each defendant.

Annual List of Property in Tax Suits. Between June 1 and July 1 each year, the clerk of the court in which tax suits have been filed must provide the trustee with a list of property involved in these suits. The list must be current up through June 1 of that year and must include identification of the property, taxpayers' names, and the years for which taxes are delinquent. A fee of $5 is added to the costs for each property, for each year of inclusion on the list (67-5-2403).[53]

Municipal Taxes Collected As Part of Tax Suit. If a municipality requests that its delinquent taxes be collected by the county delinquent tax attorney, the municipality must furnish the trustee or delinquent tax attorney with a certified list of delinquent municipal taxes (67-5-2404). This statutory provision and the one requiring the delinquent tax attorney to file the delinquent tax lawsuit by April 1 would seem to require that the municipality furnish this list on or before April 1 (67-5-2405). However, this interpretation seems to conflict with other statutes which require the municipality to provide such a list to the trustee by May 1 (67-5-2005). Note that the municipality is allowed to pursue collection of delinquent property taxes on its own (67-5-2005) pursuant to T.C.A. § 6-55-201 *et seq.*[54]

Tax Sale. Property at a tax sale is sold for cash, subject to the right of redemption, discussed below (67-5-2501). If no one bids at least the amount of the taxes, interest, penalties, and costs, the court clerk bids in that amount on behalf of the county. If the land is sold for county taxes only, the sale proceeds are to be applied in the following order: 1) payment of any unpaid balance of compensation due the delinquent tax attorney, up to 10% of the sale proceeds, 2) costs of the suit, 3) county taxes, and 4) municipal taxes (67-5-2506).

If the county purchases land at a tax sale, the county executive is to take charge of it and, during the statutory redemption period, must preserve the land from waste. At the end of this period, the county executive is to arrange to sell the land as expeditiously and advantageously as possible, working with a committee of four county commissioners to place a fair price on each tract of land (67-5-2507). If the land cannot be sold at the end of the statutory redemption period, this property held by the county is exempt from taxation,

regardless of use, as long as the property is held for the purpose of realizing the full amount of taxes, penalties, costs, and interest (67-5-2509).

Confirmation of Sale. A tax sale is not complete and title to the property does not pass until the sale is confirmed by the court. A tax deed issued before confirmation is void.[55]

Tax Sale Ledger. After the delinquent tax lawsuit is filed the trustee is required to maintain a ledger of all property sold at a tax sale and purchased by the state, county, or a municipality when the governmental entity has taken possession of that property. This ledger must be a well-bound book, properly indexed, containing a page for each parcel; it must show the taxes for which the property was sold, the book and page of the tax roll from which the taxes were obtained, and a list of the rents received or the net sale price, along with the distribution of those funds (67-5-2511). The trustee also indicates payment and tax exempt status on the current tax roll with the following or similar notation:

> *"Paid by sale of property, see Land Ledger, p. ____; actual possession having been taken by ____________ (County, City, or City and County)"*

If the governmental entity does not take actual possession of the property, it is not removed from the tax rolls and taxes continue to accrue, as is the case if the former owner or tenant is permitted to remain in possession of the property without the payment of rent to the governmental entity (67-5-2510; 67-5-2509).

Statute of Limitations. Taxes on real and personal property are barred, discharged, and uncollectible after the lapse of ten years from April 1 in the year following the year in which the taxes became delinquent, unless the property is sold at a tax sale during this period (67-5-1806). However, taxes are not barred after ten years if the county purchased the property at the tax sale and then did not take possession, thus leaving the property on the tax rolls pursuant to the provision above (67-5-2510).[56]

Redemption (67-5-2701 *et seq.*). Any time within one year from the confirmation of a tax sale, any person with a legal or equitable interest in property sold may "redeem" that property by paying all charges which have accrued on it (delinquent taxes, interest and penalties, and court costs and charges) as well as 10% interest on the purchase price from the date of the sale. People eligible to redeem include creditors, heirs, tenants in common, and those holding similar interests, as well as the delinquent taxpayers owning the property. The tax sale purchaser is notified within ten days and has opportunity to protest the redemption or to request additional funds for expenses in preserving the property. Before the enactment of this legislation in 1991 there were no specific statutes dealing with property sold at a tax sale; these transactions were governed by general principles regarding real

estate sold for any debt. Note that under prior law there was a two year redemption period, while the current law provides for a one year duration.

Miscellaneous Matters

Bankruptcy of the Taxpayer. Taxes are generally a high priority debt in a bankruptcy proceeding and are generally paid even though payment may be delayed or made in installments through a court-approved bankruptcy plan. Upon receiving a notice of bankruptcy, the trustee and other tax collecting officials are stayed (prohibited) from taking any action to collect property taxes. The automatic stay provisions of the United States Code allow notice of a tax delinquency to be issued. (11 U.S.C. § 362(b)(9)). However, any language in the notice beyond mere notification of the existence of delinquent taxes is probably prohibited. The Bankruptcy Code prohibits acts to obtain possession of property of the debtor or to collect on a claim against the debtor after the debtor files a bankruptcy petition (11 U.S.C. 362). Language in the delinquent tax notice concerning seizure and sale of property is probably prohibited under the law as an act to obtain possession of property or to collect on a claim against the debtor. This stay is in effect until the federal bankruptcy court terminates the stay.

Trustees should <u>always</u> file a proof of claim, showing amounts due plus interest and attorney's fees which can be recovered if the value of the property is sufficient. Proofs of claims are divided into pre-petition tax claims and post-petition tax claims. Pre-petition tax claims include all taxes for which liability has been incurred as of the date the debtor filed for bankruptcy, plus interest, costs, and penalties, plus post-petition interest to the extent that the value of the property is sufficient to permit it. Post-petition tax claims are for taxes assessed on the debtor's property after the date of the bankruptcy petition. These claims are generally treated as administrative expenses of the debtor's bankruptcy estate and are paid at the time they normally become due and payable (11 U.S.C. 506).

If a bankruptcy plan is filed pursuant to Chapter 11 or Chapter 13 (the bankruptcy provisions for persons or businesses attempting to reorganize), the trustee should examine the payment plan to determine whether or not to accept the plan. Once the plan is accepted, the trustee should make sure the payments under the plan are dispatched in a timely manner or contact an attorney to take appropriate steps if payments are not timely made according to the plan.[57]

Waiver of Personal Property Taxes for Defunct Business (67-5-2801). The trustee is authorized to request the delinquent tax attorney to seek a court waiver of all personal property taxes, penalties and interest for a defunct business operation. In order to qualify for the waiver, the business must have

ceased operations, its personal property cannot be located after a diligent search, and there is no fraud or intent to avoid taxes. A partial waiver is not authorized. Any wavier that is granted by the court is set forth as a credit in the monthly settlement and annual statement of the trustee.

Waiver of Penalty, Interest and Attorney Fees for Taxes on Environmentally Hazardous Real Property (67-5-2802). All or a portion of penalty, interest and attorney fees due on delinquent taxes may be waived by a court with jurisdiction over the delinquent tax lawsuit if the property is environmentally hazardous, the county legislative body has determined that no bid should be on behalf of the county at the tax sale, the waiver is made in conjunction with the cleanup of the property, and there is no fraud or intent to avoid taxes.

Debris Removal (5-1-115). The county governing body may choose to exercise statutory authority which allows the county to remove from real property accumulated debris which is harmful to the health, safety, and welfare of the population. Costs of this removal are assessed against the owner of the property and are placed on the tax rolls as a lien upon the property; these are collected in the same manner as are the county's taxes.

[1] *Tennessee Trailways, Inc. V. Butler, 373 S.W.2d 201 (Tenn. 1963).*

[2] *Edmondson v. Walker, 195 S.W. 168 (Tenn. 1917).*

[3] *Gibson County Special School District v. Palmer, 691 S.W. 2d 544 (Tenn. 1986).*

[4] *See, Tenn. Juris. "Taxation" § 3 at page 315 (1985).*

[5] *Knox v. Emerson, 131 S.W. 972 (Tenn. 1910).*

[6] *Treadwell Realty Co. v. Memphis, 116 S.W.2d 997 (Tenn. 1938).*

[7] *Shipp v. Cummings, 14 S.W.2d 747 (Tenn. 1929).*

[8] *Metropolitan Dev. & Hous. Agency v. Leech, 591 S.W.2d 427 (Tenn. 1979). Tax increment financing refers to the use of property taxes attributable to an increase in a property's value after development to retire the bond issue used to develop the property.*

[9] *Louisville & N.R.R. v. Public Serv. Comm'n, 631 F.2d 426 (6th Cir. 1980), cert. denied, 450 U.S. 959, 101 S.Ct. 1418 (1981).*

[10] *S & P Enters, Inc. v. City of Memphis, 672 S.W.2d 213 (Tenn. App. 1983).*

[11] *Weakley Co. v. Odle, 654 S.W.2d 402 (Tenn. App. 1983).*

[12]Snow v. City of Memphis, 527 S.W.2d 55 (Tenn. 1975) appeal dismissed, 423 U.S. 1083, 96 S.Ct. 873 (1976).

[13]General American Trans. Corp. v. State Board of Equalization, 536 S.W.2d 212 (Tenn. 1976).

[14]Op. Tenn. Att'y Gen. 88-81 (April 7, 1988).

[15]Op. Tenn. Att'y Gen. 87-27 (February 19, 1987); Op. Tenn. Att'y Gen.86-15 (January 23, 1986): This opinion also notes that in addition to use requirements pursuant to §§ 67-5-1001 et seq., T.C.A. § 67-5-1004 sets forth acreage requirements that must also be met in order to qualify under the Greenbelt Act.

[16]Op. Tenn. Att'y Gen.85-035 (February 13, 1985).

[17]While the TENNESSEE CONSTITUTION, Article II, Section 28, provides that all property shall be subject to tax, the General Assembly has enacted T.C.A. § 67-5-901(a)(3)(A) stating that non-business tangible personal property shall be assumed to have no value thus imposing no tax. The Tennessee Supreme Court approved this action when it ruled that the General Assembly can choose the method of valuation and can consider whether the tax itself is of any practical value, especially where the tax produces little revenue in relation to the cost of administration. Sherwood v. Clary, 734 S.W.2d 318 (Tenn. 1987); in accord with Lehnhausen v. Lake Shore Auto Parts, 410 U.S. 356 (1973). See also Op. Tenn. Att'y Gen. 89-89 (May 30, 1989). However, a previous legislative presumption that commercial personal property had no value was struck down, based on federal legislation designed to prevent discrimination against public utilities. Arkansas - Best Freight System, Inc. v. Cochran, 546 F. Supp. 915 (M.D. Tenn 1982). According to this case, a county may not assess personal property tax against specified public utilities if commercial personal property is deemed to have no value.

Tennessee's personal property taxation scheme has recently faced another discrimination challenge, based primarily on valuation of personal property. In 1991 the legislature passed statutory depreciation tables for business and industrial commercial property. Suits by several public utilities charged that these tables, among other factors, resulted in a discriminatory advantage for businesses. The state settled these lawsuits, obligating counties to return millions of dollars to the affected utilities. At the time this manual was being prepared, similar challenges from other utilities seemed likely, and counties stand to lose significant revenues.

[18]State v. Nashville C. & St. L. Ry., 137 S.W.2d 297 (Tenn. 1938).

[19]Eastland v. Sneed, 185 S.W. 717 (Tenn. 1915).

[20]Garner v. Rhea Realty Corp., 494 S.W.2d 783 (Tenn. App. 1971).

[21]Op. Tenn. Att'y Gen. 87-32 (March 6, 1987).

[22]See op. Tenn. Att'y Gen 92-61 (October 8, 1992) for a discussion of requirements for changing a reappraisal schedule.

[23]For a more complete discussion of exemptions, see Chapter 5 of County Property Taxes: A Guide to Collection (1994), published by the County Technical Assistance

Service.

[24] *Op. Tenn. Att'y Gen. 83-006 (January 7, 1983).*

[25] *Op. Tenn. Att'y Gen. U87-43 (April 13, 1987).*

[26] *Op. Tenn. Att'y Gen. 83-161 (April 20, 1983).*

[27] *Hancock v. Davidson County, 104 S.W.2d 824 (Tenn. 1937); Op. Tenn. Att'y Gen. 84-106 (March 26, 1984); Op. Tenn. Att'y Gen. June 12, 1979.*

[28] *Op. Tenn. Att'y Gen. 83-392 (November 18, 1983).*

[29] *M'Carrol's Lessee v. Weeks, 6 Tenn. (5 Hayw.) 246 (1814).*

[30]

In Davidson County the trustee is authorized to set a minimum amount acceptable as a partial payment; this minimum must be no more than the lesser of 15% or $25 (67-5-1801(e)(4)(C)).

[31] *White v. Kelly, 387 S.W.2d 821 (Tenn. 1965); Salts v. Salts, 190 S.W.2d 188 (Tenn. App. 1945).*

[32] *Sherrill v. Board of Equalization, 452 S.W.2d 857 (Tenn. 1970).*

[33] *Daniel v. Metropolitan Government, 696 S.W.2d 8 (Tenn. 1985).*

[34] *Insolvent property means property subject to tax liens, special assessments, improvement district liens, and other similar liens securing obligations in excess of the amount for which the property can be sold to a private purchaser at a tax sale. Former statutes authorizing tax liens on insolvent property to be compromised and settled (T.C.A. §§ 67-5-2601 et seq.) have been repealed.*

[35] *Hertz Corp. v. County of Shelby, 667 S.W.2d 66 (Tenn. 1984).*

[36] *Shipp v. Rarick, 67 S.W.2d 145 (Tenn. 1934).*

[37] *67-5-215(b) (deleted by 1984 Public Acts 793, § 1).*

[38] *Arkansas-Best Freight System, Inc. v. Cochran, 546 F. Supp. 915 (M.D. Tenn. 1982).*

[39] *Sherwood v. Clary, 734 S.W.2d 318 (Tenn. 1987).*

[40] *Op. Tenn. Att'y Gen. 85-274 (November 4, 1985).*

[41] *Note that a purchaser of a leasehold interest and inventory at a foreclosure sale is not a successor or purchaser of a business within the meaning of T.C.A. § 67-5-513. United American Bank v. Johnson, 9 TAM 16-2 (Tenn. Ct. App. E.S. 1984).*

[42] *U.S. v. Dyna-Tex, Inc., 372 F. Supp. 278, (1972).*

[43] *Op. Tenn. Att'y Gen. 86-39 (February 21, 1986).*

[44] *Op. Tenn. Att'y Gen. 82-68 (March 11, 1982).*

[45] *Op. Tenn. Att'y Gen. 88-100 (May 19, 1988).*

[46] *This provision applies to all counties except the following: (1) counties having a metropolitan form of government; (2) counties with a population of not less than 3,765 nor more than 5,200, not less than 6,600 nor more than 6,700, not less than 8,100 nor more than 8,200, not less than 12,300 nor more than 12,350, not less than 12,400 nor more than 12,550, not less than 14,700 nor more than 14,800, not less than 36,900 nor more than 37,100, not less than 56,200 nor more than 56,300 according to the 1970 Federal Census or any subsequent federal census.*

[47] *The language "delinquent land taxes" in T.C.A. § 67-5-2404 infers that only the delinquent property tax collected is to be used for the compensation of the attorney, without adding accrued interest and penalties to the amount. Also note, that the 10% limit may be increased to 20% in counties having a population of not less than 83,300 and not more than 83,400 (according to the 1980 Federal Census or subsequent federal census) if approved by a 2/3 vote of the county legislative body. T.C.A. §§ 67-5-2404(a)(1)(B), 67-5-2410(a)(1)(B).*

[48] *Also refer to Op. Tenn. Att'y Gen. U88-62 (June 1, 1988).*

[49] *State v. Bayless, 209 S.W.2d 504 (Tenn. App. 1947).*

[50] *Op. Tenn. Att'y Gen. 86-130 (July 22, 1986).*

[51] *Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983); See also Op. Tenn. Att'y Gen. 84-208 (June 27, 1984) regarding service of process in delinquent tax suits made by certified mail.*

[52] *Watson v. Waters, 694 S.W.2d 524 (Tenn. App. 1984).*

[53] *Op. Tenn. Att'y Gen. 83-287 (August 23, 1983).*

[54] *Op. Tenn. Att'y Gen. 87-106 (June 26, 1987).*

[55] *Marlowe v. Kingdom Hall of Jehovah's Witnesses, 541 S.W.2d 121 (Tenn. 1976).*

[56] *Op. Tenn. Att'y Gen. 83-379 (November 8, 1983).*

[57] *Bankruptcy Manual For County Treasurers, George M. Hilgendorf (1986).*

IV. ETHICS, OUSTER AND LIABILITY

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IV. ETHICS, OUSTER AND LIABILITY

Conflicts of Interest

General Law. The basic conflict of interest provision of state law prohibits the direct personal financial interest of the trustee in contracts, purchases, or work over which the trustee would have a duty to, in any manner, overlook or superintend. This basic conflict of interest statute (12-4-101) states in pertinent part:

> *(a) It is unlawful for any officer, committeeperson, director, or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract in which any municipal corporation, county, state, development district, utility districts, human resource agency, or other political subdivision created by statute shall or may be interested, to be directly interested in any such contract. "Directly interested" means any contract with the official personally or with any business in which the official is the sole proprietor, a partner, or the person having the controlling interest. "Controlling interest" includes the individual with the ownership or control of the largest number of outstanding shares owned by any single individual or corporation....*
>
> *(b) It shall not be lawful for any officer, committeeperson, director, or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract in which any municipal corporation county, state, development district, utility district, human resource agency, or other political subdivision created by statute shall or may be interested, to be indirectly interested in any such contract unless the officer publicly acknowledges such officer's interest. "Indirectly interested" means any contract in which the officer is interested but not directly so, but includes contracts where the officer is directly interested but is the sole supplier of goods or services in a municipality or county....*

This statute only prohibits conflicts of interest when the county official has a financial interest and will be voting for, overlooking, letting out, or in some manner superintending the work or contract. For example, a trustee could probably bid on providing ambulance service for the county, or selling computer equipment to the highway department, if that trustee would not be voting for or overlooking the contract in any manner. However, a trustee could not bid on or sell computer equipment to the trustee's own office. The penalty for violation of this statute is forfeiture of all compensation paid under the contract, dismissal from office, and ineligibility for the same or similar office for ten years (12-4-102).

The question often arises as to whether it is proper for a county official to have authority over a matter that will have a direct financial benefit to a relative, such as purchasing copying equipment from a nephew. The question becomes more complex when the person who will receive the direct financial benefit is the spouse of a county official. In a question involving the propriety of a person who was a member of the county board of education voting on matters affecting the salary of the spouse of that board member, the Attorney General has opined[1] that if the spouses commingle assets, the board member has an indirect conflict of interest and must acknowledge the interest and recuse himself or herself from voting. If the spouses do not commingle assets, it was the opinion of the Attorney General that the board member should not vote as a matter of public policy. The question of hiring a spouse is difficult, especially since, although no anti-nepotism statute is in effect, it is possible that the hiring of a spouse by the trustee could be considered a prohibited conflict of interest, particularly where assets of the couple are commingled.

The disclosure of indirect interests is required by the statute, which calls for "public acknowledgment" of such interests. What is necessary for public acknowledgment is unclear, especially in the context of an official such as the trustee who acts independently, as opposed to a member of the county legislative body who can announce an indirect interest prior to voting during a meeting. A trustee should therefore be careful in indirect conflict of interest situations to provide public notice of these interests prior to taking any action. For example, if a trustee purchases supplies from a corporation in which the trustee owns a small minority (not plurality) interest, this interest must be disclosed publicly. Because the trustee has no natural public forum, some form of written public notice via bulletin boards in the courthouse and notice in a newspaper of general circulation in the county may be appropriate.

It is important to note that the conflict of interest statutes make no distinction based on amount of financial interest, where there is a direct interest, apparently prohibiting even an inconsequential direct conflict of interest. However, the Attorney General has indicated that a significant interest might be required, as opposed to a *de minimis* interest. Since it would be very difficult to determine what a court might hold to be significant, and since the penalty for violation of the conflict of interest statute is so severe, a trustee would be well advised to consider any interest as being significant.[2]

Other Statutory Conflict of Interest Provisions. The 1957 Purchasing Law (5-14-101 *et seq.*) and the 1981 Financial Management Act (5-21-101 *et seq.*) both contain conflict of interest provisions. These are optional general laws which may or may not be in effect in a particular county. All of these provisions are at least as stringent as the general statute (12-4-101) discussed above.

The 1981 Financial Management Act contains the most stringent conflict of interest provision. This statute (5-21-121) provides:

(a) *The director, purchasing agent, members of the committee, members of the county legislative body, or other officials, employees, or members of the board of education or highway commission shall not be financially interested or have any personal beneficial interest, either directly or indirectly, in the purchase of any supplies, materials or equipment for the county.*

(b) *No firm, corporation, partnership, association or individual furnishing any such supplies, materials or equipment, shall give or offer, nor shall the director or purchasing agent or any assistant or employee accept or receive directly or indirectly from any person, firm, corporation, partnership or association to whom any contract may be awarded, by rebate, gift or otherwise, any money or other things of value whatsoever, or any promise, obligation or contract for future reward or compensation.*

This statute includes county employees as well as county officials within its prohibition. Further, the statute makes no distinction as to whether the interested person has any authority over the purchasing decision. The broad language of this statute prohibits county officials and employees from having any interest in any purchases or contracts made by the county.

No special definitions of direct or indirect interests are found in the 1981 Financial Management Act. Therefore, the general law definitions should be used for purposes of application of this provision involving purchasing of supplies, materials, or equipment for the county. Under this act, the director of finance or a purchasing agent makes purchases for offices such as the trustee. However, even though a purchasing agent makes the purchase following a requisition from the trustee, the trustee may not bid on the contract because of the broad language of the statute.

A similar situation holds in those counties under the County Purchasing Law of 1957, but the prohibition does not include county employees. The conflict of interest statute (5-14-114) contained in the County Purchasing Law of 1957 states:

(a) *Neither the county purchasing agent, nor members of the county purchasing commission, nor members of the county legislative body, nor other officials of the county, shall be financially interested, or have any personal beneficial interest, either directly or indirectly, in any contract or purchase order for any supplies, materials, equipment or contractual services used by or furnished to any department or agency of the county government.*

(b) *Nor shall any such persons accept or receive, directly or indirectly, from any person, firm, or corporation to which any contract or purchase order may be awarded, by rebate, gift or*

otherwise, any money or anything of value whatsoever, or any promise, obligation or contract for future reward or compensation.

(c) A violation of this section is a Class D felony.

Conflicts of Interest Based on Offices or Employment. Any county employee who is otherwise qualified may serve as a member of the county legislative body, notwithstanding the fact that such person is a county employee, except persons elected or appointed as county executive, sheriff, trustee, register, trustee, assessor of property, or any other countywide office filled by vote of the people or the county legislative body (5-5-102). Countywide officeholders may not be nominated for or elected to membership in the county legislative body. However, deputy trustees, secretaries and assistants may also hold the office of county legislative body member. Particular care must be taken to publicly acknowledge interests concerning matters relating to employment for such an employee/county legislative body member. Detailed procedures for acknowledging such interests and for restricted voting are provided for these county legislative body members (5-5-102 and 12-4-101). A county legislative body member may hold that office and seek another office, such as trustee, so long as the county legislative body is not filling the position. However, the person cannot hold both positions simultaneously.[3]

Common Law Conflict of Interest. Other situations not covered by statutes may also resent conflict of interest issues. These must be analyzed individually according to common law principles found in case law.

Time and Use of County Property Considerations

The trustee has a duty not to neglect the duties of the office. Therefore, while outside activities are permissible, they can cause problems if taken to extremes. For example, a trustee could sell computers during non-working hours, but if a contract called for the trustee personally to train the purchaser's employees to use the new equipment during regular working hours over the first month of operation, a serious question of neglect of duty could arise. Similarly, a small use of the telephone for personal business should not cause a problem, but if the trustee were also, for example, a real estate broker, the trustee could not use the office in a dual capacity, official and private, without violating various duties and violating the prohibition against use of public property for private purposes, which would be a form of official misconduct (39-16-402).

Criminal Offenses

The trustee should be aware of certain provisions of the state criminal code which may affect the trustee's official duties. The statutes contained in T.C.A. § 39-16-101 *et seq.*, which set out the offenses against the administration of government, are of primary interest to most public officials and employees. In addition to the provisions of the state criminal code, officials should be aware that there are a number of offenses that involve official misconduct, influence peddling, racketeering and wire and mail fraud that can serve as the basis for federal criminal prosecution.

Bribery Offenses. It is a criminal offense for any elected official to accept any bribe (39-16-102). Bribery, as commonly understood, is the act of giving or receiving a gift for the purpose of effecting the improper discharge of a public duty. A "kickback" is a bribe involving the payment of money or property to an individual for causing the county to buy from, to use the services of, or to otherwise deal with, the person making the payment. A kickback is often viewed as specific inducement for a particular sale, or as a reward for accomplishing a particular purpose.

Bribery is a Class C felony (39-16-102), and any trustee convicted under this statute may be punished by imprisonment for not less than three nor more than fifteen years and fined up to $10,000 (40-35-111). Persons convicted of attempting to bribe a public official are subject to the same punishment. The classic kickback situation, on a county level, involves a county official who is approached by a sales agent and is offered 10% of the purchase price if the county purchases equipment from the agent. The official is influential in the subsequent purchase of the equipment and receives the promised "cut." Both parties are guilty of bribery. It does not matter which party initiated the illegal transaction. Further, if the county official solicited the kickback, the county official would be guilty of bribery regardless of whether the sales agent agreed to pay the bribe. While bribery in terms of money is the most frequent and the most prosecuted form, other business practices that involve the giving of other amenities must be carefully scrutinized.[4]

Perks, which are usually small benefits that have no promise to act in any manner connected with them, generally are not considered a violation of law, but are prohibited by the broad language contained in the Purchasing Act of 1957 in those counties in which have adopted those laws. However, the difference between a perk and a bribe can be a subtle one of intent, so the trustee should be careful in accepting gifts or other benefits. It is possible that gratuities or perks, such as free food, lodging, and transportation given to a county official by private parties with whom the official conducts county business, may be considered a bribe. The greater the value of the perk or gratuity, the more difficult it would be to overcome the public's idea that "you don't get something for nothing."

In addition to this bribery offense, there are several related bribery offenses which are discussed below.

Soliciting Unlawful Compensation. A public servant who requests a pecuniary benefit for the performance of an official action knowing that he or she was required to perform that action without compensation or at a level of compensation lower than that requested has committed the offense of solicitation of unlawful compensation, a Class E felony (39-16-104).

Buying and Selling in Regard to Offices. This offense is committed when any person holding any office, or having been elected to any office, enters into any bargain and sale for any valuable consideration whatever in regard to the office, or sells, resigns, or vacates the office or refuses to qualify and enter upon the discharge of the duties of the office for pecuniary consideration. This offense is also committed when any person offers to buy any office by inducing the incumbent thereof to resign, to vacate, or not to qualify, or when a person directly or indirectly engages in corruptly procuring the resignation of any officer for any valuable consideration. This offense is a Class C felony. (39-16-105).

It is an exception to the offenses of bribery, solicitation, and buying and selling public office that the benefit involved is a fee prescribed by law to be received by a public servant or any other benefit to which the public servant was lawfully entitled, and it is a defense that the benefit was a trivial benefit incidental to personal, professional, or business contacts, which involves no substantial risk of undermining official impartiality, or a lawful contribution made for the political campaign of an elective public servant when the public servant is a candidate for nomination or election to public office (39-16-106).

Bribery for Votes. The Constitution and statutes also prohibit offering bribes for votes.[5] It is unlawful for any candidate for the office of trustee to expend, pay, promise, loan or become pecuniarily liable in any way for money or any other thing of value, either directly or indirectly, or to agree to enter into any contract with any person to vote for or support any particular policy or measure, in consideration of the vote or support, moral or financial, of that person (2-19-121). A violation of this statute, known as bargaining for votes, is a Class C misdemeanor (2-19-123). However, this does not render it illegal to make expenditures to employ clerks or stenographers in a campaign, for printing and advertising, actual travel expenses, or certain other allowed expenditures (2-19-124).

A stronger prohibition against bribing voters is found in the statute which makes it illegal for a person, whether directly or indirectly, either personally or through another person, to pay or give anything of value to a voter to influence the person's vote (or failure to vote) in any election, primary or convention (2-19-126). A violation of this statute is a Class C felony (2-19-

128). Voters are also prohibited from accepting bribes, and the same penalty applies. Betting on elections is also prohibited (2-19-129 through 2-19-131).

Misconduct Involving Public Officials and Employees. The criminal statutes relating to misconduct of public officials and employees are found in T.C.A. § 39-16-401 *et seq.* "Public servant" is broadly defined for these purposes a person elected, selected, appointed, employed or otherwise designated as an officer, employee or agent of government; a juror or grand juror; an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy; an attorney at law or notary public when participating or performing a governmental function; a candidate for nomination or election to public office; or a person who is performing a governmental function under claim of right although not legally qualified to do so (39-16-401).

Official Misconduct. A public servant commits an offense who, with intent to obtain a benefit, or to harm another, intentionally or knowingly:

1. Commits an act relating to the servant's office or employment that constitutes an unauthorized exercise of official power,

2. Commits an act under color of office or employment (acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity) that exceeds the servant's power,

3. Refrains from performing a duty that is imposed by law or that is clearly inherent in the nature of the office or employment,

4. Violates a law relating to the servant's office or employment, or

5. Receives any benefit not otherwise provided by law.

It is a defense to prosecution that the benefit involved was a trivial benefit incidental to personal, professional, or business contact, and involved no substantial risk of undermining official impartiality. The offense of official misconduct is a Class E felony. (39-16-402).

Official Oppression. A public servant acting under color of office or employment (acting or purporting to act in an official capacity or taking advantage of actual or purported capacity) who intentionally subjects another to mistreatment or to arrest, detention, stop, frisk, halt, seizure, dispossession, assessment, or lien that the servant knows is unlawful, or intentionally denies or impedes another in the exercise of enjoyment of any right, privilege, power, or immunity, when the servant knows the conduct is unlawful, commits the Class E felony of official oppression (39-16-403).

Misuse of Official Information. The Class B misdemeanor of misuse of official information is committed by any public servant who, by reason of information to which the servant has access in the servant's official capacity and which has not been made public, attains, or aids another to attain, a benefit (39-16-404).

Persons convicted of official misconduct, official oppression or misuse of official information are removed from office or discharged from the position. A public servant elected or appointed for a specified term is suspended without pay beginning immediately upon conviction in the trial court and continuing through the final disposition of the case, removed from office for the remainder of the term during which the conviction occurred if the conviction becomes final, and barred from holding any appointed or elected office for ten years from the date the conviction becomes final. A public servant who serves at will shall be discharged upon conviction in the trial court. An employee subsequently may obtain another public service position if the hiring authority so decides, after being fully informed of the conviction (39-16-406).

Purchasing Property Sold Through Court. A judge, sheriff, court clerk, court officer, or employee of any court commits an offense who bids on or purchases, directly or indirectly, for personal reasons or for any other person, any kind of property sold through the court for which the judge, sheriff, court clerk, court officer, or employee discharges official duties. A bid or purchase in violation of this provision is voidable at the option of the person aggrieved. This offense is a Class C misdemeanor, with no incarceration (39-16-405).

Interference with Governmental Operations. Under the umbrella of interference with governmental operations are the offenses of false reporting to law enforcement officers (39-16-502) and tampering with or fabricating evidence (39-16-503), both of which are illegal for all persons. Also, it is illegal for any person knowingly to make a false entry in, or false alteration of, a governmental record, or make, present, or use any record, document, or thing with knowledge of its falsity and with intent that it will be taken as a genuine governmental record, or intentionally and unlawfully to destroy, conceal, remove, or otherwise impair the verity, legibility, or availability of a governmental record. Destruction of or tampering with a governmental record is a Class A misdemeanor (39-16-504).

Also included within offenses against the administration of government are the offenses which constitute interference with government operations, including coercion of witnesses (39-16-507), coercion of jurors (39-16-508), improper influence of a juror (39-16-509), retaliation against a juror (39-16-510), and compensation for past action of a juror (39-16-511; 39-16-512).

The same broad definition of public servant applies to these offenses (39-16-501). As with other offenses, there may be a defense when the benefit is

trivial (39-16-513). Finally, it is a Class A misdemeanor for any employer to dismiss any employee because of jury service by the employee (39-16-514).

Obstruction of Justice. Included within the obstruction of justice offenses are the offenses of resisting stop, frisk, halt, arrest or search (39-16-602), evading arrest (39-16-603), and accepting or soliciting a benefit for refraining, discontinuing or delaying assistance in the prosecution of an offense, or "compounding" (39-16-604). It is a defense to the offense of compounding when the benefit accepted by the victim did not exceed an amount reasonably believed by the victim to be restitution or indemnification for loss caused by the offense. The offenses related to escape are found in T.C.A. §§ 39-16-605 through 39-16-608. It is an offense for any person to knowingly or intentionally permit or facilitate the escape of a person in custody (39-16-607), and it is unlawful for any person to provide an inmate with anything that may be useful for the inmate's escape with the intent to facilitate an escape (39-16-608). Failure to appear when lawfully issued a citation in lieu of arrest or when lawfully released conditioned on subsequent reappearance, or to knowingly go into hiding to avoid prosecution or court appearance is unlawful under 39-16-609.

Perjury Offenses. Perjury includes both the making of a false statement under oath and the making of a false statement, though not under oath, on an official document under certain circumstances (39-17-702). Aggravated perjury is a statement which constitutes perjury and which could have affected the outcome of the proceeding (39-16-703). It is a defense to aggravated perjury that a retraction is made before the completion of the testimony at the proceeding during which the aggravated perjury was committed (39-16-704). Inducing another to commit perjury or aggravated perjury is also an offense (39-16-705). It is not a defense to perjury or aggravated perjury that there was an irregularity in the oath (39-16-706).

Penalties. The criminal code provides that violations which may be punished by one year or more of confinement or by death are felonies, and violations punishable by a fine or confinement for less than one year are misdemeanors (39-11-110). Felonies are classified as either A, B, C, D or E and misdemeanors are classified as A, B or C (40-35-110). Sentence ranges are assigned to each classification as follows (40-35-112):

Felony	Years of Sentence
A	15 - 60
B	8 - 30
C	3 - 15
D	2 - 12
E	1 - 6

Misdemeanor	Years of Sentence
A	up to 11 months 29 days
B	up to six months
C	up to 30 days

The presumptive sentence for a felony is the minimum in each range, but the judge may increase the sentence based on enhancing and mitigating factors. Sentencing considerations are codified in the Criminal Sentencing Reform Act of 1989 (40-35-101 *et seq.*). Offenses which are not classified and for which no penalty is specified are considered Class A misdemeanors (39-11-111 and 39-11-114). Felonies for which no punishment is prescribed are considered Class E felonies (39-11-113).

Ouster

Article 7, Section 1 of the Tennessee Constitution provides that county officers, including the trustee, shall be removed from office for malfeasance or neglect of duty. The General Assembly has defined malfeasance, neglect of duty, and incompetency by statute (8-47-101), which states that county officials, including the trustee, may be ousted from office for the following:

1. Knowingly or willingly engaging in misconduct while in office;
2. Knowingly or willingly neglecting to perform duties required by law;
3. Being intoxicated in a public place;
4. Engaging in gambling; or
5. Committing any act violating any penal statute involving moral turpitude.

Decisions regarding whether a crime involves moral turpitude must be made on a case-by-case basis. In general, a crime involving moral turpitude reflects upon the moral fitness of a person, such as a crime involving dishonesty, murder, sale of drugs, prostitution, and possibly, any intentional and serious bodily harm to others. Many of the cases involving a determination of whether a crime is one of moral turpitude are those involving fitness for the granting of a license, such as a beer permit. For instance, the case of *Gibson v. Ferguson*[6] involved the question of a person's fitness for a beer permit. The case held that the offense of "rolling high dice for a Coke" and the offense of failing immediately to release seventeen bluegill fish were not crimes of moral turpitude. Generally, an official cannot be removed for a misdemeanor offense which does not involve a crime of moral turpitude.

Ouster proceedings are civil in nature and may be instituted by the attorney general, district attorney general, or county attorney, either on their own initiative or after a complaint has been made (8-47-102). It is the duty of these persons to investigate all written complaints accusing an official in that jurisdiction, and if the attorney determines that reasonable grounds exist for the complaint, to institute court proceedings to oust the official (8-47-103).[7] The privilege against self-incrimination may not be used by an official against whom ouster proceedings have been brought (8-47-107).

A group of at least ten citizens may also file ouster proceedings (8-47-110), posting security for the costs of the lawsuit. Upon request by the citizens, the attorneys named above must provide assistance (8-47-107).

Upon a finding of good cause, an official may be suspended from office by the judge pending the final hearing of the case, and the vacancy thereby created is then filled as would be any other vacancy (8-47-116, 8-47-117). The person filling the vacancy receives the same salary and fees which would have been paid to the suspended official (8-47-121).

Either party to an ouster proceeding may appeal, but the appeal does not operate to suspend or to vacate the trial court's judgment or decree, which remains in force until vacated, revised, or modified (8-47-123). An official who successfully defends an ouster suit will be restored to office and will be allowed costs of the cause and the salary and fees of the office during the time of any suspension (8-47-121).[8] The court may order the complaining party to pay costs and attorney's fees if the complaint is withdrawn or if the court finds the charges to be without merit (8-47-122). Where the ouster is successful, however, the full costs of the action will be adjudged against the ousted official (8-47-122).

As discussed previously, a conflict of interest violation (12-4-101) can result in a trustee's being ousted and found ineligible to hold office for ten years (12-4-102). In addition, a trustee who fails to account for and pay over all required taxes may be removed from office and may be required to pay a penalty of 2% per month from the time the taxes would have been paid, plus attorneys' fees; none of the amount due can be remitted after the matter has been placed in the hands of an attorney for collection (67-1-1616). Suits may be filed to collect these amounts by the state, the county or a city, and under some circumstances by taxpayers, according to the procedure established by statute (67-1-1617 *et seq.*). Willful failure to pay into the state treasury the tax revenues collected on behalf of the state is a Class E felony (67-1-1625).

Liability Problems

Liability exposure, particularly personal liability exposure, and also (because of the rapid rise in the cost of insurance) county liability exposure, is one of the most important subjects for trustees to understand. Tort reform has been a popular topic in recent years, but non-tort liability can in many instances be more costly to trustees and to counties. This chapter will discuss both tort and non-tort liability, including certain immunity provisions of law. Liability associated with personnel, one of the fastest growing areas of the law, will be mentioned only briefly in this course. Personnel is covered in depth in another course.

What is a tort? A tort is a civil action based on a violation of a duty imposed by law. A tort can be the result of an intentional act or a negligent act. An action can be both a tort and a crime, as, for instance, an assault could result in both criminal liability and civil liability. The plaintiff who claims to have suffered a tort must show an act, intentional or negligent, which violates a duty imposed by law, generally the standard of care an ordinary person would exercise in the circumstances, and damages resulting from the breach of duty. The violation of duty can be through misfeasance (the improper doing of an act), or by nonfeasance (omitting to do an act).

Tennessee Governmental Tort Liability Act. Prior to 1973, Tennessee counties were subject to the state's sovereign immunity for governmental acts, but were liable for damages resulting from proprietary activities. Governmental acts were those activities that were peculiar to governments, or activities only governments could provide, such as police protection, fire protection, education, or tax collection. Proprietary activities were those that could be provided by private as well as governmental entities, such as water and sewer service, electrical services, and mass transit.

In 1973, the Tennessee General Assembly enacted the Tennessee Governmental Tort Liability Act (29-20-101 *et seq.*), which provides that counties are immune under state law from all suits arising out of their activities, either governmental or proprietary, unless immunity is specifically removed by the law. It is important to remember that this immunity does not extend to liability under federal law.

In cases where the county is immune, county officials and employees may be individually liable, but only up to the liability limits established in the Tennessee Governmental Tort Liability Act (29-20-310(c)). When the case is one where the county can be liable, the official or employee is immune (29-20-310(b)). Willful, malicious, or criminal acts, or acts committed for personal gain, do not fall under the personal liability protective provisions of the Tennessee Governmental Tort Liability Act (nor do medical malpractice actions brought against a health care provider).

Members of all county boards, commissions, agencies, authorities, and other governing bodies created by public or private act, whether compensated or not, are absolutely immune from suit under state law arising from the conduct of the entity's affairs. This immunity is removed when the conduct is willful, wanton, or grossly negligent. (29-20-201).

Areas in which the Tennessee Governmental Tort Liability Act removes governmental immunity (*i.e.*, kinds of actions for which the county can be sued) are:

1. Claims arising from the negligent operation of motor vehicles;

2. Claims arising from negligently constructing or maintaining streets, alleys or sidewalks;

3. Claims arising from the negligent construction or maintenance of public improvements; and

4. Claims arising from the negligence of county employees (29-20-202 through 29-20-205).

There are exceptions to these areas where immunity is removed. These activities, for which the county is immune under state law, but for which the trustee or an employee may be liable, include claims arising from:

1. The exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;

2. False imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of privacy, or civil rights;

3. Issuing, denying, suspending, or revoking, or the failure to refuse to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization;

4. Failing to inspect or negligently inspecting any property;

5. Instituting or prosecuting any judicial or administrative proceeding;

6. Negligent or intentional misrepresentation;

7. Riots, unlawful assemblies, public demonstrations, mob violence and civil disturbances; or

8. Assessing, levying or collecting taxes (29-20-205).

Persons other than elected or appointed officials and members of boards, agencies and commissions are not considered county employees for purposes of the Governmental Tort Liability Act unless the court specifically finds that all of the following elements exist:

1. The county selected and engaged the person in question to perform services;

2. The county is liable for the compensation for the performance of such services and the person receives all compensation directly from the county's payroll department;

3. The person receives the same benefits as all other county employees, including retirement benefits and eligibility to participate in insurance programs;

4. The person acts under the control and direction of the county not only as to the result to be accomplished but as to the means and details by which the result is accomplished; and

5. The person is entitled to the same job protection system and rules, such as civil service or grievance procedures, as other county employees (29-20-107).

A regular member of the county voluntary or auxiliary firefighting, police or emergency assistance organization is considered to be a county employee without regard to the elements listed above (29-20-107(d)). The county cannot extend immunity to independent contractors or other persons or entities by contract (29-20-107(c)).

The county may insure, either by self-insurance or purchasing insurance, or indemnify (up to the new limits set in the Tennessee Governmental Tort Liability Act) its employees and officials, including trustees and the trustees' employees, for their liability exposure under the Tennessee Governmental Tort Liability Act (29-20-310(c)). The issue as to whether the trustee may purchase liability insurance as an expense of the office for trustees operating out of the fees of the office needs to be addressed by legislation.

The liability limits under the Tennessee Governmental Tort Liability Act (29-20-403) are as follows:

TYPE OF CLAIM	CURRENT LIMIT	7/1/02	7/1/07
Personal Injury or death, one person	$130,000	$250,000	$300,000
Personal Injury or death, one accident	350,000	600,000	700,000

(more than one person)			
Property Damage	50,000	85,000	100,000

It is important to know that these limits do *not* apply to federal civil rights actions in state or federal courts.

Actions under the Governmental Tort Liability Act must be commenced within 12 months after the cause of action arises (29-20-305), like other tort claims. This one year statute of limitations can be extended when claims involve persons under legal disabilities (incompetents, minors, etc.) or when the injured party has reasonably failed to discover the existence of his or her cause of action against the county, county officials, or employees.

Liability for Personnel Matters. The trustee has general authority over the personnel in the trustee's office. Important employment law considerations include hiring, compensation, benefits, termination, retirement, the federal Fair Labor Standards Act ("FLSA"), right-to-know statutes, reserve service, jury service, the Occupational Safety and Health Act, the Equal Pay Act, the Immigration Control Act, the insurance provisions of the Consolidated Omnibus Budget Reduction Act ("COBRA"), FICA and FIT withholdings, and maternity leave.

As an employer, the trustee must refrain from retaliating or firing based on the employee's exercise of a protected constitutional right (*e.g.*, freedom of speech), or a statutory right (*e.g.*, filing a workers' compensation claim). Discrimination must be avoided in every aspect of employment. Under state and federal law, an employer cannot discriminate against an employee or a potential employee based upon race, color, sex, religion, national origin, age or disability (including infectious, contagious or similarly transmittable diseases). Further, any form of sexual harassment is illegal. An individual may file a discrimination complaint with the Equal Employment Opportunity Commission ("EEOC") or the Tennessee Human Rights Commission ("THRC").

An employer cannot fire an employee solely for: (1) refusing to participate or remain silent about illegal activities; or (2) using an agricultural product not regulated by the alcoholic beverage commission that is not otherwise prohibited by law (*i.e.*, smoking) if the employee follows the employer's guidelines regarding the use of the product while at work (50-1-304).

Finally, the First Amendment to the United States Constitution prohibits patronage dismissals of certain types of governmental employees.[9] Patronage dismissals are those based upon political activity or affiliation.

Other Non-Tort Liability. The Tennessee Governmental Tort Liability Act does not apply to many types of actions filed in both state and federal courts. In state court, for example, compensation, breach of contract, inverse

condemnation, and many other types of common law and statutory causes of action can be the basis of a non-tort action. The limits of the Tennessee Governmental Tort Liability Act do not apply to these non-tort actions.

Breach of Contract. Counties are responsible for the breach of a contract entered into by the county. The extent of liability in such a contract action depends upon the terms of the contract and the damages suffered by the parties. The county could be required by the courts to perform a contract according to its terms in an action for specific performance.

When an official attempts to enter into a contract on behalf of the county without actual authority to enter into such a contract, the official may then be held personally liable for the performance of the contract.

Other Actions. There are numerous areas, including search and seizure, voting rights, improper arrest, discriminatory enforcement of statutes, and the use of unlawful force, which may result in lawsuits against the county based on the actions of law enforcement and other court personnel. These claims can result in lawsuits in federal court under the federal civil rights act (42 U.S.C. § 1983) or in state court under the same federal statutes or as common law actions.[10] A negligent action, unless it rises to the level of gross negligence, will not give rise to an action under § 1983.[11]

The federal antitrust laws (15 U.S.C. § 1 *et seq.*) provide that counties will not be held responsible for damages in antitrust actions, but the county can still be enjoined from doing, or mandated to do, certain acts. In general, county officials must take care in actions which restrict competition, such as granting of exclusive franchises, referring the public to particular attorneys or lending institutions, or giving different persons different access to records.

There is an extensive framework of other laws, both state and federal, applicable to counties. Consult your county attorney when you are uncertain about the legal implications of any action you are preparing to take.

[1] *Op. Tenn. Att'y Gen. dated July 15, 1983.*

[2] *Op. Tenn. Att'y Gen. 84-067 (February 16, 1984).*

[3] *Op. Tenn. Att'y Gen. 79-85 (November 1, 1979).*

[4]*"Gratuities May Cause Severe Implications for County Officials", Tennessee County News, March-April, 1982.*

[5]*Clariday v. State of Tennessee, 552 S.W.2d 759 (1976); State v. Prybil, 211 N.W.2d 308 (Iowa 1973).*

[6]*562 S.W.2d 188 (Tenn. August 30, 1976).*

[7]*See Op. Tenn. Att'y Gen. 95-069, which states discusses whether the conviction for DUI is sufficient evidence for ouster, as well as the duty of the district attorney general to institute such proceedings after investigation.*

[8]*Marshall v. Sevier County, 639 S.W.2d 440 (Tenn. Ct. App. 1982).*

[9]*See Rutan v. Republican Party of Illinois, 497 U.S. 62, 64 (1990).*

[10]*Poling v. Goins, 713 S.W.2d 305 (Tenn. 1986).*

[11]*Daniels v. Williams, 106 S.Ct. 662 (January 21, 1986); Nishiyama v. Dickson County, Tennessee, 814 F.2d 277 (6th Cir. 1987).*