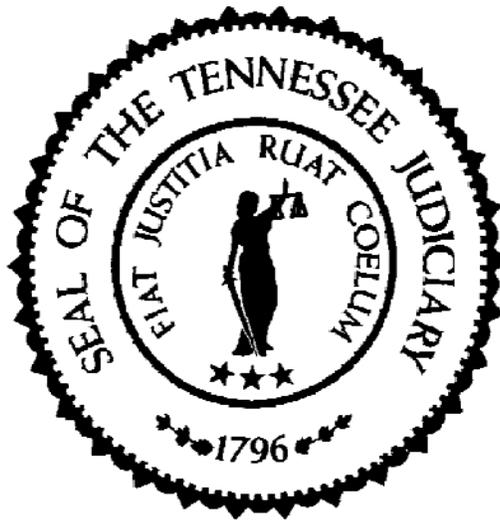


# CHILD DEPENDENCY BENCHBOOK

**Sixth Edition  
2008**



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Tennessee Court Improvement Program

Produced under the auspices of the Tennessee Court Improvement Program of the Tennessee Supreme Court, Administrative Office of the Courts, and the provisions of Section 13712 of Subchapter C, Part I of the Omnibus Budget Reconciliation Act of 1993: Grants for State Courts

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**PART I:  
PRACTICE AND PROCEDURE\***

**1.0 THE RIGHT TO REPRESENTATION IN JUVENILE DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS**

**1.01 The Parents' Right to Counsel**

1.01 (a) Parents' Right to Counsel

Tennessee Supreme Court Rule 13 provides a right to counsel for parents in child dependency and termination of parental rights cases. Tenn. Sup. Ct. Rule 13, Sec. 1(a)(1) and (d)(2)(B). The right to counsel attaches "throughout the case." Tenn. Sup. Ct. Rule 13, Sec. 1(d).

1.01 (b) Separate Counsel for Each Respondent

Given the potential for conflict of interest between parents in these types of proceedings, both the court and appointed counsel should ask questions to determine whether each parent should have his or her own attorney. Tenn. Sup. Ct. Rule 8 (Rules of Professional Conduct), RPC 1.7 and 1.9. The court must appoint separate counsel for indigent defendants in dependency and termination proceedings "having interests that cannot be represented properly by the same counsel or when other good cause is shown." Tenn. Sup. Ct. Rule 13, Sec. 1(e)(4)(C).

1.01 (c) Obligation of Court to Advise of Right to Counsel

The Supreme Court Rule requires the court to "advise any party without counsel of the right to be represented throughout the case by counsel and that counsel will be appointed if the party is indigent ...and requests appointment of counsel." Tenn. Sup. Ct. Rule 13, Sec. 1(d)(2).

In all stages of juvenile court proceedings in which a respondent is by law entitled to representation by an attorney, the respondent must be expressly informed of the right to an attorney, unless that right has been waived. Where a respondent is not represented by an attorney, the court must advise the respondent in open court of the right to an attorney and of the right to appointed counsel if indigent. The court cannot proceed with a dependency or termination hearing involving an unrepresented respondent unless the respondent has waived the right to an attorney. T.R.J.P. 30(f).

If a party before the court is not represented by an attorney, the court must ascertain whether the party understands the right to an attorney. "If the party wishes to retain an attorney, the court shall continue the hearing a reasonable time to allow the party to obtain and consult with an attorney. . . . If the party wishes an attorney and is indigent or otherwise entitled to an attorney, the court shall appoint an attorney pursuant to Tennessee Supreme Court Rule 13 or other applicable law to represent such party in all cases, or in which the court in its discretion deems the appointment of an attorney to be appropriate. In such cases the court shall continue the hearing a reasonable time to allow the party to consult with the appointed attorney." T.R.J.P. 28(b)(2).

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\* The editors wish to thank Mary Walker and Andrew Shookhoff for their enormous contributions to the development of Part One of this manual.

The term “reasonable time” must be interpreted consistently with the time limits on trial and disposition of dependency issues established by the Rules of Juvenile Procedure. If the non-indigent parent does not retain counsel within a reasonable time, the case must proceed to trial.

Special procedures exist for advising incarcerated parents in termination of parental rights proceedings of their rights, including their right to counsel. TCA § 36-1-113(f). These procedures are discussed in more detail in Section 18.05, below.

#### 1.01 (d) Requirement of Indigency Affidavit and Finding of Indigency

When a party who is entitled to representation requests the appointment of counsel and states to the court that he or she is financially unable to obtain counsel, the party must complete an Affidavit of Indigency Form provided by the Administrative Office of the Courts (AOC). Any appointment of counsel pursuant to this rule must be based on the court’s finding that the party is indigent, “which finding shall be evidenced by a court order.” Tenn. Sup. Ct. Rule 13, Sec. 1(e)(1) and (2). (See Forms Section.)

#### 1.01 (e) Waiver of the Right to Counsel

An indigent party may waive counsel only “with an understanding of the legal consequences of the rejection.” Tenn. Sup. Ct. Rule 13, Sec. 1(e)(3). When the indigent party chooses to waive counsel the court must comply with “all lawful obligations relating to waiver of the right to counsel” before the party may act pro se without the assistance or presence of counsel. Tenn. Sup. Ct. Rule 13, Sec. 1(f)(2). The refusal of counsel must be in writing, signed by the indigent party in the presence of the court and be made part of the record in the case. The court must also satisfy “all other applicable constitutional and procedural requirements relating to waiver of the right to counsel.” Tenn. Sup. Ct. Rule 13, Sec. 1(f).

The Rules of Juvenile Procedure establish specific inquiries that must be made before the court can accept such a refusal of counsel.

No respondent can be deemed to have waived the assistance of an attorney until:

- The entire process of notification of the right to counsel has been completed;
- A thorough inquiry into the respondent’s comprehension of the right to an attorney and into the respondent’s capacity to make the choice intelligently has been made by the court and the court has determined that the respondent thoroughly comprehends the right to an attorney, has the experience and intelligence to understand, and does understand the consequences of any waiver;
- The respondent has knowingly and voluntarily waived the right to counsel, and
- If the respondent is a child, that the child has consulted with a knowledgeable adult who has no interest adverse to the child. T.R.J.P. 30(g).

#### 1.01 (f) Obligation of Counsel to Continue Representation Throughout Proceedings

Appointed counsel shall continue to represent an indigent party throughout the proceedings, including any appeals, until the case has been concluded or counsel has been allowed to withdraw by a court. See Tenn. Sup. Ct. R. 14 (setting out the procedure for withdrawal in the Court of Appeals and Court of Criminal Appeals) and Tenn. Sup. Ct. R. 8, RPC 1.16. Tenn. Sup. Ct. Rule 13, Sec. 1(e)(5).

### 1.01 (g) Appointment of a Guardian Ad Litem to Assist in the Representation of a Mentally Incompetent Adult

In some cases, the parent's or guardian's mental or intellectual limitations may make it impossible for appointed counsel to consult with the client or to get meaningful direction for representing the client. In such circumstances, it is appropriate to seek the appointment of a guardian ad litem for the client. *See* Tenn. Sup. Ct. Rule 8, RPC 1.14. Tenn. Sup. Ct. Rule 13 does not provide for compensation of a guardian ad litem for a parent.

## 1.02 The Child's Right to Representation

The juvenile court judge is required by both statute and court rule to appoint a guardian ad litem for a child in any case where the interests of the child require a guardian ad litem or in any proceeding in which:

- The child has no parent, guardian or custodian appearing on the child's behalf;
- The child's interests may conflict with those of the parent, guardian or custodian;
- The child is alleged to be abused;
- The proceeding is based on an allegation of harm falling within the mandatory child abuse reporting laws (i.e., an allegation that the child is suffering from or has sustained any wound, injury, disability, or physical or mental condition caused by brutality, abuse or neglect); or
- The proceeding is a contested termination of parental rights proceeding.

Tenn. Sup. Ct., Rule 13, Sec 1(d)(2)(c) and (d). T.C.A. §§ 37-1-149(a), 37-1-403; T.R.J.P. 37; 39(d).

The court may appoint a guardian ad litem for a child on application of a party or on its own motion. Virtually all dependency and neglect and termination of parental rights proceedings require appointment of a guardian ad litem for the child based on one of these five criteria.

Appointment of a guardian ad litem is required, whether the petitioner is the Department of Children's Services (DCS), a licensed child placing agency, or a private party. The statute contemplates that the guardian ad litem is a separate entity and may not be one of the parties to the proceeding or the party's employee or representative. T.C.A. § 37-1-149.

Prior to taking appointments, a guardian ad litem must receive training appropriate to the role. T.C.A. §§ 37-1-149(a)(2).

## 1.03 Tennessee Supreme Court Rule 40: Guidelines For Guardians Ad Litem For Children In Juvenile Court Neglect, Abuse And Dependency Proceedings

### 1.03 (a) Application

Tennessee Supreme Court Rule 40 was enacted February 5, 2002. The guidelines set forth the obligations of lawyers appointed to represent children as guardians ad litem in juvenile court neglect, abuse and dependency proceedings pursuant to T.C.A. § 37-1-149, Rules 37 of the Tennessee Rules of Juvenile Procedure, and Supreme Court Rule 13. The adoption of the guidelines intended that they not be applied to proceedings in other courts that involve child custody or related issues. Tenn. Sup. Ct. Rule 40(a).

1.03 (b) Definitions.

As used in Rule 40, unless the context otherwise requires:

- Guardian ad litem is a lawyer appointed by the court to advocate for the best interests of a child and to ensure that the child's concerns and preferences are effectively advocated.
- Child's best interest refers to a determination of the most appropriate course of action based on objective consideration of the child's specific needs and preferences. In determining the best interest of the child the guardian ad litem should consider, in consultation with experts when appropriate, the following factors:
  - (i) the child's basic physical needs, such as safety, shelter, food, clothing, and medical care;
  - (ii) the child's emotional needs, such as nurturance, trust, affection, security, achievement, and encouragement;
  - (iii) the child's need for family affiliation;
  - (iv) the child's social needs;
  - (v) the child's educational needs;
  - (vi) the child's vulnerability and dependence upon others;
  - (vii) the physical, psychological, emotional, mental, and developmental effects of maltreatment upon the child;
  - (viii) degree of risk;
  - (ix) the child's need for stability of placement;
  - (x) the child's age and developmental level, including his or her sense of time;
  - (xi) the general preference of a child to live with known people, to continue normal activities, and to avoid moving;
  - (xii) whether relatives, friends, neighbors, or other people known to the child are appropriate and available as placement resources;
  - (xiii) the love, affection and emotional ties existing between the child and the potential or proposed or competing caregivers;
  - (xiv) the importance of continuity in the child's life;
  - (xv) the home, school and community record of the child;
  - (xvi) the preferences of the child;
  - (xvii) the willingness and ability of the proposed or potential caretakers to facilitate and encourage close and continuing relationships between the child and other persons in the child's life with whom the child has or desires to have a positive relationship, including siblings; and
  - (xviii) in the case of visitation or custody disputes between parents, the list of factors set forth in 36-6-106.

Tenn. Sup. Ct. Rule 40(b).

1.03 (c) General Guidelines

- The child is the client of the guardian ad litem. The guardian ad litem is appointed by the court to represent the child by advocating for the child's best interests and ensuring that the child's concerns and preferences are effectively advocated. The child, not the court, is the client of the guardian ad litem.
- Establishing and maintaining a relationship with the child is fundamental to representation. The guardian ad litem shall have contact with the child prior to court hearings and when apprised of emergencies or significant events affecting the child. The age and developmental level of the child

dictate the type of contact by the guardian ad litem. The type of contact will range from observation of a very young or otherwise nonverbal child and the child's caretaker to a more typical client interview with an older child. For all but the very young or severely mentally disabled child, for whom direct consultation and explanation would not be effective, the guardian ad litem shall provide information and advice directly to the child in a developmentally appropriate manner.

- The obligation of the guardian ad litem to the child is a continuing one and does not cease until the guardian ad litem is formally relieved by court order. The guardian ad litem shall represent the child at preliminary, adjudicatory, dispositional and post-dispositional hearings, including the permanency plan staffings, court reviews, foster care review board hearings and permanency hearings. The guardian ad litem should maintain contact with the child and be available for consultation with the child between hearings and reviews. For a child who is very young or severely mentally disabled, the guardian ad litem should regularly monitor the child's situation through contacts with the child's caretakers and others working with the child and through periodic observations of the child.

Tenn. Sup. Ct. Rule 40(c).

#### 1.03 (d) Responsibilities and duties of a lawyer guardian ad litem.

The responsibilities and duties of the guardian ad litem include, but are not limited to the following:

- Conducting an independent investigation of the facts that includes:
  - (i) Obtaining necessary authorization for release of information, including an appropriate discovery order;
  - (ii) Reviewing the court files of the child and siblings and obtaining copies of all pleadings relevant to the case;
  - (iii) Reviewing and obtaining copies of Department of Children's Services' records;
  - (iv) Reviewing and obtaining copies of the child's psychiatric, psychological, substance abuse, medical, school and other records relevant to the case;
  - (v) Contacting the lawyers for other parties for background information and for permission to interview the parties;
  - (vi) Interviewing the parent(s) and legal guardian(s) of the child with permission of their lawyer(s) or conducting formal discovery to obtain information from parents and legal guardians if permission to interview is denied;
  - (vii) Reviewing records of parent(s) or legal guardian(s), including, when relevant to the case, psychiatric, psychological, substance abuse, medical, criminal, and law enforcement records;
  - (viii) Interviewing individuals involved with the child, including school personnel, caseworkers, foster parents or other caretakers, neighbors, relatives, coaches, clergy, mental health professionals, physicians and other potential witnesses;
  - (ix) Reviewing relevant photographs, video or audio tapes and other evidence; and
  - (x) Engaging and consulting with professionals and others with relevant special expertise.
- Explaining to the child, in a developmentally appropriate manner:
  - (i) the subject matter of litigation;
  - (ii) the child's rights;
  - (iii) the court process;
  - (iv) the guardian ad litem's role and responsibilities;
  - (v) what to expect before, during and after each hearing or review;

- (vi) the substance and significance of any orders entered by the court and actions taken by a review board or at a staffing.
- Consulting with the child prior to court hearings and when apprised of emergencies or significant events affecting the child. If the child is very young or otherwise nonverbal, or is severely mentally disabled, the guardian ad litem should at a minimum observe the child with the caretaker.
- Assessing the needs of the child and the available resources within the family and community to meet the child's needs.
- Considering resources available through programs and processes, including special education, health care and health insurance, and victim's compensation.
- Ensuring that if the child is to testify, the child is prepared and the manner and circumstances of the child's testimony are designed to minimize any harm that might be caused by testifying.
- Advocating the position that serves the best interest of the child by:
  - (i) Petitioning the court for relief on behalf of the child and filing and responding to appropriate motions and pleadings;
  - (ii) Participating in depositions, discovery and pretrial conferences;
  - (iii) Participating in settlement negotiations to seek expeditious resolution of the case, keeping in mind the effect of continuances and delays on the child;
  - (iv) Making opening statements and closing arguments;
  - (v) Calling, examining and cross-examining witnesses, offering exhibits and introducing independent evidence in any proceeding;
  - (vi) Filing briefs and legal memoranda;
  - (vii) Preparing and submitting proposed findings of facts and conclusions of law;
  - (viii) Ensuring that written orders are promptly entered that accurately reflect the findings of the court;
  - (ix) Monitoring compliance with the orders of the court and filing motions and other pleadings and taking other actions to ensure services are being provided;
  - (x) Attending all staffings, reviews and hearings, including permanency plan staffings, foster care review board hearings, judicial reviews and the permanency hearing;
  - (xi) Attending treatment, school and placement meetings regarding the child as deemed necessary.
- Ensuring that the services and responsibilities listed in the permanency plan are in the child's best interests.
- Ensuring that particular attention is paid to maintaining and maximizing appropriate, non-detrimental contacts with family members and friends.
- Providing representation with respect to appellate review including:
  - (i) discussing appellate remedies with the child if the order does not serve the best interest of the child, or if the child objects to the court's order;
  - (ii) filing an appeal when appropriate; and
  - (iii) representing the child on appeal, whether that appeal is filed by or on behalf of the child or filed by another party.

Tenn. Sup. Ct. Rule 40(d).

1.03 (e) Responsibilities and duties of a guardian ad litem when the child's best interests and the child's preferences are in conflict.

- If the child asks the guardian ad litem to advocate a position that the guardian ad litem believes is not in the child's best interest, the guardian ad litem shall:
  - (i) Fully investigate all of the circumstances relevant to the child's position, marshal every reasonable argument that could be made in favor of the child's position, and identify all the factual support for the child's position;
  - (ii) Discuss fully with the child and make sure that the child understands the different options or positions that might be available, including the potential benefits of each option or position, the potential risks of each option or position, and the likelihood of prevailing on each option or position.
- If, after fully investigating and advising the child, the guardian ad litem is still in a position in which the child is urging the guardian ad litem to take a position that the guardian ad litem believes is contrary to the child's best interest, the guardian ad litem shall pursue one of the following options:
  - (i) Request that the court appoint another lawyer to serve as guardian ad litem, and then advocate for the child's position while the other lawyer advocates for the child's best interest.
  - (ii) Request that the court appoint another lawyer to represent the child in advocating the child's position, and then advocate the position that the guardian ad litem believes serves the best interests of the child.
- If, under the circumstance set forth in sub-section (b), the guardian ad litem is of the opinion that he or she must advocate a position contrary to the child's wishes and the court has refused to provide a separate lawyer for the child to help the child advocate for the child's own wishes, the guardian ad litem should:
  - (i) subpoena any witnesses and ensure the production of documents and other evidence that might tend to support the child's position;
  - (ii) advise the court at the hearing of the wishes of the child and of the witnesses subpoenaed and other evidence available for the court to consider in support of the child's position.

Tenn. Sup. Ct. Rule 40(e).

1.03 (f) Guardian ad litem to function as lawyer, not as a witness or special master.

A guardian ad litem may not be a witness or testify in any proceeding in which he or she serves as guardian ad litem, except in those extraordinary circumstances specified by Tennessee Supreme Court Rule 8, RCP 3.7.

A guardian ad litem is not a special master, and should not submit a report and recommendations to the court.

The guardian ad litem must present the results of his or her investigation and the conclusion regarding the child's best interest in the same manner as any other lawyer presents his or her case on behalf of a client: by calling, examining and cross examining witnesses, submitting and responding to other evidence in

conformance with the rules of evidence, and making oral and written arguments based on the evidence that has been or is expected to be presented.

Tenn. Sup. Ct. Rule 40(f).

#### **1.04 Compensation for Counsel for Parents, Guardians ad Litem for Children and Counsel for Children Appointed Pursuant to Tenn. Sup. Ct. Rule 40(e)(2)**

Supreme Court Rule 13 applies to appointments of counsel for parents, guardians ad litem for children and counsel for children, appointed pursuant to Tenn. Sup. Ct. Rule 40(e)(2), in indigency cases. The Rule sets the hourly compensation rate at forty dollars per hour for time reasonably spent in trial preparation (time spent preparing the case) and fifty dollars per hour for time reasonably spent “in court” (time spent before the judge on the particular case). Tenn. Sup. Ct. Rule 13, Sec. 2(c)(1) and (2). Supreme Court Rule 13 does not apply to appointment or compensation of counsel for a non-parent or a guardian ad litem appointed for an incompetent parent in dependency and termination of parental rights cases.

In dependency proceedings, there are two separate phases in which the attorney for the parent, guardian ad litem for the child and counsel for the child, appointed pursuant to Tenn. Sup. Ct. Rule 40(e)(2), are compensated. Compensation for each phase should be submitted on separate claim forms.<sup>1</sup> A copy of the appointment order must be attached to the claim form. Tenn. Sup. Ct. Rule 13, Sec. 6(a)(3). The two phases are:

- **Adjudicatory/Dispositional Phase:** from the filing of the dependency petition through the dispositional hearing, including the preliminary hearing, ratification of the initial permanency plan, adjudicatory and dispositional hearings. The maximum compensation for this phase is \$750. Tenn. Sup. Ct. Rule 13, Sec. 2 (d)(4)(A). If the court certifies the case for this phase as complex or extended the maximum compensation is \$1500. Tenn. Sup. Ct. Rule 13, Sec. 2(e)(3)(A).
- **Post-Dispositional Phase:** post-disposition through permanency for the child, including foster care review board hearings, post-dispositional court reviews and permanency hearings. The maximum compensation for this phase is \$1000. Tenn. Sup. Ct. Rule 13, Sec. 2 (d)(4)(B). If the court certifies the case for this phase as complex or extended the maximum compensation is \$2000. Tenn. Sup. Ct. Rule 13, Sec. 2(e)(3)(B).

The AOC will compensate attorneys a maximum \$1,000 (or \$2,000 if the court certifies that the case is complex or extended) in the following proceedings:

- Termination of parental rights hearing; Tenn. Sup. Ct. Rule 13, Sec. 2 (d)(4)(C). {Certified complex or extended, Tenn. Sup. Ct. Rule 13, Sec. 2 (e)(3)(C)}.
- Direct or interlocutory appeal to the Court of Appeals; Tenn. Sup. Ct. Rule 13, Sec. 2 (d)(3)(C). {Certified complex or extended, Tenn. Sup. Ct. Rule 13, Sec. 2 (e)(3)(C)}.
- Direct or interlocutory appeal to the Supreme Court. Tenn. Sup. Ct. Rule 13, Sec. 2 (d)(3)(D). {Certified complex or extended, Tenn. Sup. Ct. Rule 13, Sec. 2 (e)(3)(C)}.

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<sup>1</sup> The form, *Claim for Fees for Guardian Ad Litem or Attorney Representing Parents in Dependency and Termination of Parental Rights Cases*, is available through the Administrative Office of the Courts (AOC) or may be found at [www.tsc.state.tn.us](http://www.tsc.state.tn.us); click on “Information”, “Forms and Publications” and scroll down to “Forms”. Attorneys should read Sup. Ct. Rule 13 before filing for compensation or other expenses.

In order to be compensated for each proceeding, separate claim forms must be filed. Each claim must include a copy of the appointment order. Tenn. Sup. Ct. Rule 13, Sec. 6(a)(2) and (3). To receive compensation above the maximum the attorney must submit a motion requesting the court, in which representation was provided, to certify the case complex or extended. The motion must include “specific factual allegations demonstrating that the case is complex or extended.” Tenn. Sup. Ct. Rule 13, Sec. 2 (e)(1). Rule 13 states that the following, while neither controlling nor exclusive, indicate the type of circumstances that may support a complex or extended certification:

- The case involved complex scientific evidence and/or expert testimony.
- The case involved multiple defendants and/or numerous witnesses.
- The case involved multiple protracted hearings.
- The case involved novel and complex legal issues.

Tenn. Sup. Ct. Rule 13, Sec. 2 (e)(1)(A)-(D).

If the motion is granted, an order stating the specific facts supporting the finding or incorporating by reference the motion that includes the specific facts must be forwarded to the AOC with the claim form. The order must be signed by the judge “contemporaneously” with the approval of the claim form in order to qualify for payment. **A nonc pro tunc order will not support payment of complex or extended claims.** Tenn. Sup. Ct. Rule 13, Sec. 2 (e)(1)(E). All complex or extended payments must be approved by the director of the AOC. If a claim is not approved the claim will be transmitted to the chief justice whose decision is final.

In cases in which the parent is not indigent, the appointed guardian ad litem or counsel for the child is entitled to “reasonable compensation” to be assessed against either the county or the parents or legal guardians. T.C.A. § 37-1-150(a)(3) and (d).

### **1.05 Reimbursement of Expenses Incident to Representation**

Supreme Court Rule 13 provides for payment of expenses incident to appointed counsel’s representation. Tenn. Sup. Ct. Rule 13, Sec. 1(a)(1)(D).

#### 1.05 (a) Reimbursement of Expenses Without Prior Approval.

The AOC will reimburse the following expenses without prior approval of the court or the director of the AOC if reasonably necessary to the representation of the party:

- Long distance telephone charges, if supported by a log showing the date of the call, the person or office called, the purpose of the call, and the duration of the call stated in one-tenth (1/10) hour segments.
- Mileage for travel within the state in accordance with Judicial Department travel regulations, if supported by a log showing the mileage, the purpose of the travel, and the origination and destination cities.
- Lodging where an overnight stay is required at actual costs, if supported by a receipt, not to exceed the current authorized executive branch rates. (In-state rates: [www.state.tn.us/finance/act/travel.html](http://www.state.tn.us/finance/act/travel.html) and out-of-state rates: [www.state.tn.us/finance/act/policy.html](http://www.state.tn.us/finance/act/policy.html).)
- Meals in accordance with the Judicial Department travel regulations if supported by a receipt, where an overnight stay is required.

- Parking at actual costs up to ten dollars per day if supported by a receipt.
- Photocopying - black and white copies
  - In-house copying at a rate not to exceed seven cents (\$0.07) per page.
  - Actual cost of outsourced copying if supported by a receipt, at a rate not to exceed ten cents (\$0.10) per page.
  - Actual cost of providing to client a copy of appellate briefs and opinion.
  - The cost of providing to the indigent party a copy of the court file or transcript will not be reimbursed once the appeal is complete because the original file and transcript belong to the client.
  - Prior approval of the court and the director is required if an attorney, expert, or investigator anticipates that total copying costs will exceed \$500.
- Photocopying - color copies
  - In-house color copying at a rate not to exceed one dollar (\$1.00) per page.
  - Actual cost of outsourced color copies at a rate not to exceed \$1.00 per page if supported by a receipt.
  - Prior approval of the court and the director is required if an attorney, expert, or investigator anticipates that total copying costs will exceed \$500.
- Computerized research at actual cost for case-related legal and internet research if supported by receipts. If actual costs are not incurred, compensation will be limited to time spent conducting the search. Pro rata cost of subscription(s) will not be paid.
- Miscellaneous expenses such as postage, commercial delivery service having computer tracking capacity, film, or printing will be compensated at actual cost, not to exceed the fair and reasonable market value, if accompanied by a receipt. Prior approval of the court and the director is required if an attorney, expert, or investigator anticipates that total miscellaneous expenses will exceed \$250.

Tenn. Sup. Ct. Rule 13, Sec. 4(a)(3).

#### 1.05 (b) Reimbursement of Expenses Only With Prior Approval.

Counsel may be reimbursed for other expenses not included in Tenn. Sup. Ct. Rule 13, Sec. 4(a)(3), including out of state travel, only upon **prior approval by the judge** presiding over the case **and by the AOC director**. The motion requesting prior approval must “include both an itemized statement of the estimated or anticipated costs and specific factual allegations demonstrating that the expenses are directly related to and necessary for the effective representation of the indigent party. “ Tenn. Sup. Ct. Rule 13, Sec. 4(b)(2).

If the motion is granted, the court order must “either recite the specific facts demonstrating that the expenses are directly related to and necessary for the effective representation of the indigent party or incorporate by reference and attach the motion that includes the specific facts demonstrating that finding.” Tenn. Sup. Ct. Rule 13, Sec. 4(b)(3). The order and attachments must be submitted to the AOC director for prior approval **before** any expenses are incurred. Tenn. Sup. Ct. Rule 13, Sec. 4(b)(4).

#### 1.05 (b)(i) Court Reporters

When requesting reimbursement for the expense of a court reporter the per diem rate may not exceed the maximum Judicial Department rate for the judicial district; and the court reporter must have a delegated purchase authority (DPA) on file with the AOC. Counsel should contact the AOC to obtain a list of court reporters who have a DPA on file and who have agreed to provide services at the Judicial Department rates. If counsel obtains a court reporter who agrees to reimbursement at the maximum Judicial

Department rates and does not have a DPA on file, that reporter may submit a DPA to the AOC prior to reimbursement.

105 (b)(ii) Transcripts in Termination of Parental Rights Appeals.

In a termination of parental rights appeal involving the Department of Children’s Services, the Department by internal policy, should order an original and one copy of the transcript upon notice of the appeal. Tenn. Sup. Ct. Rule 13, Sec. 4(c) provides that the AOC director is authorized to reimburse the Department for the transcript expense at the Judicial Department rate **without** obtaining prior approval by court order.

In a termination of parental rights appeal that does not involve the Department of Children’s Services, the indigent appellant may request the reimbursement for the expense of the transcript pursuant to the procedures outlined in Section 1.05(b) above at the Judicial Department rate. Prior to requesting the transcript counsel should contact the AOC regarding the current per-page rate for the transcript. In addition the court reporter must have a DPA on file with the AOC.

1.05 (b)(iii) Compensation of Experts

Supreme Court Rule 13 provides for the “appointment and compensation of experts, investigators, and other support services for indigent parties” in child dependency and termination of parental rights termination proceedings. Tenn. Sup. Ct. Rule 13, Sec. 1(a)(1)(E).

The AOC will pay for the costs of such expert services as expenses incident to representation. Tenn. Sup. Ct. Rule 13, Sec. 4(a)(2) (Note: Tenn. Sup. Ct. Rule 13, Sec. 5 applies only to criminal cases but counsel should refer to this section regarding the procedure and required findings for obtaining reimbursement and maximum hourly rates for specific services.) Counsel may be reimbursed for expert services only upon motion and prior approval by the judge presiding over the case and **prior approval by the AOC.**

The attorney must file a motion with the court that includes the following:

- the nature of the services (the type of expert and the service being sought);
- the name, address, qualifications and licensure status of the person providing the service;
- the means, date, time and location at which the services will be provided;
- a statement of the itemized costs of the services, including the hourly rate, and the amount expected for additional or incidental costs;
- the particularized need for the service requested; and
- if the expert is not located within 150 miles of the court where the case is pending, an explanation of the efforts made to obtain the services of a provider within 150 miles.

The order authorizing the expert services must contain the following:

- a finding that the service is necessary to ensure the protection of the client’s constitutional right;
- a finding of the particularized need for the service
- the specific facts that demonstrate the need;
- name and address of the person approved to provide the service (If the expert is not located within 150 miles of the court where the case is pending, an explanation of the efforts made to obtain the services of a provider within 150 miles);

- a finding that the hourly rate to be charged for the service is reasonable in that it is comparable to the rates charged for similar services. (see, Sup. Ct. Rule 13, Sec. 5(d) for maximum hourly rates per service);
- The dollar amount of services being approved.

The court may satisfy the requirements by incorporating by reference and attaching the motion that includes the specific facts supporting the particularized need. The order and attachments should be submitted to the AOC director for prior approval. If the director denies approval, the claim will be submitted to the chief justice whose decision is final.

#### 1.05 (c) Spoken Foreign Language Interpreters and Translators

Supreme Court Rule 13 provides that the “reasonable costs associated with an interpreter’s and/or translator’s services will be compensated when a court finds, upon motion of counsel or sua sponte, that an indigent party has limited English proficiency (“LEP”). Prior approval of the AOC director is not required though a court order is required. Sup. Ct. Rule 13, Sec. 4(d).

The term “interpret” refers to the process of transmitting the spoken word from one language to another. The term “translate” refers to the process of transmitting the written word from one language to another. Tenn. Sup. Ct. Rule 13, Sec. 4(d)(1). The Rule provides for the compensation rates and expenses for the interpreter or translator. Claims must be submitted by the interpreter or translator on forms provided by the AOC, signed by the court or counsel and accompanied by the court’s order appointing the interpreter/translator. Tenn. Sup. Ct. Rule 13, Sec. 4(d).

In dependency and termination of parental rights cases, if a party with limited English proficiency qualifies for a court appointed attorney, he or she also qualifies for payment of the services of an interpreter or translator for all court proceedings, including adjudicatory, dispositional, ratification, foster care review board, permanency and termination of parental rights hearings and for any other attorney-client communication that occurs outside of court. Rule 13 does not include payment for interpreter services for permanency plan staffings or other meetings conducted by the Department of Children’s Services. The Department is responsible for providing interpreters for those meetings.

Tenn. Sup. Ct. Rule 13, Section (4)(d)(10) provides a mechanism for reimbursing counties that choose to utilize credentialed interpreters on a full-time or part-time basis.

See the AOC website for information regarding interpreters/translators; a roster of qualified interpreters/translators; and forms, including the court appointment order, at [www.tncourts.gov](http://www.tncourts.gov). Advocates are also advised to read Supreme Court Rules 41 and 42.

Payment for an interpreter for a hearing impaired person is provided for pursuant to T.C.A. § 24-1-211. If the interpreter is appointed by the court, the interpreter’s fee is paid out of the county funds.

#### 1.05 (d) Filing and Review of Claims for Compensation and Reimbursement of Expenses

All claims should be filed with the clerk’s office and reviewed and approved by the judge who presided over the final disposition of the case. Each claim must be supported by a copy of the order of appointment or order authorizing the expenditure. In cases where prior approval of the AOC director or chief justice is required, the approval must also be attached. Tenn. Sup. Ct. Rule 13, Sec. 6(a)(1)-(3).

Claims in the adjudicatory/dispositional phase of the dependency case and the termination of parental rights case must be filed no later than 180 days after disposition of the case. Claims in the post-dispositional phase of the dependency case must be filed within 180 days from the last activity related to the case. Unless filed within the 180-day period, the claim will be deemed waived and will not be paid. This provision becomes effective January 1, 2005. Tenn. Sup. Ct. Rule 13, Sec. 6(a)(1)-(3).

The AOC will examine and audit all claims for compensation and reimbursement to insure compliance with Rule 13. The determination to pay a claim will be made by the AOC director and will be final, except where review by the chief justice is required. Any claim denied in whole or substantial part by the director shall be reviewed by the chief justice. The determination of the chief justice is final. Tenn. Sup. Ct. Rule 13, Sec. 6(b).

### **1.06 Appointment of a Court Appointed Special Advocate**

The court may also appoint a non-lawyer special advocate trained in accordance with the standards of the Tennessee Court Appointed Special Advocates Association (CASA) to act in the best interest of a child before, during and after court proceedings. T.C.A. § 37-1-149(b)(1). The court appointed advocate “shall conduct such investigation and make such reports and recommendations pertaining to the welfare of the child as the court may order or direct.” T.C.A. § 37-1-149(b)(2).

Unlike the guardian ad litem, the CASA may testify as a witness. Reports and recommendations of the CASA must be made available to all the parties but can only be admitted into evidence pursuant to applicable evidentiary rules. The CASA is not, simply by virtue of being a CASA, qualified as an expert witness, nor is the testimony of a CASA exempt from the rules of evidence, including those regarding hearsay.

CASA reports often include both personal observations of the CASA (e.g., interactions observed between the parent and child during visits, physical conditions of households visited by the CASA) and hearsay (e.g., what teachers, relatives and neighbors told the CASA). Parties often stipulate to the admission of the CASA report or fail to object when it is proffered. Advocates should keep in mind that CASA reports are generally inadmissible into evidence at adjudicatory hearings and at termination of parental rights hearings absent a stipulation by the parties. The information in the report can be presented to the court in other ways: witnesses and other sources of information can be subpoenaed to court for the hearing.

## 2.0 DEPENDENCY PROCEEDINGS: CAUSES OF ACTION, JURISDICTION AND VENUE

### 2.01 Dependency Causes of Action

A “dependent and neglected child” is a child under the age of eighteen:

- Who is without a parent, guardian or legal custodian;
- Whose parent, guardian or person with whom the child lives, by reason of cruelty, mental incapacity, immorality or depravity is unfit to properly care for the child;
- Who is under unlawful or improper care, supervision, custody or restraint by any person or organization;
- Who is unlawfully kept out of school;
- Whose parent, guardian or custodian neglects or refuses to provide necessary medical, surgical, institutional, or hospital care;
- Who, because of lack of proper supervision, is found in any place the existence of which is in violation of law;
- Who is in such condition of want or suffering or improper guardianship or control as to injure or endanger the morals or health of the child or of others;
- Who is suffering from, has sustained or is in immediate danger of suffering from or sustaining a wound, injury, disability or physical or mental condition caused by brutality, neglect or other actions or inactions of a parent, relative, guardian or caretaker;
- Who has been in the care of a person or agency not related to the child by blood or marriage for 18 continuous months in the absence of a court order and the person or agency has not initiated custody or adoption proceedings;
- Who is or has been allowed, encouraged, or permitted to engage in prostitution or obscene or pornographic activity and whose parent, guardian or other custodian neglects or refuses to protect the child from further such activity.

T.C.A. § 37-1-102 (b)(1), (4), and (12).

“Severe child abuse,” a finding of which has a number of special consequences discussed in Sections 5.03, 9.06, 10.04, 17.02 and 17.04, below, is defined as:

- The knowing exposure of a child to or the knowing failure to protect a child from abuse or neglect that is likely to cause great bodily harm or death;
- The knowing use of force on a child that is likely to cause great bodily harm or death;
- Specific brutality, abuse or neglect towards a child which in the opinion of qualified experts has or will reasonably be expected to produce severe psychosis, neurotic disorder, severe depression, severe developmental delay or retardation, or severe impairment of the child’s ability to function adequately in the child’s environment and the knowing failure to protect a child from such conduct; or
- The commission of any act towards the child prohibited by T.C.A. §§ 39-13-502-504 (aggravated rape, rape, aggravated sexual battery), T.C.A. § 39-13-522 (rape of a child), T.C.A. § 39-15-302 (incest) and T.C.A. § 39-17-1005 (especially aggravated sexual exploitation of a minor);
- The knowing failure to protect a child from any of the above described conduct.
- Knowingly allowing a child to be present within a structure where the act of creating methamphetamine, as that substance is identified in T.C.A. § 39-17-403(d)(2), is occurring.

T.C.A. § 37-1-102(b)(21). Yet to be determined in Tennessee is whether the definition of a child for

purposes of dependency proceedings includes a fetus. Advocates are referred excellent discussions of this issue by two courts in other states, reaching opposite conclusions, in *State of Wisconsin ex rel. W. v. Zruzicki*, 561 N.S.2d 729 (Wisc. 1997) and *Whitner v. South Carolina*, 492 S.E.2d 777 (S.C. 1997).

## 2.02 Jurisdiction in Dependency Proceedings

The juvenile court has exclusive original jurisdiction over dependency proceedings. T.C.A. § 37-1-103(a)(1). The filing of a dependency proceeding in juvenile court generally authorizes the juvenile court to enter orders that preempt or supercede the jurisdiction of circuit or chancery court over custody proceedings in those courts. *DHS v. Gouvitsa*, 735 S.W.2d 452 (Tenn. App. 1987); *Arnold v. Gouvitsa*, 735 S.W.2d 458 (Tenn. App. 1987). See also *Marmino v. Marmino*, 238 S.W.2d 105, 108 (1950).

There are two exceptions to the juvenile court's otherwise exclusive jurisdiction over dependency and neglect proceedings: (1) when an adoption petition is filed; and (2) when jurisdiction of the child's case is already established in a court in another state pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act.

The filing of an adoption petition suspends any juvenile court proceeding (other than unruly or delinquency proceedings) and confers on the adoption court exclusive jurisdiction over allegations of abuse or neglect regarding the child during the pendency of the adoption proceeding. T.C.A. § 36-1-116(f)(1),(2). Parties in any juvenile court proceeding suspended by the filing of an adoption proceeding, including the state and the guardian ad litem, may intervene in the adoption proceeding.

The Uniform Child Custody Jurisdiction and Enforcement Act supercedes the juvenile court's jurisdiction if Tennessee does not have jurisdiction of a particular child custody proceeding as described in the Act. T.C.A. § 36-6-201, et. seq. The Act provides that a juvenile court has temporary emergency jurisdiction if the child has been abandoned and is physically present in Tennessee, or if it is necessary in an emergency to protect the child because the child, a sibling or parent of the child is subjected to or threatened with mistreatment or abuse. See *P.E.K. v. J.M.*, 52 S.W.3d 653, (Tenn. App. 2001).

## 2.03 Venue in Dependency Proceedings; Transfer Between Courts

A dependency proceeding may be commenced in the county in which either:

- The child resides;
- The child is present when the proceeding is commenced; or
- An adoption petition regarding the child is pending.

T.C.A. §§ 37-1-111(a), (c); 36-1-116(f)(1), (2). Ordinarily, a child's residence is considered to be that of his or her parent, guardian or legal custodian. However, there may be circumstances in which a child can establish a county of residence separate and apart from that of the parent, guardian or legal custodian. The juvenile court judge may, on motion of any party or on the court's own motion, transfer the dependency and neglect proceeding to the court in the county of the child's residence after the adjudication. T.C.A. § 37-1-112; T.R.J.P. 28(g).

If a juvenile court proceeding is commenced and a proceeding involving the child's custody is also commenced or pending in the circuit, chancery or general sessions court exercising domestic relations

jurisdiction, the juvenile court, on motion of a party or on its own motion after an adjudication making specific findings of fact pursuant to § 37-1-129(a)(2) and after ordering any essential services for the child and family, may transfer the custody proceeding to the court where the pending matter has been commenced. Also a case may be transferred if the residence of the child changes during the pendency of the juvenile court proceedings. The transfer shall only occur upon a finding of fact by the transferring court that the transfer will be in the best interest of the child, will promote judicial economy, will provide a more reasonable or convenient forum, or for other good cause. The transferring court may communicate with the receiving court concerning the transfer of the case. The transfer of the custody proceeding to another court exercising domestic relations jurisdiction (except to another juvenile court) shall not occur if the case involves allegations of dependency, neglect or abuse and the child is in the custody of the department of children's services. T.C.A. § 37-1-112(b). The juvenile court shall retain jurisdiction to the extent needed to complete any reviews or permanency hearings for children in foster care as may be mandated by federal or state law. This provision does not establish concurrent jurisdiction for any other court to hear juvenile cases, but merely permits courts exercising domestic relations jurisdiction to make custody determinations. Transfers shall be at the sole discretion of the juvenile court. T.C.A. § 37-1-103(c). An appeal of the decision to transfer shall be to the court of appeals. T.C.A. § 37-1-112(d).

Tennessee juvenile courts may also transfer to or receive from courts in other states dependency and neglect proceedings in situations in which the state of the child's residence changes to or from Tennessee. T.C.A. §§ 37-1-142 - 145. These "court-to-court" transfers are different from transfers between one state agency and another under the Interstate Compact Act. (T.C.A. § 37-4-201, et seq.)

### **3.0 INITIATION OF DEPENDENCY CASES: PETITION; SUMMONS; REFERRAL TO THE DEPARTMENT OF CHILDREN'S SERVICES**

#### **3.01 The Filing of a Petition; Who May File; Contents**

Juvenile dependency proceedings are initiated by the filing of a petition in juvenile court. Petitions may be filed by the Department of Children's Services (DCS), private childcare agencies, or private parties. T.C.A. § 37-1-119; T.R.J.P. 8(a). While a non-lawyer may file a petition or pleading on his or her own behalf, only a lawyer may file a petition or pleading on behalf of DCS or another agency.

There is some confusion as to whether a private party can be denied the opportunity to file a dependency petition. While the Rules of Juvenile Procedure contemplate an intake process that allows a pre-petition review of the circumstances of the case by court staff (T.R.J.P. 8), it is doubtful that a court can constitutionally deprive a person of the right to file a dependency petition based on the court's judgment that a petition is not warranted or appropriate under the facts. The remedy for an improperly filed petition lies with the judge or referee who can dismiss the petition if it is defective or if it fails to state a cause of action.

With the consent of the parties and approval of the judge, juvenile court staff can "informally adjust" a dependency complaint or petition by providing counseling, advice or referrals for services to the child and family. T.C.A. §§ 37-1-110; 37-1-128(b)(1); T.R.J.P. 8(d); T.R.J.P. 12(b); T.R.J.P. 13(c); T.R.J.P. 14. However, the court must still report the allegations to the Department of Children's Services as discussed in Section 3.02, below, and no informal adjustment should be made until that investigation is completed and the Department has been given an opportunity to intervene.

The petition must:

- Be verified (signed under oath), but may be based upon "information and belief"-- the petitioner need not have first hand knowledge of the facts alleged;
- Set forth in plain and concise language the factual allegations supporting the petition including:
  - (1) The name, resident address and date of birth of the child if known;
  - (2) The name and resident addresses, if known, of the parents, guardian or custodian of the child and of the child's spouse, if any;
  - (3) The date, manner and place of the acts alleged as the basis for dependency and neglect;
  - (4) That the child is dependent and neglected and that it is in the best interest of the child that the proceeding be brought;
  - (5) Whether the child is "in custody" (shelter care, foster care, detention, the custody of an agency), and if so, the location of the custodian and the time the child was taken into custody.

T.R.J.P. 9; T.C.A. § 37-1-120. If the petition is filed by DCS and the Department is seeking custody, the Department must comply with the reasonable efforts requirements of T.C.A. § 37-1-166, discussed at Section 5.0, below.

### 3.02 Requirement of D.C.S. Referral in Cases Where DCS is Not Petitioner

A person or agency other than DCS may file a complaint or petition in juvenile court alleging a child to be dependent and neglected. In those cases, the court must promptly refer the case to DCS to investigate the social conditions of the child and to report the findings to the court to aid the court in its disposition. T.R.J.P., Rule 13(a); T.C.A. § 37-1-128(b)(1).

Unless emergency removal is necessary, the Department must investigate the case within 30 days and, if appropriate, offer services to the family or child. T.C.A. § 37-1-166(f).

### 3.03 Issuance of Summons

After the petition is filed, the court must set a hearing date and direct that a summons issue to:

- The parents, guardians or other custodian of the child;
- The guardian ad litem for the child;
- The child, if the child is fourteen years or older;
- Any other persons who appear to be proper or necessary parties to the proceeding.

T.C.A. § 37-1-121(a); T.R.J.P. 10(a). The court has an obligation to attempt to identify the biological father and to serve him with the summons. However, in a case in which an alleged but non-legitimated father has not had a substantial relationship with the child, the case can be brought to final hearing without serving the alleged biological father and should not be unnecessarily delayed just to obtain service. The distinction between those non-legitimated fathers who have substantial relationships with their children and those who do not is one of constitutional significance. Compare, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972) and *Caban v. Mohammed*, 441 U.S. 380 (1978), with *Quilloin v. Wolcott*, 434 U.S. 246 (1978), and *Lehr v. Robinson*, 463 U.S. 248 (1983). See also discussion of Tennessee caselaw in Part II of this manual.

The summons must include:

- A copy of the petition (or, in the case of service by publication, a statement of the general nature of the allegations);
- A statement of the date, time and place of the hearing on the petition;
- A statement requiring the person to whom the summons is directed to appear before the court at that date and time to answer the allegations in the petition. (There is no requirement that a written answer or other written response be made to the petition. T.R.J.P. 20.)

T.C.A. § 37-1-121(a), (b); T.R.J.P. 10(a). The summons can include an endorsement by the judge or referee requiring that the child appear at the hearing and directing the child's parent, guardian or custodian to bring the child to the hearing. T.C.A. § 37-1-121(c); T.R.J.P. 10(b). In emergency circumstances discussed below, the summons can include an endorsement by the judge or referee ordering that a law enforcement officer serve the summons and take the child into immediate custody. T.C.A. § 37-1-121(d).

For service of process in termination or parental rights proceedings see Section 18.0, below.

### **3.04 Service of Summons; Who May Serve**

Service of the summons may be made as follows:

- (1) A party who can be found within Tennessee must be served personally at least three days before the hearing (other than a preliminary hearing).
- (2) A party who is within Tennessee but cannot be found, but whose address is known or with reasonable diligence can be ascertained may be served by registered or certified mail to the party's address at least five days before the hearing.
- (3) A party who can be found out of state must be served:
  - (a) by delivering the summons personally to the party at least five days before the hearing; or
  - (b) by registered or certified mail at least five days before the hearing; or
  - (c) by service on the Secretary of State. (T.C.A. § 37-1-123(a); T.R.J.P. 10(c)(1); T.C.A. § 20-2-205, et seq.)
- (4) A party who cannot be found or whose post office address cannot be ascertained "after reasonable effort" can be served by publication in accordance with T.C.A. §§ 21-1-203 and 204, with the hearing date to be at least five days after the date of the last publication. T.C.A. § 37-1-123(b); T.R.J.P. 10(c)(2).
- (5) A party in a foreign country shall be served pursuant to Rule 4 of the Tennessee Rules of Civil Procedure. T.R.J.P. 10(c)(5).

Any "suitable person under the direction of the court" may serve a summons. T.C.A. § 37-1-123(c); T.R.J.P. 10(c)(3). A DCS social worker or any other adult can meet this qualification so parties are not dependent on the sheriff or court staff to serve process. Service of process can be achieved by leaving the summons with any person over the age of eighteen who is at the address of the person named in the summons.

### **3.05 Waiver of Service of Summons**

A person other than a child may waive service of summons by written stipulation or voluntary appearance. T.C.A. § 37-1-121(e). (Additional guidelines for waiver of rights by adults are found in T.R.J.P. 30.) The Rules of Juvenile Procedure allow a child to waive service of summons only if the right is knowingly and voluntarily waived, and the child has, prior to the waiver, consulted with a knowledgeable adult with no interest adverse to the child. T.R.J.P.10(d); 30(d).

### **3.06 Special Summons Endorsements: Requiring the Child to Be Taken Into Custody and Brought to Court**

The court may issue a summons and direct an officer to bring the child before the court if it appears that the child's health or welfare is endangered, or that the child may abscond or be removed from the jurisdiction of the court, or that the child will not be brought before the court. T.C.A. § 37-1-121(d). This procedure allows the child to be brought to court for an immediate pendente lite hearing. It does not authorize a change of custody or shelter care pending that hearing. Such emergency change of custody or placement in shelter care is governed by the emergency removal criteria and procedures discussed in Section 4.0, below.

### **3.07 Attachment Option When Summons Ineffectual**

The court may issue an attachment if a party cannot be served, or if the party served fails to obey the summons, or if the court believes that the summons will be ineffectual. T.C.A. § 37-1-122.

This procedure allows the party attached to be brought to court for an immediate pendente lite hearing. It does not authorize the person to be jailed or held in detention pending that hearing. The contempt process is the proper vehicle for the arrest and detention of a person who willfully fails to comply with a court order or subpoena to appear in court. This process requires notice and an opportunity to be heard.

Special procedural requirements must be met to support the issuance of an attachment of a child. Such attachments are to issue only “for extraordinary matters.” If a child fails to appear at a hearing or conference to which the child has been properly summoned or personally notified to appear, the judge or referee may issue an order of attachment. T.R.J.P. 11(a). In other circumstances there must be probable cause to believe the child to be dependent and in need of the immediate protection of the court. The probable cause determination must be supported by a statement of the person requesting the attachment, reduced to writing and made under oath, and must provide sufficient information to support an independent judgment of probable cause for the issuance of the attachment. T.R.J.P. 11(b).

Like the issuance of the special summons discussed in Section 3.06, this procedure allows the child to be brought to court for an immediate pendente lite hearing. It does not authorize a change of custody or shelter care pending that hearing. Such emergency change of custody or placement in shelter care is governed by the emergency removal criteria and procedures discussed in Section 4.0, below.

### **3.08 Service by Publication: Diligent Search Requirement; Provisional Hearing Option; Interlocutory Orders**

When a necessary party cannot be located and service of process must be made by publication, the court may proceed to a provisional hearing on the petition with respect to all other parties on whom service of process has been obtained. Under these conditions, the court is not required to wait for service of process by publication to be completed, and may enter an interlocutory order of disposition. T.C.A. § 37-1-125.

The provisional hearing must in all respects comply with the notice and hearing requirements of a final hearing on the petition (as discussed in Sections 9.0 and 10.0, below) and the child “must be personally before the court.” The interlocutory order is binding on the parties served, but does not affect the rights and duties of the party who is served by publication. The findings of fact and interlocutory orders become final without further evidence if the party served by publication fails to appear for the final hearing on the petition. However, if the party does appear at the final hearing, the interlocutory findings and orders shall be vacated and disregarded and the final hearing conducted without regard to the interlocutory proceeding. T.C.A. § 37-1-125.

## 4.0 EMERGENCY REMOVAL

In general, due process requires that a parent be given notice and an opportunity to be heard before the state can interfere with a parent's custodial rights to his or her child. However, under some circumstances a child may be removed from the custody of the parent without notice or hearing.

### 4.01 Conditions Justifying Emergency Removal

An "emergency removal" is permissible if there is probable cause to believe that:

- The child is neglected, dependent or abused; AND
- The child is subject to an immediate threat to the child's health or safety to the extent that delay for a hearing would be likely to result in severe or irreparable harm; OR
- The child may abscond or be removed from the jurisdiction of the court; AND
- There is no less drastic alternative to removal of the child from the custody of the child's parent, guardian or legal custodian available, which would reasonably and adequately protect the child's health or safety or prevent the child's removal from the jurisdiction of the court pending final hearing.

T.C.A. § 37-1-114(a)(2).

The Department of Children's Services must make reasonable efforts to prevent the removal of a child from the home, if this can be done safely. T.C.A. § 37-1-166. The requirement of the state to make reasonable efforts is discussed in Section 5, below.

Conditions for emergency removal include a situation in which a parent leaves a child with a neighbor and fails to return to pick up the child, and no one is willing and able to continue to care for the child. In a situation like this, the Rules of Juvenile Procedure allow DCS staff to remain in the child's home until a relative, parent or legal guardian agrees to take responsibility for the child. T.R.J.P. 5(d)(5).

### 4.02 Persons Authorized to Make Emergency Removal

A law enforcement officer, DCS social worker or duly authorized officer of the court may remove a child prior to the filing of a petition and without a court order, if the person has reasonable grounds to believe that the emergency requirements discussed above exist. T.C.A. § 37-1-113(a)(3); T.R.J.P. 5(d)(2).

Physicians and hospital administrators may retain a child in the hospital until "the next regular session of the juvenile court," if the doctor or administrator believes that the child would be in imminent danger of harm upon release from the hospital. T.C.A. § 37-1-404.

A removal can also be made pursuant to a court order obtained by filing a petition and asserting in the petition facts that would support an ex parte issuance of an emergency removal order by the court. T.C.A. §§ 37-1-113(a)(3), 37-1-114(b)(2); 37-1-122(d)(1); T.R.J.P. 5(d)(1). The ex parte order must include a judicial finding and supporting facts that it is contrary to the welfare of the child to remain in the home. 45 CFR 1356.21(c). If the child is taken into custody prior to filing a petition, the petition must be filed no later than two days after the child is removed, excluding non-judicial days. T.R.J.P. 5(d)(4).

**4.03 Notice Requirements Following Emergency Removal: Petition Requirement; Setting of Preliminary Hearing**

The person taking a child into custody in an emergency removal is required to give notice to the parent, guardian or other legal custodian of the fact that the child has been taken into custody and of the reasons for taking the child into custody. If the emergency removal is accomplished in advance of the filing of a petition, a petition must be filed “as soon as possible” but in no event later than two judicial days after the child is taken into custody. T.C.A. §§ 37-1-115(a)(2); 37-1-128(b)(2); T.R.J.P. 5(d)(4).

The court is obligated to ensure that notice is given to parents, guardians, or other legal custodians, and to the child, if the child is fourteen years or older. This must include notice of their right to a preliminary hearing, the time date and place of the hearing, and the factual circumstances necessitating the removal. T.R.J.P. 5(d)(3).

## **5.0 REASONABLE EFFORTS INQUIRY; REASONABLE EFFORTS REQUIREMENT; EXCEPTIONS TO REASONABLE EFFORTS REQUIREMENT**

### **5.01 Reasonable Efforts Defined**

In order to achieve permanency for the child, the state is required to make reasonable efforts, if it can be done safely, to:

- Prevent the need for removal of the child from the child's family (family preservation);
- Enable a child in custody to return home (reunification); or
- Reach another permanency goal for the child, as identified in the permanency plan.

Under Tennessee law, "reasonable efforts" is defined as "the exercise of reasonable care and diligence by the Department to provide services related to meeting the needs of the child and the family." T.C.A. § 37-1-166(g). Reasonable efforts are aimed at helping children achieve permanency. They are provided to children and parents or guardians in an attempt to achieve the permanency goal identified for the child.

Reasonable efforts are a crucial component of foster care because these efforts represent the responsibilities of the state and agencies to effectuate permanency. Each child's permanency plan must clearly articulate the services (efforts) to be provided. In the case of biological parents whose children have been removed, reasonable efforts provide a second chance at learning parenting skills that will enable them to keep their children safe and to nurture their children's healthy development.

The obligation to provide reasonable efforts was first imposed by the Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272, 42 USC § 670, et seq. The Adoption and Safe Families Act of 1997 (ASFA), P.L. 105-89, clarified the reasonable efforts requirements of the earlier law, and specifically exempts certain types of cases from the reasonable efforts requirements. (See Section 5.03, below.) ASFA emphasizes that the child's health and safety shall be the paramount concern of all efforts made toward permanency.

### **5.02 Reasonable Efforts Requirement**

At every hearing where the child is placed or remains in custody, the court must make a finding of reasonable efforts. This finding should address what efforts (or services) were provided by the Department to prevent removal of the child, to reunify the family, or to achieve another permanency goal for the child. T.C.A. § 37-1-166(a) and (g).

The Department bears the burden of showing that it made reasonable efforts by providing services that were reasonable in duration, scope, and intended effect, given the family's and child's circumstances. The Department must provide an Affidavit of Reasonable Efforts, answering the following questions:

- Is removal necessary in order to protect the child, and if so, what is the specific risk or risks to the child or family that necessitates removal of the child?
- What specific services are necessary to allow the child to remain in the home or to be returned to the home?
- What services have been provided to assist the family and the child so as to prevent removal or to reunify the family?
- Has the Department had the opportunity to provide services to the family and the child, and, if not,

then what are the specific reasons why services were not provided?

T.C.A. § 37-1-166(b) and (c). The juvenile court reviews the Affidavit of Reasonable Efforts, but must also make an independent determination based on evidence presented in court. In making a reasonable efforts determination, the court must find, based on all the facts and circumstances, whether:

- There is no less drastic alternative to removal;
- Reasonable efforts have been made to prevent the need for removal or make it possible for the child to return home; and
- Continuation of the child's custody with the parent or legal guardian is contrary to the best interests of the child.

T.C.A. § 37-1-166(d). If, after hearing the proof and reviewing the Affidavit of Reasonable Efforts, a court is not satisfied with the efforts made by the Department, the court may make a finding that the Department did not provide reasonable efforts. The consequences of negative findings are discussed in Section 5.05, below.

### 5.03 Exceptions To Reasonable Efforts Requirements

Reasonable efforts to preserve or reunify the child with the family are not required if a court of competent jurisdiction has determined that:

- (1) The parent has subjected the child, a sibling, half-sibling, or other child in the household to "aggravated circumstances" defined in Tennessee as: abandonment, abandonment of an infant (child under the age of one year), aggravated assault, aggravated kidnapping, especially aggravated kidnapping, aggravated child abuse and neglect, aggravated sexual exploitation of a minor, especially aggravated exploitation of a minor, aggravated rape, rape, rape of a child, incest, or severe child abuse as defined in T.C.A. § 37-1-102; or
- (2) The parent has committed murder or voluntary manslaughter of any sibling, half-sibling or other child residing temporarily or permanently in the home, or the parent has aided or abetted, attempted, conspired, or solicited to commit such a murder or voluntary manslaughter; or
- (3) The parent has committed a felony assault that results in serious bodily injury to the child or to any sibling, half-sibling or other child residing temporarily or permanently in the home; or
- (4) The parental rights of the parent to a sibling or half-sibling have been terminated involuntarily;

**AND** that family preservation or reunification is not in the best interest of the child. T.C.A. § 37-1-166; P.L. 98-1097.

If the juvenile court determines that one or more of these exceptions apply and a decision is made not to provide reasonable efforts to reunify the family, the court must schedule a permanency hearing within 30 days of the date of that determination. T.C.A. § 37-1-166(g)(5). See Section 14.0, below.

**5.04 Reasonable Efforts in the Context of the Permanency Process**

Reasonable efforts inquiries ordinarily focus on efforts to preserve or reunify the family. However, as indicated above, reunification is not an appropriate goal in all cases. The court, as part of its review process, is required to make findings as to whether the Department is making reasonable efforts toward achieving the goal identified in the permanency plan in a timely manner and to complete whatever steps are necessary to finalize the permanent placement of the child. T.C.A. § 37-1-166(g).

**5.05 Legal Consequences of Failure to Make Reasonable Efforts**

Tennessee receives substantial federal assistance conditioned on its compliance with the requirements of the federal adoption assistance and child welfare legislation. Through the Department of Children's Services, the state provides assurances that it will meet all the requirements of federal law, including the provision of reasonable efforts. If courts in individual cases find that those efforts are inadequate, resulting in negative reasonable efforts findings, federal funding can be jeopardized.

With respect to individual dependency proceedings, the failure to make reasonable efforts hinders permanency for children. However, a negative reasonable efforts determination does not provide a parent with a basis to insist that a child be returned to an unsafe household, nor does that failure preclude a finding by the court that a child is dependent and neglected.

See Part II, Case Law Section for the Court of Appeals and Supreme Court's treatment of reasonable efforts issues in Tennessee.

## **6.0 PRELIMINARY HEARING FOLLOWING EMERGENCY REMOVAL**

The purpose of the preliminary hearing is for the court to determine whether the Department, through the introduction of proof, has established that the emergency removal of the child was justified. The court must find probable cause that:

- The child is neglected, dependent or abused; AND
- The child is subject to an immediate threat to the child's health or safety that would likely result in severe or irreparable harm; OR
- The child may abscond or be removed from the jurisdiction of the court; AND
- There is no less drastic alternative to removal of the child from the custody of the child's parent, guardian or legal custodian available which would reasonably and adequately protect the child's health or safety or prevent the child's removal from the jurisdiction of the court pending a hearing.

### **6.01 Time Limit for Preliminary Hearing**

A preliminary hearing must be held no later than three judicial days (72 hours), and in no event later than 84 hours after the child's removal. The court must determine whether there is probable cause to believe that the conditions for the emergency removal exist. T.C.A. § 37-1-117(c); T.R.J.P. 16(a), (c).

### **6.02 Notice of Preliminary Hearing**

The court is required to make every effort to notify the parent, guardian or legal custodian of the date, time and place of the preliminary hearing and the factual circumstances necessitating the removal. A child of fourteen years or older is also entitled to such notice. T.C.A. §§ 37-1-117(c), 37-1-121; T.R.J.P. 5(d)(3).

### **6.03 Waiver of Preliminary Hearing; Revocation of Waiver**

A parent, guardian or legal custodian can waive the right to a preliminary hearing or the time limits associated with the scheduling of the hearing by making an express and knowing waiver. That waiver may be revoked at any time. If the waiver is revoked, a preliminary hearing must then be rescheduled within 72 hours of the date of revocation of the waiver. T.R.J.P. 16(b); T.C.A. § 37-1-117(c).

### **6.04 Conduct of the Preliminary Hearing**

The parents, guardian or other legal custodian, and a child fourteen years or older, have a right to be heard at the preliminary hearing, to cross-examine witnesses, and to present evidence of their own. T.C.A. §§ 37-1-127(a) and 37-1-121. Reliable hearsay is admissible at a preliminary hearing. T.R.J.P. 16(a).

### **6.05 Required Findings and Orders at Preliminary Hearing**

The standard of proof at the preliminary hearing is "reasonable grounds to believe," or "probable cause." If the emergency removal conditions exist, the court may order the child to be placed in the custody of a

suitable person or agency. If the court determines the conditions are not met, the child must be returned to the custody of the person from whom the child was removed. The court may enter an interim or preliminary order setting forth conditions of the return – including, for example, services to be provided, actions to be taken, appropriate restraining orders – designed to protect the rights and interests of the child and the parties pending further hearing. T.R.J.P. 16(c).

The court must inquire into and make specific findings regarding whether the Department has complied with reasonable efforts to prevent the removal of the child and the extent of reasonable efforts provided towards reunification. T.C.A. § 37-1-166. See discussion in Section 5.0, above. The court must also either set child support as part of the preliminary hearing or set a date for child support hearing within 45 days of the date of the child’s placement in state custody. T.C.A. § 37-1-151(a)(2).

#### **6.06 Permanency Plan Requirements if Child Remains in DCS Custody**

A permanency plan must be promptly developed, submitted to the court, and approved or ratified for all children who remain in custody and their families. (See the full discussion of the rights of parties and obligations of the court and the Department of Children’s Services in this regard in Section 12, below).

## **7.0 DISCOVERY IN DEPENDENCY PROCEEDINGS**

Parties in dependency proceedings are entitled to access to information available to parties in a civil proceeding in circuit court under the Tennessee Rules of Civil Procedure. The precise mechanisms for accomplishing discovery are to be addressed by local rule in each juvenile court. T.R.J.P. 25. If the court does not have a local discovery rule, a petition for rulemaking can be filed with a suggested rule attached for the court's consideration.

For discovery in termination of parental rights proceedings see Section 19.0, below.

## **8.0 ASSESSMENT, EVALUATION, AND TREATMENT OF A CHILD PENDING HEARING**

### **8.01 Department of Children's Services Assessment**

The juvenile court has the authority to order the Department of Children's Services to make an assessment of the child and report the findings and recommendations to the court at any time prior to the disposition of a dependency proceeding. Such an order of referral confers authority to the Department or its designees to transport the child and to obtain any necessary evaluations of the child without further consent of the parent, legal custodian or guardian of the child. T.C.A. § 37-1-128(c)(1).

The Department must obtain consent from the parent, guardian or legal custodian for treatment for either the mental or physical well being of the child. If consent cannot be obtained, the Department may apply to court for authorization to provide consent on behalf of the child. T.C.A. § 37-1-128(c)(2).

The Department's must report its recommendations within 15 days. The court has the authority to extend the time limit up to thirty days.

The report must include a review of:

- The child's previous records, including, but not limited to, health records and educational records;
- The child's family history;
- The child's current family status;
- A written recommendation concerning the child's status.

T.C.A. § 37-1-128(c)(3).

### **8.02 Court Ordered Medical Examination and Treatment**

The court may order the child examined at a suitable place by a physician regarding the child's medical condition during the pendency of any proceeding. The court may order medical or surgical treatment of a child who is suffering from a serious physical condition or illness that requires prompt treatment. Under these circumstances, treatment may commence even if the parent, guardian or other custodian has not been given notice of a hearing, is not available, or without good cause informs the court of such person's refusal to consent to treatment. T.C.A. § 37-1-128(d).

### **8.03 Court Ordered Evaluation for Mental Illness or Mental Retardation**

The court may also order an assessment of the child to determine if the child suffers from mental illness or mental retardation. The child may be evaluated on an outpatient basis by a community mental health center, mental health institute, or licensed private practitioner. If there is reason to believe the child may be suffering from mental retardation, the court may order an outpatient evaluation of the child. This evaluation can be performed by the community mental health center, developmental center or licensed private practitioner designated by the Commissioner of the Department of Mental Health and Developmental Disabilities to serve the court. T.C.A. § 37-1-128(e)(1). (If a community mental health center receives grants or contracts from DMHDD and the commissioner has not designated another provider for outpatient evaluation for the court, DMHDD must contract with the center for evaluation services and the center must provide such services to courts within the catchment area. T.C.A. § 37-1-128(e)(5).

If the professional attempting to perform the evaluation determines that the evaluation cannot be performed properly on an outpatient basis, the court may order the child placed in a hospital or treatment resource (defined in T.C.A. § 33-1-101) for evaluation and for treatment necessary to the evaluation. Inpatient hospitalization or treatment under these conditions may not last for more than thirty days. T.C.A. § 37-1-128(e)(1).

The court may order the child placed in a hospital or treatment resource for evaluation and treatment necessary to the evaluation, for not more than thirty days. The court must first determine that the child is mentally ill and poses an immediate substantial likelihood of serious harm, (defined in Title 33 Chapter 6 Part 5) because of the mental illness. If a child is placed in a state-supported facility, the child shall be in the custody of the commissioner of DMHDD. T.C.A. § 37-1-128(e)(1)(A), (B).

The court-ordered evaluator must file a complete report with the court. The report must include:

- Whether the child is mentally ill or mentally retarded;
- Identification of the care, training or treatment required to address conditions of mental illness or mental retardation which are found;
- Recommendation of resources which may be able to provide such services;
- Whether the child is subject to voluntary or involuntary admission or commitment under the mental health/mental retardation admission/commitment statutes (Title 33);
- Any other relevant information that is within the competence of the evaluator.

T.C.A. § 37-1-128(e)(2). The court may initiate appropriate mental health or mental retardation commitment proceedings or take other appropriate action under other provisions of the Juvenile Court Act or Title 33, if the court finds that the child needs care, training or treatment for mental illness or mental retardation. T.C.A. § 37-1-128(e)(3).

#### **8.04 Pre-dispositional Evaluation and Assessment with Child in Custody of DCS**

After adjudication, but prior to the disposition of a child found to be dependent and neglected, delinquent, unruly or in need of services under § 37-1-175, the court may place the child in custody of the Department for the purpose of evaluation and assessment if the Department has a suitable placement available for such purpose. If the department determines there is no suitable placement available, the court may not the Department to take custody of the child for the purpose of evaluation and assessment. Such pre-disposition custody shall last for a maximum of 30 days and the court shall have a hearing to determine the appropriate disposition before the expiration of the 30 days.

#### **8.05 Pre-dispositional Report/Social History**

The court can order a pre-dispositional report to include an investigation and evaluation of the habits, surroundings, conditions and tendencies of the child. The court can designate the person to conduct the investigation and evaluation and to make the report. T.R.J.P. 33. The report cannot be considered by the judge prior to a determination that the allegations in the petition have been established, and the court has adjudicated the child to be dependent and neglected.

## **8.06 Evidentiary Issues Regarding Court Ordered Assessments and Evaluations**

Court ordered evaluations are not automatically admissible in a proceeding before the court. The reports, evaluations, and assessments cannot be considered by the court unless introduced in accordance with the applicable rules of evidence. See discussion at Section 10.01, below.

## 9.0 THE ADJUDICATORY HEARING

The adjudicatory hearing is a bench trial in which the court determines whether the factual allegations of the petition have been established by clear and convincing evidence and whether the evidence supports a finding that the child is dependent. (There is no provision for a jury trial in a dependency proceeding in juvenile court. T.C.A. § 37-1-124(a).) The statute contemplates a bifurcated hearing process: an adjudicatory hearing, followed by a dispositional hearing. A party has a right to insist upon this bifurcation. In practice parties often seek to introduce dispositional evidence during the adjudicatory hearing. T.R.J.P. 32(a). It is important to recognize that certain evidence (i.e., reliable hearsay) that may be admissible in the dispositional hearing may not be admissible at the adjudication.

### 9.01 Time Limits for Scheduling Adjudicatory Hearings

An adjudicatory hearing must be scheduled within 30 days of the date the child was taken into custody, if the child is in custody pursuant to an emergency removal. The hearing must be held within 30 days of the filing of the petition if “reasonable and possible,” but in no event later than 90 days after the date the petition was filed. T.R.J.P. 17(a). Continuances may be granted upon a showing of good cause but must be continued by the court to a date certain. T.R.J.P. 17(b).

### 9.02 Conduct of Adjudicatory Hearing

Despite general language in the code that hearings be conducted “in an informal but orderly manner,” T.C.A. § 37-1-124(a), dependency proceedings in juvenile court are to be conducted “in accordance with the highest standards of courtroom conduct and deportment which shall be prescribed in writing by local rules.” T.R.J.P. 27(a).

Dependency proceedings are explicitly exempted from the general requirements that proceedings “shall be open to all persons who are properly concerned.” T.R.J.P. 27(a). The juvenile court has the discretion to exclude the public from dependency proceedings. T.R.J.P. 27.

The court has authority to request the district attorney, city or county attorney, or any attorney to present the evidence in support of the petition and otherwise conduct the proceedings on behalf of the state. If requested, the statute says the attorney “shall present the evidence.” T.C.A. § 37-1-124(b).

### 9.03 Beginning the Adjudicatory Hearing

At the beginning of the adjudicatory hearing, the Court is required to:

- Ascertain whether the parties before the court are represented by counsel;
- Explain to any party who is not represented the right to be represented by counsel, including their right to be represented by appointed counsel if indigent;
- Verify the name, age and residence of the child;
- Ascertain the relationship of the parties to the child and to each other;
- Ascertain whether all necessary parties are present;
- Ascertain whether notice requirements have been complied with, and if not, whether the affected parties knowingly and voluntarily waive compliance;

- Explain to the parties their rights, including the right to confront and cross-examine witnesses, and the right to subpoena and present evidence on their own behalf;
- Explain the purposes of the hearing and the possible consequences.

T.R.J.P. 28(b)(1). Much of this information should be provided in advance of the hearing, either at a pretrial conference or other pretrial proceeding. However, the judge or referee is required to perform this function and cannot delegate it to a court clerk or other non-judicial officer.

#### **9.04 Hearsay Exceptions**

In arriving at its decision, the court must consider only evidence that has been formally admitted. The Tennessee Rules of Evidence apply to all adjudicatory hearings. T.R.J.P. 28(c).

Advocates should be able to respond effectively to evidentiary issues that commonly arise in juvenile dependency proceedings, especially those relating to hearsay. Hearsay exceptions that often arise in juvenile court include:

- Statements of children;
- Records of regularly conducted activity; and
- Expert testimony.

##### 9.04 (a) Statements of Children

A child's out of court statement is admissible if the statement:

- Is made by a child alleged to be the victim of physical, sexual, or psychological abuse or neglect,
- Is about abuse or neglect, and
- Is offered in a civil action concerning issues of dependency or issues concerning termination of parental rights.

T.R.E. 803(25).

A child of any age may be called as a witness by any party and is subject to cross-examination. A child is presumed to be a competent witness unless this presumption is rebutted. T.R.E. 601.

If the court determines that the circumstances surrounding the declaration indicate a lack of trustworthiness, the statement is inadmissible. T.R.E. 803(25). See *Miller v. Tennessee Bd. Of Paroles*, No. 01A01-9806-CH-00293, 1999 WL 43263, \*6-8 (Tenn. Ct. App. Feb. 1, 1999). Juvenile court practitioners are encouraged to refer to this case and its footnotes concerning the issue of the reliability of children's statements.

Children thirteen years or older at the time of the hearing must testify unless unavailable as defined in T.R.E. 804(a). T.R.E. 803(25).

A statement by a child that does not allege abuse and neglect may be admissible under a different exception to the hearsay rule or as non-hearsay, i.e., "excited utterance" or "then existing mental, emotional, or physical condition."

The trial court has discretion to fashion a more comfortable environment for the child to testify in order to minimize any harmful effects to the child. Due process requires that, at a minimum, the parties' attorneys be present and the proceeding be recorded. (See *Department of Human Servs. v. Norton*, 928 S.W.2d 445 (Tenn. Ct. App. 1996). Permission to appeal denied. *Rutherford v. Rutherford*, 971 S.W. 2d 955 (Tenn. Ct. App. 1997).)

#### 9.04 (b) Records of Regularly Conducted Activity

With respect to the "Business Record" exception found in T.R.E. 803(6), advocates should examine the following questions:

- Is the record made by or from information transmitted by a person with knowledge and a business duty to record or transmit the record?
- Is the record kept in the course of a regularly conducted business activity?
- Is the record made at or near the time of the event?
- Is it the regular practice of that business activity to make the record?

A business record must be introduced through the record's custodian or other qualified witness. Only the exact words of the record, not a verbal summary, are admissible. The record is inadmissible if the source of information or circumstances of preparation indicate a lack of trustworthiness. Records prepared for purposes of the litigation are generally inadmissible.

#### 9.04 (c) Expert Testimony

Tennessee Rule of Evidence 702 allows opinion testimony by persons "qualified" by the court as an expert. Experts are qualified based upon their scientific, technical, or specialized knowledge of a particular subject matter. Through voir dire, advocates should probe the qualifications of a proffered expert and should determine whether the qualifications being offered are relevant to the issues in the case. For example, a psychiatrist may or may not be qualified to testify about the effects of child sexual abuse.

Expert testimony often relies on underlying facts or data that "may be made known to the expert at or before the hearing." T.R.E. 703. This raises two issues for the advocate. First, an expert may gather data at the hearing by observing the parties and may testify on those observations. Second, the expert is required to disclose underlying facts or data, and that data must be trustworthy. If the facts or data indicate a lack of trustworthiness, the testimony may be disallowed. Advocates should always test the trustworthiness of an expert's underlying facts or data.

Scientific or technical evidence will not be admissible unless it is determined to be reliable. The reliability of scientific evidence is determined by considering the following nonexclusive list of factors:

- Whether the scientific evidence has been tested and the methodology with which it has been tested;
- Whether the evidence has been subjected to peer review or publication;
- Whether a potential rate of error is known;
- Whether the evidence is generally accepted in the scientific community; and
- Whether the expert's research in the field has been conducted independent of litigation.

*State v. Begley*, 956 S.W.2d 471, 475 (Tenn. 1997).

The roles and training required of persons associated with child welfare, such as DCS social counselors, CASAs and therapists, do not automatically qualify those persons as expert witnesses entitled to give expert opinions. Their testimony as lay witnesses, in the form of opinions or inferences, is “limited to those opinions and inferences which are (1) rationally based on the perception of the witness, and (2) helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue.” T.R.E. 701. The judge will usually be able to draw the same conclusions without qualifying these witnesses as experts.

### **9.05 Standard of Proof at the Adjudicatory Hearing**

The burden of proof in adjudicatory hearings in dependency cases is “proof by clear and convincing evidence.” T.R.J.P. 28(f); T.C.A. § 37-1-129(c).

### **9.06 Required Findings of Fact**

A court must enter an order of dismissal if it is not satisfied that the evidence of dependency and neglect is clear and convincing. The court cannot find evidence insufficient to support a dependency finding and still order DCS to monitor the child and family. *In re Chandler, DHS v. Nix*, 4 TAM 9-7 (Tenn. Ct. App., W.S., February 1, 1979).

When the court finds that the evidence of dependency is clear and convincing, it must enter an order adjudicating the child dependent and neglected. The court must “include in its adjudicatory order, or in a separate document (e.g. a memorandum opinion) findings of fact upon which it relies for the adjudication embodied in the order.” T.R.J.P. 28(f)(2). The court must also determine who committed severe child abuse as defined in T.C.A. § 37-1-102(b)(21), if applicable. The court must make a specific finding of fact identifying the perpetrator and the “basis of its conclusions.” T.C.A. § 37-1-129(a)(2).

The court must also make reasonable efforts inquiries and make findings as required by T.C.A. § 37-1-166. See discussion in Section 5, above. Failure to make clear findings of fact can create issues on appeal.

Findings of fact must be made within 30 days of the close of the hearing, or if an appeal or petition for certiorari is taken, within five days thereafter, excluding Sundays. T.R.J.P. 28(f).

Findings of fact at the adjudicatory hearing can be used at subsequent proceedings. For example, if in a subsequent termination of parental rights proceeding the petitioner seeks to prove “persistence of conditions that led to the removal,” it is important that the order entered at the time of removal specify what those conditions were. Parties should consider submitting proposed findings of fact. If the judge has not made written findings of fact within the time allowed by law, the attorney should file a motion requesting that findings of fact be made.

### **9.07 Setting the Case for Dispositional Hearing; Time Limits; Predispositional Orders**

If there is an adjudication of dependency and neglect, the court shall either proceed to conduct a dispositional hearing immediately following the conclusion of the adjudicatory hearing or set the case for a dispositional hearing. T.C.A. § 37-1-129(c); T.R.J.P. 28(f)(1)(ii) and 32(a).

The dispositional hearing is scheduled within 15 days of the adjudicatory hearing if the child is in custody; otherwise within 90 days. T.R.J.P. 18(a). Extensions of time may be granted at the request of or with the consent of the child or for by order of the court upon good cause shown. T.R.J.P. 18(b).

### **9.08 Interim Orders; Child Support**

The court may provide an interim disposition pending the dispositional hearing. T.R.J.P. 32(b). The court may also order assessments and evaluations as discussed in Section 8, above.

The court must also address the issue of child support for any child who remains in or is committed to state custody pending a dispositional hearing. T.C.A. § 37-1-151(b).

## 10.0 THE DISPOSITIONAL HEARING

The purpose of the dispositional hearing is to “design an appropriate plan to meet the needs of the child and to achieve the objectives of the state in exercising jurisdiction.” T.R.J.P. 32.

### 10.01 Evidence Admissible at the Dispositional Hearing

In arriving at its dispositional decision, the court may consider evidence from only two sources: evidence that has been formally admitted and the child’s juvenile court record. T.R.J.P. 32(f).

The rules of evidence apply, except that “reliable hearsay, including, but not limited to, certified copies of convictions or documents such as psychiatric or psychological evaluations of the child or the child’s parents or custodian or reports prepared by the Department of Children’s Services may be admitted.” T.R.J.P. 32(f). All evidence helpful in determining the questions presented, including oral and written reports, may be received by the court and relied upon to the extent of its probative value even though it may not have been admissible at the adjudicatory hearing. T.C.A. § 37-1-129(d).

If “reliable hearsay” is admitted, the party against whom that evidence is admitted must be given “a fair opportunity to rebut” such evidence. T.R.J.P. 32(f). The parties or their counsel must be afforded an opportunity to examine and controvert written reports received and to cross-examine individuals making the reports. T.C.A. § 37-1-129(d).

The Rules of Juvenile Procedure contain a special rule when sensitive information is part of reports or when sensitive information is relied upon for those reports. The court, upon finding that inspection by the parties would be detrimental to the child, may restrict access to the information to attorneys for the parties. The court may appoint counsel for an unrepresented party if necessary to comply with this exception. T.R.J.P. 33(e). This rule is of questionable constitutional validity, unless the parties waive their right to inspect the information, other than through their attorney. As the Court of Appeals has observed, this issue is not one of minor legal technicality:

For a court to issue an order based in whole or in part on a report kept secret from the parties is repugnant to our democratic system of government. The Constitution of Tennessee guarantees that the courts shall be open to all persons and that they shall have a remedy “by due course of law.” Art. 1, Section 17. This is a hollow guarantee if issues may be decided by the court on “evidence” known only to the court. *Greenfield v. Ferguson*, 1985 Tenn. App. LEXIS 2991, at \*4, (Tenn. Ct. App. M.S. July 11, 1985).

The Juvenile Court Act includes a provision that “sources of confidential information need not be disclosed.” T.C.A. § 37-1-129(d). A similar reference is made in the Rules of Juvenile Procedure to “information protected from disclosure by law.” T.R.J.P. 33. These provisions protect the identity of persons who report abuse or neglect pursuant to T.C.A. § 37-1-409(a)(2). However, the court, in its discretion, may determine that disclosure of confidential information, including the identity of the reporter, is material to the hearing. T.C.A. § 37-1-409(a)(1).

## 10.02 Dispositional Options

If the court did not remove children from the home or if the children were returned to the home after the preliminary hearing, the court may use appropriate community resources for care, supervision, and treatment of the child, appropriate to the needs of the child. T.R.J.P. 32; T.C.A. § 37-1-101(a)(3).

At the conclusion of the dispositional hearing, the court may make any of the following orders of disposition “best suited to the protection and physical, mental and moral welfare of the child:”

- (1) Allow the child to remain with the child’s parents, guardian, or other custodian, subject to conditions established by the court; or
- (2) Transfer legal custody to:
  - (a) Any individual who, after a home study, is found by the court to be qualified to receive and care for the child;
  - (b) Department of Children’s Services;
  - (c) An agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child;
  - (d) An individual in another state with or without supervision by an appropriate officer under T.C.A. § 37-1-142;
  - (e) A county department of children’s services; or
  - (f) Transfer custody to the juvenile court of another state under T.C.A. § 37-1-141 if the child is or is about to become a resident of that state.

T.C.A. § 37-1-130(a)(1)-(4). Dispositional orders must be in writing and signed by the judge. T.R.J.P. 32(j).

## 10.03 Reasonable Efforts Findings at the Dispositional Hearing; Provisions for Child Support for Child in State Custody

The court must make a reasonable efforts inquiry and appropriate findings if the child remains in or is placed in state custody, as discussed in Section 5.0, above.

The court must also address the issue of child support. T.C.A. § 37-1-151. Ideally, child support is addressed as early as possible in the proceedings. However, the court has the option to schedule a separate child support hearing within 45 days of the date the child is placed in state custody. T.C.A. § 37-1-151(a)(2).

The Child Support Guidelines establish child support for any child placed in state custody. Procedures for setting child support in a separate child support proceeding are set forth in T.C.A. § 37-1-151.

Strict application of the Child Support Guidelines may be inappropriate in cases where children are removed from indigent parents. The judge shall make written findings as to why a deviation from the Guidelines is appropriate. T.C.A. § 36-5-101.

#### 10.04 Special Procedures for Return of Custody Where Brutality or Abuse Found

Children who have been found to be abused pursuant to T.C.A. § 37-1-102(b)(12)(G) may not be returned to the custody of the perpetrator or to the non-offending perpetrator who failed to protect the child until the court has considered specific reports and recommendations. The court must consider:

- Reports from the commissioner of children's services or his designee having a master's degree in social work or equivalent training and experience, as the commissioner deems appropriate;
- Reports from a psychiatrist, or in the alternative, a physician and a psychologist, based on professionally appropriate examinations of the child and of the person who engaged in or failed to protect the child from the brutality or abuse; or
- Reports from a multidisciplinary protective services team from DCS based on professionally appropriate examinations of the child and of the person who engaged in or failed to protect the child from the brutality or abuse.

T.C.A. § 37-1-130(c). The reports and recommendations must be filed within 30 days after the court orders the local director of the county office of the Department to obtain the reports. The Department may intervene as a matter of right in any such proceeding. T.C.A. § 37-1-130.

A child who has suffered either sexual abuse or aggravated child abuse shall not be placed back in the care of the abusive party unless the judge finds, by clear and convincing evidence, that a threat to the child's safety no longer exists. T.C.A. § 37-1-167.

#### 10.05 Authority of Department of Children's Services Over Placement of Children in Custody; Procedures For Return of Child to Home By Department

Any order which places custody of a child with the Department of Children's Services empowers the Department to select any specific residential or treatment placement or programs for the child according to the determination made by the Department, its employees, agents or contractors. T.C.A. § 37-1-129(e)(1). Effective July 1, 2004, the court may review the residential or treatment placement of a child placed in the Department's custody pursuant to T.C.A. § 37-1-129(e)(2).

Editors Note: T.C.A. § 37-1-129(e), as amended, does not appear to allow the court to actually order a specific placement. However, pursuant to the federal regulation, 45 CFR 1356.21 (g)(3), 65 FR 4020 (1/25/00), it appears the juvenile court does have the authority to order a particular placement if an evidentiary hearing is held and all relevant testimony is allowed, including that of the Department. See also, Debra Ratterman Baker, Et Al., American Bar Association, *Making Sense Of The Asfa Regulations: A Roadmap For Effective Implementation* (Diane Boyd Rauber, Esq., ed., 2001).

A dependent child cannot be committed to or confined in an institution designed or operated for the benefit of delinquent children without a finding that the child is delinquent. T.C.A. § 37-1-130(b).

When the Department determines that a child committed to its custody as a dependent child is ready to return home, the Department must notify the court in writing of its intention to place the child at home on a trial home visit. If the court objects to the trial home visit, it must notify the Department of its objection in writing or set a hearing within fifteen days of the date of the notice, with such hearing to be held at the

earliest possible date. If written the court does not provide objection, the Department may place the child on a trial home visit. The notice must include the provision that the Department's legal custody of the child will terminate in 90 days. T.C.A. § 37-1-130(e)(1).

The Department may remove the child during this 90-day period on an emergency or non-emergency basis. A hearing must be held pursuant to T.C.A. § 37-1-130(e)(2).

During the 90-day trial home visit, the court may periodically review the child's status and may make orders consistent with the best interest of the child. T.C.A. § 37-1-130(e)(3).

#### **10.06 Advisement of Right to Appeal**

At the dispositional hearing, the court must advise the respondent of his or her right to appeal, (T.R.J.P. 32) and should notify the parties of the time limits and manner for perfecting an appeal. T.R.J.P. 36(d).

**11.00 REVIEW OF DECISIONS OF THE REFEREE IN DEPENDENCY PROCEEDINGS<sup>2</sup>**

The juvenile court judge may appoint a member of the bar to serve as a referee and can assign to that referee a case or class of cases to be heard in the first instance. T.C.A. § 37-1-107(a). The referee has the same authority as the juvenile judge in issuing process and in conducting proceedings. T.C.A. § 37-1-107(b).

**11.01 Appealable Orders**

Any party in a dependency proceeding has a right to a de novo hearing before the juvenile court judge of any decision of the referee, other than decisions on preliminary matters. Any decision of the referee in such cases, including a decision on any preliminary matter, is reviewable by the juvenile court judge “on the court’s own motion.” T.C.A. § 37-1-107(d).

The Juvenile Court Act does not define “preliminary matters.” Some examples of “preliminary matters” are rulings on requests for discovery, motions to suppress evidence, emergency removal and preliminary hearings. T.C.A. § 37-1-107(d).

**11.02 Manner of Appeal to Juvenile Judge; Time Limits**

Where there is an appeal, the party seeking review of the referee's decision must file a request for a hearing before the judge within five days, excluding nonjudicial days, of the date of the entry of the order. T.C.A. § 37-1-107(e).

**11.03 Effect of Decisions of Referees Pending Appeal; Stays**

The findings and recommendations of the referee constitute the decree of the court pending any rehearing unless the judge orders otherwise. Either the referee or the judge can issue a stay of the order pending rehearing, either on his or her own motion or pursuant to a motion filed by any party. T.C.A. § 37-1-107(c).

**11.04 Appeal from the Referee to Circuit Court**

An appeal from a final order of the referee may be filed in the circuit court pursuant to T.C.A. § 37-1-159. T.C.A. § 37-1-107(f). See discussion at Section 16.0, below.

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<sup>2</sup>This section was adapted from Kozlowski and Shookhoff, “Juvenile Appeals” in *Appellate Practice in Tennessee* Tennessee Bar Association, 1991, Second Edition.

## 12.0 THE PERMANENCY PROCESS

The legislative purpose of the permanency process is to

- protect children from unnecessary separation from parents who can provide safe homes;
- protect them from prolonged placement in foster care and the uncertainty it provides; and
- assure that, if an early return to the care of their parents is not possible, they will be placed in a permanent home at an early date.

T.C.A. § 37-2-401(a).

This process is intended to provide a mechanism to monitor children in foster care to ensure that “everything reasonably possible is being done to achieve a permanent plan for the child.” T.C.A. § 37-2-401(b).

In light of this mandate, the court assumes a critical role in monitoring the child’s progress toward a timely and safe permanent placement. Pursuant to federal and state law, the juvenile court judge is responsible for assuring compliance with the law relating to permanency and for holding the system accountable for making decisions which are in the best interests of the child. See discussion in *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*, National Council of Juvenile and Family and Juvenile Court Judges (1995).

It is critical that advocates understand the permanency process, both within the statutory framework and as it pertains to an individual case. The permanency plan embodies that process in an individual case, providing a blueprint for the future of the child and family. Advocates and parties must be involved in its development, so that contents of the plan reflect the tasks and responsibilities of all parties necessary to achieve the goal identified. They should actively participate in the development, modification and monitoring of the permanency plan so that children and families will not be deprived of the services needed for reunification or other permanent placement.

### 12.01 Development of the Permanency Plan

An individualized permanency plan is created by the Department of Children’s Services or other agency for every child in custody. The contents of the plan are generated at a staffing, which should include input from the child, the parents, the foster parents or relatives with physical custody, advocates for the parents and child, the agency, and any other persons who can provide information about the family. The agency must convene the staffing within 30 days of the date of foster care placement. T.C.A. § 37-2-402(8); 37-2-403(a)(1).

DCS must provide lawyers and parties with adequate notice of the staffing to allow them to prepare and to be present. If a lawyer cannot be present, the client should be advised not to sign the plan until the lawyer has reviewed and made any necessary changes or suggestions.

Sometimes plans contain statements where there might be factual disputes that have not yet been the result of a judicial finding or statements that might be subject to varying interpretations, e.g., the parent “has a substance abuse problem,” “is a drug addict,” “the child tortures animals,” “the child teases animals.” Advocates on all sides of the case should avoid these kinds of statements.

## 12.02 Contents of the Permanency Plan

Each plan must include a GOAL of one of the following for each child:

- Return to parents (reunification);
- Placement of child with relatives;
- Adoption;
- Permanent guardianship; or
- Planned permanent living arrangement

T.C.A. § 37-2-403(a)(1).

The plan must include a statement of the child's needs and the problems of the parents and the child at the time the child came into state custody. There must be a separate statement of responsibilities for the parents, the agency, the child (if the child was given responsibilities), and anyone else who has a role in achieving the goals of the permanency plan. The statement of responsibilities must be stated in specific terms and be reasonably related to the goal as stated in the plan. The caseworker who is responsible for the day-to-day implementation of the plan must be identified. T.C.A. § 37-2-403(a)(2)(A) and (b)(3).

The permanency plan may provide for concurrent planning, which requires the Department to provide reasonable efforts toward two goals simultaneously. T.C.A. § 37-1-166(g)(6). Depending upon the individual circumstances of the family, the department may provide reunification services while at the same time actively pursue goals of other permanent living arrangements, such as adoption. Concurrent planning allows the family time to comply with the permanency plan and receive the services necessary to reunify the family. In those cases in which the family cannot comply with the plan, concurrent planning helps to ensure a prompt permanent placement for the child.

## 12.03 Requirement of Judicial Approval or Ratification of the Permanency Plan

The juvenile court has jurisdiction over the permanency plan. The judge must ratify the plan within 60 days of the child's placement in care. All parties must have notice of the ratification hearing, including parents, child, foster parents, relatives with physical custody, pre-adoptive parents, DCS caseworker, service providers, advocates for the parents and child and any other interested persons. T.C.A. §§ 37-2-403(a)(2)(A) and 37-2-416. At the ratification hearing, the judge must advise the parents or legal guardians of the law relating to abandonment, the consequences that failure to visit or support the child may result in termination of parental rights, and that the parents or guardians may seek an attorney to represent them. T.C.A. § 37-2-403(a)(2)(B)(i). The judge must also ensure DCS has provided notice of the hearing to the parents, relatives with physical custody or pre-adoptive parents. T.C.A. § 37-2-416(b).

If the parties have agreed to the goals and the assignment of responsibilities under the permanency plan, the court may approve the plan as submitted if it finds the plan to be in the best interest of the child. This may take place prior to or at the dispositional hearing. However, if the court is not satisfied with the plan, the court may hold a separate ratification hearing immediately following the disposition and modify the responsibilities, consistent with the findings of fact at the adjudicatory and dispositional hearings. At this hearing, all relevant evidence, including oral and written reports, may be received by the court. T.C.A. § 37-2-403(a)(3).

If the parents dispute the goals and assignment of responsibilities under the plan, the court must hold a hearing in order to resolve the dispute no later than 60 days after the child enters foster care. Again, the court may receive all relevant evidence, including oral and written reports. The court may modify the responsibilities in order to approve a plan that it finds to be in the best interest of the child. T.C.A. § 37-2-403(a)(3) and (4)(A).

#### **12.04 Miscellaneous Provisions Affecting the Development and Implementation of the Permanency Plan**

##### 12.04 (a) Mental Health Counseling.

In all cases involving child abuse and neglect when the child is placed in state custody, the plan must stipulate the abusing or neglecting parent shall receive rehabilitative assistance through mental health counseling if ordered by the court. T.C.A. § 37-2-403(a)(5).

##### 12.04 (b) Planned Permanent Living Arrangement

The plan for a child who remains in foster care for more than a year may be modified to a long-term agreement between a foster parent and the agency charged with the custody and care of the child. In these situations, there must be appropriate arrangements for the child and procedures for the termination of the agreement when it is in the best interest of the child. T.C.A. § 37-2-403(a)(6). The Adoption and Safe Families Act of 1997 states that planned permanent living arrangement shall be allowed only where DCS and the court have documented a compelling reason why all other permanent arrangements would be contrary to the child's best interests.

##### 12.04 (c) Surrender or Termination Action

The agency having guardianship of a child in foster care as a result of a surrender or termination of parental rights shall prepare and submit a plan to the foster care review board or court. The plan shall include the goal for the child of relative placement, adoption or planned permanent living arrangement. Specific reasons must be given for any goal other than placement of the child with a relative or adoption. The plan shall also include a statement of specific responsibilities of the agency and the caseworker designed to achieve the stated goal. T.C.A. § 37-2-403(b).

#### **12.05 Judicial Authority to Monitor the Implementation of the Permanency Plan**

Once the plan has been approved or ratified by the court, the judge monitors the parties' progress toward the goal and evaluates their performance in complying with the terms of the plan. T.C.A. §§ 37-2-404(a); 37-2-409(b)(1).

The court's authority to order a specific placement is limited. Any order which places custody of a child with the Department of Children's Services empowers the Department to select any specific residential or treatment placement or program for the child according to the determination made by the Department, its employees, agents or contractors. T.C.A. § 37-1-129(e)(1). Effective July 1, 2004, the court may review the residential or treatment placement of a child placed in the Department's custody pursuant to T.C.A. § 37-1-129(e)(2).

Editors Note: T.C.A. § 37-1-129(e), as amended, does not appear to allow the court to actually order a specific placement. However, pursuant to the federal regulation, 45 CFR 1356.21 (g)(3), 65 FR 4020 (1/25/00), it appears the juvenile court does have the authority to order a particular placement if an evidentiary hearing is held and all relevant testimony is allowed, including that of the Department. See also, Debra Ratterman Baker, Et Al., American Bar Association, *Making Sense Of The Asfa Regulations: A Roadmap For Effective Implementation* (Diane Boyd Rauber, Esq., ed., 2001).

T.C.A. §§ 37-1-129(e) does not limit the court's role in examining the goal for the child and assuring the responsibilities of the plan and the placement choice further the attainment of the goal. It is the court's duty to assure all parts of the plan are in the best interest of the child, including the appropriateness of a particular placement.

By virtue of its jurisdiction over the permanency plan, the court may convene an evidentiary hearing at any time an issue is raised concerning the plan. The court may hold a hearing to determine that the child's needs are being met in a manner consistent with those identified in the plan. For example, foster home placement may be inappropriate for a child whose needs are identified as in-patient drug treatment or sexual perpetrator treatment.

## **12.06 Parental Rights Related to the Permanency Plan**

As described in Section 12.03, above, the parents must receive notice to appear at the court hearing to ratify the plan. If the parents cannot be located or if they refuse or fail to appear, the agency can still proceed with a termination on grounds of abandonment. The court record or an affidavit must show that the parents were included at the permanency plan staffing. Alternatively, the record must document efforts to notify the parents of the staffing, and that the court advised the parents concerning the law on abandonment and termination. T.C.A. § 37-2-403(a)(2)(B)(ii) (b) and (c).

One of the grounds to terminate parental rights is substantial noncompliance by the parent with the statement of responsibilities of the permanency plan. The failure of the parent to sign or agree to the plan will not prevent the termination on the grounds of substantial non-compliance with the permanency plan if the court finds the parent was informed of the plan's contents, and the requirements of the plan were reasonable and related to remedying the conditions which necessitated foster care. T.C.A. § 37-2-403(a)(2)(C).

## **12.07 Timetables of Review Hearings and Reports Required**

Federal and state law governs timetables for review hearings. In Tennessee, the child's case must be reviewed within 90 days of the date of foster care placement and every six months thereafter. These reviews may be conducted by the court or delegated to the foster care review board. The reviewer must review the permanency plan and make a report on the progress made in achieving the goals contained in the plan. The judge may review the case more frequently. T.C.A. § 37-2-409(d).

The statute contemplates that the court will enter an order outlining progress. If the foster care review board conducts the review, the board is required to make a written report to the judge outlining progress made and setting a time for the goal to be achieved and the date of the next review. T.C.A. §§ 37-2-404(b), 37-2-406.

The custodial agency is required to submit a report for each child in foster care placement and detail the progress made toward reaching the goal set out in the plan. The court and the parties should have an updated plan and a progress report at every review. T.C.A. § 37-2-404(a).

### **12.08 Procedures at Review Hearings**

At the review hearings the court or the foster care review board must assess compliance with T.C.A. §§ 37-2-404(b) and 37-1-166. (See Section 5.0, above for discussion of T.C.A. § 37-1-166 regarding reasonable efforts.) At this review, the court or the board shall:

- (1) Determine the necessity and appropriateness of continued state custody or foster care placement;
- (2) Assess the compliance of all parties with the statement of responsibilities; and
- (3) Determine the extent of progress in addressing the causes necessitating foster care placement and progress toward the goal set out in the plan.

The reviewer must project a likely date on which the goal of the plan will be achieved. T.C.A. § 37-2-404(b). (For further discussion on foster care review boards, see Section 12.10, below.)

Notice of the review must be provided to the parents and their counsel, who have a right to attend and participate in the review, unless there has been a termination of parental rights. T.C.A. § 37-2-404(b). In addition, notice must be provided to foster parents, relatives with physical custody and pre-adoptive parents and the court must ensure at each review that DCS has provided the notice. T.C.A. § 37-2-416.

Specific questions must be addressed by the board or the court at all review hearings. (The order or report should specify the answers.) Depending on the circumstances, these questions include:

- Is the goal on the permanency plan appropriate or does it need to be modified?
- Is there a need for continued placement in foster care?
- Is the court-approved permanency plan adequate to achieve safe reunification or other permanent goal?
- Is the child in a safe and appropriate placement that adequately meets all physical, emotional and educational needs?
- Are the responsibilities in the permanency plan reasonably related to why the child came into care?
- Is the agency making reasonable efforts to rehabilitate and reunify the family and eliminate the need for placement of the child?
- Do the services set forth in the plan and the responsibilities of the parties need to be clarified or modified due to the availability of additional information or changed circumstances? If so, how?
- To what extent are the parents in compliance with the permanency plan?
- To what extent is the child in compliance with the permanency plan if the child was given responsibilities?
- Do the terms of visitation with the parents or siblings or others need to be changed?
- Does child support need to be set or modified?
- Do any additional court orders need to be made to move the case toward permanency for the child?
- What time frame should be followed to achieve the goal set in the plan?
- When should the case be reviewed again? By the court or foster care review board?

### 12.09 Necessary Persons at Review Hearings

The child (if age appropriate), parents, social worker, foster parents or relatives with physical custody, pre-adoptive parents, other service providers (counselor, treatment team, teacher), and the parties' lawyers should attend the review hearings in order to have all relevant information available for the judge or the board. Subpoenas may be issued to guarantee attendance of reluctant witnesses. If the child is placed outside the county, the child's lawyer needs to request that DCS provide transportation for the child. The review hearings are constitutionally insufficient if only the DCS worker is present.

### 12.10 The Foster Care Review Board

In order to ensure regular review of the parties' compliance under the permanency plan, the juvenile judge may appoint a panel of citizen volunteers, the foster care review board, to conduct the review hearings 90 days after the child comes into care and every six months thereafter. The judge may choose not to appoint a board and may judicially review these cases at the required intervals. If the judge fails to do either, DCS is delegated the responsibility of appointing a board by statute. T.C.A. § 37-2-406(a)(4).

Parties must be notified of hearings before the foster care review board. The hearings proceed as informal reviews, with relaxed evidentiary standards. The parents, child, foster parents, pre-adoptive parents, relatives with physical custody, DCS case managers, advocates for the parties, and other interested persons have a right to be heard.

The board's role is to advise the court. The board must submit a report to the judge for each child reviewed. The board also must make findings and recommendations regarding the efforts and progress made by the Department to carry out the permanency plan, including a determination of whether the Department is providing reasonable efforts, and any other recommendations regarding the child. The report must include the date of the next review. The board may not ratify the permanency plan or conduct permanency hearings, as these are judicial responsibilities. T.C.A. § 37-2-406.

The board has authority to make a direct referral to the court in two instances:

- (1) Where conditions persist that constitute a deterrent to reaching the permanency goals and such conditions indirectly or chronically compromise the health, safety or welfare of the child. The judge or referee must hear this referral within 30 days.
- (2) Where issues in a particular case constitute a risk of harm and directly compromise the health, safety or welfare of the child. The judge or referee must hear this referral within 10 days.

T.C.A. § 37-2-406(c)(1). (See Forms Section.)

### 12.11 Rehearing Issues Involving Foster Care Review

Any interested person may file a petition, in writing and under oath, for a rehearing upon all matters coming within the foster care section of the Code, as long as the child is under the jurisdiction of the court. T.C.A. § 37-2-410. The court may modify or set aside any order consistent with the provisions of T.C.A. § 37-1-129(e) and 37-2-403(d). This means not only lawyers for the parties can file petitions, but foster parents, teachers, and relatives may also have access and input with the court. Of course, the child and the parents are parties and may file motions or petitions as desired.

**12.12 Methods of Review**

There are a variety of approaches for obtaining review of actions taken or orders entered in the course of the foster care review or permanency planning process. A party dissatisfied with the action of the juvenile court in approving, over objection, the terms of a permanency plan probably has no right to appeal de novo to circuit court. Certiorari and supersedeas may be an appropriate means of obtaining review. Another alternative available to a party in such a case would be to petition to modify the original dispositional order. If the judge denies the petition, de novo appeal of that decision is available. See Section 16.0, below, for discussion of appeal to circuit court.

## **13.0 PERMANENT GUARDIANSHIP**

### **13.01 The Authority to Appoint a Permanent Guardian**

The juvenile court has the sole authority to appoint a qualified person as permanent guardian to a child. This appointment may occur at any hearing in which a permanent legal disposition can be made, including permanency hearings (Section 14.0), child protection proceedings and delinquency proceedings. The court retains jurisdiction to enforce modify, or terminate an order of permanent guardianship until the child reaches the age of eighteen (18), or the age of nineteen (19) for children adjudicated delinquent.

T.C.A. §§ 37-1-801, 805.

### **13.02 Who May Serve as a Permanent Guardian**

Any adult, including a relative, foster parent or another adult with a significant relationship with the child may serve as a permanent guardian. However, in cases where the child is in the custody of DCS, the court must inquire as to the department's opinion on both the proposed permanent guardianship and the proposed permanent guardian. An agency or institution may not be a permanent guardian. T.C.A. § 37-1-802(a).

### **13.03 Criteria and Required Findings for Permanent Guardianship**

The court may issue a permanent guardianship order only if the court finds that:

- The child has been previously adjudicated dependent and neglected, unruly or delinquent;
- The child has been living with the proposed permanent guardian for at least six months;
- The permanent guardianship is in the child's best interests;
- Reunification of the parent and child is not in the child's best interests; and
- The proposed permanent guardian:
  - Is emotionally, mentally, physically and financially suitable to become the permanent guardian;
  - Is suitable and able to provide a safe and permanent home for the child;
  - Has expressly committed to remain the permanent guardian for the duration of the child's minority;
  - Has expressly demonstrated a clear understanding of the financial implications of becoming a permanent guardian, including an understanding of any potential resulting loss of state or federal benefits or other assistance; and
  - Will comply with all terms of any court order to provide the child's parent with visitation, contact or information.

T.C.A. § 37-1-802(b).

When determining if permanent guardianship is in the child's best interest, the court shall consider, in addition to any other relevant evidence, the following:

- The child's need for continuity of care and caregivers, and for timely integration into a stable and permanent home, taking into account the differences in the development and the concept of time of children of different ages;
- The physical, mental, and emotional health of all individuals involved to the degree that each affects the welfare of the child, the decisive consideration being the physical, mental, and emotional needs of the child; and
- The quality of the interaction and interrelationship of the child with the child's parent, siblings, relatives, and caregivers, including the proposed permanent guardian.

T.C.A. § 37-1-802 (c).

The court must give consideration to the reasonable preference of a child 12 years or older. The court is provided discretion as to the consideration of the preference of a younger child. Generally, the preferences of an older child should be assigned greater weight than those of a younger child. Appointment of a permanent guardian is not limited to children in the custody of DCS.

T.C.A. § 37-1-802(d) & (e).

A parent may voluntarily consent to the permanent guardianship. However, the court must be assured that the parent understands the implications and obligations of his or her consent prior to the court entering any order awarding permanent guardianship.

T.C.A. § 37-1-802(f).

### **13.04 Effect of an Award of Permanent Guardianship**

An award of permanent guardianship does not terminate the parental rights of the parent to the child. The rights and responsibilities accompanying a parent-child relationship remain intact, including the right to consent to the adoption of one's child. Parents still have the responsibility of providing for the child's financial and medical needs, as well as other support for the child. A child continues to have the right to inherit from his or her parent.

The order of permanent guardianship, whether by agreement of the parties or otherwise, must address the frequency and nature of visitation, contact and the sharing of information between relatives, pursuant to the best interests of the child. The order may restrict or prohibit visitation, contact or the sharing of information with the parent. Upon a showing by affidavit of immediate harm to the child, the court may stay the visitation or contact order on an ex parte basis pending a hearing, not to exceed 30 days. A modification of an order of visitation or contact shall be based upon a finding, by a preponderance of evidence, that there has been a substantial change in the material circumstances and that the proposed modification is in the best interest of the child.

Nothing shall prevent removal of the child by the department from the permanent guardian, based upon allegations of abuse or neglect, pursuant to §§ 37-1-113 and 37-1-128.

T.C.A. § 37-1-803.

### **13.05 Rights and Responsibilities of the Permanent Guardian**

Specific rights and responsibilities accompany the award of permanent guardianship. Further, the permanent guardian is not liable to third persons by reason of the relationship for acts of the child. At all times, the permanent guardian shall maintain physical custody of the child and shall have the following rights and responsibilities concerning the child:

- To protect, nurture, discipline, and educate the child;
- To provide food, clothing, shelter, and education as required by law, and necessary health care, including medical, dental and mental health, for the child;
- To consent to health care, without liability by reason of the consent for injury to the child resulting from the negligence or acts of third persons, unless a parent would have been liable in the circumstances;
- To authorize a release of health care and educational information;
- To authorize a release of information when consent of a parent is required by law, regulation, or policy;
- To consent to social and school activities of the child;
- To consent to military enlistment or marriage;
- To obtain representation for the child in legal actions;
- To determine the nature and extent of the child's contact with other persons;
- To make decisions regarding travel; and
- To manage the child's income and assets.

T.C.A. §§ 37-1-804.

Further, the permanent guardian may receive money paid for the child's support to the child's parent under the terms of any statutory benefit or insurance system or any private contract, settlement, agreement, court order, devise, trust, conservatorship, or custodianship, and money or property of the child.

A permanent guardian may also receive payments from government benefits on behalf of the child as a result of the parent qualifying due to his or her income and assets.

After the permanent guardianship order is entered, the court may order the parent or other legally obligated person to pay a reasonable sum that will totally or partially cover the support and medical treatment of the child. Failure of the parent or other legally obligated person to comply with this order may result in a contempt proceeding or entry of the order, which shall have the effect of a civil judgment.

The court shall, if applicable, prescribe in the order who may claim the child as a dependent for purposes of federal income tax.

T.C.A. §§ 37-1-807.

### **13.06 Modifying or Terminating the Order of Permanent Guardianship**

A modification or termination of the permanent guardianship may be requested by the permanent guardian, the child if sixteen (16) years of age or older, the parent, or by the state. A modification or termination may also be ordered by the juvenile court on its own initiative.

Where the permanent guardianship is terminated by a juvenile court order, the court shall make further provisions for the permanent guardianship or custody of the child, based upon the best interests of the child.

An order for modification or termination of the permanent guardianship shall be based on a preponderance of the evidence finding that there has been a substantial change in material circumstances, or a determination by the court that one or more findings required by § 37-1-802(b) are no longer supported by the evidence. In determining whether there has been a substantial change in circumstances, the court may consider whether the child's parent is currently able and willing to care for the child, or that the permanent guardian is unable to continue to care for the child.

In addition to a finding of a substantial change in material circumstances, the court shall also find that the proposed modification or termination is in the best interests of the child. In determining whether it is in the child's best interest that the permanent guardianship be modified or terminated, the court shall consider, along with other evidence determined to be relevant, the following factors:

- The child's need for continuity of care and caregivers, and for timely integration into a stable and permanent home, taking into account the differences in the development and the concept of time of children of different ages;
- The physical, mental, and emotional health of all individuals involved, to the degree that each affects the welfare of the child, the decisive consideration being the physical, mental, and emotional needs of the child; and
- The quality of the interaction and interrelationship of the child with the child's parent, siblings, relatives, and caregivers, including the proposed permanent guardian.

Prior to modifying or terminating the permanent guardianship order to return the child to the parent, the court must consider whether there has been resolution of the factors in the home that resulted in the adjudication of the child as dependent and neglected, unruly, or delinquent. Where there has been involvement of the family with the department, consideration may include the parent's history of participation in working toward completion of the permanency plan.

In the event that it is necessary to appoint a successor permanent guardian, appropriate parties may be considered by the court, with the parent having no greater priority than a third party. The court may also consider, where appropriate, return of custody to the parent.

If a child is in guardianship of the Department of Children's Services, pursuant to Title 36, the guardianship may be transferred to a permanent guardianship with the consent of the guardian.

T.C.A. § 37-1-806.

## 14.0 THE PERMANENCY HEARING

The permanency hearing is a proceeding at which the judge reaches a final decision concerning the permanent placement for the child. The Adoption and Safe Families Act of 1997 raised the status of the permanency hearing, emphasizing its significance in reaching finality in a dependency case, and underscoring the formality of the hearing, with its attendant needs for due process and zealous advocacy.

The juvenile court judge or referee (not the foster care review board) must hold a permanency hearing within twelve months of the child's placement in foster care. If a court determines, pursuant to T.C.A. § 37-1-166(g)(4), that one or more of the exceptions to providing reasonable efforts to reunify the family exist and a decision is made not to provide reasonable efforts, the court must hold a permanency hearing within 30 days of that determination. At this permanency hearing, if the permanency plan does not contain an alternative goal to reunification, the court should order another permanency plan be drafted by DCS. The court must review reasonable efforts towards the stated goal contained in any plan.

The court uses evidence presented at the permanency hearing to determine the extent of compliance of all parties (parents, other caregivers living in the home, the agency, and the child if the child was assigned responsibilities) with the terms of the plan, and their progress toward the permanency goal for the child. Based on that determination, the court reaches a decision on the child's permanent placement. In the case of a child who is sixteen years of age or older, the court must determine the services needed to assist the child in the transition from foster care to independent living. T.C.A. § 37-2-409. (DCS Policy 16.52 provides that any child who is fourteen to twenty-one years of age shall receive independent living skills.)

### 14.01 Nature and Purpose of the Permanency Hearing

The permanency hearing is a formal court proceeding, although reliable hearsay may be admissible. The National Council of Juvenile and Family Court Judges recommends that the permanency hearing be allocated 60 minutes on the court's docket in order to allow enough time to hear evidence from all parties. See *Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases*, at 77-86. The reader should note that the *Resource Guidelines* predate the Adoption and Safe Families Act of 1997.

The purpose of the permanency hearing is to reach finality in a dependency case. Under ASFA, the court must decide which of the following six options best addresses the permanent needs of the child:

- (1) Return to the home, and, if so, the date of the return;
- (2) A referral for legal guardianship or other form of permanent custody [Tennessee law prioritizes placement with a relative as a permanency goal. Effective July 1, 2007, Tennessee added permanent guardianship as a permanency goal. T.C.A. § 37-2-403.];
- (3) Placement for adoption, and if so, the date DCS will file a petition to terminate parental rights;
- (4) Placement in another permanent living arrangement, where DCS has documented for the court a compelling reason for determining that other permanency options are not in the child's best interest;
- (5) If an out-of-state placement, whether that placement continues to be appropriate and in the child's best interest; or
- (6) A transition to independent living, if the child is 16 years or older. [In Tennessee, independent living is not a goal but a reference to services provided to older youth.]

42 U.S.C. 675(5)(C).

## 14.02 Conduct of the Permanency Hearing

### 14.02(a) Notice and Participation

All procedural protections for the child and family must be in place. Notice must be given to the parents, the child, foster parents, relatives with custody and pre-adoptive parents. The court should consider requiring the child to be present to have the opportunity to state his or her choice of placement. All lawyers involved in the case must be notified and participate in the proceeding.

### 14.02(b) Decisions to be Made at the Permanency Hearing

The judge must evaluate the extent to which all parties have progressed toward the goal identified in the permanency plan. The court must go beyond a simple inquiry as to each person's progress and move to a decision-making mode. The court must also make a reasonable efforts finding as required by T.C.A. § 37-1-166. The court should review its prior orders assessing the agency's reasonable efforts toward permanency, in compliance with the statute. See discussion at Section 5.0, above. All evidence that is admissible at a dispositional hearing pursuant to T.C.A. § 37-1-129 shall be allowed. T.C.A. § 37-2-409(b)(2).

Once the court determines what the definitive, long-term decision is for the child's placement, the court sets a definite timetable with the duties of each party clearly outlined. The court may want to approve a plan to transition the child home if efforts toward reunification have been successful.

If the goal has been to reunify and the parents have substantially complied with their responsibilities under the plan, the judge will set a date for reunification at this hearing. If the goal is relative placement, the judge shall set a date for the placement to occur. If concurrent planning has been implemented, the judge will determine the final goal and set the necessary time lines. If the goal is adoption, the judge will set a date for the Department to file the petition to terminate parental rights. 42 U.S.C. 675(5)(C).

If the child cannot be safely returned home, the judge should inquire as to the Department's efforts to locate another permanent placement. The law requires DCS to explore the child's extended family for suitable relative placement. If a willing relative cannot be located, the judge should inquire whether the foster parents or other identified caregivers would be suitable and available to adopt the child. Advocates should be aware that DCS provides adoption subsidy benefits for some children, in compliance with agency regulations.

At the permanency hearing, the court should inquire as to the Department's plan concerning termination of parental rights, in compliance with ASFA. If the Department states that it has documented reasons why termination would not be in the best interest of the child, the court should determine whether those reasons are compelling, thus justifying the exception to terminating parental rights. (See Section 17.04, below, for a discussion of termination of parental rights under ASFA.)

Planned permanent living arrangement should be considered only when the Department can document compelling reasons why it is not in the child's best interest to pursue other permanency goals. The child's age, behavior, or the unavailability of adoptive homes are not valid reasons for setting the goal of Planned permanent living arrangement.

**14.03 Requirement of Dispositional Order after Permanency Hearing**

The order issued by the court at the conclusion of the permanency hearing shall include findings of fact based on the proof offered. It is critical that the date for the next review be set before the parties leave the courtroom. Either the judge or the review board must monitor timely compliance with the deadlines set in the order to assure permanency. A date certain for the filing of a new permanency plan, the petition to terminate, and other needed actions should be included in the order.

**14.04 Subsequent Hearings**

If the child continues in foster care beyond the permanency hearing, the court must conduct subsequent permanency hearings every twelve months until the child is released from custody. T.C.A. § 37-2-409(a). The court may convene a permanency hearing sooner, however. In addition, the court or foster care review board must conduct a review of the plan every six months. T.C.A. § 37-2-404. The statutory availability of these reviews should not diminish the Department's efforts to actively pursue a permanent home for the child. Both the court and the foster care review board may conduct more frequent reviews.

## 15.0 PETITIONS TO MODIFY OR VACATE ORDERS<sup>3</sup>

### 15.01 Grounds for Modifying or Vacating Orders

An order in a dependency proceeding must be set aside if:

- It was obtained by fraud or mistake sufficient to satisfy the legal requirements in any other civil action;
- The court lacked jurisdiction over a necessary party;
- The court lacked subject matter jurisdiction; or
- Newly discovered evidence so requires.

T.C.A. § 37-1-139(a).

An order in a dependency proceeding, other than a dismissal of a petition on the merits (with prejudice) and an order terminating parental rights, may also be changed, modified or vacated on the ground that changed circumstances so require in the best interest of the child. T.C.A. § 37-1-139(b).

### 15.02 Who May File

Any party to the proceeding or any person having supervision or legal custody of or an interest in the child may petition for modification or vacation of an order. T.C.A. § 37-1-139(c); T.R.J.P. 34(d). This includes DCS. (*See Department of Human Services v. Mattox*, No. 89-366-II, 15 TAM 22-10 (Tenn. Ct. App. W.S., April 18, 1990), seeking vacation of an order finding that the children were not sexually abused by their step-grandfather, based on newly discovered evidence--statements made by a child regarding abuse subsequent to the court's finding.)

### 15.03 Contents of Petition

A petition to modify or vacate must include:

- the court, title and action number of the original proceeding;
- name, age and address of the child;
- name and address of the parent, guardian or legal custodian;
- date and general nature of the order to be modified or vacated;
- a concise statement of the grounds alleged to require modification or vacation of the order, including any change of circumstance or new evidence;
- a concise statement as to the relief requested;
- a statement of the petitioner's relationship or interest in the child if a person other than the child brings the petition.

T.R.J.P. 34(d).

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<sup>3</sup>This section was adapted from Kozlowski and Shookhoff, "Juvenile Appeals" in *Appellate Practice in Tennessee* (Tennessee Bar Association, 1991, Second Edition).

**15.04 Time Limits for Hearing on Petition**

The petition must be set for hearing within 30 days, T.R.J.P. 34(e)(1), unless the parties agree to the entry of an agreed order of modification, in which case the court can, in its discretion, enter that order without a formal hearing on the petition. T.R.J.P. 34(e)(5).

**15.05 Notice to Parties**

The clerk of the court is required to give notice to all necessary parties. T.R.J.P. 34(e)(2). Notice is to be given by the service of a summons in conformance with the notice requirements of a dependency petition. T.C.A. § 37-1-139(d).

**15.06 Conduct of Hearing; Applicable Procedures and Rules of Evidence**

If the change of circumstances or newly discovered evidence relates to the adjudicatory hearing, then the procedures and rules applicable to adjudicatory hearings apply. In all other cases, dispositional hearing rules apply. T.R.J.P. 34(e)(4).

**15.07 Modification of Agreed Order**

Modification of an agreed order may not result in the child being placed in DCS custody without a petition filed alleging the child to be dependent, neglected, abused, unruly or delinquent. In addition, the judicial findings of “contrary to the welfare” and “reasonable efforts” must be made by the court. T.C.A. § 37-1-139(c); T.R.J.P. 22(c).

## **16.0 APPEAL TO CIRCUIT COURT<sup>4</sup>**

### **16.01 Appealable Orders; Notice of Appeal; Time Limits**

Any party may appeal the final order or judgment in a dependency proceeding to circuit court for de novo review by filing a notice of appeal with the juvenile court clerk within ten judicial days “following the juvenile court’s disposition.” T.C.A. § 37-1-159(a); T.R.J.P. 36. This includes final orders both from original proceedings and from proceedings to modify or vacate orders pursuant to T.C.A. § 37-1-139 and T.R.J.P. 34.

If the order or judgment from which the appeal is taken was from a hearing or de novo rehearing (pursuant to T.C.A. § 37-1-107) by the juvenile court judge, the appeal period commences “the day after the order of disposition is entered.” T.C.A. § 37-1-159(a).

An order from a referee may be appealed directly to the circuit court. In this case, an appeal must be perfected within ten days of the confirmation of the referee’s final order. T.C.A. §37-1-159(a). *See also* T.C.A. § 37-1-107(e).

Review of preliminary dependency rulings may in some situations be obtained by common law writ of certiorari. Emergency or preliminary placement decisions can also be challenged by writ of habeas corpus.

### **16.02 Record on Appeal**

Upon receiving a notice of appeal, the clerk of the juvenile court should immediately forward the juvenile court record, including the findings of the judge and any written reports by court staff or professional consultants, to the circuit court. T.C.A. § 37-1-159(c). However, because the appeal to the circuit court is a de novo hearing, the circuit court, in reaching its disposition, may only consider those parts of the record admitted in evidence pursuant to the applicable rule of evidence.

### **16.03 Effect of Juvenile Court Judgment Pending Appeal; Stays**

The filing of an appeal does not automatically stay the order of the juvenile court. T.C.A. § 37-1-159(b). The circuit court has authority to issue a stay and make any temporary disposition of the child pending appeal that is available under the Juvenile Court Act. *Id.* There is no specific provision authorizing the juvenile court to stay its own order pending appeal. However, the court can do so by incorporating into its order a provision that execution of the order will not occur until the time for appeal has passed, or, if appeal is taken, until the circuit court orders otherwise.

### **16.04 Setting of Case for Trial De Novo; Time Limits**

Appeals from juvenile court are to be set for an early hearing. Some courts by local rule automatically set juvenile appeals once they are perfected. Others place the burden on the party appealing the case to file a

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<sup>4</sup>This section was adapted from Kozlowski and Shookhoff, “Juvenile Appeals” in *Appellate Practice in Tennessee* (Tennessee Bar Association, 1991, Second Edition).

motion to set within a specific time of the date of perfecting the appeal on penalty of dismissal of the appeal for failure to prosecute.

A hearing must be held within 45 days of the receipt of the juvenile court record by the circuit court when an appeal is taken from a juvenile court decision involving the removal of a child from the custody of the parent or guardian or from the custody of the Department of Children's Services. T.C.A. § 37-1-159(c).

A party who perfects an appeal to circuit court in compliance with T.C.A. § 37-1-159 is entitled to an expedited hearing in circuit court and that hearing is "to take precedence over other cases except those which are also statutorily mandated to be heard within a specific time frame." *Department of Human Services v. Rogoish*, No. 03A01-9704-CV-00145, 1997 Tenn. App. LEXIS 570, at \*4 (Tenn. Ct. App. August 26, 1997).

### **16.05 Pretrial Procedures; Discovery; No Right to Jury Trial**

No formal pleadings are required on appeal to place the case at issue in circuit court. The petition, which served as the lead process in the juvenile court, serves as the basis of the circuit court proceeding and no answer is required. Neither complaints nor answers need be filed, but the Rules of Civil Procedure apply to most other aspects of de novo appeal proceedings before the circuit court. Discovery and pretrial motion practice are handled as in any other civil case. Although the Tennessee Supreme Court has not addressed the issue, the Tennessee Court of Appeals has ruled that there is no right to a jury trial in de novo appeal hearings in circuit court in dependency cases. *Department of Human Services v. Lanier*, 6 TAM 14-17 (Tenn. Ct. App. M.S. February 13, 1981).

### **16.06 Conduct of De Novo Hearing**

A case appealed from juvenile court to circuit court is tried de novo in circuit court, pursuant to the rules of procedure and evidence applicable to any other bench trial in a civil case. Although the entire record of the juvenile court, including the court's findings and written reports, is forwarded to the circuit court on appeal, the circuit court renders its decision solely upon evidence adduced at trial. There is no presumption of correctness of the juvenile court order, and the circuit court judge can consider only those parts of the record that are introduced into evidence pursuant to applicable evidentiary standards.

The petitioning party in juvenile court retains the burden of the petitioner on de novo appeal in circuit court, regardless of which party filed the appeal. This petitioner also retains the right to nonsuit the case, even if it deprives the appellant of an opportunity for "exoneration" from the juvenile court finding. *Lawson v. Bradley*, No. 81-274-2, 7 TAM 24-7 (Tenn. Ct. App. M.S. April 2, 1982).

### **16.07 Effect of Filing of Other Action in Juvenile Court While Appeal Pending**

Filing of another proceeding in juvenile court regarding the child (such as a petition to modify or a termination of parental rights petition) does not authorize the circuit court to delay, suspend, or dismiss (even without prejudice) a de novo appeal. *Rogoish*, above. The only action that would suspend such an appeal would be the filing of an adoption petition. See discussion in Section 2.02, above.

**16.08 Judgment of Court; Remand for Enforcement**

The judgment of the circuit court is rendered following a de novo hearing. In the final order, the circuit court must remand the case to juvenile court for enforcement of the judgment. T.C.A. § 37-1-159(c).

**16.09 Appeal from Circuit Court**

Appeals from the orders of the circuit court may be taken to the Court of Appeals pursuant to the Tennessee Rules of Appellate Procedure applicable to other civil appeals from circuit court.

**16.10 Expedited Appeals to the Court of Appeals**

Editors' Note: Appeals in termination of parental rights cases are discussed in Section 21.0, below. Tennessee Rules of Appellate Procedure, Rule 8A applies to appeals in termination of parental rights cases. Rule 8A does not apply to appeals in child dependency cases.

While the timeframe for most civil appeals is adequate for adults, the same cannot be said for a child. State and federal law require permanency for a child within a restrictive timeframe. Advocates must also consider the impact of delay within the context of the child's perception of time so that appellate review can be accomplished as expeditiously as possible.

Rule 2 of the Tennessee Rules of Appellate Procedure authorizes the Court of Appeals in appropriate cases to suspend the rules, including the time lines for preparation and filing of the transcript, for filing of briefs and for oral argument. A party seeking an expedited appeal should file a motion requesting (1) the suspension of the rules under Rule 2 and (2) a prehearing conference, pursuant to Rule 33, to set an expedited schedule for the appeal.

A memorandum of law should accompany the motion as required by Rule 22. Any facts relied on in support of the motion should either be referenced to the record or, if reference to the record is not possible, supported by appropriate affidavits and exhibits.

A second procedural avenue by which appeals can be expedited is to file a Rule 13 motion under the Rules of the Court of Appeals to expedite a civil appeal. However, parties are advised to use this rule cautiously. Parties waive their rights to a written decision and to review by the Supreme Court under this rule.

**16.11 Obligation of Counsel with Respect to Appeal**

In all juvenile court cases, counsel has an obligation to ensure that the client is aware of the appellate remedies available, the time limits for perfecting an appeal and the manner for perfecting an appeal.

In addition, counsel has an obligation to act to preserve the client's right to appeal pending decisions as to whether to appeal and pursue appellate remedies at the client's direction as long as counsel remains counsel of record. Because Rule 19(b) of the Tennessee Rules of Juvenile Procedure and Rule 13 of the Rules of the Supreme Court require continued representation by counsel until relieved by the court, counsel's obligations to the client continue until counsel is removed as counsel of record.

Counsel should advise the client about the relative merits of any appeal; however, the decision to appeal is a decision made by the client.

## **17.0 TERMINATION OF PARENTAL RIGHTS PROCEEDINGS: CAUSES OF ACTION, JURISDICTION, AND VENUE**

### **17.01 Termination of Parental Rights Causes of Action**

Termination of parental rights requires a finding by clear and convincing evidence that (a) one or more grounds for termination exist and (b) termination is in the best interests of the child. Both issues must be litigated.

### **17.02 Grounds for Termination**

Under Tennessee law, there are nine statutory grounds for termination of parental rights:

- (1) Abandonment, as defined in T.C.A. §§ 36-1-102. *See also* T.C.A. § 37-2-402(10)(A):
  - (a) For a period of four consecutive months immediately preceding the filing of the petition the parent, who knew or reasonable should have known the child's location,
    - willfully failed to visit or engage in more than token visitation, and/or
    - willfully failed to support or engage in more than token support;
    - willful failure to visit or engage in more than token visitation or to support or engage in more than token support of the child's mother during the four months immediately preceding the birth of the child, (1)(A)(iii);or
  - (b) For a parent or guardian who is incarcerated at the time of the filing of the petition, or who has been incarcerated during all or part of the four months immediately preceding the filing of the petition, willful failure to visit or engage in more than token visitation or willful failure to support or engage in more than token support of the child in the four months immediately preceding the incarceration, (1)(A)(iv); or
  - (c) For a parent or guardian who is incarcerated at the time of the filing of the petition or for all or part of the four months immediately preceding the filing of the petition, the parent or guardian has engaged in conduct prior to incarceration which exhibits a wanton disregard for the welfare of the child, (1)(A)(iv); or
  - (d) For a parent or guardian whose child has been removed pursuant to a dependency neglect proceeding and placed in custody of DCS or a licensed child-placing agency, which agency was found to have made reasonable efforts to prevent removal and reasonable efforts to assist the parents, failure of the parents for a period of four months following the removal to make reasonable efforts to provide a suitable home and demonstration of a lack of concern for the child to such a degree that it appears unlikely they will be able to provide a suitable home for the child at an early date, (1)(A)(ii).
  - (e) The child, as a newborn infant aged 72 hours or less, was voluntarily left at a facility by such infant's mother pursuant to § 68-11- 255; and, for a period of 30 days after the date of voluntary delivery, the mother failed to visit or seek contact with the infant; and, for a period of 30 days after notice was given under § 36-1-142(e), and no less than 90 days

cumulatively, the mother failed to seek contact with the infant through the Department or to revoke her voluntary delivery of the infant. (1)(A)(v).

T.C.A. § 36-1-113(g)(1).

- (2) Substantial noncompliance by the parent or guardian with the statement of responsibilities in the permanency plan; T.C.A. §§ 36-1-113(g)(2); 37-2-403(a)(2)(C).
- (3) Persistence of conditions:
  - (a) The child has been removed by court order from the parent or guardian for more than six months;
  - (b) Conditions which led to the removal or which in all reasonable probability would cause the child to be subjected to further neglect or abuse still persist and prevent the child's safe return to the parent;
  - (c) There is little likelihood the conditions will be remedied at an early date to allow reunification in the near future; and,
  - (d) The continuation of the parent-child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

T.C.A. § 36-1-113(g)(3)(A).

- (4) The parent or guardian has been found to have committed severe child abuse under any prior order of a court or by the court in the termination proceeding against the child, any sibling or half sibling, or any other child residing temporarily or permanently in the home of the parent or guardian. T.C.A. § 36-1-113(g)(4).
- (5) The parent or guardian has been sentenced to (but not necessarily served) more than two years imprisonment for conduct against the child, any sibling or half-sibling, or any other child residing temporarily or permanently in the home of the parent or guardian, which has been found under any prior order of a court or by the court in the termination proceeding to be severe child abuse. T.C.A. § 36-1-113(g)(5).
- (6) The parent has been confined in a correctional or detention facility of any type, by order of a court as a result of a criminal act, under a sentence of ten or more years, and the child is under eight years at the time the sentence is entered by the court. T.C.A. § 36-1-113(g)(6).
- (7) The parent has been convicted of or found civilly liable for the intentional and wrongful death of the child's other parent or legal guardian. T.C.A. § 36-1-113(g)(7).
- (8) The parent or guardian is mentally incompetent to provide for the further care and supervision of the child because the parent or guardian is presently so impaired and is likely to remain so that it is unlikely that the parent or guardian will be able to assume or resume the care of and responsibility for the child in the near future. T.C.A. § 36-1-113(g)(8)(B)(i).

- (9) For a person who, at the time of the filing of a petition to terminate the parental rights of such person or, if no such petition is filed, at the time of the filing of a petition to adopt a child, is not the legal parent or guardian of the child or is a biological father who has not legitimated the child, the person has failed to, without good cause or excuse:
- (a) Make reasonable share of prenatal, natal and postnatal expenses involving the birth upon the person's receipt of notice of the impending birth;
  - (b) Make reasonable child support payments in accordance with the child support guidelines;
  - (c) Seek reasonable visitation or, if visitation has been granted, failed to visit or engage in more than token visitation; or,
  - (d) File a petition to establish paternity of the child within thirty days after notice of alleged paternity by the child's mother, or by registering with the putative father registry;
  - (e) Has failed to manifest an ability and willingness to assume legal and physical custody of the child; or
  - (f) Placing custody of the child in his or her legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child.

T.C.A. § 36-1-113(g)(9)(A).

### **17.03 Best Interest Determination at the Termination Hearing**

In determining whether termination is in the best interest of the child, the court must consider:

- Whether the parent or guardian has made such an adjustment of circumstance, conduct or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- Whether the parent or guardian has maintained regular visitation or other contact with the child;
- Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological, and medical condition;
- Whether the parent or guardian or other person residing with the parent or guardian has shown brutality, physical, sexual, emotional, or psychological abuse or neglect toward the child, or another child or adult in the family or household;
- Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled

substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

- Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- Whether the parent or guardian has paid child support consistent with the child support guidelines.

T.C.A. § 36-1-113(i).

#### **17.04 Requirements Under ASFA for DCS to Initiate Termination Proceedings**

The Adoption and Safe Families Act of 1997 requires the Department to initiate termination proceedings (or intervene in proceedings initiated by another party) in any case in which:

- The child has been in DCS foster care approximately 15 of the last 22 months; or
- The child has been found to be an abandoned infant; or
- The parent has been found by a court in either a civil or criminal proceeding to have committed murder or voluntary manslaughter of a sibling, half-sibling or any other child residing temporarily or permanently in the home, or the parent has aided or abetted, attempted, conspired, or solicited to commit such a murder or voluntary manslaughter; or
- The parent has been found by a court in either a civil or criminal proceeding to have committed a felony assault that has resulted in serious bodily injury or severe abuse to the child or to a sibling, half-sibling, or any other child residing temporarily or permanently in the home; or
- The juvenile court has made a finding of severe child abuse.

T.C.A. § 36-1-113(h)(1).

The Department of Children's Services may not be required to file a petition to terminate parental rights under the following circumstances:

- The child is being cared for by a relative; or
- There is a compelling reason, documented in the permanency plan (which is available for the court to review), that termination would not be in the best interests of the child; or
- Reasonable efforts toward reunification are required under T.C.A. § 37-1-166, but the Department has not provided services which the Department deems necessary for the safe return of the child to the home.

T.C.A. § 36-1-113(h)(2).

#### **17.05 Jurisdiction**

The juvenile, circuit and chancery courts have concurrent jurisdiction over proceedings to terminate parental rights. T.C.A. §§ 37-1-104(c); 36-1-113(a). The filing of an adoption petition in circuit or chancery court suspends any termination of parental rights proceeding in any other court and confers upon the adoption court jurisdiction over the termination issues. T.C.A. § 36-1-116(f).

### **17.06 Venue**

The petition to terminate parental rights can be filed:

- In the court of county where the child currently resides in the physical custody of the petitioner;
- In the juvenile, circuit or chancery court which entered the prior order by which the petitioner currently holds legal custody or complete or partial guardianship;
- In the court in the county where the child currently resides or which has jurisdiction to adjudicate a termination of parental rights if the petitioner currently has legal custody or complete or partial guardianship of the child under a prior court order or statutory authorization;
- If filed as part of an adoption proceeding, in accordance with the venue requirements of T.C.A. § 36-1-114.

T.C.A. § 36-1-113(4); T.C.A. § 36-1-114.

## **18.0 INITIATION OF TERMINATION OF PARENTAL RIGHTS PROCEEDINGS**

### **18.01 Who May File**

A termination of parental rights petition may be filed against the parent by the prospective adoptive parents of the child, including extended family members caring for related children, any licensed child-placing agency having custody of the child, the child's guardian ad litem, or the Department of Children's Services. T.C.A. § 36-1-113(b); T.R.J.P. 39(a).

### **18.02 Contents of Petition to Terminate Parental Rights**

The petition must be verified (signed under oath) but may be based upon "information and belief" -- the petitioner need not have first hand knowledge of the facts alleged. If the parent whose parental rights are proposed for termination is the legal parent of the child, as defined in T.C.A. § 36-1-102(28), and if the parent is alleged to be deceased, then diligent efforts must be made by the petitioner to verify the death. T.C.A. § 36-1-113(d)(1).

The petition must include statements of the following:

- The child's name;
- The child's age or date of birth;
- The child's place of birth;
- The child's current residence address or county of residence or that the child is in the custody of the Department of Children's Services or a licensed child-placing agency;
- Any other facts that allege the basis for terminating parental rights and that bring the child and parties within the jurisdiction of the court;
- A verified statement that:
  - 1) That the putative father registry has been consulted within ten working days of the filing of the petition and whether there exists any claim on the registry to the paternity of the child;
  - 2) Whether there exists any other claim or potential claim to the paternity of the child; and
  - 3) Whether any other parental or guardianship rights have been terminated by surrender, parental consent or other means; and whether any other such rights must be terminated.
- That the petition or request for termination shall have the effect of forever severing all of the rights, responsibilities and obligations of the parent or guardian to the child who is the subject of the termination order and of the child to the parent or guardian;
- That the child will be placed in the guardianship of other persons or public or private agencies who, or which, will have the right to adopt the child, or to place the child for adoption and consent to the child's adoption; and

- That the parent or guardian shall have no further right to notice of proceedings for adoption of the child by other persons and that the parent or guardian will have no right to object to the child's adoption or to have any relationship, legal or otherwise with the child.

T.C.A. § 36-1-113(d)(2) and (3); T.R.J.P. 39(a).

The petition shall also contain the following notice:

Any appeal of the trial court's final disposition of the petition for termination of parental rights will be governed by Rule 8A, Tennessee Rules of Appellate Procedure, which imposes special time limitations for the filing of a transcript or statement of the evidence, the completion and transmission of the record on appeal, and the filing of briefs in the appellate court, as well as other special provisions for expediting the appeal.

T.R.J.P. 39(a)(9) and T.R.C.P. 9A.

### **18.03 Persons Who Must Be Named As Defendants**

The legal parents, guardian of the person of the child, and the biological parents of the child must be made parties to the termination proceeding and served with a copy of the petition. The exception to this is where the parent, legal parent, guardian, or putative father of the child has:

- (1) Surrendered parental or guardianship rights to the child;
- (2) Executed a parental consent which has been confirmed by the court;
- (3) Waived such rights pursuant to T.C.A. § 36-1-111(w);
- (4) Lost parental rights to the child subsequent to a termination of parental rights; or
- (5) Is deceased.

T.C.A. § 36-1-113(c)(3)(B); T.C.A. § 36-1-117(a).

If the mother was married when the child is born or conceived, the husband must be named and served unless there is a court order (e.g. a divorce decree) declaring him not to be the father of the child. If the mother and biological father were not married, the biological father must be served if he was legally declared to be the father by court order, or signed an Acknowledgment of Paternity. The following putative fathers must be served: anyone who has (1) filed a legitimation petition; (2) registered with the putative father registry; (3) been identified by the mother under oath as the father; (4) claimed to the mother, the petitioner or DCS to be the father; (5) was openly living with the child at the time of removal; (6) is recorded on the child's birth certificate as the father; (7) entered into a permanency plan in which he acknowledged he was the father; or (8) has been identified as the father "by other information that the court determines to be credible and reliable." T.C.A. § 36-1-117(b) and (c).

### **18.04 Service of Process**

Effective July 1, 2006, the Rules of Civil Procedure apply in termination of parental rights cases in juvenile court. The juvenile court may suspend any of those rules if the interests of justice so require. Service of process for termination petitions filed in circuit, chancery or juvenile court is governed by the Tennessee Rules of Civil Procedure.

T.R.J.P. 1, T.C.A. § 36-1-117(m)(2).

### **18.05 Special Notice Requirements for Incarcerated Parent or Guardian**

Before terminating the rights of any parent or guardian who is incarcerated or who was incarcerated at the time the termination proceeding initiated, it must be affirmatively shown to the court that such incarcerated parent or guardian received actual notice of the following:

- The time and place of the hearing to terminate parental rights;
- That the hearing will determine whether the rights of the incarcerated parent or guardian should be terminated;
- That the incarcerated parent or guardian has the right to participate in the hearing and contest the allegation that his or her rights should be terminated; and, at the discretion of the court, such participation may be achieved through personal appearance, teleconference, telecommunication or other means deemed by the court to be appropriate;
- That if the incarcerated parent or guardian wishes to participate in the hearing and contest the allegation, such parent or guardian, if indigent, will be provided with a court-appointed attorney; and, shall have the right to present testimony by means of depositions or interrogatories as provided by the Tennessee Rules of Civil Procedure; and
- If, by means of a signed waiver, the court determines that the incarcerated parent or guardian has voluntarily waived the right to participate in the hearing and contest the allegation, or if such parent or guardian takes no action after receiving this special notice of rights, the court may proceed with such action without the parent's or guardian's participation.

T.C.A. § 36-1-113(f) and T.R.J.P. 39(b).

**19.0 PRETRIAL PROCEDURES IN TERMINATION OF PARENTAL RIGHTS;  
DISCOVERY; AUTHORIZATION TO ORDER EXAMINATION OF CHILD AND/OR  
PARENT****19.01 Rules of Civil Procedure**

Effective July 1, 2006, the Rules of Juvenile Procedure are amended and provide that in termination of parental rights proceedings in juvenile court the Rules of Civil Procedure apply. The juvenile court may suspend any of those rules if the interests of justice so require. T.R.J.P. 1.

**19.02 Answer to Complaint**

Pursuant to the Rules of Civil Procedure the respondent is required to serve an answer within 30 days after service of the summons and complaint. T.R.C.P. 12.01. (The Rules of Juvenile Procedure do not require an answer be served. This would apply only if the Rules of Civil Procedure are suspended by the court because the interests of justice so require.)

**19.03 Discovery**

Though Rule 1 of the Rules of Juvenile Procedure was amended effective July 1, 2006 and states that the Rules of Civil Procedure govern termination of parental rights proceedings in juvenile court, discovery in such cases in juvenile court is still governed by Rule 25 of the Rules of Juvenile Procedure. TRJP 1(b). Also effective July 1, 2006, Rule 25 of the Rules of Juvenile Procedure was amended and in pertinent part reads “a party to a civil action in juvenile court that is otherwise governed by the Tennessee Rules of Civil Procedure may serve notice of or request for discovery on another party. The party on whom notice or request is served may seek a protective order with regard to the notice or request. Leave to obtain discovery shall be freely given when justice so requires.” This portion of the Rule applies to termination of parental rights proceedings.

**19.04 Physical and Mental Examinations**

Rule 35 of the Rules of Civil Procedure provides that the court may order a party or child in legal custody of a party to submit to a physical or mental examination. The order must be made upon a motion for good cause shown, pursuant to T.R.J.P. 35.01. (T.R.J.P. 39(e)(3) provides for a medical or mental examination of a child; and of a parent if his or her parental ability to care for the child is at issue.)

## **20.0 CONDUCT OF TERMINATION OF PARENTAL RIGHTS HEARING**

Termination of parental rights trials are conducted in the same manner as other adjudicatory hearings in juvenile court and other bench trials in circuit and chancery court.

### **20.01 Continuance or Adjournment for Purposes of Receiving Additional Information**

The court may, for good cause shown, continue or take the case under advisement for such time as is required for receiving additional evidence, reports or assessments, or any other necessary information. T.R.J.P. 39(e)(4).

### **20.02 Evidence Admissible; Inapplicability of Statutory Privileges**

The Tennessee Rules of Evidence apply to the trial of termination of parental rights petitions in juvenile, circuit, or chancery court. The Tennessee Rules of Juvenile Procedure, in regard to the admissibility of evidence, also apply to the trial of termination of parental rights petitions in juvenile, circuit, or chancery court. T.C.A. § 36-1-113(j).

Neither the husband-wife privilege, physician-patient privilege, psychologist-patient privilege, nor clergy-penitent privilege shall be grounds for excluding evidence in termination of parental rights proceedings. T.R.J.P. 39(e)(5).

### **20.03 Findings of Fact; Standard of Proof**

If the court finds by clear and convincing evidence that grounds for termination exist and the termination of parental rights is in the child's best interest, then it must enter an order granting the petition. Otherwise the court must enter an order dismissing the petition. T.R.J.P. 39(f)(2). The clear and convincing evidence standard is constitutionally mandated. *Santosky v. Kramer*, 455 U.S. 745 (1982). The standard applies to establishing both the grounds for termination and that termination is in the child's best interest. *State v. Calabretta (In re J.J.C.)*, 148 S.W.3d 919, (Tenn. Ct. App. 2004).

The trial court should include in the order specific findings of fact and conclusions of law with regard to each ground presented. *In re D.L.B.*, 118 S.W.3d 360 (Tenn. 2003).

A juvenile court order terminating parental rights shall award complete custody, control and guardianship of the child to the Department of Children's Services or a licensed child-placing agency with the right to place the child for adoption and consent to adoption in loco parentis. T.R.J.P. 39(f)(3).

## 21.0 APPEALS IN TERMINATION OF PARENTAL RIGHTS CASES

Appeals in termination of parental rights cases, whether heard in circuit, chancery or juvenile court, and whether from final orders or interlocutory orders, are to the Court of Appeals on the record pursuant to the Tennessee Rules of Appellate Procedure. T.C.A. § 37-1-159(e). Rule 8A of the Tennessee Rules of Appellate Procedure governs appeals as of right in termination of parental rights cases filed on or after July 1, 2004. Rule 8A does not apply to an interlocutory appeal as it is not an “appeal as of right.”

### 21.01 Rule 8A of the Tennessee Rules of Appellate Procedure

Editor’s Note: This section includes information regarding Rule 8A of the Tennessee Rules of Appellate Procedure. Attorneys should read the Tennessee Rules of Appellate Procedure in its entirety before filing any appeal.

#### 21.01 (a) Application

Rule 8A governs any appeal as of right in a termination of parental rights proceeding. The other rules of appellate procedure also apply to such an appeal; however, when a provision of Rule 8A conflicts with another rule of appellate procedure, the provision of Rule 8A shall control.

#### 21.01 (b) Notice of Appeal

It is not necessary for a party to file a motion to alter or amend the judgment or a motion for a new trial in order to obtain appellate review of the judgment of the trial court. T.R.A.P. 8A(a)(1). In addition to meeting the requirements of T.R.A.P. 3(f) regarding the contents of the notice of appeal, the notice of appeal in a termination of parental rights proceeding shall indicate that the appeal involves a termination of parental rights case. T.R.A.P. 8A(a)(2). The notice of appeal must be filed with the clerk of the trial court within 30 days after the date of entry of the judgment. T.R.A.P. 4(a).

#### 21.01 (c) Stay or Injunction Pending Appeal

Pursuant to Rule 62 of the Tennessee Rules of Civil Procedure or Rule 39(g)(4) of the Rules of Juvenile Procedure, when an appeal is taken from the trial court’s disposition, the trial court in its discretion may stay its order or otherwise suspend relief or grant whatever additional or modified relief is deemed appropriate during the pendency of the appeal. The trial court’s decision regarding a stay or other such relief granted may be reviewed by the appellate court pursuant to Rule 7 of the Rules of Appellate Procedure. T.R.A.P. 8A(b).

#### 21.01 (d) Content and Preparation of the Record

Rule 24 of the Tennessee Rules of Appellate Procedure governs the content and preparation of the record. In addition to the papers excluded from the record pursuant to Rule 24(a), any portion of a juvenile court file of a child dependency, delinquency or status case that has not been properly admitted into evidence at the termination of parental rights trial shall be excluded from the record. T.R.A.P. 8A(c).

21.01 (e) Transcript; Statement of Evidence; Procedure When No Transcript or Statement Is Filed; Objections

Any transcript of the evidence or proceedings filed pursuant to T.R.A.P. 24(b) shall be filed within 45 days after filing the notice of appeal. If the appellee has objections to the transcript as filed, the appellee shall file the objections with the clerk of the trial court within 10 days after service of notice of the filing of the transcript. T.R.A.P. 8A(c)(1).

Any statement of the evidence or proceedings filed pursuant to Rule 24(c) shall be filed within 45 days after filing the notice of appeal. If the appellee has objections to the statement as filed, the appellee shall file objections thereto with the clerk of the trial court within 10 days after service of the declaration and notice of the filing of the statement. T.R.A.P. 8A(c)(2).

If no transcript or statement of the evidence or proceedings is to be filed, the appellant shall, within 15 days after filing the notice of appeal, file with the clerk of the trial court and serve upon the appellee a notice that no transcript or statement is to be filed. If the appellee deems a transcript or statement of the evidence or proceedings to be necessary, the appellee shall, within 15 days after service of the appellant's notice, file with the clerk of the trial court and serve upon the appellant a notice that a transcript or statement is to be filed. The appellee shall prepare the transcript or statement at the appellee's own expense or apply to the trial court for an order requiring the appellant to assume the expense. Subdivisions (c)(1) and (c)(2) of T.R.A.P. 8A are applicable to the transcript or statement filed by the appellee under this section, except that the appellee under this section shall perform the duties assigned to the appellant in subdivisions (c)(1) and (c)(2) of T.R.A.P. 8A and the appellant under this section shall perform the duties assigned to the appellee. T.R.A.P. 8A(c)(3).

Unless the time has been extended by order, if the appellant fails to file within 45 days from the filing of the notice of appeal either the transcript or statement of evidence or notice that no transcript or statement is to be filed, the clerk of the trial court shall provide written notice within 10 days to the clerk of the appellate court of the appellant's failure to comply with this subdivision, with a copy provided to counsel and pro se parties. T.R.A.P. 8A(c)(1).

21.01 (f) Approval of the Record by the Trial Judge or Chancellor

After the expiration of the 10-day period for objections by the appellee, the trial judge shall approve the transcript or statement of the evidence and shall authenticate the exhibits. If not approved within 20 days after the expiration of the period for filing objections by the appellee, the transcript or statement of the evidence and the exhibits shall be deemed to have been approved and considered so by the appellate court. If approval did not occur by reason of the death or inability to act of the trial judge the case is governed by T.R.A.P. 24(f). T.R.A.P. 8A(d).

21.01 (g) Completion and Transmission of the Record

The record on appeal shall be assembled, numbered and completed by the clerk of the trial court and transmitted to the clerk of the appellate court within five days of the approval of the record by the trial judge or by operation of the automatic-approval provision, whichever occurs first. T.R.A.P. 8A(e).

**21.01 (h) Extension of Time for Completion of the Record**

If the record cannot be completed within the time permitted, the clerk of the trial court shall request an extension of time from the appellate court. The request must state the reasons for the requested extension and must be made within the time originally prescribed for completing the record or within an extension previously granted.

Extensions of time for completion of the record in termination of parental rights cases are disfavored and will be granted by the appellate court only upon a particularized showing of good cause.

Trial court clerks shall give priority to completion of the record in termination of parental rights cases over other types of cases. The time for completing the record shall not be extended to a day more than 60 days after the date of the filing of the transcript or statement of evidence or the appellant's notice that no transcript or statement is to be filed.

In the event of the failure of the clerk of the trial court to complete the record within the time allowed, the clerk of the appellate court shall notify the trial court and take such other steps as may be directed by the appellate court.

T.R.A.P. 8A(f).

**21.01 (i) Filing and Service of Briefs**

The appellant must serve and file a brief within 30 days after the date on which the record is filed with the clerk. The appellee must serve and file a brief within 20 days after the appellant's brief is filed with the clerk. Reply briefs must be served and filed within 14 days after filing of the preceding brief. All other matters regarding briefs of the appellant and appellee shall be governed by T.R.A.P. 27, 28, 29, 30 and 32. T.R.A.P. 8A(g).

**21.01 (j) Extensions of Time**

Extensions of time in an appeal of a termination of parental rights proceeding are disfavored and will be granted by the appellate court only upon a particularized showing of good cause. T.R.A.P. 8A(i).

**21.01 (k) Appeal by Permission from Court of Appeals to Supreme Court**

The provisions of Rule 11 control review by the Supreme Court in a termination of parental rights proceeding. T.R.A.P. 8A(h).

**21.02 Restrictions on Collateral Attack of Termination of Parental Rights Order**

After the entry of an order terminating parental rights, no party to the proceeding, nor anyone claiming under such a party, may later question the validity of the termination by reason of any defect or irregularity, jurisdictional or otherwise, except by timely appeal. A termination cannot be overturned by any court or collaterally attacked by any person or entity after one year from the date of entry of the final order of termination. T.C.A. § 36-1-113(q).

### **21.03 Review of Decisions of Referee in Termination Proceedings**

If a juvenile court referee hears the termination petition, the parties would have the option of a de novo rehearing before the juvenile court judge prior to appealing to the Court of Appeals. The procedures governing rehearing in dependency cases set forth in Section 11.0, above, are applicable in termination cases heard before the referee, with the exception of the calculation of the time for filing a Notice of Appeal in the Court of Appeals. The Notice of Appeal must be filed within 30 days of the final order of the juvenile court. The date of the final order would either be the date of entry of the order of the juvenile court judge on rehearing or the date of the order of the judge confirming the findings and recommendations of the referee, if no rehearing were requested.

The assignment of a case to a referee for a hearing adds another layer to the appellate process. Because of the importance of expediting the appellate process in termination of parental rights cases, and because these cases are likely to result in appeals being taken, the better practice is for the juvenile court judge to decide the case.

### **21.04 Stay Pending Appeal**

When an appeal is taken from the trial court's disposition, the court in its discretion may stay its order or otherwise suspend relief or grant whatever additional or modified relief is deemed appropriate during the pendency of the appeal and upon such terms as it deems proper. The trial court's decision regarding a stay, or other such relief granted, may be reviewed pursuant to Rule 7 of the Tennessee Rules of Appellate Procedure by the appellate court. T.R.J.P. 39(f)(4).

### **21.05 Standard of Review**

Rule 13(d) of the Tennessee Rules of Appellate Procedure requires that review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.

When the trial court fails to make a specific finding of fact on a particular matter, the review of the fact in the record is a purely de novo review. Issues of law are reviewed de novo upon the record with no presumption of correctness. *In re Valentine*, 79 S.W.3d 539, 542 (Tenn. 2002).

Mixed questions of law and fact require a review of review de novo with no presumption of correctness. *Nash-Putnam v. McCloud*, 921 S.W.2d 170 (Tenn. 1996), citing *Aaron v. Aaron*, 909 S.W.2d 408 (Tenn. 1995).

**PART II: CASE LAW**

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## PART II: CASE LAW

### 1.0 JURISDICTION OF JUVENILE COURT IN DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS

Editors' note: Case law, especially in dependency and termination of parental rights matters, is constantly evolving. The summaries of cases in Part II of this manual are intended only to guide advocates in their legal research. They cannot be considered an exhaustive review of dependency and termination of parental rights law. Advocates are strongly advised to read each case in its entirety and to diligently research recent decisions. Case law is current through July 31, 2007, however not all dependency or termination cases are included.

Please note that unlike reported decisions, unpublished opinions do not carry precedential value. Copies of unpublished cases cited to the court must be included in appendices to any brief or other paper and furnished to adversary counsel. Sup. Ct. Rule 4(5); Ct. Appeals Rule 12. (Reported Tennessee cases consist of only those cases reported in the South Western Reporter Series.)

#### 1.01 Jurisdiction and Venue

##### 1.01 (a) Jurisdiction

*In re D.Y.H.*, 226 S.W.3d 327 (Tenn. 2007). Father filed a dependency and neglect petition in juvenile court and the court found the mother abused the child, awarding custody to the father. Three years later, the mother filed a petition for change of custody. The juvenile court denied her petition and the mother appealed to circuit court, which dismissed the appeal for lack of jurisdiction finding the petition was not part of the dependency and neglect proceeding. The Court of Appeals affirmed. The Supreme Court held the petition to change custody was part of the dependency and neglect proceedings and therefore appealable to circuit court. **“In all cases in juvenile court involving a custody determination there must be some underlying proceeding that gives the court subject matter jurisdiction.** Unlike circuit or chancery courts, which are courts of general jurisdiction, juvenile courts in Tennessee are courts of limited jurisdiction. *Stambaugh v. Price*, 532 S.W.2d 929, 932 (Tenn. 1976).” (footnote omitted.) *Id.* at 330. The primary **statutes that provide for jurisdiction of the juvenile court are T.C.A. §§ 37-1-103 and 37-1-104. Pursuant to T.C.A. §§ 37-1-103(c):**

**(W)hen a juvenile court acquires jurisdiction from a dependency and neglect proceeding, its exclusive original jurisdiction continues until one of following events occur:**

- (1) the case is dismissed;**
- (2) the custody determination is transferred to another court;**
- (3) a petition for adoption is filed; or**
- (4) the child reaches the age of eighteen. *Id.***

Because the court acquired jurisdiction over the child pursuant to the dependency and neglect petition and the subsequent finding, “without an interrupting event under section 37-1-103(c), a subsequent decision by the juvenile court on whether to modify an initial custody order will also arise from and be a part of the dependency and neglect proceeding. *Id.* at 331.

*In re Adoption of A.M.H.*, 215 S.W.3d 793 (Tenn. 2007). Rehearing denied and clarified at 215 S.W.3d 793, US Supreme Court certiorari denied by *Baker v. Shao-Qiang He*, 2007 U.S. LEXIS 8357 (U.S., June 25, 2007). Stay denied by *Baker v. Shao-Qiang He*, 2007 U.S. LEXIS 8315 (U.S., June 25, 2007). On appeal of the termination of parental rights, the appellees **challenged the jurisdiction of the Supreme Court to preside over the appeal citing T.C.A. § 36-1-113 (q)**, which states in part “and in no event, for any reason, shall a termination of parental rights be overturned by any court or collaterally attacked by any person or entity after one (1) year from the date of the entry of the final order of termination.” Specifically, the appellants argued the statute prevented the Court from hearing the case because one year had passed since the entry of the order terminating the child’s parental rights. The Court, in construing the statute, found it was not ambiguous. **“The statute plainly states that the trial court’s ‘order’ terminating parental rights may not be challenged by a party to the proceeding ‘except based upon a timely appeal of the termination order as may be allowed by law.’** Tenn. Code Ann. § 36-1-113(q) (emphasis added).” *Id.* at \*808.

The Court reviewed the issue of a “final order” holding that **an order “does not become final until ‘all direct appeals have been exhausted** including an application for appeal or for certiorari to the Tennessee or United States supreme court.’ Cf. Tenn. Code Ann. § 39-17-901 (5) (2003).” *Id.* The Court further stated **the statute is a “statute of repose” and is intended to limit the time in which an action may be filed, “not a limit on the time for direct appeal.** *Id.*

*State Dep’t of Children’s Servs. v. Owens*, 129 S.W.3d 50 (Tenn. 2004). S.L.O. was placed in state custody in 1999 after allegations of abuse against her adoptive parents, the Owensens, were made. At the time S.L.O. was placed in custody, she lived with her seven biological siblings though S.L.O. was the only child that had been adopted by the Owensens. Her siblings were returned to Indiana and later adopted by relatives, the Maddoxes. The record indicates that the Maddoxes did not know that S.L.O. had been placed into state custody in Tennessee. In May 2001 the Maddoxes filed a petition to intervene and for temporary custody. A month later DCS filed a petition to terminate the parental rights of the Owensens to S.L.O. The juvenile court heard the termination petition on August 22, 2001, and immediately afterwards heard the Maddoxes’ petition. An order filed September 5, 2001, terminated the Owensens’ parental rights and awarded guardianship of S.L.O. to DCS. On October 9, 2001, the juvenile court entered an order declaring the Maddoxes’ petition moot since guardianship had been awarded to DCS. The order did however make a finding that granting custody to the Maddoxes was not in the child’s best interest. There were no specific fact-findings to support the best interest determination. The Maddoxes filed a notice of appeal in circuit court. DCS countered by filing a motion to dismiss for lack of jurisdiction alleging that when guardianship was awarded, juvenile court lost jurisdiction to hear custody issues. The circuit court agreed with DCS. The Maddoxes appealed to the Court of Appeals. The Court of Appeals agreed that circuit court did not have jurisdiction to hear termination matters but had the authority to transfer the case to the Court of Appeals and modified the circuit court’s order accordingly.

The Supreme Court found that the Maddoxes’ petition was part of the dependency proceeding and not the termination proceeding stating, **“(t)he nature and substance of a proceeding cannot be transformed simply by the filing of a petition with a different caption.”** *Id.* at 54. Nor did the Court accept the assertion of DCS that the Maddoxes’ petition was superseded by the order of guardianship pursuant to T.C.A. 36-1-113(n). The Court held **“(t)he order which TDCS alleges is superseded is not an order of guardianship, but rather, a pending custody petition....Therefore, the statute is inapplicable under its own terms.** *Id.* at 55. The Court expressed concern that the Maddoxes despite proper efforts were denied an opportunity to be heard on the merits of their case. The Court ruled **“we deem this an appropriate case to invoke our authority pursuant to Tennessee Rule of Appellate Procedure 36(a). We reverse the judgment of the Court of Appeals and remand the cause to the circuit court, which shall regard the cause as involving dependency and neglect and shall concurrently consider and**

**decide all petitions within that context.”** *Id.* at 57. See also, *In re T.M.C.*, No. M2004-02653-COA-R3-JV, 2005 Tenn. App. LEXIS 832 (Tenn. Ct. App. December 28, 2005).

*Toms v. Toms*, 98 S.W. 3d 140 (Tenn. 2003). A dependency petition was filed in juvenile court by the paternal grandmother of the child. The mother subsequently filed a complaint for divorce in circuit court. The juvenile court dismissed the dependency petition without prejudice. The paternal grandparents intervened in the divorce proceedings alleging the children were dependent and neglected and were awarded custody of the children. The mother filed an application for an extraordinary appeal to the Court of Appeals that was denied. She then filed the same in the Supreme Court that was granted. One issue on appeal is whether juvenile or circuit court had jurisdiction to hear the dependency action of the grandparents. The mother argued because the original dependency proceeding filed by the grandparents was filed in juvenile court, T.C.A. § 37-1-103(a) grants exclusive original jurisdiction to the juvenile court over the dependency proceedings. **The Supreme Court held that juvenile court lost jurisdiction upon dismissal of the dependency petition pursuant to T.C.A. § 37-1-103(c). The Court held that jurisdiction of a dependency petition continues in juvenile court until it is dismissed or the custody determination is transferred to another juvenile, circuit, chancery or general sessions court exercising domestic relation jurisdiction as prescribed by the statute.**

*In re K.A.Y.*, 80 S.W.3d 19 (Tenn. Ct. App. 2002). **Pursuant to T.C.A. § 36-1-116(f)(2) the filing of a petition for adoption in circuit or chancery court suspends a pending custody matter in juvenile court and the court hearing the petition for adoption is not required to decide the pending custody petition.**

*In re Hatcher*, 16 S.W.3d 792 (Tenn. Ct. App.1999). The juvenile court entered an order of adoption after the mother surrendered her rights to her child to the pre-adoptive parents. The juvenile court vacated the adoption order fifteen months after its entry. The pre-adoptive parents appealed and argued that T.C.A. § 36-1-122(b)(1) prevents parties to adoptions from raising the jurisdictional issue after the order becomes final. The Court of Appeals held that T.C.A. § 36-1-122(b)(1) must be read in conjunction with T.C.A. § 36-1-122(b)(2). **The Court found that since the juvenile court did not have subject matter jurisdiction, the adoption order may be attacked even after one year.**

*State v. George (Green)*, 968 S.W.2d 896 (Tenn. Crim. App. 1997). The Court of Criminal Appeals held that the chancery court did not have jurisdiction to issue a temporary restraining order or to adjudicate a petition for change of custody after the filing and adjudication in the juvenile court of a petition for dependency and neglect. The Court of Criminal Appeals found that **“jurisdiction cannot be conferred to a chancery court or circuit court sua sponte or by consent of the parties.”** 968 S.W. 2d, at 898. Citing *Hicks v. Hicks*, 01A01-9309-CH-00417, 1994 Tenn. App. LEXIS 166 (Tenn. Ct. App. March 30, 1994); *Simpkins v. Greer*, 01A01-9202-CH-00060, 1993 Tenn. App. LEXIS 91 (Tenn. Ct. App. January 29, 1993). See also *Green v. George*, No. 02A01-9711-CH-00279, 1999 WL 252710 (Tenn. Ct. App. April 28, 1999).

*State Dep't of Human Services v. Gouvitsa*, 735 S.W. 2d 452 (Tenn. Ct. App. 1987). Permission to appeal denied. See also *Arnold v. Gouvitsa*, 735 S.W.2d 458. The juvenile court found the children to be dependent and neglected and awarded legal custody to the Department of Human Services. On appeal, the circuit court granted father's motion to dismiss the petition on the ground that an earlier circuit court order granting custody to the father was res judicata. DHS appealed. **The Court of Appeals held that exclusive jurisdiction was vested in juvenile court upon the filing of the petition alleging dependency, and the circuit court lacked jurisdiction to make an award of custody.** This case was consolidated with the appeal of the custody matter arising out of the prior divorce proceedings in the circuit court. The Court held pursuant to T.C.A. § 37-1-103, in all proceedings alleging a child to be

delinquent, unruly or dependent and neglected, the juvenile court has exclusive, original jurisdiction. The Court cited *Marmino v. Marmino*, 34 Tenn. App. 352, 238 S.W.2d 105 (1950) and *Kidd v. State*, 207 Tenn. 244, 338 S.W. 2d 621 (1960). The Court, in quoting *Marmino*, stated:

We think it is a sound and simple view that the Chancery Court never loses jurisdiction of the question of custody, that is, the subject matter as part of a divorce proceeding, but the right and power to exercise that jurisdiction upon the person or the minor may be suspended temporarily or permanently either prior to or after the inception of the divorce case by reason of the exercise by the Juvenile Court of the special, exclusive jurisdiction conferred on it to determine whether the minor is "dependent" or "delinquent," as defined by the Statute and hence necessarily to determine custody. *Id.* at 456.

The circuit court did not have jurisdiction to proceed on the issue of custody on the father's petition, filed as part of the post-divorce proceedings, after the petition alleging dependency was filed in the juvenile court. The Court of Appeals remanded the case to the circuit court to hear the appeal of the judgment of the juvenile court.

*State ex rel. Baker v. Turner*, 562 S.W.2d 435 (Tenn. Ct. App. 1977). Court of Appeals **reversed the chancery court whose order gave custody of the child to mother and precluded child's placement in foster care.** Parties were divorced in chancery court in December 1972, and custody awarded to mother with visitation by paternal grandfather. In July 1976, father and grandfather reported to juvenile court that the child was allegedly being beaten by mother, and filed a dependency and neglect petition. The child was placed in foster care after interviews with all involved. Mother filed for habeas corpus in chancery court. After the September 1, 1976 hearing, the chancellor enjoined father, grandfather, juvenile court and DHS employees from interfering with the mother's custody. The Court of Appeals overruled the motion to dismiss the appeal in order to decide "crucial question" of whether juvenile court has exclusive jurisdiction to hear dependency and neglect petitions. The Court reviewed *Marmino v. Marmino*, 34 Tenn.App. 352, 238 S.W.2d 105 (1951), and *Kidd v. State*, 207 Tenn. 244, 338 S.W.2d. 621 (1960), and concluded that the juvenile court does have exclusive jurisdiction over the dependency petition. See also, *Craft v. Juvenile Court (In re N.E.C.)*, 173 S.W.3d 736 (Tenn. Ct. App. 2005).

*In Re H.N.K.*, No. M2005-02577-COA-R3-PT, 2006 Tenn. App. LEXIS 402 (Tenn. Ct. App. June 13, 2006). DCS filed a petition to terminate the parents' parental rights in the Juvenile Court of Franklin County subsequent to filing a dependency and neglect petition in that county. Prior to these proceedings, the Juvenile Court of Lincoln County had adjudicated a dependent and neglect petition filed by DCS. The court dismissed the petition as to the mother and returned custody of the child to her. As to the father, the court found the child dependent and neglected and ordered the father to complete an anger management or domestic violence program before assuming visitation with the child. **The Western Section vacated the judgment because the Juvenile Court of Franklin County did not have jurisdiction over the termination of parental rights proceeding.**

The Court reviewed T.C.A. § 37-1-103(c) that requires the jurisdiction to continue in the juvenile court that originally obtains jurisdiction over a dependency and neglect case, until the court dismisses or transfers the case, an adoption petition is filed or the child reaches 18 years of age. **The Court determined the Juvenile Court in Lincoln County did not lose jurisdiction of the child by dismissing the dependency petition against the mother.** The Court held: "Had Mother been the only parent involved in the action in the Juvenile Court of Lincoln County, or if the court dismissed the petition as to both parents, then the Juvenile Court of Franklin County would have been allowed to exercise its jurisdiction over the petition to terminate their parental rights." *Id.* at \*20.

*State Dep't of Children's Servs. v. R.S.*, No. M2002-00919-COA-R3-CV, 2003 Tenn. App. LEXIS 657 (Tenn. Ct. App. September 11, 2003). The children were placed in DCS custody by the juvenile court and a termination of parental rights petition was brought in circuit court. **The circuit court denied the petition to terminate the parents' rights filed by DCS and ordered DCS perform a home study and prepare a plan for the return of the children to the parents.** DCS appealed. The Middle Section affirmed the trial court's dismissal of the petition to terminate parental rights. However **the Court vacated the portion of the order regarding the return of custody to the parents and held that once the termination petition is dismissed, the authority of the "court hearing only the termination matter ends....Where there is an unappealed order finding the children dependent and neglected and awarding custody, jurisdiction reverts to the juvenile court that entered that order.** *Id.* at \*66. See also, *In re DMD*, No. W2003-00987-COA-R3-PT, 2004 Tenn. App. LEXIS 381 (Tenn. Ct. App. June 17, 2004). Permission to appeal denied at *In re DMD*, 2004 Tenn. LEXIS 1043 (Tenn., Nov. 22, 2004); and *Department of Children's Servs. v. Galvin*, No. 03A01-9807-CV-00233, 1999 Tenn. App. LEXIS 257 (Tenn. Ct. App. April 16, 1999).

*State Dep't of Children's Servs. v. R.M.M.*, No. E2001-02678-COA-R3-JV, 2002 Tenn. App. LEXIS 679, (Tenn. Ct. App. September 23, 2002). Eastern Section **held juvenile court has jurisdiction to proceed on a termination of parental rights petition during the pendency of an appeal of its prior order determining dependency and neglect involving the same parties.** The Court cited *In re T.H.*, No. 01-A-01-9412-JV-00600, 1996 Tenn. App. LEXIS 218 (Tenn. Ct. App. April 10, 1996).

*In the Matter of H.N.R.*, No. M2001-02264-COA-R3-JV, 2001 Tenn. App. LEXIS 968 (Tenn. Ct. App., November 21, 2001). The Department of Children's Services appealed an order of the juvenile court transferring a case pursuant to T.C.A. § 37-1-112 to circuit court that was initiated by a dependency petition in juvenile court. **The Middle Section held the order was ineffective to transfer jurisdiction to the circuit court because it failed to include the findings required by T.C.A. § 37-1-129(a)(2). The Court stated the statute does not authorize the transfer of a dependency petition, only a transfer of the custody determination.**

*Baltz v. Knight*, No. 01A01-9606-JV-00263, 1998 Tenn. App. LEXIS 764 (Tenn. Ct. App. November 13, 1998). The Middle Section found that juvenile court did not have subject matter jurisdiction to modify a decree of another state involving custody of children. Parents were divorced in Arkansas, mother was awarded custody of two children and moved to Tennessee. Father moved to Georgia. Six years after the divorce, the parents entered an agreed order in juvenile court in Tennessee awarding custody of one child to the mother and the other child to the father. Mother subsequently filed pleadings requesting the juvenile court to declare the order void for lack of subject matter jurisdiction and filed a petition in chancery court to enroll and enforce the Arkansas custody decree. The juvenile court declared its order void and the father appealed. The Court of Appeals considered Tennessee's and Arkansas' version of the Uniform Child Custody Jurisdiction Act (UCCJA) and the federal Parental Kidnapping Prevention Act (PKPA), concluding that Tennessee courts have jurisdiction to modify the Arkansas decree because the parents and children had maintained no connection with Arkansas and Tennessee was the children's "home state." **The Court of Appeals held that "[u]nless a juvenile court is exercising exclusive jurisdiction under T.C.A. § 37-1-103, it cannot interfere with a custody decision made in the context of a divorce proceeding."** *Id.* at \*12. **The father attempted to rely on T.C.A. § 37-1-104(a)(2) that allows for concurrent jurisdiction with the probate courts to determine custody or appoint a guardian of the person of a child. The Court of Appeals held that this section did not apply as the father did not initiate a guardianship proceeding in the juvenile court.**

*State v. Thompson*, No. 01A01-9511-CH-00538, 1997 Tenn. App. LEXIS 860 (Tenn. Ct. App. December 5, 1997). **A juvenile court may assess child support when another court with concurrent jurisdiction has not previously ordered the parent to pay child support.**

1.01 (b) Venue

*In re B.N.S.*, No. M2003-02524-COA-R3-PT, 2004 Tenn. App. LEXIS 263 (Tenn. Ct. App. April 26, 2004). Hamilton County Juvenile Court placed custody of B.N.S. with her aunt and uncle. The aunt and uncle later moved with B.N.S. to Marion County. Marion County Juvenile Court placed B.N.S. in DCS custody. B.N.S. was placed in a foster home outside of Marion County. DCS filed a petition to terminate the parental rights to B.N.S. in Marion County. The juvenile court granted the termination petition despite the mother's objection that venue was not proper. Mother appealed. **Middle Section reversed the order terminating parental rights, finding that Marion County did not have venue to hear the proceeding pursuant to T.C.A. 36-1-113(d)(4)(C) in that 1) the child did not reside in Marion County nor was B.N.S. in the physical custody of DCS when the termination petition was filed; 2) the Marion County custody order was not a valid order since the Hamilton County had obtained proper jurisdiction over the custody of B.N.S. Hamilton County's jurisdiction continued until the case had been dismissed, transferred to another court with domestic relations jurisdiction or an adoption petition is filed; and 3) that T.C.A. 36-1-113(d)(4)(C) should not be interpreted to enable DCS to circumvent T.C.A. 37-1-103(c).**

*State v. Ford*, No. 01A01-9704-JV-00171, 1997 Tenn. App. LEXIS 795 (Tenn. Ct. App. November 14, 1997). Petition to rehear denied, 1998 Tenn. App. LEXIS 87. Middle Section reversed the termination of parental rights order and remanded the case to the trial court to enter an order dismissing the petition for lack of jurisdiction. Children were found to be neglected and dependent by the juvenile court in one county and a petition to terminate parental rights was filed in the juvenile court of another county. Mother claimed improper venue. **Court of Appeals found that because of the fundamental liberty interest of parents in the care and custody of their children, there is a strong preference for venue in the "home county" for proceedings to terminate parental rights. The Court of Appeals also found that the trial court lacked jurisdiction because jurisdiction had attached in the county where the children were adjudicated and where custody was granted to DCS.**

1.01 (c) Standing

*Gonzalez v. Tenn. Dep't of Children's Servs.*, 136 S.W.3d 613 (Tenn. 2004). Grandparents filed a motion to intervene in juvenile court in a termination of parental rights proceeding. The juvenile court denied the motion but granted the grandparents leave to an interlocutory appeal pursuant to Tenn. R. App. P. 9. The Court of Appeals denied the grandparents' application. The Supreme Court granted the application for permission to appeal and upheld the juvenile court's denial of the motion to intervene. The issue before the Court was whether the trial court erred in denying the motion to intervene as of right. **The Supreme Court held that standing to intervene in a termination proceeding in juvenile court is properly analyzed pursuant to Rule 24 of the Tennessee Rules of Civil Procedure, thus overturning *Skerrett v. Ass'n for Guidance*, No. M2002-00218-COA-R3-JV, 2003 Tenn. App. LEXIS 486, 2003 WL 21634412 (Tenn. Ct. App. July 11, 2003), which held that Tenn. R. Civ. P. 24 is not applicable to proceedings in juvenile court. The Supreme Court further held that the Gonzalazes did not have a right to intervene pursuant to Tenn. R. Civ. P. 24. **The Rule allows intervention as of right in three situations: 1) when a statute confers an unconditional right to intervene, 2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented****

**by existing parties, and 3) by stipulation of all the parties.** The Court found that “(a)lthough it is conceivable that a grandparent may adduce evidence sufficient to support intervention as of right in a parental termination hearing, we agree with the majority of jurisdictions which hold that the grandparental relationship does not alone support intervention.” *Id.* at 620. The Court also found the grandparents were not “without a remedy. They may participate in the termination proceedings as witnesses, they may file a petition for custody or adoption, or they may elect other appropriate options.” *Id.* See also, *In re A.J.H.*, No. M2005-00174-COA-R3-PT, 2005 Tenn. App. LEXIS 740 (Tenn. Ct. App. November 28, 2005).

***Osborn v. Marr*, 127 S.W.3d 737, (Tenn. 2004). Supreme Court held a parent does not have standing to file a petition to terminate parental rights pursuant to T.C.A. §36-1-113(g)(6).** Mother filed a petition to terminate the father’s parental rights of a child born out of wedlock after the father was sentenced to a 16-year prison term. The trial court dismissed the petition on an issue unrelated to the standing of the mother and the Court of Appeals reversed. The Supreme Court held that it must determine whether the Court has jurisdiction over the subject matter before review of the substantive issue. “When a statute creates a cause of action and designates who may bring an action, the issue of standing is interwoven with that of subject matter jurisdiction and becomes a jurisdictional prerequisite.” *Id.* at 740. Since standing is a subject matter jurisdiction it cannot be waived. The Court found:

Tennessee Code Annotated section 36-1-113(b) is clear and unambiguous. The statute omits the parent of a child as one of the persons or entities with standing to file a petition to terminate parental rights. The legislature’s decision to omit a child’s parent from those persons with standing to terminate parental rights is consistent with statutes governing other aspects of a parent-child relationship. A parent has the duty to financially support his or her children. See Tenn. Code Ann. § 34-1-102 (2001); *Gallaher v. Elam*, 104 S.W.3d 455, 461 (Tenn. 2003). When parental rights are terminated, all legal rights and obligations of the parent are severed, including the duty to provide support. See Tenn. Code Ann. § 36-1-113(l)(1) (2001). The termination of a parent’s parental rights outside the context of a prospective adoption would deny the child the support of two parents. *Id.*

Mother argued she has a fundamental constitutional right to ensure the safety of her child by filing a termination of parental rights petition against an unfit father. The Court held the exclusion of parents from the statute of those having standing “does not impermissibly infringe upon the fundamental right of parent to the care and custody of their children.” Mother also argued that preventing a parent from having standing violates her equal protection right. The Court held that “a parent seeking to terminate the parental rights of the other parent outside the context of an adoption is not similarly situated to any of the groups listed as having standing” under the statute. *Id.* The Court vacated the judgments of the lower courts.

***M.H. v. A.H.*, No. E2002-00180-COA-R3-JV, 2002 Tenn. App. LEXIS 884 (Tenn. Ct. App. December 11, 2002). Permission to appeal denied. Eastern Section reversed the judgment terminating the mother’s parental rights because the petitioners did not have standing to file a petition to terminate parental rights. The petitioners had custody of the child but did not seek to adopt the child in the trial court. The Court held in a termination of parental rights proceeding, T.C.A. § 36-1-113(b) is an exclusive list of those who have standing to bring a termination of parental rights petition.**

## 1.02 Appeal of Dependency Proceeding

*In re D.Y.H.*, 226 S.W.3d 327 (Tenn. 2007). For description of case see 1.01(a), above.

*State Dep't of Children's Servs. v. Owens*, 129 S.W.3d 50 (Tenn. 2004). For description of case see 1.01(a), above.

*In re N.T.B.*, 205 S.W.3d 499 (Tenn. Ct. App. 2006). The parents appealed the juvenile court's adjudication of the finding of dependency and neglect to the circuit court which found the child suffered severe child abuse. The parents appealed the circuit court's ruling and argued the court erred in its finding of severe abuse while the child was in the care of the parents. **The parents asserted they did not abuse the child or have knowledge of the abuse as defined by T.C.A. § 37-1-102(b)(21).** The Court of Appeals discussed the "knowing" requirement, citing *In re R.C.P.*, No. M2003-01143-COA-R3-PT, 2004 Tenn. App. LEXIS 449 (Tenn. Ct. App. July 13, 2004). *Id.* at 506. **Based on the expert witness testimony, the Court held the parents "could have, and should have, recognized that severe child abuse had occurred or that it was highly probable that it would occur."** *Id.* at 507. [See Section 4.05, below, for a description of *In re R.C.P.*]

*State Dep't of Children's Servs. v. M.P.*, 173 S.W.3d 794 (Tenn. App. 2005). Permission to appeal denied. The dependency case and the termination of parental rights case were consolidated on appeal. In addressing the finding of severe child abuse in the dependency matter, the Court of Appeals found the trial court had based its ruling on the definitions of severe child abuse under T.C.A. § 37-1-102(b)(21)(B) and (C). **The Court held in order to make a finding of severe child abuse pursuant to T.C.A. § 37-1-102(b)(12)(B), opinion testimony of "qualified experts" is required. The Court concluded, because no expert testimony was presented, the finding of severe child abuse defined in subsection (B) was not supported by clear and convincing evidence.**

*In re T.B.H.*, No. M2006-01232-COA-R3-JV, 2007 Tenn. App. LEXIS 239 (Tenn. Ct. App. April 20, 2007). Maternal grandparents filed a petition in juvenile court alleging their grandchildren were dependent and neglected. The court adjudicated T.B.H. to be dependent and neglect and neglected, and awarded permanent custody to the grandparents. At a hearing of the father's subsequent petition to change custody, the court held that he had the burden of proof to show a material change in circumstance. Father dismissed his petition and filed a Rule 60 motion requesting the court set aside the dependency order. The court denied the motion and the father appealed to the Court of Appeals, which transferred the appeal to the circuit court as it arose out of dependent and neglect proceeding. The circuit court denied the Rule 60 motion and the father appealed. The Middle Section affirmed the decision.

On appeal, the father argued the juvenile court did not have jurisdiction to award permanent custody, pursuant to T.C.A. §§ 37-1-102(b)(7) and 37-1-130(a)(1). The Court held:

"In the real sense of the word, all custody orders are temporary, since they remain in the control of the court for future modification as circumstances demand." *Black v. Black*, 1988 Tenn. App. LEXIS 167, 1988 WL 22823, \*4 (Tenn.Ct.App. Mar. 10, 1988). **Although the language "full legal and physical custody" was not ideal, it effectively marked the final disposition of the matter such that an attempt to modify the custody arrangement would require Mr. Harriman to show a material change in circumstances.** Despite the parties' arguments to the contrary, it makes no difference in this case whether the order granted the Ogletrees permanent or temporary custody but rather that the order was an order of final disposition such that Mr. Harriman had a right to appeal to the Circuit Court pursuant to Tennessee Code Annotated section 37-1-159(a).

No appeal was perfected. **It is after an order of final disposition that a natural parent may lose the right to invoke the doctrine of superior parental rights in a petition to change custody.** *Id.* at \*9-10.

The father also asserted he had the same right to “reasonable efforts” as a parent in a case involving DCS. The Court stated that **in the case of *Blair v. Badenhope*, 77 S.W.3d 137 (Tenn.2002), “the Tennessee Supreme Court rejected the primacy of the goal of reunification in custody cases where the State was not involved.”** *Id.* at \*12.

*In Re D.J.R.*, No. M2005-02933-COA-R3-JV, 2007 Tenn. App. Lexis 64 (Tenn. Ct. App. January 30, 2007). The child’s aunt and uncle filed a dependent and neglect petition. The adjudication of dependency and neglect was appealed to the circuit court which found the child to be dependent and neglect based on T.C.A. § 37-1-102(b)(12) because the child was at risk of harm from exposure to domestic violence and the mother’s denial of drug addiction. In holding there was not clear and convincing evidence of a substantial risk of harm, the Middle Section found the evidence indicating such a risk occurred more than two years before the hearing.

Although courts may and should consider past conduct to the extent that it assists in determining a person's current parenting skills or in predicting whether a person will be capable of having custody of a child, the consideration of past conduct may be tempered by considering, inter alia, the nature and severity of the past conduct in relation to the welfare of the child, when the conduct occurred, and what remedial actions, if any, the parent has taken. *Id.* at \*19.

*Kissick v. Kallaher*, No. W2004-02983-COA-R3-CV, 2006 Tenn. App. LEXIS 329 (Tenn. Ct. App. May 18, 2006). The mother filed an appeal in the circuit court of the dismissal of her dependency and neglect petition by the juvenile court. The circuit court dismissed the petition without a hearing and the mother appealed. The Western Section held the mother was entitled to a *de novo* hearing in the circuit court.

**Tennessee Code Annotated § 37-1-159(a) unambiguously contemplates a *de novo* trial which includes "testimony of witnesses." A *de novo* trial is "[a] new trial on the entire case - that is, on both questions of fact and issues of law - conducted as if there had been no trial in the first instance." *Black's Law Dictionary* 1544 (8th ed. 2004). Unsworn statements made by counsel and a guardian ad litem in chambers constitute neither "testimony" nor trial. See *Kelly*, 43 S.W.3d at 515-15; *Wyatt v. Lassiter*, 42 Tenn. App. 124, 299 S.W.2d 229, 237 (Tenn. App. 1957). *Id.* at \*9.**

*Tenn. Dep't of Children's Servs. v. M.S.*, No. M2003-01670-COA-R3-CV, 2005 Tenn. App. LEXIS 139 (Tenn. Ct. App. March 8, 2005). Permission to appeal denied by *State v. M.S.*, 2005 Tenn. LEXIS 756 (Tenn., Aug. 29, 2005). The juvenile court found the children to be dependent and neglected, and victims of severe child abuse and the parents appealed to circuit court. The circuit court made the same findings at the *de novo* adjudicatory hearing. The parents appealed the findings to the Court of Appeals which upheld the circuit court’s ruling. **The Middle Section noted that there is no statutory authority requiring that severe child abuse be proven by clear and convincing evidence. In holding that the clear and convincing evidence standard is required to prove severe child abuse the Court reviewed the specific consequences that may result from this finding.** First, the child may not be returned home unless there is compliance with the procedural requirements of T.C.A. § 37-1-130 and the juvenile court finds clear and convincing evidence that the child’s home is safe from further abuse. Second, reasonable efforts to reunify the family are not required pursuant to T.C.A. § 37-1-166(g)(4)(A). Finally, the finding of severe child abuse constitutes a ground for termination of parental rights.

***In re D.L.(P.)C.***, No. M2003-00088-COA-R3-CV, 2003 Tenn. App. LEXIS 878 (Tenn. Ct. App. December 15, 2003). The mother appealed the trial court's award of custody of her four minor children to DCS based upon a finding of severe abuse. Specifically, the trial court found that either the mother or father was the perpetrator of the child's injuries and the other parent failed to protect the child. **The Middle Section affirmed the trial court's ruling and did not require that one of the parents be named as the perpetrator of the abuse.**

***Fletcher v. Fletcher, (In re K.B.F.)***, No. E2001-01223-COA-R3-JV, 2002 Tenn. App. LEXIS 210 (Tenn. Ct. App. March 26, 2002). Maternal grandparents filed a petition for emergency custody in juvenile court "essentially" alleging the children were dependent and neglected and they were awarded custody. Subsequently, the father filed a petition for contempt and requested custody of the children. At a hearing the juvenile court ordered custody remain with the grandparents and awarded visitation with the father. **The father appealed to the circuit court and that court dismissed the appeal stating the subject matter of the order was custody, visitation and contempt and therefore the appeal was to the Court of Appeals. The Eastern Section vacated the judgment of the circuit court and remanded the case for a hearing *de novo* of the father's appeal pursuant to T.C.A. § 37-1-159(a).**

See also, *Lovell v. Lovell*, No. M2005-02955-COA-R3-CV, 2007 Tenn. App. LEXIS 12 (Tenn. Ct. App. January 4, 2007).

## 2.0 FUNDAMENTAL LIBERTY INTERESTS OF PARENTS

### 2.01 Parents' Rights to Raise Their Children

*Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993). In regard to the constitutional fundamental rights of parents, the Tennessee Supreme Court held, **“the right to rear one's children is so firmly rooted in our culture that the United States Supreme Court has held it to be a fundamental liberty interest protected by the Fourteenth Amendment to the United States Constitution.”** *Id.* at 578. “Tennessee's historically strong protection of parental rights and the reasoning of federal constitutional cases convince us that **parental rights constitute a fundamental liberty interest under Article I, Section 8 of the Tennessee Constitution.**” *Id.* at 579. In reviewing both federal and state cases, the Court upheld “the state's authority as *parens patriae* when interference with parenting is necessary to **prevent serious harm** to a child.” *Id.* at 580. See also, *Santosky v. Kramer*, 455 U.S. 745, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982); and *Stanley v. Illinois*, 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972).

*Nale v. Robertson*, 871 S.W.2d 674 (Tenn. 1994). The Supreme Court held **“(p)arents, including parents of children born out of wedlock, have a fundamental liberty interest in the care and custody of their children under both the United States and Tennessee Constitutions.** *Id.* at 678. Five days after the birth of his child out of wedlock the biological father filed a notice of intent to claim paternity. The mother placed the child with an adoption agency who placed the child with the Nales. The father filed a petition to legitimate in juvenile court and the Nales subsequently filed a petition for adoption in circuit court alleging abandonment. They later amended the petition withdrawing the abandonment ground and only asserted that adoption was in the best interest of the child. The father petitioned the circuit court for visitation and a separate petition to legitimate the child. The court denied the petition for visitation. However, the father began contributing support. The circuit court granted the petition for adoption without disposing the petition for legitimation. The Court of Appeals remanded the case for the trial court to dispose of the legitimation petition prior to hearing the adoption petition and the Nales appealed to the Supreme Court

The Supreme Court found: “The Court of Appeals held correctly that a petition to legitimate a child filed prior to an adoption petition must be decided, and decided adversely to the putative father, before the adoption petition may be considered.” *Id.* at 677. “The Court of Appeals, in an appropriate response to the Nales’ contention that the determinative issue was [the child’s] best interest, stated:

Any child’s interest will be served by being raised by two loving parents in a happy home .  
 . [but] visions of the idealized traditional nuclear family must give way to the stark reality .  
 . . that others may be better parents or may be able to raise a child in more affluent surroundings are not sufficient reasons in and of themselves to deny a petition to legitimate.  
 . . A trial court may not deny a legitimation petition simply because persons other than the biological father wish to adopt the child. **Biological bonds should not be so lightly brushed aside, and the courts should not be given a license to engage in social engineering by invoking the “best interests of the child.”** *Id.* at 677-78.

The Court cited those U. S. Supreme Court cases that distinguished between unwed fathers who pursued relationships with children and those who did not. The Court rejected the contention that *Hawk* limited the protection of parental rights to “an intact nuclear family with fit parents” as untenable. *Id.* at 680. The Court found the father made reasonable effort to establish both a personal and legal relationship with the child; and “therefore, has established a fundamental liberty interest in the child and legitimation cannot be denied except upon proof that would support the termination of parental rights under (the abandonment statute). *Id.* at 680.

2.01 (a) Requirement of Finding of Substantial Harm or Other Compelling Reason for State Intervention

*Petrosky v. Keene*, 898 S.W.2d 726 (Tenn. 1995). The Supreme Court reversed the Court of Appeals judgment awarding custody of the child, born out of wedlock, to the grandmother and granted custody to the father. The Supreme Court held that the **father had established a substantial relationship with the child and there was no evidence of substantial harm, “therefore, [the father] has a fundamental interest in parenting the child that precludes a best interest determination of custody.”** *Id.* at 728.

*In re Audrey S.*, 182 S.W.3d 838 (Tenn. Ct. App. 2005). One issue raised on appeal by the mother of the termination of her parental rights was **whether the trial court is constitutionally required to make a separate and distinct finding that she is an unfit parent or poses a risk of substantial harm to the child, apart from the finding of one or more statutory grounds, in order to terminate her parental rights.** The Court of Appeals held:

This argument misconceives the relationship between the operation of the termination statutes and the constitutional requirement that "before a parent's rights can be terminated, there must be a showing that the parent is unfit or that substantial harm to the child will result if parental rights are not terminated." *In re Swanson*, 2 S.W.3d at 188; accord *Hawk v. Hawk*, 855 S.W.2d at 577, 579, 581. This court has repeatedly recognized that the statutory grounds for termination of parental rights listed in Tenn. Code Ann. § 36-1-113(g) are all examples of parental conduct and situations that render a parent unfit or pose a risk of substantial harm to the welfare of a child. . . Thus, **as long as the juvenile court has correctly found that at least one of the statutory grounds for termination of parental rights exists, the constitutional requirement of a showing of parental unfitness or a risk of substantial harm to the welfare of a child has been satisfied.** *Id.* at \*104-105.

*Ray v. Ray*, 83 S.W.3d 726; (Tenn. Ct. App. 2001). **In determining “substantial harm” to a child the Court of Appeals held “substantial” indicates two factors:**

First, it connotes a real hazard or danger that is not minor, trivial, or insignificant. Second, it indicates that the harm must be more than a theoretical possibility. While the harm need not be inevitable, it must be sufficiently probable to prompt a reasonable person to believe that the harm will occur more likely than not. *Id.* at 732 (footnote omitted).

**The Court held the burden of proof in determining substantial harm is the “clear and convincing” standard that is used in termination of parental rights cases. In addition, the standard of review is also the same as in termination proceedings and is a presumption that the trial court’s finding of facts is correct unless the evidence preponderates otherwise,** pursuant to Tenn. R. App. P. 13(d).

*In re C.L.J.*, No. M2003-01949-COA-R9-JV, 2003 Tenn. App. LEXIS 793, (Tenn. Ct. App. November 7, 2003). Parents of the child never married and were involved in a “protracted, bitter custody dispute” until the father’s death. Prior to his death, the parties had joint custody with the father as primary custodian and the mother had supervised visitation. Upon the father’s death, the paternal aunt and uncle filed a petition for custody. The trial court granted them temporary custody and determined that the mother could gain custody only if she proved she could adequately parent the child. The mother was granted an interlocutory appeal to determine whether the trial court applied the correct legal standard for custody between a biological parent and non-parent. The Middle Section held:

**What the juvenile court currently has before it is an initial petition for custody filed by persons who are not C.L.J.'s biological parents. J.A.G., the child's biological**

**mother, has never relinquished custody to a non-parent, nor has a court previously awarded custody of C.L.J. to a non-parent. Accordingly, J.A.G. is entitled to invoke the superior rights doctrine. She cannot be deprived the custody of C.L.J. unless the court finds, by clear and convincing evidence, that placing C.L.J. in her custody will expose him to a substantial risk of harm.** *Id.* at \*15.

*In re Campbell*, No. 01A01-9802-JV-00086, 1998 Tenn. App. LEXIS 634 (Tenn. Ct. App. September 23, 1998). Middle Section vacated the judgment of the juvenile court awarding custody of the child to the stepfather and remanded the case for a hearing on the father’s petition for custody. The Court of Appeals found the father was provided notice that the hearing in juvenile court would involve an adjudication of delinquent child support. He was not provided notice that the hearing was also to adjudicate custody of the child and was not prepared to present evidence supporting his claim for custody. **The record contained evidence that the father had established a relationship with his daughter and had at least a “colorable claim” to her custody.** Further, it was found that “[e]ven if he had been prepared to present evidence, there is some indication in the record that the juvenile court would not have considered it because of the agreement between [the stepfather] and [mother] to give custody of Laura to [the stepfather]. This was error.” *Id.* at \*10. The case was **remanded to the trial court to hear the issue of whether the father had established a sufficient parental relationship with his daughter that would entitle him to custody; and, that should he be awarded custody, his daughter would not be exposed to substantial harm.**

See also:

*Tennessee Baptist Children's Homes, Inc. v. Swanson (In Re Swanson)*, 2 S.W.3d 180, (Tenn. 1999).

*Nash-Putnam v. McCloud*, 921 S.W.2d 170 (Tenn. 1996).

*Petrosky v. Keene*, 898 S.W.2d 726 (Tenn. 1995).

*In re Adoption of Female Child, Bond v. McKenzie*, 896 S.W.2d 546 (Tenn. 1995).

*Davis v. Davis*, 842 S.W.2d 588 (1992).

*O’Daniel v. Messier*, 905 S.W. 2d 182 (Tenn. Ct. App. 1995).

2.01 (b) Applicability of Superior Rights Doctrine of Parent v. Material Change in Circumstances Standard in Modification of Prior Custody Order

*In re Adoption of A.M.H.*, 215 S.W.3d 793 (Tenn. 2007). Rehearing denied and clarified at 215 S.W.3d 793, US Supreme Court certiorari denied by *Baker v. Shao-Qiang He*, 2007 U.S. LEXIS 8357 (U.S., June 25, 2007). Stay denied by *Baker v. Shao-Qiang He*, 2007 U.S. LEXIS 8315 (U.S., June 25, 2007). After reversing the termination of the parents’ parental rights, the Supreme Court addressed the effect of the initial consent order that placed custody and guardianship of the child with non-parents. As held in *Blair v. Badenhope*, 77 S.W.3d 137, 141-143 (Tenn. 2002), “‘absent extraordinary circumstances,’ parents are not entitled to superior rights when seeking to *modify* a valid order placing custody with a non-parent ‘even when that order resulted from the parent's voluntary relinquishment of custody to the non-parent.’” *Id.* at 811. However, *Blair* defined four circumstances where the presumption of superior rights of parents would continue to exist. (See *Blair*, below). The Court stated:

Recognizing the possibility that in the informal setting of juvenile court unrepresented parents could enter into a formal order without understanding the actual effect of transferring custody, we have explained that it is only a parent's "voluntary transfer of custody to a non-parent, *with knowledge of the consequences of that transfer*," that will defeat a parent's claim to superior rights of custody. (citing *Blair* at 147 emphasis added). The evidence establishes that the parents were misled as to the consequences of a change in custody and uninformed about the guardianship provision and, therefore, did not enter

into the agreement with knowledge of the consequences of the transfer of custody and guardianship. *Id.*

In revoking the initial order changing custody, the Court held the parents “did not voluntarily transfer custody and guardianship” of their child “with knowledge of the consequences and, therefore, are entitled to the superior rights to custody.” *Id.* at 812. The Court proceeded to determine whether substantial harm to the child existed if returned to the parents. The Court held evidence that the child had lived and bonded with the guardians did not rise to the level of substantial harm required when considering the rights of parents vs. non-parents in a custody proceeding. *Id.* at 812-813.

***Blair v. Badenhope*, 77 S.W.3d 137 (Tenn. 2002). Supreme Court held “our Constitution does not accord natural parents a presumption of superior rights to modify an existing and valid order of custody, even when that order results from the parent voluntarily agreeing to give custody to the non-parent.” *Id.* at 148 (emphasis added.). The Court found natural parents enjoy the presumption of superior rights in four circumstances:**

1) when no order exists that transfers custody from the natural parents; 2) when the order transferring custody from the natural parent is accomplished by fraud or without notice to the parent; (3) when the order transferring custody from the natural parent is invalid on its face; and (4) when the natural parent cedes only temporary and informal custody to the non-parents. *Id.* at 143.

**If these circumstances do not exist and the initial custody order was valid, the standard to apply in modification of a custody award is whether a material change in circumstances has occurred which makes a change in custody in the child’s best interest.** The burden of proof rests on the parent seeking the change of custody. In describing “material change in circumstances “ the Court stated:

(T)here are no hard and fast rules for determining when a child's circumstances have changed sufficiently to warrant a change of his or her custody." *Solima v. Solima*, 7 S.W.3d 30, 32 (Tenn. Ct. App. 1998). Nevertheless, the following factors have formed a sound basis to determine whether such a change has occurred: the change has occurred after the entry of the order sought to be modified and the change is not one that was known or reasonably anticipated when the order was entered, see *Smith v. Haase*, 521 S.W.2d 49, 50 (Tenn. 1975), and the change of circumstances is one that affects the child's well-being in a meaningful way, *Hoalcraft v. Smithson*, 19 S.W.3d 822, 829 (Tenn. Ct. App. 1999). *Id.* at 150.

***In re Askew, Lewis v. Donoho*, 993 S.W.2d 1 (Tenn. 1999). Supreme Court reversed the lower courts’ decisions requiring the mother to carry the burden of proof to regain custody of her child where there had been no initial finding of substantial harm to the child. The child was placed in the custody of a distant relative by the juvenile court and remained in her custody for approximately eight years. The mother filed numerous pleadings for return of custody. The Supreme Court held the lower courts misapplied the test for modification of custody by placing the burden on the mother to show a change of circumstances and that a change of custody would not result in substantial harm to the child.**

***Means v. Ashby*, 130 S.W.3d 48 (Tenn. Ct. App. 2003). The trial court denied the termination of parental rights petition filed by the legal custodians but ordered that custody remain with the legal custodians. The Court of Appeals affirmed the denial of the termination of parental rights petition of both the father and mother; vacated the portion of the order that continued custody with the legal custodians; and remanded the case to the trial court for further consideration in regard to *Blair v. Badenhope*, 77 S.W.3d 137 (Tenn.**

2002). **The Court reviewed the original order placing custody with the petitioners and determined that process was not served on the father prior to the entry of the order and therefore did not bind the father. The Court held the original custody order fell within the second exception set out in *Blair*, specifically that the order transferring custody from the father was accomplished without notice to him; therefore the father should be afforded the presumption of superior rights over a non-parent and the analysis mandated by *In re Askew*, 993 S.W.2d 1 (Tenn. 1999) should be applied. This analysis requires a specific finding of substantial harm to the child.**

The Court further held that **the analysis to be applied to the mother was to first determine the effect of the initial custody order on her. The Court found that based on the record it could not determine whether the fourth exception under *Blair* applied to the mother, specifically whether she ceded only temporary and informal custody to the petitioners. If the order is determined to be effective as to the mother, she would have to show a material change in circumstances and best interest to be awarded custody. However, if the order is not effective, the analysis of *Askew* applies requiring a finding of substantial harm.** *Id.* at 58.

See also:

Kendrick v. Shoemake, 90 S.W.3d 566 (Tenn. 2002).

Means v. Ashby, 130 S.W.3d 48 (Tenn. Ct. App. 2003).

## 2.02 Due Process Rights

### 2.02 (a) Right to Counsel/GAL, Notice, Interpreter, and Transcript

***Keisling v. Keisling*, 92 S.W.3d 374 (Tenn. 2002). Supreme Court reversed the order of the trial court transferring custody of the child where no petition requesting a change of custody had been filed, finding a violation of the notice requirements of due process.** The Court held due process requires:

procedural protections as the particular situation demands. . . Three factors must be considered in determining the procedural protections demanded by a particular situation: "(1) the private interest at stake; (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *State v. Culbreath*, 30 S.W.3d 309, 317-18 (Tenn. 2000) (citing *Wilson v. Wilson*, 984 S.W.2d 898, 902 (Tenn. 1998). *Id.* at \*8.

In this case the Court found: 1) the private interest is the custody of one's children and is a "fundamental constitutional interest" *Id.* at \*14; 2) the risk of erroneous deprivation of custody of children "is substantial when no pleadings exist informing the parent that a change in custody is contemplated by the court." *Id.*; and, 3) no compelling state interest (i.e., emergency) existed to justify "the suspension of the of the basic elements of due process – notice and an opportunity to be heard." *Id.* at \*13.

***In re M.L.D.*, 182 S.W.3d 890 (Tenn. Ct. App. 2005). The trial court held the petitioners (mother and stepfather) failed to prove the grounds for termination of the father's parental rights and dismissed the petition. Petitioners appealed the dismissal and failed to provide a transcript or statement of the evidence to the appellate court. The Court of Appeals noted that pursuant to the **Rule 24 of Rules of Appellate Procedure it is the appellant's responsibility to prepare the record that "conveys a fair, accurate and complete account of what transpired in the trial court" regarding the issues on appeal.** *Id.* at 894. Appellants attempted to attach a document purporting to be a statement of the evidence to their brief**

but the Court held **an attachment to a brief is not part of the official record before the appellate court**, citing *Hunt v. Shaw*, 946 S.W.2d 306 (Tenn. Ct. App. 1996). *Id.* The Court held in the absence of a transcript or statement of the evidence there is a conclusive presumption that the findings of fact of the trial court are correct, citing *J.C. Bradford & Co. v. Martin Constr. Co.*, 576 S.W.2d 586 (Tenn. 1979). *Id.* at 895.

(Editor's Note: Other unreported cases have held the presumption does not apply in termination of parental rights cases and a sufficient record of the trial proceedings must be provided to the appellate court. See, ***In Re T.B.L., No. E2006-00771-COA-R3-PT; 2006 Tenn. Ct. LEXIS 366 (Tenn. Ct. App. June 2, 2006), below.*** See also, *In re S.L.D.*, No. E2005-01330-COA-R3-PT, 2006 Tenn. App. LEXIS 267 (Tenn. Ct. App. April 26, 2006); *L.D.N. v. R.B.W.*, No. E2005-02057-COA-R3-PT, 2006 Tenn. App. LEXIS 103 (Tenn. Ct. App. February 17, 2006); *In re A.L.N.*, No. M2004-02830-COA-R3-PT, 2005 Tenn. App. LEXIS 527 (Tenn. Ct. App. August 24, 2005); *Tenn. Dep't of Children's Servs. v. Hoffmeyer*, No. M2002-00076-COA-R3-JV, 2003 Tenn. App. LEXIS 205 (Tenn. Ct. App March 13, 2003); *In re J.M.C.H.*, No. M2002-01097-COA-R3-JV, 2002 Tenn. App. LEXIS 822 (Tenn. Ct. App. November 26, 2002); *In re Adoption of J.D.W.*, No. M2000-00151-COA-R3-CV, 2000 Tenn. App. LEXIS 546, (Tenn. Ct. App. August 16, 2000).

***In re S.Y.***, 121 S.W.3d 358 (Tenn. Ct. App. 2003). One issue presented by the mother on appeal of the termination of her parental rights was whether the juvenile court's failure to appoint her an attorney at the child dependency proceeding violated her due process rights under the federal and state constitutions. The Court of Appeals held "that **any violation of appellant's due process rights, and any violation of the Tennessee Rules of Juvenile Procedure that may have occurred at the dependent and neglect proceeding, was fully remedied by the procedural protections provided Young at the termination hearing**", (citing, *In re Hoover-Crawford*, No. M2000-01655-COA-R3-CV, 2001 Tenn. App. LEXIS 554, 2001 WL 8846044 (Tenn. Ct. App. July 27, 2001), and *State v. Wilkerson*, No. 03 A01-9810-JV-00341, 1999 Tenn. App. LEXIS 618, 1999 WL 775759 (Tenn. Ct. App. Sept. 15, 1999).

***In re Valle***, 31 S.W.3d 566 (Tenn. Ct. App. 2000). **The Appellate Court reversed the trial court order terminating parental rights due in part to the trial court's reversible error in failing to inform the parents of the right to be represented by an attorney pursuant to Tennessee Rules of Juvenile Procedure 39.** The trial court had appointed an attorney ad litem to represent the mother though there was confusion of the duties expected and the attorney ad litem did not assume an adversary stance. This appointment did not meet the requirements mandated by Rule 39. The Appellate Court also addressed the issue of the necessity of a court interpreter and found that no inquiry was made by the trial court to determine the need of an interpreter. The Court held because a party is entitled to be present at all stages of a trial the "party must be in a position to understand the nature of the case and testimony of the witnesses." *Id.* at 573. **Because of the nature of a termination of parental rights case the Court found it incumbent upon the trial court to be careful in exercising its discretion in appointing an interpreter.**

***State ex rel. T.H. by H.H. v. Min***, 802 S.W.2d 625 (Tenn. Ct. App. 1990). The Court of Appeals reversed, in part, the judgment of the trial court holding that the **parents' due process rights were violated because they were entitled to counsel in the child dependency proceeding.** The Court further held there is no absolute right to counsel but each case must be decided based on the criteria in *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981) and *Davis v. Page*, 714 F.2d 512 and 516 (5th Cir. 1984). Parents filed a complaint and petition for writ of habeas corpus against the Commissioner of the Department of Human Services seeking return of the child and declaratory judgment that their due process rights were violated by failure of the juvenile court to appoint

counsel to represent them in the dependency proceedings. The Chancellor held that the proceedings in juvenile court met the requirements of due process and the parents appealed.

In determining whether due process entitles the parent to the appointment of counsel, the court must examine the parent's interest, the state's interest and the risk that failure to appoint counsel will result in an erroneous decision. *Min* at 626. The Court, citing *Lassiter* and *Davis*, listed several factors to consider in the decision to appoint counsel: (1) whether expert medical and/or psychiatric testimony is presented at the hearing; (2) whether the parents have had uncommon difficulty in dealing with life and life situations; (3) whether the parents are thrust into a distressing and disorienting situation at the hearing; (4) the difficulty and complexity of the issues and procedures; (5) the possibility of criminal self-incrimination; (6) the educational background of the parents; and (7) the permanency of potential deprivation of the child in question.

***In re Adoption of D.P.E.***, No. E2005-02865-COA-R3-PT, 2006 Tenn. App. LEXIS 551 (Tenn. Ct. App. August 22, 2006). Prior to the trial of the termination of parental rights, the parties agreed it was not necessary to appoint a guardian ad litem for the child and none was appointed. Both parents and the Department of Children's Services contested the petition. The trial court terminated the parental rights of both parents. The sole issue addressed by the appellate court was whether the trial court erred in not appointing a guardian ad litem. The Western Section held **the appointment of the guardian ad litem in a termination of parental rights case is mandatory pursuant to Supreme Court Rule 13 § 1(d)2(D) and cannot be waived by the parties.** The Court found:

The guardian ad litem functions independently of other parties to the proceedings in recognition of the possibility that the child's best interests may not coincide with the interests of all other parties. It is the general duty of the guardian ad litem to undertake any and all legally sanctioned actions consistent with insuring that the child's best interests are protected. In fulfilling this duty, the guardian ad litem must, among other things, interview the other parties and witnesses, review pertinent records, and file and respond to pleadings on the child's behalf. The importance and necessity of a guardian ad litem in a termination case was made clear by the Tennessee Supreme Court in Tenn. S. Ct. R. 13 § 1(d)2(D). *Id.* at \*8.

The Court held the failure to appoint a guardian ad litem was not harmless error and remanded the case for the appointment of a guardian ad litem and a new trial.

***In Re T.B.L.***, No. E2006-00771-COA-R3-PT; 2006 Tenn. Ct. LEXIS 366 (Tenn. Ct. App. June 2, 2006). The father appealed the termination of his parental rights. The Middle Section vacated the judgment because of the inadequacy of the appellate record. The Court, citing *M.L.B. v. S.L.J.*, 519 U.S. 102, 128, 117 S. Ct. 555, 570, 136 L. Ed. 2d 473 (1996), held because of the constitutional rights of parents implicated by the termination of parental rights, the record on appeal must be "complete enough to enable" the appellate court "to fairly consider the merits of the issues" the parent raises on appeal. *Id.* at \*4.

**The State must provide an adequate record in all cases in which the parent whose rights are at stake is indigent, including termination proceedings that have been commenced by private parties.** *L.D.N. v. R.B.W.*, 2006 Tenn. App. LEXIS 103, No. E2005-02057-COA-R3-PT, 2006 WL 369275, at \*4-5 (Tenn. Ct. App. Feb. 17, 2006) (No Tenn. R. App. P. 11 application filed); *In Re: Adoption of J.D.W.*, 2000 Tenn. App. LEXIS 546, No. M2000-00151-COA-R3-CV, 2000 WL 1156628 at \*4 & n.5 (Tenn. Ct. App. Aug. 16, 2000) (No Tenn. R. App. P. 11 application filed).<sup>2</sup>

fn 2 **When the parent whose rights are at stake is indigent, this court will not conclusively presume that the trial court's findings of fact are supported by the evidence and are correct.** *In re J.D.W.*, 2000 Tenn. App. LEXIS 546, 2000 WL1156628, at \*3. However, when a parent who is not indigent fails to provide an adequate transcript, we will presume that the record supports the trial court's findings. *See, e.g., In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005). *Id.* at \*4-5.

The Court held rarely will a statement of the evidence be sufficient “because of the burden of proof in termination of parental rights proceedings and the fact-intensive nature of the appeals.” *Id.*

***Tenn. Dep't of Children's Servs. v. David H.***, No. M2004-01043-COA-R3-JV 2006 Tenn. App. LEXIS 193, (Tenn. Ct. App. March 21, 2006). The issue raised on appeal by the parents claiming to be indigent was whether the provisions of the Tennessee and United States Constitutions provide an absolute due process right to have counsel appointed in a child dependency proceeding. The Western Section held **“in this state an indigent respondent in either a parental termination case or in a dependency and neglect case has a right to the services of a court-appointed attorney”** pursuant to Supreme Court Rule 13. *Id.* at \*12. **Rule 13(1)(e)(2) directs the trial court to follow the procedures outlined at T.C.A. § 40-14-202 to determine whether a party is indigent.** The statute requires a full and complete hearing and defines an indigent person as “any person who does not possess sufficient means to pay reasonable compensation for the services of a competent attorney.” *Id.* at \*13-14. The Court found **“(i)ncome alone is not the sole determinative of whether a person qualifies as indigent for purposes of appointment** of counsel. In a complex case such as this one, a reasonable attorney fee could easily be beyond the financial ability of persons who are employed but earn modest wages.” *Id.* at \*16. The Court vacated the finding of abuse and remanded the case to the trial court.

***In re M.H.***, No. M2005-00117-COA-R3-PT, 2005 Tenn. App. LEXIS 755 (Tenn. Ct. App. December 2, 2005). One issue raised by the father on appeal of the termination of his parental rights was the violation of his due process rights and T.C.A. § 37-1-121(a) because he was not served with notice of the child dependency proceedings. T.C.A. § 37-1-121(a) requires the court to issue “a summons to the parents, guardian or other custodian, a guardian ad litem and any other persons as appear to the court to be proper or necessary parties to the proceeding...” At the time of the child dependency proceedings the father was not the “legal” father; had doubts that he was indeed the biological father of the child; was incarcerated in California and not able to provide for the child’s care and custody. **Based on these factors, the Middle Section found that it was “questionable” whether the father was a “necessary” party to the child dependency proceedings.** *Id.* at \*14.

As to the due process issue, the Court stated three factors must be considered to determine the protections that are required: “(1) the private interest at stake; (2) the risk of erroneous deprivation due to the procedures used and the probable value, if any, of additional procedural safeguards; and (3) the government's interest. *Keisling v. Keisling*, 92 S.W.3d 374, 377 (Tenn. 2002).” *Id.* at \*15. Though the Court acknowledged that a parent’s right to care and custody “may trigger due process protections regarding notice before custody is removed,” the father did not have custody; and “(h)is right to custody had been forfeited, to the extent it ever existed, upon his incarceration and consequential inability to provide care. In other words, unlike the parent in *Kiesling*, the father herein did not face the loss of custody of his child due to the dependency and neglect proceeding.” *Id.* The Court held failure to provide him notice would not lead to an “erroneous deprivation of custody.” *Id.* at \*16. The Court found the government’s interest to be significant in providing for the care and custody of the child. In reviewing these three factors, the Court concluded failure to provide notice to the father of the child dependency proceedings did not deprive him of due process.

A second issue raised on appeal by the father was effective assistance of counsel at the termination hearing. The Court acknowledged that ineffective assistance of counsel is a ground to reverse a criminal judgment based on the Constitutional right of a defendant to counsel. The Court also noted that “Tennessee has now joined the vast majority of states which have declared that an indigent respondent in a parental termination case, like an indigent defendant in a criminal case, is entitled to the services of a court-appointed attorney. Tenn. R. Sup. Ct. 13, Section 1 (d)(2)(D).” The Court stated several states allow ineffective assistance of counsel as a ground for reversal of a judgment of termination of parental rights but Tennessee has not. **The Court declined to establish a constitutional protected right of effective assistance of counsel in the present case.**

*In re W.B.*, No. M2004-00999-COA-R3-PT, 2005 Tenn. App. LEXIS 262 (Tenn. Ct. App. April 29, 2005). The trial court terminated the mother’s parental rights on the ground of persistence of conditions though this ground was not alleged in the termination petition. The Middle Section stated that though “parties may try an issue not raised in the pleadings by express or implied consent, *see* Tenn. R. Civ. P. 15.02, we cannot conclude that the parties tried a totally separate ground in this case. There is nothing in the record to indicate that the parties had any reason to believe that the court was considering another ground.” (Footnote omitted.) *Id.* at \*43. The Court held:

**Because the private interest at stake in this case is fundamental, *i.e.*, the permanent severing of all parent-child ties; because the risk of an erroneous deprivation of those rights is created by a *sua sponte* ruling on a ground not alleged is great; and because the government has no compelling interest in such a procedure, due process compels reversal of the trial court's holding that Mother's parental rights could be termination on the basis of Tenn. Code Ann. § 36-1-113(g)(3)(A). *See Keisling*, 92 S.W.3d at 378-80. Mother was at a distinct disadvantage in preparing to defend on a ground that was not alleged, and the courts are required to view due process requirements strictly in cases involving the termination of parental rights. *See In re M.J.B.*, 140 S.W.3d at 651. Accordingly, we reverse the trial court's holding on the ground of persistence of conditions. *Id.* at \*44.**

*State, Dep't of Children's Svcs. v. RDV*, No. E2004-01216-COA-R3-PT, 2005 Tenn. App. LEXIS 154 (Tenn. Ct. App. March 17, 2005). **Eastern Section vacated and remanded the judgment terminating father’s parental rights holding that T.C.A. § 40-14-202 requires a full and complete hearing on the issue of indigency at any time during the proceedings when indigency is claimed.** At the time of the hearings in the trial court, the father was incarcerated. At a hearing prior to the termination and without the father’s participation, the trial court found the father was not indigent based on an affidavit of indigency signed by the father and testimony of the father’s family. At the hearing on the termination of parental rights, the father participated via teleconference and asserted he had no income or assets to employ an attorney. The trial judge stated the decision regarding indigency had been made at the prior hearing and proceeded to terminate his parental rights. The Court of Appeals reviewed Rule 39 of the Rules of Juvenile Procedure and Rule 13 of the Supreme Court Rules. In addition, the Court cited T.C.A. § 40-14-202 and listed the factors required by the statute that the court must consider when determining indigency:

(T)he nature of the services to be rendered, the usual charge in the community for an attorney to render such service, the income of the accused, any property owned by the accused, the poverty level income guidelines compiled by the department of labor, whether the party posted a bond, and other relevant circumstances. Tenn. Code Ann. § 40-14-202. Further, Tenn. Code Ann. § 40-14-201, the definition section relating to the above statute, defines an indigent person as "any person who does not possess sufficient

means to pay reasonable compensation for the services of a competent attorney." *Id.* at \*10-11.

The Court further held assets or income of the father's family cannot be considered when determining indigency, citing *State v. Gardner*, 626 S.W.2d 721 (Tenn. Crim. App. 1981); *State v. Ramsey*, 2003 Tenn. Crim. App. LEXIS 632, 2003 WL 21658589 (Tenn. Crim. App. July 15, 2003).

*In re M.E.*, No. M2003-00859-COA-R3-PT. 2004 Tenn. App. LEXIS 526 (Tenn. Ct. App. August 16, 2004). **Middle Section vacated the judgment terminating the father's parental rights finding that father had been deprived of his right to counsel.** The trial court initially found that father was entitled to appointed counsel and accordingly appointed counsel to represent father. At some later point the trial court relieved father's appointed counsel without explanation and did not appoint substitute counsel. Father retained counsel on the eve of the termination hearing; however, father's retained attorney was absent for the majority of the hearing and the trial court proceeded with the termination hearing. The Court opined, "**(t)he foregoing analysis of the performance, or lack thereof, of Father's attorney reveals that it was so inadequate it was equivalent to Father having no attorney. Father had the right to an attorney. It is also apparent that he needed an attorney. This is apparent from the fact the court appointed counsel to represent him at the inception of the case and the judge advised Father during the trial that he needed an attorney to represent him.**" *Id.* at \*49.

*Department of Children's Services v. Agbignor*, No. M2000-03214-COA-R3-JV, 2002 Tenn. App. LEXIS 807, (Tenn. Ct. App. November 15, 2002). Permission to appeal denied. The Middle Section affirmed the termination of the father's parental rights to his two biological children. One issue on appeal was whether the father's due process and statutory rights were violated when he was required to proceed with the termination proceeding without counsel. The same attorney represented the father continuously for three years. After being served the petition to terminate parental rights the father did not contact his attorney, left the country for a month and did not contact the attorney upon his return to Nashville. He did not appear for the termination hearing until an hour after it had begun. His attorney filed a motion to withdraw and the trial court granted the request prior to the start of the hearing. When told by the trial judge that he would have to represent himself for the remainder of the proceeding, the father did not offer any complaint about his attorney's services for the prior three years and did not deny his attorney's representations that he failed to contact the attorney for a number of months. **The Court found the father effectively waived his right to representation.**

*State v. Layne*, No. M2001-00652-COA-R3-JV, 2002 Tenn. App. LEXIS 78, (Tenn. Ct. App. February 1, 2002). The Middle Section **held that failure to notify the mother's attorney of the foster care review board hearing does not constitute reversible error.** The Court found that T.C.A. § 37-1-150, T.R.J.P. 39 and Sup. Ct. Rule 13 create a right to counsel for parents in a proceeding that could result in a finding of dependency or in a termination of parental rights proceeding. However, the foster care review board does not have the authority to make a dependency or termination of parental rights finding. The board's authority is to make recommendations to the court.

*State v. Cox*, No. M1999-01598-COA-R3-CV, 2001 Tenn. App. LEXIS 496 (Tenn. Ct. App. July 17, 2001). In a dependency proceeding in juvenile court the mother filed a motion for expanded visitation. After reviewing the pleadings, the court scheduled and held a permanency hearing. The court modified the permanency goal from reunification to adoption and terminated the mother's visitation with the child. The mother appealed the judgment *de novo* to the circuit court. The circuit court affirmed the juvenile court's order and the mother appealed to the appellate court. One issue alleged on appeal was whether proper notice of the adjudication of visitation and the permanency goal was provided to meet due process requirements. The Middle Section held **T.C.A. § 37-2-409 regarding the permanency hearing and periodic reviews for children in foster care provides "statutory notice" of what issues are raised at**

**these hearings.** The purpose of these hearings is to continually review and determine the child's best interests, setting out future goals for providing the child with a permanent home and determining how those goals can best be accomplished. The Court also held the opportunity for *de novo* review of the juvenile court's decision by the circuit court also provided a full and adequate notice of and opportunity to be heard on all issues before the court.

*In re Adoption of J.D.W.*, No. M2000-00151-COA-R3-CV, 2000 Tenn. App. LEXIS 546 (Tenn. Ct. App. August 16, 2000). The Middle Section vacated the order of the trial court terminating the father's parental rights and granting the adoption to the stepfather. The father was not represented by counsel nor was a transcript made of the proceedings. The father first asked for appointed counsel after the trial in a motion for a new trial. **The Court vacated the termination of parental rights and adoption finding that the father's failure to request court-appointed counsel prior to trial does not relieve the court of its affirmative duty to inform the parent of the right to counsel.**

In addition to the due process violation for lack of representation, the father claimed there was not clear and convincing evidence to support a termination of parental rights. Since there was no transcript, the trial court adopted its findings of fact in the Memorandum Opinion as the "Statement of the Evidence" for appellate purposes. The Court held:

(I)n cases involving the termination of parental rights, a record of the proceeding of sufficient completeness to permit proper appellate consideration of the parent's claims must be made in order to preserve that parent's right to an effective appeal. If the parent whose rights are to be terminated is indigent, then the trial court must ensure that such a record is created and made available to a parent who seeks to appeal. *Id.* at \*13

The Court held that **even in cases such as this, where the termination of parental rights petition is not brought by the state but by a private party "the state is required to provide a record because state action is invoked by asking a court to end a parental relationship."** n.5. *Id.*, at \*14. (Citing *M.L.B. v. S.L.J.*, 519 U.S. 102, 116, 117 S.Ct. 555, 564, 136 L.Ed.2d 473, 488. Because there was not a sufficient complete record for review, the Court vacated the orders terminating the father's parental rights and granting the subsequent adoption and remanded the case to the trial court for a new trial. Further the Court found that the trial court must determine the father's indigency and if indigent, "ensure the availability of a record of trial evidence and events which is sufficiently complete to allow an appellate court to review the evidence in accordance with applicable standards." *Id.* at \*14.

*In re Campbell*, No. 01A01-9802-JV-00086, 1998 Tenn. App. LEXIS 634 (Tenn. Ct. App. September 23, 1998). **Insufficient notice on the custody issue violated the father's due process rights.** The Court of Appeals found the father was provided notice that the hearing in juvenile court would involve an adjudication of delinquent child support. He was not provided notice the hearing was also to adjudicate custody of the child and was not prepared to present evidence supporting his claim for custody. The record contained evidence that the father had a "colorable claim" to custody and should have been provided an opportunity to present the evidence. The case was remanded to the trial court for a hearing on the custody issue.

*Department of Children Servs. v. Taylor*, No. 03A01-9609-JV-00286, 1997 Tenn. App. LEXIS 196 (Tenn. Ct. App. March 19, 1997). **Rule 39(f)(2) of the Tennessee Rules of Juvenile Procedure requires that a party without counsel at the beginning of a hearing on petition to terminate parental rights must be informed of the right to be represented by counsel.** Eastern Section reversed the judgment of the trial court terminating the father's parental rights. The Court held T.R.J.P. 39(f)(2) requires that a party without counsel at the beginning of a hearing on petition to terminate parental rights must be

informed of the right to be represented by counsel. Indigent persons have a right to appointed counsel. Trial judge apparently did not consider factors outlined in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), regarding appointment of counsel, which is reversible error.

See also:

*Stokes v. Arnold*, 27 S.W.3d 516 (Tenn. Ct. App. 2000).

*In re ADC*, No. E2006-00771-COA-R3-PT, 2007 Tenn. App. LEXIS 121 (Tenn. Ct. App. March 7, 2007).

*Department of Children's Services v. R.C.*, No. E2000-01939-COA-R3-CV, 2001 WL 291917 (Tenn. Ct. App. March 26, 2001.)

*In re K.D.D.*, No. M2000-01554-COA-R3-JV, 2001 Tenn. App. LEXIS 141 (March 7, 2001).

*State v. Pruitt; In Re A.J.P.*, No. M2000-00416-COA-R3-CV, 2000 Tenn. App. LEXIS 415 (Tenn. Ct. App. June 27, 2000).

*In re Fillingier*, No. 02A01-9409-JV-00223, 1996 Tenn. App. LEXIS 301 (Tenn. Ct. App. May 22, 1996).

*In re Adoption of Howson*, No. 03A01-9301-CV-00072, 1993 Tenn. App. LEXIS 457 (Tenn. Ct. App. July 12, 1993).

## 2.02 (b) Conduct of Trial

*In re B.G.J.*, 215 S.W.3d 396 (Tenn. Ct. App. 2006). The father appealed the termination of his parental rights that was entered on a default judgment. The Court held **in termination of parental rights cases, default judgments are allowed; however, "there must be proof presented from which the court can determine whether grounds exist for termination, and whether termination is in the child's best interest.** *Tenn. DCS v. D.L.M.L.*, 2006 Tenn. App. LEXIS 266, 2006 WL 1072155 (Tenn. Ct. App. Apr. 24, 2006). *Id.* at \*398.

*Department of Human Servs. v. Hauck*, 872 S.W.2d 916 (Tenn. Ct. App. 1993). Permission to appeal denied. **On the procedural issue of amending a petition on the day of trial, the Court of Appeals said that rules relating to the amendment of pleadings are liberal and trial court's discretion in allowing amendments at any stage of the proceeding should not be disturbed on appeal unless it plainly appears that such discretion was abused."** *Id.* at 919. (Emphasis added.) The trial court forbade prejudicial surprise testimony" in its order allowing the amendment of additional grounds for the termination of rights, and the defendant did not complain that this was violated. Since the issue was not raised, the court presumed no prejudice to defendant.

*State v. Lilly*, No. W2003-02156-COA-R3-PT, 2004 Tenn. App. LEXIS 300 (Tenn. Ct. App. April 30, 2004). Mother appealed the termination of her parental rights. One issue on appeal was whether the trial court committed prejudicial error when the rebuttal testimony of a witness was allowed in violation of the sequestration rule pursuant to Tenn. R. Evid. 615. **The Western Section held there was a violation of the sequestration rule because the rule was invoked at the beginning of the hearing and the witness did not fall within any of the exceptions of Tenn. R. Evid. 615. However the Court found the error was harmless because the trial court relied upon the witness' testimony in considering the ground of persistence of conditions and the Court affirmed the termination on the ground of abandonment. The testimony did not change the outcome or prejudice the mother.**

*Dep't of Children's Servs. v. K.G. (In re K.L.H.)*, No. E2003-00437-COA-R3-PT, 2003 Tenn. App. LEXIS 863 (Tenn. Ct. App. December 12, 2003). The trial court held a hearing on DCS's petition to terminate the mother's parental rights and took the matter under advisement. Subsequent to that hearing DCS filed a motion for ratification of the permanency plan. The motion was sent to the mother and her attorney, but did not include a hearing date. The trial court began the ratification hearing and took

evidence without the mother or her attorney being present. Mother's attorney was notified of the hearing as it was occurring, appeared and informed the court that neither she nor the mother received prior notice. However, the court continued taking testimony. Less than one month after the ratification hearing the judge entered an order, *inter alia*, terminating the mother's parental rights. On appeal the mother raised the issue that the trial court violated her due process rights by allowing testimony at an ex parte hearing. DCS asserts that though neither the mother nor her attorney were present for the entire hearing this constitutes harmless error. DCS also claims that the mother and her attorney had notice of the Department's motion and took no steps to determine when it would be heard. **The Eastern Section vacated and remanded the termination of parental rights judgment. The Court found the mother had a right to be notified and be present with her attorney during all hearings related to the termination of her parental rights. The Court held "(t)he State violated Mother's due process rights by failing to notify her in advance of the hearing date so as to allow Mother and her attorney time to prepare adequately for the hearing and to attend the hearing." *Id.* at \*11.**

*State v. Everson*, No. W2002-01085-COA-R3-JV, 2003 Tenn. App. LEXIS 859 (Tenn. Ct. App. December 11, 2003). Mother appealed the termination of her parental rights. One issue raised on appeal was whether her due process rights were violated because of the "wholesale admission into evidence" of hearsay. Though objections were made by both parties as to hearsay, the judge stated he did not "want a bunch of objections" and assured the attorneys much of the evidence would "go in one ear and out the other." He stated he would consider evidence that was "pertinent" or "important." *Id.* at \*30. The Western Section found:

**However well-intentioned the trial judge may have been, clearly this was a misguided manner in which to conduct the trial. While we agree with the trial judge's emphasis on the importance of determining the future of the children, and hasten to add the importance of determining the fundamental right of Mother to parent her children, this is not a reason to discard the Rules of Evidence. To the contrary, the Rules of Evidence, premised on basic notions of fair play, become even more essential in cases such as this, where the stakes are so very high. *Id.* at 31.**

On appeal the State asserted that the non-hearsay testimony and admissions of the mother provided clear and convincing evidence and the error of the trial court was harmless. **The Court held, even disregarding the inadmissible hearsay, the evidence supported the termination of parental rights.**

*In re Z.J.S.*, No. M2002-02235-COA-R3-JV, 2003 Tenn. App. LEXIS 415 (Tenn. Ct. App. June 3, 2003). The trial court terminated the parental rights of three parents: the mother of both children, the father of K.L.P and the father of M.J.P. The trial court allowed both fathers to be served by publication in the *county paper* based on the allegations in the termination petition that the fathers were unknown. Neither father was present at the trial nor did either appeal the judgment. The mother appealed. **The Middle Section found that both children were born in Arizona and DCS knew the identities of both fathers who had last resided in Arizona. The Court held DCS's efforts to locate the fathers were not diligent or reasonable and the constructive service by publication selected to provide notice was not reasonably calculated to inform the fathers of the proceeding. The Court stated the Tennessee Rules of Juvenile Procedure allow for service by publication if, only after a "reasonable effort," a party cannot be located or address ascertained. The Court found that service of a biological parent "is not a mere perfunctory act undertaken simply to satisfy the technicalities of some statute. It has constitutional dimensions." *Id.* at \*19. The Court vacated the portion of the order terminating the parental rights of both fathers. See also, *In re L.T.P.*, No. E2004-02085-COA-R3-PT, 2005 Tenn. App. LEXIS 180 (Tenn. Ct. App. March 29, 2005).**

*State Dep't of Children's Servs. v. T.M.K.*, No. E2000-02840-COA-R3-JV, 2002 Tenn. App. LEXIS 704 (Tenn. Ct. App. September 30, 2002). Permission to appeal denied. Eastern Section held the **decision of whether to stay civil proceedings for a parent who is incarcerated is left to the discretion of the trial court, affording the prisoner sufficient time for filing briefs and motions and conducting discovery.** The Court held one of the main factors to be considered is whether the inmate will be released from incarceration and able to appear in court within a reasonable amount of time after the suit is initiated. In holding the trial court did not err in denying the mother's motion to hold the proceedings in abeyance, the Court reviewed the facts that the mother would be released one year after the date of the trial, two of the children had been in foster care for eight years and two other children since birth.

*State v. Mitchell*, No. 03A01-9602- JV-00043, 1996 Tenn. App. LEXIS 723 (Tenn. Ct. App. November 12, 1996). **Ex parte contacts by DHS worker with the trial judge combined with the child testifying outside the presence of mother and her attorney were sufficiently egregious to require reversal of the termination of parental rights.**

### 3.0 EVIDENTIARY AND PROCEDURAL ISSUES

#### 3.01 Burden of Proof

*In re Dunigan*, 658 S.W.2d 112 (Tenn. Ct. App. 1983). **The standard of proof at adjudication is clear and convincing evidence.** (Dependency Case.)

*Nash-Putnam v. McCloud*, 921 S.W.2d 170 (Tenn. 1996). **Clear and convincing evidence is the standard of proof in a termination of parental rights case.**

*In re C.W.W.*, 37 S.W.3d 467 (Tenn. Ct. App. 2000). The Court of Appeals described the clear and convincing evidence standard of proof as follows:

(A) although it does not require as much certainty as the "beyond a reasonable doubt" standard, the "clear and convincing evidence" standard is more exacting than the "preponderance of the evidence" standard. *O'Daniel v. Messier*, 905 S.W.2d 182, 188 (Tenn. App. 1995); *Brandon v. Wright*, 838 S.W.2d 532, 536 (Tenn. App. 1992). In order to be clear and convincing, evidence must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence. [\*\*20] *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n. 3 (Tenn. 1992), *O'Daniel v. Messier*, 905 S.W.2d at 188. Such evidence should produce in the fact-finder's mind a firm belief or conviction as to the truth of the allegations sought to be established. *O'Daniel v. Messier*, 905 S.W.2d at 188; *Wiltcher v. Bradley*, 708 S.W.2d 407, 411 (Tenn. App. 1985). In contrast to the preponderance of the evidence standard, clear and convincing evidence should demonstrate that the truth of the facts asserted is "highly probable" as opposed to merely "more probable" than not. *Lettner v. Plummer*, 559 S.W.2d 785, 787 (Tenn. 1977); *Goldsmith v. Roberts*, 622 S.W.2d 438, 441 (Tenn. App. 1981); *Brandon v. Wright*, 838 S.W.2d at 536. *Id.* at 474.

#### 3.02 Evidence

##### 3.02 (a) Generally

*In re M.O.*, 173 S.W.3d 13 (Tenn. Ct. App. 2005). The Court of Appeals held the **clear and convincing standard of proof may be satisfied by circumstantial evidence.** "The law does not distinguish between direct evidence and circumstantial evidence as far as probative value is concerned. Direct and circumstantial evidence is equally relevant, NEIL P. COHEN ET AL., TENNESSEE LAW OF EVIDENCE § 4.01[5], at 4-10 (4th ed. 2000), and equally probative. *Id.* at 20.

*State Dep't of Children's Servs. v. D.W.J.*, No. E2004-02586-COA-R3-PT, 2005 Tenn. App. LEXIS 372 (Tenn. Ct. App. June 29, 2005). In this termination of parental rights case, the appellate record contained pleadings from the termination of parental rights trial and the prior child dependency proceedings, and other unauthenticated documents. No documents were filed as exhibits during the termination trial. The Eastern Section found that the trial court based the decision to terminate parental rights on documents that were filed with the clerk but not admitted into evidence at the trial. Pursuant to T.C.A. § 36-1-113(j), evidence allowed in a termination case is provided for in the Rules of Evidence and Rules of Juvenile Procedure. **Rule 28(c) of the Rules of Juvenile Procedure provides that only evidence "formally admitted" shall be considered in adjudicatory hearings and this does not mean documents that are only filed with the court clerk.** *Id.* at \*7. The Court also held that its review cannot include documents

not properly in the appellate record pursuant to Rules 8(A) and 24 of the Rules of Appellate Procedure. (For a discussion of the record on appeal, see Section 3.05 below.)

*State Dep't of Children's Servs. v. Carey (In re D.C.)*, No. W2004-00472-COA-R3-PT, 2004 Tenn. App. LEXIS 723 (Tenn. Ct. App. November 3, 2004). One issue on appeal was whether the trial court erred in admitting evidence of the mother's fourth DUI arrest that occurred subsequent to the filing of the termination of parental rights petition. **The Western Section held that the paramount concern is the "welfare and best interest of the child," therefore all evidence "relevant to that inquiry" should be admitted.** *Id.* at \*15.

### 3.02 (b) Children's Testimony & Admissibility of Children's Statements Regarding Abuse/Neglect

*Rutherford v. Rutherford*, 971 S.W. 2d 955 (Tenn. Ct. App. 1997). **The trial judge has discretion to take testimony from a child outside the courtroom if it is in the best interest of the child; however, the parties' attorneys and court reporter must be present and a transcript of the evidence must be filed on appeal.** The Eastern Section vacated the judgment of the trial court changing custody of the child from the mother to the father. The trial judge interviewed the child alone in chambers. Though the appellant did not explicitly raise the issue, the Court of Appeals held the interview constituted reversible error.

*Department of Human Servs. v. Purcell*, 955 S.W.2d 607 (Tenn. Ct. App. 1997). **The determination of the trustworthiness of children's extrajudicial statements regarding abuse or neglect is a matter for the trial court to decide and the decision will not be overturned unless there is a showing of abuse of discretion.** The Eastern Section affirmed the trial court's judgment terminating parental rights of the mother of three minor children on the ground of abandonment and severe child abuse. The mother was serving a sentence of twenty years for the murder of the children's father that occurred as a violent multiple shooting in the presence of at least one of the children. One issue on appeal was whether the trial court erred by allowing inadmissible evidence including hearsay testimony. The Court held the extrajudicial statements of children, who were under the age of thirteen, regarding abuse and neglect were admissible, pursuant to T.R.E. Rule 803(25)(statement of child). The Court found that the determination of the trustworthiness of the statements is a matter for the trial court to decide and the decision will not be overturned unless there is a showing of abuse of discretion.

*Department of Human Servs. v. Norton*, 928 S.W.2d 445 (Tenn. Ct. App. 1996). The Court of Appeals affirmed juvenile court's termination of parental rights as to both parents. One issue raised by the parents on appeal was that the trial court improperly failed to allow the children, ages six and seven, to testify at trial. At the trial, the State presented an expert witness in an attempt to rebut the presumption of T.R.E. Rule 601 (every person is presumed competent to be a witness except as otherwise provided). **The Court of Appeals held that children are presumed to be competent witnesses, but the presumption is rebuttable.** The State's witness, who qualified as an expert regarding the competency of the children to testify, opined that requiring the children to testify would not be in their best interest. He stated, "both children shut down in therapy and the responses to me many times is that they just don't want to discuss it. And the higher their anxiety or depression goes, depending on which child you're talking about, the more resistant they are to discussing the issues because of the emotional pain associated with the issues and the blame they put on themselves." *Id.* at 447.

The Court of Appeals held:

The evidence offered does not rebut the presumption of competency, but goes to the propriety of forcing the children to testify in court. If a witness is competent, the Court

is required to accept his or her testimony, **but there are circumstances where the Court should tailor the manner in which the evidence is received so as to minimize any harmful effects on the witness.** Apparently no request for receiving the children's testimony under other conditions was made, but the failure of the Trial Judge to allow evidence from the children was error, however, considering the record as a whole, more probably than not this failure did not affect the judgment, due to the substantial, clear and convincing evidence on the issue of termination. *Id.* at 448.

*Haines v. Haines*, No. E2005-02180-COA-R3-CV, 2007 Tenn. App. LEXIS (Tenn. Ct. App. January 4, 2007). At trial, the guardian ad litem for the children conducted an examination of the children in chambers outside of the presence of the parties and their counsel. The attorneys for the parents were permitted to watch the examination of the children by closed-circuit television and to ask questions of the children after the direct examination by the guardian ad litem. The trial court granted the father's petition for change of custody. On appeal, the Eastern Section held **the failure to allow the parties' counsel to be physically present in chambers during the guardian ad litem's examination of the children violated the mother's right to due process and constituted reversible error.** The judgment was vacated and remanded to the trial court for a new trial to be heard by a different trial judge.

*Clarneau v. Clarneau*, No. M2003-02182-COA-R3-CV, 2005 Tenn. App. LEXIS 329 (Tenn. Ct. App. June 2, 2005). Appeal denied by *Clarneau v. Clarneau*, 2005 Tenn. LEXIS 1106 (Tenn. December 5, 2005). The Middle Section held the child's statement made to a social worker was inadmissible hearsay. See Section 3.02(e) below for a description of the case.

*Tenn. Dep't of Children's Servs. v. M.S.*, No. M2003-01670-COA-R3-CV, 2005 Tenn. App. LEXIS 139 (Tenn. Ct. App. March 8, 2005). Permission to appeal denied by *State v. M.S.*, 2005 Tenn. LEXIS 756 (Tenn., Aug. 29, 2005). One issue on appeal was whether the trial court erred in admitting hearsay statements of the children regarding abuse in the adjudication of severe child abuse at the dependency proceeding. Parents asserted the statements were not trustworthy pursuant to Rule 803(25) of the Rules of Evidence. The Middle Section looked to the **Advisory Commission Comments to Rule 803(25) that "suggest that the trial court should consider the motivation of the minor declarants, the motivation of adults to influence them, and the presence or absence of evidence corroborating the statements."** *Id.* at \*51. After a thorough review of the statements made by the children to various adults who testified about the statements, the Court held the children's statements were credible and the trial court did not abuse its discretion in admitting them. The Court found, "(t)here is no evidence that any adult around the children was motivated to induce the children to false testimony. There is also nothing in this record to suggest any motivation on the part of the children to invent their stories of abuse." *Id.* at 60. The Court also noted the sexualized behavior the children exhibited.

*Miller v. Tennessee Bd. Of Paroles*, No. 01A01-9806-CH-00293, 1999 Tenn. App. LEXIS 69, (Tenn. Ct. App. Feb. 1, 1999). **In order to make a constitutionally adequate finding that good cause exists for dispensing with the opportunity to confront or cross examine a witness, a parole board hearing officer should have considered three issues: first, the inherent reliability of the child's statements; second, the circumstances under which the child gave her statements (whether the child's statements had been tested for veracity through adversarial questioning); and third, the child's ability to testify, given his or her emotional state.** Hearsay evidence of child sexual abuse was introduced at parole revocation hearing, where underlying offense did not involve a child. Parole Board Hearing Officer revoked Parolee's parole based solely on hearsay evidence of child sexual abuse. Trial court denied Parolee's petition for common law writ of certiorari. Court of Appeals, Middle Section, reversed and remanded trial court's denial. Editors' note: Juvenile court practitioners are encouraged to

refer to this case. The footnotes cite many cases and law reviews that address the issue of the reliability of children's statements.

See also:

*Scarborough v. Scarborough*, 752 S.W.2d 94 (Tenn. Ct. App. 1988).

*State Dep't of Children's Servs. v. Hopson*, No. E2000-01606-COA-R3-CV, 2001 Tenn. App. LEXIS 234 (Tenn. Ct. App. April 10, 2001). Permission to appeal denied at *Tennessee Dep't of Children's Servs. v. Hopson*, 2001 Tenn. LEXIS 679. (Tenn. 2001).

*In re S.M.C.*, No.01A01-9807-JV-00358, 1999 Tenn. App. LEXIS 365 (Tenn. Ct. App. June 11, 1999).

*State v. Mitchell*, No. 03A01-9602-JV-00043, 1996 Tenn. App. LEXIS 723 (Tenn. Ct. App. November 12, 1996).

*Greenfield v. Ferguson*, No. 84-198-II, 1985 Tenn. App. LEXIS 2991 (Tenn. Ct. App. July 11, 1985).

### 3.02 (c) Admission by Party

*State Dep't of Children's Servs. v. M.P.*, 173 S.W.3d 794 (Tenn. Ct. App. 2005). The child was placed in DCS custody on May 27, 2003 after the parents were arrested on unrelated charges. On May 29 counsel was appointed for mother and father. On May 30<sup>th</sup> and June 3<sup>rd</sup> the DCS case manager interviewed mother and father in jail. No notice was giving to their perspective counsel. During the interview mother admitted to sexually inappropriate behavior with the child. On June 6 at the DCS office, the mother was interviewed by a detective without notice to her attorney. The mother signed a statement acknowledging receipt and understanding of the Miranda rights and declining her attorney's presence. At the termination of parental rights hearing, counsel for mother challenged the admission of the mother's statements to the DCS case manager and the detective as a violation of her Fourteenth Amendment rights.

**The Court opined that the mother's statements to the detective should not be excluded because the mother was not in custody at the time of the interview and the requirements of a custodial interrogation were not required. The Court did take notice that the Miranda warnings were given to the mother and her indication that her waiver was knowing and voluntary. The Court concluded that the mother's statements to the DCS case manager were properly admitted. In reaching its conclusion the Court factored the following:**

- Mother had been appointed counsel but did not ask for her counsel to participate in interviews.
- Mother did not assert her privilege against self-incrimination.
- DCS had an affirmative duty to make reasonable efforts to provide appropriate services for the benefit of the child and the family, and the worker's objective in interviewing the mother was to provide services and not to obtain information for the criminal investigation.
- DCS case manager was not directed by the DCS attorney or the detective on how to interview of the mother.
- Mother voluntarily agreed to be interviewed.

*Department of Children's Services v. Whited*, No. M2000-03213-COA-R3-JV, 2001 Tenn. App. LEXIS 833, (Tenn. Ct. App. November 8, 2001). **Middle Section held permanency plans were admissible as exceptions to the hearsay rule because the mother signed the plans. The Court found the documents were statements offered by a party in which the party has manifested an adoption or belief in their truth pursuant to Rule 803(1,2) of the Tennessee Rules of Evidence.**

3.02 (d) Business Record Exception

*State Dep't of Children's Servs. v. C.M.B.*, No. E2006-00841-COA-R3-PT, 2006 Tenn. App. LEXIS 785 (Tenn. Ct. App. December 13, 2006). On appeal of the termination of parental rights, the mother asserted the trial court erred by relying on hearsay evidence, specifically the testimony of a DCS case manager reading the records of a previous case manager into evidence. DCS attempted to introduce this evidence under the business record exception to hearsay pursuant to the Rule 803(6) of the Rules of Evidence. The Eastern Section held **DCS failed to lay the proper foundation for admission of the records of regularly conducted activity but the admission of the records was not reversible error. Rule 803(6) "requires the record be 'made at or near the time by or from information transmitted by a person with knowledge and a business duty to record or transmit if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the . . . report . . . , all as shown by the testimony of the custodian or other qualified witness.'" *Id.* at \*20-21.**

*State v. B.F.*, No. E2004-00338-COA-R3-PT, 2004 Tenn. App. LEXIS 822 (Tenn. Ct. App. December 2, 2004). One issue on appeal of the termination of parental rights was whether the DCS case manager's testimony regarding information documented in the DCS record, not made an exhibit, and to which the case manager had no personal knowledge should have been excluded as inadmissible hearsay. The state argued the case manager's testimony was admissible under the business record exception pursuant to Tenn. R. Evid. 803(6). The Eastern Section **held Rule 803(6) specifically refers to "records" that consist of a "memorandum, report, record or data compilation" and the "exception pertains solely to the admission of information in the form of tangible documentation."** *Id.* at \*7. **The Court held the Rule does not apply to testimony of a witness based on "memory of what the record stated."** *Id.* The Court further found that even had the record been offered as an exhibit, the proper foundation was not laid for its introduction into evidence.

3.02 (e) Expert Testimony

*Clarneau v. Clarneau*, No. M2003-02182-COA-R3-CV, 2005 Tenn. App. LEXIS 329 (Tenn. Ct. App. June 2, 2005). Appeal denied by *Clarneau v. Clarneau*, 2005 Tenn. LEXIS 1106 (Tenn. December 5, 2005). One issue raised on appeal by the mother in this custody matter was whether the trial court erred in qualifying a social worker as an expert and allowing the worker to testify regarding statements made by one of the children. The social worker testified that the child has said, "Daddy {Mike} hit mommy." *Id.* at \*13 From this comment, the social worker concluded there had been physical violence in the home. The Middle Section cited the applicable Rules of Evidence:

Tenn. R. Evid. 702 permits an expert to testify "in the form of an opinion or otherwise," only where the "scientific, technical, or other specialized knowledge" offered by the witness will substantially assist the trier of fact. Tenn. R. Evid. 703 requires an expert's opinion to be supported by trustworthy facts or data "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. . . ." Tenn. R. Evid. 703. *Id.*

**The Court held the record was inadequate to qualify the social worker as an expert and excluded her professional opinion.**

Next, the Court examined the recitation of the statement made by the child. The Court held the statement was hearsay that was not covered under the exception to hearsay at Tenn. R. Evid. 802(25) {statements of child victims regarding abuse or neglect}. In reaching this decision, the Court looked to the advisory

comments of the Rule regarding trustworthiness and corroboration of the statement. The Court noted the lack of evidence regarding the circumstances leading up to or following the statement. The Court also found there was no corroboration of the alleged event of which the child spoke. The child's sibling and mother denied there was physical violence in the home and the social worker took no action in response to the alleged statement.

*Tenn. Dep't of Children's Servs. v. M.S.*, No. M2003-01670-COA-R3-CV, 2005 Tenn. App. LEXIS 139 (Tenn. Ct. App. March 8, 2005). Permission to appeal denied by *State v. M.S.*, 2005 Tenn. LEXIS 756 (Tenn., Aug. 29, 2005). On the appeal of the adjudication of dependency and neglect and severe child abuse, parents argued that the admission into evidence of part or all of the deposition testimony of the doctors constituted error. Specifically, the parents argued that the admission violated *State v. Ballard*, 855 S.W. 2d 557 (Tenn. 1993), which held the admission of expert testimony concerning symptoms of post-traumatic stress syndrome in a child sexual abuse case is reversible error. Though *Ballard* involved a criminal trial before a jury, the Middle Section concluded its holdings were applicable to the present case. Citing *State v. Coley*, 32 S.W.3d 831, (Tenn. 2000), the Court stated the **“Tennessee Supreme Court has since described *Ballard* as excluding a specific category of expert testimony and as holding that ‘expert testimony concerning symptoms of post traumatic stress syndrome exhibited by victims of child abuse was inadmissible.’ *Coley*, 32 S.W.3d at 834.”** *Id.* at 65. The Court distinguished the present case from *Ballard*, citing *State v. Lacy*, 983 S.W.2d. 686 (Tenn. 1998), and held **“a mental health professional who treated an alleged child abuse victim should also be allowed to testify as to the mental health injuries sustained by the child and the likely cause of such injuries**, based on the same reasoning used in *Lacy*.” *Id.* at \*66. The Court found that the doctors did not testify to “generalized symptoms” of post-traumatic stress syndrome that could be caused by sexual abuse of the children; but that one doctor testified to the diagnosis of the disorder as the treating psychiatrist of one child. *Id.* at 74. The other doctor testified to “entirety of the information...including the sexualized behavior” from which she concluded the child “had witnessed or experienced adult sexual conduct.” *Id.* at 77. The Court held the testimony did not violate *Ballard*.

*State v. Robbins*, No. W2004-00487-COA-R3-PT, 2004 Tenn. App. LEXIS 806 (Tenn. Ct. App. November 18, 2004). At the appeal of this termination of parental rights case, two issues were raised regarding expert testimony. The first issue argues by the mother was whether the trial court erred in allowing a person who was not a licensed counselor at the time of the trial to proffer expert testimony. The Western Section reviewed Rules 702 and 703 of the Rules of Evidence. The Court held the **“determinative factor is ‘whether the witness's qualifications authorize him or her to give an informed opinion on the subject at issue.’ *State v. Stevens*, 78 S.W.3d 817, 834 (Tenn.2002).”** *Id.* at 16. The court next examined the witness' credentials and experience. She possessed a master's in clinical psychology and was only three hours short of her Licensed Professional Counselor certification. She had been employed with Pathways for 14 years with the majority of her practice involving working with abused children. Further, she had previously testified as an expert witness 18 times in other cases in 2003. The Court ruled the fact she was not licensed was immaterial as to whether she was qualified to render an expert opinion and the trial court did not abuse its discretion in allowing her to proffer an expert opinion.

The second issue raised regarded the respective weights applied by the trial court to the testimony of the counselor versus that of a more credentialed witness. In reviewing this issue, the Court examined the expert's qualifications and the substance of his testimony. This particular witness held a doctoral degree in counseling; was licensed senior psychological examiner; and, had been employed with Pathways for ten plus years. He had interviewed the mother once for three hours and gave her several psychological tests. He never met the children or reviewed their counseling records. **The Court opined that the testimonies of the respective experts were not in conflict; rather the counselor's testimony supplemented that of the doctor's, who had no knowledge of the children.**

See also, *In Re P.J.G.*, No. E2006-02003-COA-R3-PT; 2007 Tenn. App. LEXIS 261 (Tenn. Ct. App. April 27, 2007).

### 3.02 (f) Use of Guardian Ad Litem Report and Testimony

*Toms v. Toms*, 98 S.W. 3d 140 (Tenn. 2003). A complaint for divorce was filed in circuit court and the pending juvenile court dependency proceeding was dismissed. The paternal grandparents intervened in the divorce proceeding alleging the children were dependent and neglected and were awarded custody of the children without an evidentiary hearing and based exclusively on the guardian ad litem's reports. The mother filed an application for an extraordinary appeal to the Court of Appeals that was denied. She then filed the same in the Supreme Court that was granted. The Supreme Court reversed the trial court **holding that the guardian ad litem's report is an "out-of-court statement made by the guardian ad litem that normally will be introduced for the truth of the statements contained in it" (*Id.* at \*10), and is therefore hearsay and not admissible.** Editors Note: This case is cited as it was decided after Sup. Ct. Rule 40 was enacted. The opinion discusses the guardian ad litem's report and testimony in a custody proceeding in circuit court.

*State v. B.F.*, No. E2004-00338-COA-R3-PT, 2004 Tenn. App. LEXIS 822 (Tenn. Ct. App. December 2, 2004). One issue on appeal of the termination of parental rights was whether the trial court erred in allowing the GAL's to testify as a witness. The Eastern Section reviewed Supreme Court Rule 40(f) which states that a GAL "may not be a witness or testify in any proceeding in which he or she serves as guardian ad litem, except in those extraordinary circumstances specified by Supreme Court Rule 8, § § EC 5-9, 5-10 and DR 5-101." *Id.* at \*13. **The Court found DCS did not allege any extraordinary circumstances and the GAL's testimony should have been excluded as evidence.**

### 3.02 (g) Access to Records

*In re T.K.C.*, No. W2001-03017-COA-R3-JV, 2002 Tenn. App. LEXIS 937 (Tenn. Ct. App. December 30, 2002). One issue on appeal was whether the trial court erred in ruling that non-disclosed documents in possession of only DCS were not relevant or were privileged after an *in camera* inspection of the documents by the trial judge. The Western Section **held the trial court is afforded wide discretion in the admission or rejection of evidence and will be reversed on appeal only upon a showing of an abuse of discretion.**

Editor's Note: T.R.J.P. Rule 25 allows full discovery in juvenile court. *See also State v. Mitchell*, No. 03A01-9602-JV-00043, 1996 Tenn. App. LEXIS 723 (Tenn. Ct. App. November 12, 1996).

## 3.03 Procedure

### 3.03 (a) Ratification of Permanency Plan

*In re A.W.*, 114 S.W.3d 541, (Tenn. Ct. App. 2003). One issue on appeal of the termination of parental rights proceeding was whether the permanency plans were nullities because they were not timely ratified by the juvenile court pursuant to T.C.A. § 37-2-403. **The Court of Appeals held though the juvenile court did not meet the statutory deadlines, "these requirements are directory and not mandatory."** *Id.* at 546.

See also, *In re T. F.*, No. W2001-01935-COA-R3-JV, 2002 Tenn. App. LEXIS 138 (Tenn. Ct. App. February 19, 2002).

3.03 (b) Civil Procedure

*In re M.L.D.*, 182 S.W.3d 890 (Tenn. Ct. App. 2005). Mother and stepfather filed a petition to terminate father's parental rights. The trial court denied the petition and petitioners filed a motion to alter or amend the judgment pursuant to Rule 59.04 of the Rules of Civil Procedure raising, for the first time, the issue of whether the father was the legal parent. The trial court denied the motion and the Court of Appeals agreed. **The Court held the purpose of a Rule 59 motion is to provide the trial court with an opportunity to correct errors before the judgment becomes final. The following are circumstances where the motion is appropriate: 1) the controlling law changes before the judgment becomes final; 2) previously unavailable evidence becomes available; or 3) to correct a clear error of law or to prevent injustice. A Rule 59 motion may not be used to raise new theories that were not tried or asserted previously.**

*In re Petition of Weatherford*, No. W1999-01014-COA-R3-CV, 2000 Tenn. App. LEXIS 837 (Tenn. Ct. App. December 29, 2000). Father appealed the termination of his parental rights alleging his procedural due process rights were violated because the trial court failed to dismiss the petition pursuant to his Rule 12.02(6) motion, pursuant to the Rules of Civil Procedure. Father argued the petition failed to allege any grounds for termination, only alleged that the termination of parental rights was in the child's best interest, and that T.C.A. § 36-1-113(d)(2)(D) requires the complaint state the grounds for termination of parental rights. **The Western Section held Tenn. Civ. Proc. Rule 15.02 provides that when issues are not raised by the pleadings but are tried by express or implied consent, the issues shall be treated as if they had been raised by the pleadings.** The Court found the appellees raised the issue of abandonment in the opening statement and the father testified on that issue at trial. **Though abandonment was not specifically raised in the pleadings it was tried by implied consent.**

3.03 (c) De Novo Appeal

*Kelly v. Evans*, 43 S.W.3d 514, (Tenn. App. 2001). Court of Appeals **held the appeal of a referee's decision to the juvenile judge, who on his own volition decided to hear the matter on the record of the hearing before the referee, did not constitute a de novo appeal as contemplated by T.C.A. § 37-1-107(e).** The Court remanded the case for a *de novo* hearing.

*State v. S.A.M.H.*, No. E2004-02543-COA-R3-PT, 2005 Tenn. App. LEXIS 214 (Tenn. Ct. App. April 13, 2005). The termination of parental rights hearing was heard by the juvenile court referee who failed to comply with the requirements of Rule 4(c)(2) of the Rules of Juvenile Procedure by not informing the mother of the five-day time limit to request a rehearing before the judge. The mother filed a request for a rehearing six judicial days after the entry of the referee's order. The juvenile court judge denied the request for rehearing as being untimely filed.

The mother appealed to the Court of Appeals. On appeal, DCS argued that the five judicial day time period to file for a rehearing is jurisdictional and the judge was without subject matter jurisdiction to rehear the case. The Court declined to comment on the jurisdictional issue stating that the matter could be addressed by deciding whether the judge should have ordered a full rehearing on its on motion. The record indicated, though the judge wanted to correct any negative effects of the referee's noncompliance with the Rule 4, the judge believed he was without jurisdiction to do so. **The Court of Appeals opined that the order was not final even though the time to appeal had run because the referee's order had not been confirmed pursuant to Tenn. R. Juv. P. 4(d). Therefore, the judge had the authority pursuant to T.C.A. § 37-1-107(e) and Tenn. R. Juv. P. 4(c)(1) to order a rehearing.** The judgment was vacated and remanded.

See also, *State ex rel. Theus v. Woods*, No. W2002-00342-COA-R3-JV, 2003 Tenn. App. LEXIS 675 (Tenn. Ct. App. September 12, 2003).

### 3.03 (d) Civil Procedure Surrender of Parental Rights

***In re Hatcher***, 16 S.W.3d 792 (Tenn. Ct. App.1999). **The Court of Appeals held that though the mother failed to sign surrender documents, after reviewing all the circumstances the proceedings substantially complied with the statutory requirements of a valid surrender.** The Court found that T.C.A. § 36-1-111(k)(1)(C)(i) provides an alternative to the court witnessing the mother's signature on the surrender form if the court questions the parent on the matters required by the statute.

***Dorris v. Crisp***, No. M2000-02170-COA-R3-CV, 2001 Tenn. App. LEXIS 410 (Tenn. Ct. App. June 1, 2001). Four months after the mother surrendered her parental rights to her child she filed a petition to set aside the surrender alleging no home study was performed on the home of the pre-adoptive parents to whom she surrendered her parental rights. The trial court granted the petition. The pre-adoptive parents appealed. The Middle Section held the mother effectively surrendered her child and did not attempt to revoke the surrender within the time prescribed by statute. **The Court found the mother could not expand the statutory time to revoke the surrender by using a procedural defect that was not intended to protect the parent.**

### 3.04 **Order: Findings of Fact and Conclusions of Law**

***In re D.L.B.***, 118 S.W.3d 360 (Tenn. 2003). In addressing the grounds for termination, the Supreme Court held:

The trial court is required to find only one statutory ground for termination of parental rights. See Tenn. Code Ann. § 36-1-113 (2001). However, given the importance of establishing the permanent placement of a child who is the subject of a termination of parental rights proceeding, **the trial court should include in its final order findings of fact and conclusions of law with regard to each ground presented. If the trial court addresses each ground that is raised in a termination proceeding, the child's permanent placement will not be unnecessarily delayed due to a remand for findings on alternate grounds.** *Id.* at 367.

The Supreme Court remanded the case to the trial court to address each ground asserted in the termination of parental rights petition.

***In re Thomas P.***, No. E2005-01367-COA-R3-PT; 2006 Tenn. App. Lexis 357 (Tenn. Ct. App. May 31, 2006). Permission to appeal denied at 2006 Tenn. LEXIS 821 (Tenn., September 5, 2006). On the appeal of the termination of the mother's parental rights, she contended the trial court erred in failing to enter the order within 30 days of the conclusion of the hearing, pursuant to T.C.A. § 36-1-113(k). Citing *In re M.R.W.*, 2006 Tenn. App. LEXIS 297, No. M2005-02329-COA-R3-PT, 2006 WL 1184010 (Tenn. Ct. App. W.S., filed May 3, 2006), the Eastern Section held this did not constitute reversible error.

***In re B.L.R.***, No. W2004-02636-COA-R3-PT, 2005 Tenn. App. LEXIS 461 (Tenn. Ct. App. August 4, 2005). The Western Section **vacated and remanded the portion of the order terminating the father's parental rights in regard to the best interest prong. The Court held the trial court failed to include in the order "an analysis of the factors set forth in section 36-1-113(i) of the Tennessee Code and their applicability to the facts of this case."** *Id.* at 47. [But see, *White v. Moody*, 171 S.W.3d 187 (Tenn. Ct. App. 2004). Trial court failed to enter the order with findings of fact and conclusions of law regarding

best interest, pursuant to T.C.A. § 36-1-113(k). The Court determined, though the “appropriate remedy” was to remand the case for the entry of written findings of fact and conclusions of law, it would not do so because the case had been remanded on two other occasions resulting in a delay of three years of the final resolution. *Id.* at 192. The Court proceeding to review the trial court’s oral findings of fact.]

*In re C.R.B.*, No. M2003-00345-COA-R3-JV, 2003 Tenn. App. LEXIS 804 (Tenn. Ct. App. November 13, 2003). In addressing whether the grounds to terminate parental rights were proven by clear and convincing evidence, the Middle Section **held the order of the trial court terminating parental rights was “fundamentally flawed” as it failed to comply with T.C.A. § 36-1-113(k) that requires trial courts to prepare written findings of fact and conclusions of law in termination cases.** *Id.* at \*9. The Court found the statute reflects the legislature’s recognition of the need for “individualized decisions” in termination cases and that findings of fact and conclusions of law “promote the just and speedy resolution of appeals” *Id.* at \*11. This mandate does not allow trial courts to comply with “customary practice of making oral findings from the bench and later adopting them by reference in their final order.” *Id.* The failure of the trial court to make the necessary findings not only affects the standard of review but also the “viability of the appeal.” *Id.* at \*13. The Court vacated a portion of the order and remanded the case to the trial court to prepare specific written findings of fact and conclusions of law for each of the grounds asserted by DCS.

See also:

*State v. C.H.K.*, 154 S.W.3d 586 (Tenn. Ct. App. 2004).

*Ingle v. Ingle (In re M.E.I.)*, No. E2004-02096-COA-R3-PT, 2005 Tenn. App. LEXIS 604, (Tenn. Ct. App. September 26, 2005).

*In re M.E.W.*, No. M2003-01739-COA-R3-PT, 2004 Tenn. App. LEXIS 250 (Tenn. Ct. App. April 21, 2004).

*State v. McBee*, No. M2003-01326-COA-R3-PT, 2004 Tenn. App. LEXIS 85, (Tenn. Ct. App. February 9, 2004).

*In re K.N.R.*, No. M2003-01301-COA-R3-PT, 2003 Tenn. App. LEXIS 915, (Tenn. Ct. App. December 23, 2003).

*In re Muir*, No. M2002-02963-COA-R3-CV, 2003 Tenn. App. LEXIS 831 (Tenn. Ct. App. November 25, 2003).

*Sorrells v. Sorrells*, No. E1999-01658-COA-R3-CV, 2000 Tenn. App. LEXIS 675 (Tenn. Ct. App. October 5, 2000).

### 3.05 Record on Appeal

*In re M.J.B.*, 140 S.W.3d 643 (Tenn. Ct. App. 2004). Permission to appeal denied. Regarding the record, the Court of Appeals found that:

“(l)ike many other appeals from decisions to terminate parental rights under *Tenn. Code Ann. § 36-1-113*, the record in this case contains many extraneous documents that are not properly includable in the record on appeal....**A termination of parental rights proceeding is not simply a continuation of a dependent-neglect proceeding. It is a new and separate proceeding involving different goals and remedies, different evidentiary standards, and different avenues for appeal.**” *Id.* at 650-651.

The Court advised that all records on appeal in termination of parental rights cases must comply with the opinion in this case and Tenn. R. App. Proc. 8A(c), amended January 15, 2004, and **“should consist only of: (1) the petition to terminate parental rights and all pleadings and other papers subsequently**

filed with the lower court, (2) a transcript or statement of the evidence of the termination proceedings in the lower court, (3) the original of all exhibits filed in the lower court in the termination proceeding, and (4) any other matter designated by a party and properly includable in the record on appeal.” *Id.* at 652.

*In re C.A.H.*, No. M2004-00523-COA-R3-PT, 2004 Tenn. App. LEXIS 532, (Tenn. Ct. App. August 18, 2004). Middle Section found the record on appeal contained extraneous documents that did not pertain to the petition to terminate parental rights and stated this has been a problem in prior opinions that the Court has attempted to address without success. The Court held **Tenn. R. App. Proc. 40(g) provides that the clerk of the trial court shall forfeit the clerk’s entire cost, or portion thereof, to prepare and transmit the record for failure to complete the record on appeal in the manner prescribed.** The Court also noted in footnote n5 that **counsel has an affirmative duty to abridge the record and sanctions have been imposed when appropriate.**

See also:

*In re A.L.N.*, No. M2004-02830-COA-R3-PT, 2005 Tenn. App. LEXIS 527 (Tenn. Ct. App. August 24, 2005).

*In re M.E.*, No. M2003-00859-COA-R3-PT, 2004 Tenn. App. LEXIS 526 (Tenn. Ct. App. August 16, 2004).

*In re D.L.L.*, No. M2003-02736-COA-R3-PT, 2004 Tenn. App. LEXIS 469, (Tenn. Ct. App. July 22, 2004).

#### **4.0 LEGAL GROUNDS FOR FINDING OF DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS**

#### **4.0 4.01 LEGAL GROUNDS FOR FINDING OF DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS**

##### **4.01 Preliminary Issues**

##### 4.01 (a) Reasonable Efforts

Editors' Note: There are three separate references in the statutes to “reasonable efforts” made by the agency. The first is at T.C.A. § 37-1-166 and mandates at every proceeding prior to ordering a child committed to or retained within the custody of DCS the court must make a finding whether the Department has provided reasonable efforts, consistent with the child’s safety, to: (1) prevent removal of the child from the home, (2) effect prompt reunification of the child and family, and/or (3) effect alternative permanency placement in a timely manner when reunification is not the goal. The best practice is to insist on a reasonable efforts determination at every dependency hearing. The second reference is at T.C.A. § 36-1-113(i) and requires that in a determination of whether the termination of parental rights is in the best interest of the child, the court shall consider, among other factors, whether the parent or guardian has failed to effect a lasting adjustment, after reasonable efforts by the agency, for such a duration of time that adjustment does not reasonably appear possible. The third reference is included in the ground of abandonment at T.C.A. § 36-1-102(1)(A)(ii) and provides that for a period of four months following removal of a child, DCS or other licensed child-placing agency has made reasonable efforts to assist the parent in establishing a suitable home for the child.

Note that in *In re C.M.M.*, No. M2003-01122-COA-R3-PT, 2004 Tenn. App. LEXIS 160 (Tenn. Ct. App. March 9, 2004), discussed below, the Middle Section held, in termination of parental rights proceeding filed pursuant to T.C.A. § 36-1-113(g)(1) - (3) {abandonment, substantial noncompliance with the permanency plan and persistence of conditions, DCS must prove by clear and convincing evidence that it made reasonable efforts to reunify the family.

*In re Tiffany B.* 228 S.W.3d 148 (Tenn. Ct. App. 2007). Permission to appeal denied at 2007 Tenn. LEXIS 379 and 2007 Tenn. LEXIS 531. Parental rights were terminated based on the grounds of abandonment, substantial noncompliance with the permanency plan and persistence of conditions. Both parents appealed alleging DCS failed to present clear and convincing proof that reasonable efforts were made to reunify the family. The Court of Appeals recited the public policies enacted by the Tennessee General Assembly that support the importance of the family in our culture and legal heritage; the preference of reuniting families when children are placed in foster care by assisting parents in addressing their issues and improving parenting skills; and the responsibility of DCS to provide assistance and support to parents through the provision of reasonable efforts within the context of the permanency plan. This case provides a synopsis of appellate decisions addressing the responsibilities of DCS and parents in regard to reasonable efforts.

The DCS case manager testified it was difficult to provide services to the parents because the parents were “on the run,” never contacted her, and were repeatedly incarcerated. DCS provided little evidence that the first two case managers made any contact with the parents. The third case manager was assigned seven months after removal and had only a few conversations with the parents. She admitted she never provided services to the parents and decided that termination would be appropriate four months after being assigned the case. The Court held DCS failed to present clear and convincing proof it provided reasonable efforts stating:

**In circumstances that do not involve serious physical abuse or harm to the child, the law does not permit the Department to be passive when it removes children from their parents' custody. The law requires the Department to bring its skills, experience, and resources to bear in a reasonable way to bring about the reunification of the family.** *Id.* at 160.

*In re Giorgianna H.*, 205 S.W.3d 508 (Tenn. Ct. App. 2006). On appeal of a termination of the parents' parental rights on the ground of persistence of conditions, the parents raised the issue that DCS failed to make reasonable efforts to reunite the family. The Court of Appeals cited **seven factors courts use to determine the reasonableness of DCS' efforts:**

**the reasons for separating the parent from his or her children, (2) the parent's physical and mental abilities, (3) the resources available to the parent, (4) the parent's efforts to remedy the conditions that required the removal of the children, (5) the resources available to the Department, (6) the duration and extent of the parent's remedial efforts, and (7) the closeness of the fit between the conditions that led to the initial removal of the children, the requirements of the permanency plan, and the Department's efforts.** *In re C.M.C.*, 2005 Tenn. App. LEXIS 458, No. E2005-00328-COA-R3-PT, 2005 WL 1827855, at \*9 (Tenn. Ct. App. Aug. 3, 2005) (No Tenn. R. App. P. 11 application [\*\*26] filed); *State Dep't of Children's Servs. v. B.B.M.*, 2004 Tenn. App. LEXIS 767, No. E2004-00491-COA-R3-PT, 2004 WL 2607769, at \*6 (Tenn. Ct. App. Nov. 17, 2004) (No Tenn. R. App. P. 11 application filed); *In re C.M.M.*, 2004 Tenn. App. LEXIS 160, 2004 WL 438326, at \*7. *Id.* at 519.

*Dep't of Children's Servs. v. S.M.D.*, 200 S.W.3d 184 (Tenn. Ct. App. 2006). Permission to appeal denied at 2006 Tenn. LEXIS 634 and 2006 Tenn. LEXIS 637. Mother appealed the termination of her parental rights. One issue on appeal was whether DCS proved by clear and convincing evidence that it provided reasonable efforts. **During the dependency proceeding, the juvenile court entered a finding that DCS had not made reasonable efforts to achieve permanency. The Court of Appeals found DCS made additional efforts after the finding in the dependency proceeding and held DCS established clear and convincing proof it made reasonable efforts to reunify the family.**

*In re M.O.*, 173 S.W.3d 13 (Tenn. Ct. App. 2005). In this termination of parental rights case, the trial court found that DCS had made reasonable efforts to prevent the removal of the child from the father's custody but also found that reunification was not "a viable option." *Id.* at 21. The trial court held the father had sexually abused the child but did not make a finding of severe child abuse. The Court of Appeals held that **because there was not a finding of severe child abuse, DCS could not "take advantage of the exception (to reasonable efforts to reunify the family) in Tenn. Code Ann. § 37-1-166(g)(4)(A)."** *Id.* However, the Court found DCS' decision not to pursue reunification was reasonable based on the circumstances of the case.

*In re A.W.*, 114 S.W.3d 541, (Tenn. Ct. App. 2003). On appeal of the termination of parental rights judgment one issue raised by the mother was whether DCS failed to provide reasonable efforts to reunify the family pursuant to T.C.A. § 37-1-166(a). The Court of Appeals held the "more pertinent statute is found in Tenn. Code Ann. § 36-1-113(i);" citing *Department of Children's Servs. v. Malone*, No. 03A01-9706-JV- 00224, slip op. p.1 (Tenn. Ct. App. February 5, 1998). *Id.* at 546, {Editor's Note: see, *In re C.M.M.* below.} The Court found the mother had substantially corrected all but one of the conditions existing in the home at the time of removal with assistance provided by the Department. The remaining

condition was the mother's mental illness that could only be treated with medication. She refused to take her medication until the termination proceeding was initiated. The Court stated **“(w)e are unsure what additional services short of confinement, DCS could have supplied that would have helped the mother take her medication.”** *Id.* at 547.

*In re M.B.*, No. M2006-02063-COA-R3-PT, 2007 Tenn. App. LEXIS 179 (Tenn. Ct. App. March 30, 2007). Father's parental rights were terminated on the grounds of abandonment, substantial noncompliance with the permanency plan and persistence of conditions. On appeal the father contended DCS did not provide reasonable efforts to reunify the family. In its review, the Middle Section determined three out of the five responsibilities of the father on the permanency plan were crucial to reunification: 1) become a drug-free parent; 2) employment and income to support the child; and 3) adequate housing. *Id.* at \*17. DCS contracted with RSI to assist the father. He obtained inpatient treatment, completing a 30 day program. The DCS case manager testified that the records indicated RSI provided transportation for the father to a career center. There was no testimony from RSI. The only testimony regarding housing was that the father was living with friends. *Id.* at \*17. **“The Department bears the ultimate burden to show that the Department or its agent, RSI, made reasonable efforts to assist Father with drug rehabilitation and finding employment and housing upon release from rehabilitation.”** *Id.* at \*19. The Court held DCS failed to prove by clear and convincing evidence that reasonable efforts to reunify the family were provided.

*Dep't of Children's Servs. v. M.R.N.*, No. M2006-01705-COA-R3-PT, 2007 Tenn. App. LEXIS 25 (Tenn. Ct. App. January 17, 2007). Mother's rights were terminated on the grounds of mental incompetence and persistence of conditions. The mother appealed, stating the DCS did not provide reasonable efforts to address her mental issues, such as her depression, anxiety, and dependent personality disorder. **The Western Section found that reasonable efforts are not required for the ground of mental incompetence**, citing *In re C.M.M.*, No. M2003-01122-COA-R3-PT, 2004 Tenn. App. LEXIS 160 (Tenn. Ct. App. March 9, 2004). *Id.* at 37. **The mother also asserted her mental issues were so intertwined with the persistence of conditions ground that DCS was required to make reasonable efforts. The Court held DCS was required to establish reasonable efforts on the persistence of conditions ground and that it met its obligation.**

*In re Randall B.*, No. M2006-00055-COA-R3-PT, 2006 Tenn. App. LEXIS 630 (Tenn. Ct. App. September 28, 2006). The mother voluntarily placed the child with AGAPE, a private licensed child placing agency. AGAPE entered into a permanency plan with the father almost five months after the placement of the child. A second permanency plan was prepared eight months later. AGAPE filed a petition to terminate parental rights and the trial court terminated the father's rights based on abandonment, substantial noncompliance with the permanency plan and persistence of conditions. The father appealed alleging AGAPE failed to provide reasonable efforts. Though AGAPE conceded it must provide the same services to children placed in its custody as those in custody of DCS, AGAPE argued it had no statutory obligation to provide reasonable efforts to reunify the family.

The Middle Section held **parents of children who are in custody of a private agency pursuant to a court order are entitled to the same rehabilitative services as parents whose children are in custody of DCS; therefore, the agency must provide reasonable efforts to reunify the family pursuant to T.C.A. § 36-1-116.** *Id.* at 26. In construing the statutes to determine the intent of the Tennessee General Assembly, the Court reviewed T.C.A. §§ 37-2-403(a)(1) and 37-5-517(a) that require private agencies to prepare a permanency plan for each child in their care. These plans include a statement of responsibility of the parents, agency and caseworker that are specific and reasonable related to achieving one of the statutory goals, including reunification. T.C.A. §§ 37-2-403(a)(1)(A) and (2)(A). The juvenile court must approve the permanency plan to assure it addresses the child's best interest. T.C.A. § 37-2-403(a)(2)(A)

In addition, private agencies must submit periodic progress reports to the court. T.C.A. § 37-2-404(b). The Court also looked to the termination of parental rights statutes, specifically T.C.A. §§ 36-1-102(1)(A)(ii) and 36-1-113(i)(2), that provide the agency make reasonable efforts. *Id.* at \*20-23. The Court held AGAPE failed to prove by clear and convincing evidence that it made reasonable efforts and vacated the order terminating the father's parental rights.

***Dep't of Children's Servs. v. Howard***, No. W2006-00585-COA-R3-PT, 2006 Tenn. App. LEXIS 590 (Tenn. Ct. App. August 8, 2006). The trial court terminated the father's parental rights on the ground of persistence of conditions and he appealed. DCS asserted it proved by clear and convincing evidence that other conditions (the father's narcissistic personality disorder) would subject the children to further abuse or neglect. The father countered that DCS failed to make reasonable efforts. **The Western Section found that though the likelihood of success of treatment was poor, DCS had an obligation to provide reasonable efforts and reversed the termination of parental rights.**

***State v. D. D. T.***, 2006 Tenn. App. LEXIS 518, 2006 Tenn. App. LEXIS 518 (Tenn. Ct. App. July 31, 2006). The trial court terminated the father's parental rights on the ground of abandonment for failure to support or visit the child. In addition, the court found DCS failed to make reasonable efforts but that it was excused from providing reasonable efforts due to the father's abandonment of the child. The Middle Section affirmed the judgment and found, **pursuant to T.C.A. § 37-1-166(g)(4)(A), "aggravated circumstance" is a statutory exception that relieves DCS from the obligation to provide reasonable efforts. Abandonment of a child falls within the definition of an aggravated circumstance.** *Id.* at \*14.

***Dep't of Children's Servs. v. McClure (In re T.M.)***, No. M2005-02433-COA-R3-PT, 2006 Tenn. App. LEXIS 484 (Tenn. Ct. App. July 20, 2006). The termination of parental rights petition alleged the parents failed to protect the children from severe child abuse and excused DCS from the requirement to provide reasonable efforts to reunite the family, pursuant to T.C.A. § 37-1-166(g). The first permanency plan had been devised and reasonable efforts had begun when the children disclosed allegations of sexual abuse. DCS ceased providing reasonable efforts to reunify the family. **The trial court found: "Although the court made no previous finding of aggravated circumstances, the court does not find additional efforts to be statutorily necessary due to the grounds for termination that were alleged by [DCS]."** *Id.* at \*20. The parents appealed and argued the trial court erred in finding that DCS was not required to make reasonable efforts. The Western Section held:

**As grounds for the termination of the parental rights of Mother and Father, the trial court found that the children had been subjected to severe child abuse as defined under Section 37-1-102(b)(21). We have determined that this finding was supported by clear and convincing evidence. Therefore, under section 37-1-166(g)(4)(A), reasonable efforts to reunify the children with Mother and Father were not required. Accordingly, this argument must be rejected." *Id.* at \*27.**

***State Dep't of Children's Servs. v. S.V. (In re M.V.)***, No. E2006-00686-COA-R3-PT, 2006 Tenn. App. LEXIS 462 (Tenn. Ct. App. July 6, 2006). The trial court terminated the mother's parental rights on the ground of persistence of conditions. On appeal, the Eastern Section held DCS failed to make reasonable efforts and vacated the termination of her parental rights. The Court found the evidence showed the **mother had a narcissistic personality disorder and without treatment to address her specific personality disorder, she had no realistic chance of making the changes necessary to be reunited with her children. DCS had this information but failed to assist her in obtaining the necessary treatment. With intensive therapy, she had a chance to correct the conditions that led to the children's removal.** *Id.* at \*29-30.

*In re Meagan E.*, No. E2005-02440-COA-R3-PT, 2006 Tenn. App. LEXIS 350 (Tenn. Ct. App. May 30, 2006). The mother's parental rights were terminated on the ground of substantial noncompliance with the permanency plan, among other grounds. One issue on appeal was whether DCS had provided reasonable efforts to reunify the family. The Eastern Section held **DCS was excused from making reasonable efforts, pursuant to T.C.A. § 37-1-166(g)(4)(A), because the juvenile court, in the child dependency proceeding, found the mother committed severe child abuse.**

*In re A.J.H.*, No. M2005-00174-COA-R3-PT, 2005 Tenn. App. LEXIS 740 (Tenn. Ct. App. November 28, 2005). The trial court terminated the father's parental rights based on substantial non-compliance with the permanency plan and persistence of conditions. One requirement on the permanency plan was that the father complete a psychosexual evaluation and follow the recommendations. Upon the request of the father, DCS made an appointment for the psychosexual evaluation that was cancelled by the father due to the financial expense. The case manager eventually requested "flex funding" for the evaluation which was completed. The evaluation contained a number of recommendations including a plethysmograph or Abel-Screen evaluation. After the termination of parental rights petition was filed, DCS requested "flex funding" for the Abel-Screen evaluation.

The father alleged that DCS's failure to provide funding, from the beginning, for his initial evaluation prevented him from addressing the barriers to permanency identified in the plan. DCS argued that the father's refusal to take the polygraph as recommended in the evaluation, violation of prior court orders from Michigan and continuing to drive on an invalid license constituted evidence of substantial noncompliance and persistence of conditions. The Middle Section found **"(t)he linchpin of the father's argument on appeal, therefore, is the relationship between these failures on his part to comply with the permanency plan requirements and DCS's efforts to identify and treat the psychological issues which D.H. (father) alleges are part and parcel of his inability to comply."** *Id.* at \*27. The Court noted that DCS had the burden of proving that it made reasonable efforts to determine if the father "would have benefitted from a more integrated approach to assessing the alleged roots of his chronic joblessness and homelessness-a lack of coping skills, his prior diagnosis and alcohol and drug history as well as possible adult ADD." *Id.* at \*28. The Court remarked that DCS did not satisfy this burden by citing "budgetary concerns as an excuse for the incomplete assessment." *Id.* **The Court further stated "Departmental funding concerns did not and should not prevent the initial emergency removal. They should not now be used as an excuse for the substantial delay and ultimate failure in assessing and treating what could be the root causes of the barriers to reunification."** *Id.* The Court reversed the termination of parental rights as DCS failed to establish reasonable efforts pursuant to T.C.A. § 37-1-166(a)(2) and (g)(2) by clear and convincing evidence.

*In re A.L.B.*, No. M2004-01808-COA-R3-PT, 2005 Tenn. App. LEXIS 399 (Tenn. Ct. App. July 6, 2005). The trial court terminated the parental rights of both parents on the grounds of substantial noncompliance with the permanency plan and persistence of conditions. The Middle Section reversed the termination as to both grounds. The Court took issue with DCS' efforts to reunify the family. **There was a 15-month period where no services were offered to the family and the children "languished in foster care."** *Id.* at \*38. **The Court held that providing in-home services and purchasing cleaning supplies did not amount to reasonable efforts under the circumstances.**

*In re J.L.E.*, No. M2004-02133-COA-R3-PT, 2005 Tenn. App. LEXIS 384 (Tenn. Ct. App. June 30, 2005). Mother's rights were terminated pursuant to abandonment at T.C.A. § 36-1-102(1)(A)(ii) for failing to make reasonable efforts to provide a suitable home within four months of the removal of the children; substantial non-compliance with the permanency plan under T.C.A. § 36-1-113(g)(2); and persistence of conditions pursuant to T.C.A. § 36-1-113(g)(3). The Middle Section reversed the trial court as to each of these grounds.

As to the ground of abandonment defined at T.C.A. § 36-1-102(1)(A)(ii), the Court **held DCS must prove by clear and convincing evidence that it made reasonable efforts to assist the parent in establishing a suitable home for the children within the four months subsequent to the removal of the children.** The Court found that it was not clear from the record whether any caseworker had assisted the mother during the first two months and the only efforts to assist her to obtain housing was the caseworker's offer to request funding to help with "deposits, etc." and to provide the paperwork to her to apply for public housing. The mother was mildly mentally retarded and without transportation. The Court held DCS failed to establish that it made reasonable efforts. (See also *In re C.L.M.*, No. M2005-00696-COA-R3-PT, 2005 Tenn. App. LEXIS 536 (Tenn. Ct. App. August 25, 2005.)

Regarding the grounds of substantial non-compliance with the permanency plan and persistence of conditions, the Court also held DCS must prove by clear and convincing evidence that it made reasonable efforts to reunify the family, citing *In re C.M.M.*, No. M2003-01122-COA-R3-PT, 2004 Tenn. App. LEXIS 160 (Tenn. Ct. App. March 9, 2004). The Court found mother required mental health services, including "mental health case management, psychiatric treatment and psychological counseling." *Id.* at \*40. Mother was taken by the caseworker to two mental health centers and denied treatment and a letter was sent to the mother for follow-up appointment which she did not remember receiving. The Court held:

This court has not found it easy to identify the types of services Mother needed and the available sources for each of them. We are unable to find that Mother should have been expected to know exactly what she needed, where she could obtain the services, and how to access the system. **Simply giving a mildly retarded woman in this situation phone numbers and sending her a letter does not meet the reasonableness standard.** *Id.* at 44.

*In re M.J.M.*, No. M2004-02377-COA-R3-PT, 2005 Tenn. App. LEXIS 221 (Tenn. Ct. App. April 14, 2005). Mother's rights were terminated pursuant to T.C.A. § 36-1-102(1)(A)(ii) for failing to make reasonable efforts to provide a suitable home within four months of the removal of the children, among other grounds. The **Middle Section held in order to terminate parental rights on this ground DCS must prove by clear and convincing evidence that it made reasonable efforts to assist the parent in establishing a suitable home for the children.** During this period, the mother faced incarceration for methamphetamine use; was required to obtain drug treatment and secure employment; had no transportation; and had no family or friends to provide support. The Court found DCS failed to provide reasonable efforts by simple giving her a list of rental properties and offering to pay the first month's rent, deposit and utilities bills with "flex funds." **The Court held "(t)he Department knew or should have known that any efforts to find D.M. housing before she addressed her methamphetamine addiction would be for naught."** *Id.* at \*25. DCS also relied on the mother's lack of visitation with the children to show she was unlikely to obtain suitable housing. The court find DCS failed to prove that the failure to visit was willful and that she had found suitable housing prior to the termination of parental rights hearing.

*Dept of Children's Servs. v. Puryear (In re C.McN.)*, No. W2004-02878-COA-R3-PT, 2005 Tenn. App. LEXIS 189 (Tenn. Ct. App. March 30, 2005.) In its review of reasonable efforts to reunify the family, the Western Section held:

Whether DCS has used **reasonable efforts in a particular case is a fact specific inquiry, and we examine such efforts on a case-by-case basis.** The legislature has defined "reasonable efforts" as "the exercise of reasonable care and diligence by the department to provide services related to meeting the needs of the child and the family."

Tenn. Code Ann. § 37-1-166(g)(1) (2003). While DCS bears the burden of proving that reasonable efforts toward reunification are made in a particular case, we are cognizant of the fact that "reunification of a family is a two-way street, and the law does not require DCS to carry the entire burden of this goal." *State v. Belder*, No. W2003-02888- COA-R3-PT, 2004 Tenn. App. LEXIS 441, at \*24 (Tenn. Ct. App. July 9, 2004); *State v. Malone*, No. 03A01-9706-JV-00224, 1998 Tenn. App. LEXIS 83, at \*5-6 (Tenn. Ct. App. Feb. 5, 1998). The efforts employed by DCS in a particular case do not have to be "Herculean," *In re C.M.M.*, 2004 Tenn. App. LEXIS 160, at \*25, but they must be "reasonable efforts." Tenn. Code Ann. § 37-1- 166(a)(1) (2003); *Malone*, 1998 Tenn. App. LEXIS 83, at \*6. *Id.* at \*27-28.

***Tenn. Dep't of Children's Servs. v. M.S.***, No. M2003-01670-COA-R3-CV, 2005 Tenn. App. LEXIS 139 (Tenn. Ct. App. March 8, 2005). Permission to appeal denied by *State v. M.S.*, 2005 Tenn. LEXIS 756 (Tenn., Aug. 29, 2005). Parents appeal the adjudicatory order of the circuit court in this child dependency case. The circuit court held a *de novo* adjudicatory hearing and upheld the juvenile court's finding that the children were dependent and neglected and victims of severe child abuse, (i.e., sexual abuse by the father). Parents argued DCS failed to provide reasonable efforts to prevent removal and to reunify the family, pursuant to T.C.A. § 37-1-166. In regard to **reasonable efforts to prevent removal**, the Middle Section held section (b) of T.C.A. § 37-1-166 provides the burden is on DCS to prove that reasonable efforts were made; section (c) describes the affidavit that must be filed by DCS regarding reasonable efforts; and section (d) denotes the finding that the juvenile court must make when determining if DCS has made reasonable efforts. The Court went on to state that section (g)(1) of T.C.A. § 37-1-166 requires **"the child's health and safety shall be the paramount concern."** *Id.* at \*18. The Court upheld the finding of the trial court that reasonable efforts to prevent removal were made as, prior to the removal, DCS entered into a safety plan with the parents that allowed the children remain in the home with the mother pending further investigation of the sexual abuse allegation. The parents violated the safety plan and the father removed the children from the state. The Court found that had the safety plan not been violated, the emergency removal would not have been required at the time it occurred and DCS had no reasonable alternative to the removal. The Court also held the efforts to reunify the family were reasonable, including no contact with the children by the father and supervised visits of the mother. The Court found, **"DCS's first responsibility was the welfare of the children, and any analysis of the reasonableness of its actions must take into account the priority to be given to the children's health and safety."** *Id.* at \*23.

***State Dep't of Children Servs. v. Sangster***, No. W2004-02060-COA-R3-PT, 2005 Tenn. App. LEXIS 69 (Tenn. Ct. App. February 4, 2005). The Western Section held where trial court made a **finding of severe child abuse at the adjudication of the dependency petition, DCS was "statutorily absolved" from providing reasonable efforts to reunify the family pursuant to T.C.A. § 37-1-166(g)(4)(A).** *Id.* at \*17. See also, *In re E.H.*, No. W2004-00514-COA-R3-PT, 2005 Tenn. App. LEXIS 44 (Tenn. Ct. App. January 26, 2005).

***State v. B.B.M.***, No. E2004-00491-COA-R3-PT, 2004 Tenn. App. LEXIS 767 (Tenn. Ct. App. November 17, 2004). The trial court terminated the mother's parental rights on three grounds finding that DCS had made reasonable efforts to reunify the family. **In reviewing the appellate record that did not include the permanency plans or other documents from the DCS file nor any testimony as to reasonable efforts provided by DCS for the period subsequent to the children being placed in DCS custody until DCS decided to seek termination, the Eastern Section held it would not "simply assume" reasonable efforts were made and reversed the termination.** *Id.* at \*25. The Court acknowledged **T.C.A. § 37-1-166(g)(6) allows DCS to concurrently provide reasonable efforts towards reunification and adoption** and this "duality" could account for the caseworkers "admittedly lackluster

efforts” provided after the deadline for the mother to complete the responsibilities on the permanency plan. *Id.* at \*26. However, **the Court opined that the statute does not mean DCS may terminate reasonable efforts towards reunification of the family when it makes a decision to proceed with for termination “at some point in the future.”** *Id.* at \*25.

*In re M.E.*, No. M2003-00859-COA-R3-PT, 2004 Tenn. App. LEXIS 526 (Tenn. Ct. App. August 16, 2004). A termination proceeding based on the persistence of conditions ground, pursuant to T.C.A. § 36-1-113(g)(3), requires DCS to demonstrate by clear and convincing evidence that reasonable efforts have been made to reunify the child and parent. The record reflected that DCS had provided numerous services to the mother, yet **failed to provide the most obvious and essential** service that the mother needed. Specifically, DCS failed to provide the services recommended from a mental health evaluation. The Court opined that **failure to provide the recommended psychological therapy to the mother rendered the services that had been provided “a waste of time and money.”** *Id.* at 24. Middle Section reversed the decision of the juvenile to court to terminate the mother parental rights finding that DCS had not made reasonable efforts to reunify the children with their mother.

*In re C.M.M.*, No. M2003-01122-COA-R3-PT, 2004 Tenn. App. LEXIS 160 (Tenn. Ct. App. March 9, 2004). Trial court terminated mother’s parental rights on three grounds, T.C.A. § 36-1-113(g)(1) abandonment, (2) substantial noncompliance with the permanency plan, and (3)(A) persistence of conditions. **Middle Section vacated the order terminating the mother’s parental rights because DCS failed to prove that reasonable efforts were made to reunify the family.** The Court addressed the relationship between “reasonable efforts” found at T.C.A. § 36-1-113(i) and T.C.A. § 37-1-166. The Court noted that it has previously pointed to T.C.A. § 36-1-113(i) as “more pertinent” to termination of parental rights proceedings than T.C.A. § 37-1-166 but has also relied on T.C.A. § 37-1-166 in termination proceedings; and, these statutes must be read in pari material. *Id.* at n23, \*25. The Court found that the “reasonable efforts” required by T.C.A. § 37-1-166 are “precisely the same sort of ‘reasonable efforts’” under T.C.A. § 36-1-113(i). *Id.* at \*24.

The Court also found that “**when the termination proceeding involves grounds that implicate the Department’s obligation, ...establishing that it made reasonable efforts to reunite the child with his or her parents is an essential ingredient of the Department’s case. In these cases, the Department has the burden of proving its reasonable efforts even when the parent has not questioned the adequacy of its efforts.**” *Id.* at \*28. The grounds that require this burden of proof are those found at T.C.A. § 36-1-113(g)(1) - (3). The grounds found at T.C.A. § 36-1-113(g)(4) - (8) “usually will not require the Department to demonstrate that it has made reasonable efforts to reunite a child with his or her parents.” *Id.* at n26 and n27.

When required, the Department must establish that it has made reasonable efforts to reunite the child with his or her parents by **clear and convincing evidence.** *Tenn. Code Ann. § 36-1-113(c)*. This heightened burden of proof does not alter the standard by which the Department’s efforts will be judged - **the “reasonableness” standard.** Rather, it simply **requires the Department to present sufficient evidence regarding its reunification efforts to enable the trier-of-fact to conclude, without any serious or substantial doubt, that the Department’s remedial efforts were reasonable under all the circumstances.** *Id.* at \*29.

The **procedure** for proving reasonableness is found at T.C.A. § 37-1-166(c)(2) and (3) and requires DCS to **file an affidavit outlining: 1) the necessary services required to reunite the family; 2) those services actually provided to the parents and child; and, 3) whether DCS has had an opportunity to provide the services and, if not, the reasons the services have not been provided.** A detailed affidavit

that meets the requirements of T.C.A. § 37-1-166(c)(4) may be sufficient to establish “reasonableness” by clear and convincing evidence. However, **if the parent asserts the efforts were not reasonable, DCS may be required to present additional evidence to the affidavit. Failure by DCS to present the affidavit “is not fatal if the Department introduces competent evidence** specifically identifying the services required in the permanency plan, the services actually provided to the parents, and the outcomes of these services.” *Id.* at \*31. The Court also held that “**(s)imply introducing copies of the contents of the Department’s file will not suffice.**” *Id.* at \*31-2.

*Tenn. Dep’t of Children’s Servs. v. R.G.T.*, No. E2002-02804-COA-R3-JV, 2003 Tenn. App. LEXIS 408, (Tenn. Ct. App. May 30, 2003). Permission to appeal denied at *Tenn. Dep’t of Children’s Servs. v. R.G.T.*, 2003 Tenn. LEXIS 961 (Tenn. Oct. 6, 2003). Father asserted on appeal of the termination of his parental rights that DCS failed to **provide reasonable efforts to prevent removal of the one-day old child from his home pursuant to T.C.A. § 36-1-102(I)(A)(ii)**. The trial court found that though DCS had made no effort to assist the father in doing “anything”, the lack of action was reasonable because of the court’s previous ruling in a prior termination proceeding of the child’s siblings that the parents were mentally incompetent. **Eastern Section held the Department’s actions “were reasonable in light of the parents’ history with DCS and the previous termination proceedings.”** *Id.* at \*18, (emphasis added).

*In the Matter of D.D.V.*, No. M2001-02282-COA-R3-JV, 2002 Tenn. App. LEXIS 126 (Tenn. Ct. App. February 14, 2002). Middle Section reversed the trial court’s order terminating the parental rights of the mother because the grounds of abandonment, nonsubstantial compliance with the permanency plan and persistence of conditions were not proven by clear and convincing evidence. At the termination of parental rights hearing the primary obstacle for reunifying the mother and child was the lack of stable housing. **The Court held DCS did not make reasonable efforts pursuant to T.C.A. § 37-1-166(g)(1) to assist the mother in obtaining housing. The Court stated “the social workers at the Department have an obligation to use their superior insight and training to help their clients with the problems the Department itself has identified, even when not specifically asked to do so by the client.”** *Id.* at \*22.

*In re S.M.C.*, No.01A01-9807-JV-00358, 1999 Tenn. App. LEXIS 365 (Tenn. Ct. App. June 11, 1999). Middle Section affirmed termination of parental rights. One issue presented by the mother was whether DCS provided reasonable efforts to reunify the family. The Court of Appeals held that DCS provided reasonable efforts beginning when the first child was removed from the home. The Court further found that the mother continued to deny that her husband sexually abused their daughter.

See also:

*Tennessee Dep’t of Human Services v. Riley*, 689 S.W. 2d 164 (Tenn. Ct. App. 1984).

*State Dep’t of Children’s Servs. v. T.N.S.S.*, No. E2003-02935-COA-R3-PT, 2004 Tenn. App. LEXIS 883 (Tenn. Ct. App. December 30, 2004).

*In re C.LaC.*, No. M2003-02164-COA-R3-PT, 2004 Tenn. App. LEXIS 172, (Tenn. Ct. App. March 17, 2004.)

*State Dep’t of Children’s Servs. v. L.L.T.*, No. E2003-00501-COA-R3-JV, 2003 Tenn. App. LEXIS 955, (Tenn. Ct. App. December 30, 2003).

*State Dep’t of Children’s Servs. v. Shortt (In re T.B.S.)*, No. M2002-02920-COA-R3-JV, 2003 Tenn. App. LEXIS 432 (Tenn. Ct. App. June 10, 2003). Permission to appeal denied at *State Dep’t of Children’s Servs. v. Shortt*, 2003 Tenn. LEXIS 900 (Tenn. Oct. 6, 2003).

*Department of Children’s Servs. v. Malone*, No. 03A01-9706-JV-00224, 1998 Tenn. App. LEXIS 83 (Tenn. Ct. App. February 5, 1998).

*Farmer v. Department of Children Servs.*, No. 01A01-9610-JV-00485, 1997 Tenn. App. LEXIS 938 (Tenn. Ct. App. December 30, 1997).

*In re Fillinger*, No. 02A01-9409-JV-00223, 1996 Tenn. App. LEXIS 301 (Tenn. Ct. App. May 22, 1996).

*In re Jeremy D.*, No. 01A01-9510-JV-00479, 1996 Tenn. App. LEXIS 292 (Tenn. Ct. App. May 17, 1996).

*Department of Human Services v. Curran*, No. 01A01-9310-CV-00435, 1994 Tenn. App. LEXIS 74 (Tenn. Ct. App. February 18, 1994).

*Department of Children's Services v. Conaster*, No. 1, 1990 Tenn. App. LEXIS 113 (Tenn. Ct. App. February 23, 1990).

*Department of Human Services v. Amundsen*, No. 87-100-II, 1987 Tenn. App. LEXIS 2990 (Tenn. Ct. App. October 14, 1987).

*Lee v. Holder*, No. 84-152-II, 1985 Tenn. App. LEXIS 3417 (Tenn. Ct. App. August 20, 1985).

*Department of Human Services v. Caldwell*, No.82-251-11 (Tenn. Ct. App., M.S. May 16, 1983).

*Department of Human Services v. Gilbert*, 7 TAM 25-18, (Tenn. Ct. App., E.S. April 29, 1982).

#### 4.01 (b) Reasonable Efforts Toward Other Permanency Goals

*State v. Hardin*, No. W2004-02880-COA-R3-PT, 2005 Tenn. App. LEXIS 311 (Tenn. Ct. App. May 26, 2005). One issue on appeal was whether DCS made reasonable efforts to place the child with relatives pursuant to T.C.A. § 37-2-403(d). Western Section held the statute does not mandate placement with relatives but requires DCS to consider “such placement in light of safety and best interest of the child.” *Id.* at \*45.

*Department of Children's Services v. Moss*, No. 01A01-9708-JV-00424, 1998 Tenn. App. LEXIS 200 (Tenn. Ct. App. March 20, 1998). Western Section affirmed judgment of the trial court terminating father's parental rights. **The Court of Appeals held that DCS made reasonable efforts to place the children with a relative.**

See also:

*In re Adoption of A.K.S.R.*, 71 S.W.3d 715 (Tenn. Ct. App. 2001) regarding preference of foster parent vs. relative in termination of parental rights and adoption proceeding.

*State Dep't of Children's Servs. v. F. E. B.*, No. E2001-00942-COA-R3-JV, 2003 Tenn. App. LEXIS 121 (Tenn. Ct. App. February 12, 2003). Issue not raised at trial of termination of parental rights.

*In re S.B.*, No. M1999-00140-COA-R3-CV, 2000 Tenn. App. LEXIS 308 (Tenn. Ct. App. May 12, 2000).

#### 4.02 **Abandonment** - T.C.A. § 36-1-113(g)(1) as Defined in T.C.A. § 36-1-102

##### 4.02 (a) “Willfulness” Required to Prove Abandonment for T.C.A. § 36-1-102(1)(A)(i), (iii) and (iv)

*In re Adoption of A.M.H.*, 215 S.W.3d 793 (Tenn. 2007). Rehearing denied and clarified at 215 S.W.3d 793, US Supreme Court certiorari denied by *Baker v. Shao-Qiang He*, 2007 U.S. LEXIS 8357 (U.S., June 25, 2007). Stay denied by *Baker v. Shao-Qiang He*, 2007 U.S. LEXIS 8315 (U.S., June 25, 2007). The ground for termination of parental rights involved in this appeal is the parents' willful abandonment for failing to visit for the four months preceding the petition to terminate their rights. The Supreme Court held the parents' failure to visit was not willful. **“Where, as here, the parents' visits with their child have resulted in enmity between the parties and where the parents redirect their efforts at maintaining a parent-child relationship to the courts the evidence does not support a ‘willful failure to visit’ as a ground for abandonment.”** *Id.* at 810.

***Tennessee Baptist Children's Homes, Inc. v. Swanson (In Re Swanson)*, 2 S.W.3d 180, (Tenn. 1999). Supreme Court held the statute providing for termination of parental rights that failed to include the element of intent within the definition of failure to support or visit a child was unconstitutional.**

*In re Audrey S.*, 182 S.W.3d 838 (Tenn. Ct. App. 2005). The Court of Appeals discussed the element of willfulness in regard to the ground of abandonment as follows:

The concept of "willfulness" is at the core of the statutory definition of abandonment. A parent cannot be found to have abandoned a child under Tenn. Code Ann. § 36-1-102(1)(A)(i) unless the parent has either "willfully" failed to visit or "willfully" failed to support the child for a period of four consecutive months. "Willfully" is a word of many meanings, and so each use of the word must be interpreted with reference to the statutory context in which it appears. *United States v. Sanchez-Corcino*, 85 F.3d 549, 552-53 (11th Cir. 1996); *In re Adoption of Muir*, 2003 Tenn. App. LEXIS 831, No. M2002-02963-COA-R3-CV, 2003 WL 22794524, at \*5 (Tenn. Ct. App. Nov. 25, 2003) (No Tenn. R. App. P. 11 application filed); GEORGE W. PATON, A TEXTBOOK ON JURISPRUDENCE 313 n.2 (4th ed. 1972) (suggesting that use of the word should be avoided because of its ambiguities).

In the statutes governing the termination of parental rights, "willfulness" does not require the same standard of culpability as is required by the penal code. *G.T. v. Adoption of A.E.T.*, 725 So. 2d 404, 409 (Fla. Dist. Ct. App. 1999). Nor does it require malevolence or ill will. *In re Adoption of a Minor*, 343 Mass. 292, 178 N.E.2d 264, 267 (Mass. 1961). Willful conduct consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent. *In re Mazzeo*, 131 F.3d 295, 299 (2d Cir. 1997); *United States v. Phillips*, 19 F.3d 1565, 1576 (11th Cir. 1994); *In re Adoption of Earhart*, 117 Ohio App. 73, 190 N.E.2d 468, 470 (Ohio Ct. App. 1961); *Meyer v. Skyline Mobile Homes*, 99 Idaho 754, 589 P.2d 89, 97 (Idaho 1979). Conduct is "willful" if it is the product of free will rather than coercion. Thus, a person acts "willfully" if he or she is a free agent, knows what he or she is doing, and intends to do what he or she is doing.

Failure to visit or support a child is "willful" when a person is aware of his or her duty to visit or support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so. n34 *In re M.J.B.*, 140 S.W.3d at 654; see also *Shorter v. Reeves*, 72 Ark. App. 71, 32 S.W.3d 758, 760 (Ark. Ct. App. 2000); *In re B.S.R.*, 965 S.W.2d 444, 449 (Mo. Ct. App. 1998); *In re Estate of Teaschenko*, 393 Pa. Super. 355, 574 A.2d 649, 652 (Pa. Super. Ct. 1990); *In re Adoption of C.C.T.*, 640 P.2d 73, 76 (Wyo. 1982). Failure to visit or to support is not excused by another person's conduct unless the conduct actually prevents the person with the obligation from performing his or her duty, *In re Adoption of Lybrand*, 946 S.W.2d 946, 950, 329 Ark 163 (Ark. 1997), or amounts to a significant restraint of or interference with the parent's efforts to support or develop a relationship with the child, *In re Serre*, 77 Ohio Misc. 2d 29, 665 N.E.2d 1185, 1189 (Ohio Ct. C.P. 1996); *Panter v. Ash*, 177 Ore. App. 589, 33 P.3d 1028, 1031 (Or. Ct. App. 2001). n35 The parental duty of visitation is separate and distinct from the parental duty of support. Thus, attempts by others to frustrate or impede a parent's visitation do not provide justification for the parent's failure to support the child financially. *Bateman v. Futch*, 232 Ga. App. 271, 501 S.E.2d 615, 617 (Ga. Ct. App. 1998); *In re Leitch*, 732 So. 2d 632, 636 n.5 (La. Ct. App. 1999).

The willfulness of particular conduct depends upon the actor's intent. Intent is seldom capable of direct proof, and triers-of-fact lack the ability to peer into a person's mind to assess intentions or motivations. *In re Adoption of S.M.F.*, 2004 Tenn. App. LEXIS 826, No. M2004-00876-COA-R9-PT, 2004 WL 2804892, at \*8 (Tenn. Ct. App. Dec. 6, 2004) (No Tenn. R. App. P. 11 application filed). Accordingly, triers-of-fact must infer intent from the circumstantial evidence, including a person's actions or conduct. *See Johnson City v. Wolfe*, 103 Tenn. 277, 282, 52 S.W. 991, 992 (1899); *Absar v. Jones*, 833 S.W.2d 86, 89-90 (Tenn. Ct. App. 1992); *State v. Washington*, 658 S.W.2d 144, 146 (Tenn. Crim. App. 1983); *see also In re K.L.C.*, 9 S.W.3d 768, 773 (Mo. Ct. App. 2000).

n34 A parent who fails to support a child because he or she is financially unable to do so is not willfully failing to support the child. *O'Daniel v. Messier*, 905 S.W.2d at 188; *Pierce v. Bechtold*, 60 Tenn. App. 478, 487, 448 S.W.2d 425, 429 (1969).

n35 Conduct that amounts to a significant restraint or interference with a parent's efforts to support or develop a relationship with a child includes: (1) telling a man he is not the child's biological father; (2) blocking access to the child; (3) keeping the child's whereabouts unknown; (4) vigorously resisting a parent's efforts to support the child; or (5) vigorously resisting a parent's efforts to visit the child. *In re S.A.B.*, 735 So. 2d 523, 524 (Fla. Dist. Ct. App. 1999); *In re Adoption of Children by G.P.B., Jr.*, 161 N.J. 396, 736 A.2d 1277, 1282 (N.J. 1999); *Panter v. Ash*, 33 P.3d at 1031; *Taxonomy of Children's Rights*, 11 WM. & MARY BILL RTS. J. at 957. *Id.* at \*47-52.

Editor's Note: Knowledge of the responsibility to support or visit is factor in determining "willfulness." Pursuant to T.C.A. § 37-2-403, when an "agency" obtains custody of a child, it is required to notify the parents or legal guardians of the statutory definitions of abandonment and the criteria and procedures for termination of parental rights. The following cases address situations where the child is placed in custody of an agency and also discuss the implication of notice in cases where the child is placed in custody of individuals, without the involvement of a child-placing agency.

*In re J.L.E.*, No. M2004-02133-COA-R3-PT, 2005 Tenn. App. LEXIS 384 (Tenn. Ct. App. June 30, 2005). Middle Section reversed the trial court's termination of the mother's parental rights on the ground of abandonment, pursuant to T.C.A. § 36-1-102(1)(A)(ii), because **DCS failed to comply with the notice provisions of T.C.A. § 37-2-403**. The Court held:

**The notice provisions of the statute are designed to inform parents, before they engage in conduct constituting abandonment, of the potential consequences of that conduct...** With regard to the definition of abandonment occurring in the first four months after the child is removed from the home, that notice would need to be given quickly and clearly. If a parent is notified after the fact, *i.e.* after the four months has run, he or she has no way to avoid the consequences and cannot remedy the situation. In that situation, the purpose of the notice requirements is not fulfilled. (Emphasis added.) *Id.* at \*28-29.

Neither of the two permanency plans prepared prior to the filing of the termination of parental rights petition contained the mother's signature or the notice requirement. The Court did not consider the plan that contained the mother's signature and notice requirement that was developed after petition was filed. One of the initial plans was ratified by the juvenile court judge and the judge's signature affirmed "that the approval was based on evidence presented in support of the plan and with 'all parties having the opportunity to be heard.'" *Id.* at \*27. However, the Court found that there was nothing in the record to indicate when the hearing was held or that the judge provided the explanations pursuant to T.C.A. § 37-2-

403(a)(2)(B)(i). Also, the Court held DCS did not present other evidence required by T.C.A. § 37-2-403(a)(2)(B)(ii) and did not file an affidavit pursuant to T.C.A. § 37-2-403(a)(2)(B)(ii)(c). Therefore, DCS was precluded from termination on the grounds of abandonment.

*In re W.B.*, No. M2004-00999-COA-R3-PT, 2005 Tenn. App. LEXIS 262 (Tenn. Ct. App. April 29, 2005). This appeal involves a termination of parental rights case in which the petition to terminate was filed by a couple who had been awarded custody of the children. One issue on appeal was the termination of the mother's parental rights based on abandonment for failure to visit or support the children. The Middle Section reviewed "willfulness" and the mother's knowledge of her duty to support and visit as follows:

When the Department of Children's Services or other child-placing agency obtains custody of children removed from the parents' home, it is required to notify the parents of the statutory definitions of abandonment and the criteria and procedures for termination of parental rights. Tenn. Code Ann. § 37-2-403(a)(2)(A). In such situations, a court cannot terminate a parent's rights on the ground of abandonment unless such notice, including the consequence of abandonment, has been given by the agency petitioning for termination or the court itself. Tenn. Code Ann. § 37-2-403(a)(2)(B). **In the case before us, neither DCS nor another agency was involved, so the statute does not apply.** Nonetheless, Mother's knowledge of a duty or expectation that she provide support and visit is a factor in determining willfulness. We find nothing in the record to indicate she was ever told she was expected to provide support or face termination of her parental rights. *Id.* at \*38.

*In re D.D.K.*, No. M2003-01016-COA-R3-PT, 2003 Tenn. App. LEXIS 927 (Tenn. Ct. App. December 30, 2003). DCS filed the petition to terminate parental rights and the father's rights were terminated on the ground of abandonment. **The Middle Section held DCS failed to comply with the procedures outlined pursuant T.C.A. § 37-2-403. The Court found when a child is placed in custody of DCS "the legislature has determined that the ground of abandonment must be explained to the parents"** *Id.* at \*12. The Court held:

Thus, DCS was not authorized to proceed on the ground of abandonment unless it could show (1) Father was given the required notice by a permanency plan containing the notice and signed by Father or that Father refused to sign such a plan presented to him, (2) in the absence of those documents, some court record showing an explanation by the court of the consequences of abandonment, or (3) an affidavit of diligent efforts by DCS to provide such notice prior to the filing of the termination petition. Our review of the record before us contains none of these alternative methods of showing notice. *Id.* at 16.

The Court vacated the order terminating the father's rights on the ground of abandonment because there was no proof the father was ever notified of the definition and consequences of abandonment or of any reason justifying the failure to provide the notice.

See also:

*In re K.C.*, No. M2005-00633-COA-R3-PT, 2005 Tenn. App. LEXIS 636 (Tenn. Ct. App. October 4, 2005).

*In re C.L.H.*, No. M2000-02799-COA-R3-JV, 2001 Tenn. App. LEXIS 424 (Tenn. Ct. App. June 5, 2001).

4.02 (b) T.C.A. § 36-1-102(1)(A)(i) – Failure to Support/Visit within 4 Months of Petition

*In re Adoption of A.M.H.*, 215 S.W.3d 793 (Tenn. 2007). Rehearing denied and clarified at 215 S.W.3d 793, US Supreme Court certiorari denied by *Baker v. Shao-Qiang He*, 2007 U.S. LEXIS 8357 (U.S., June 25, 2007). For a description of the case see 4.02(a), above.

*In re D.L.B.*, 118 S.W.3d 360 (Tenn. 2003). A petition to terminate the father’s parental rights was filed in juvenile court and a subsequent petition was filed in chancery court. The petition in juvenile court was dismissed and the chancery court terminated the father’s parental rights on the ground of abandonment, pursuant to T.C.A. § 36-1-102(1)(A)(i) – failure to visit or support the child for four months preceding the filing of the petition. To compute the four-month period, the chancellor used the date immediately preceding the filing of the petition in juvenile court that was dismissed. The Court of Appeals affirmed. **The Supreme Court held the lower courts erred in interpreting T.C.A. § 36-1-102(1)(A)(i) and T.C.A. § 36-1-102(1)(F) and that, reading the statutes as a whole, T.C.A. § 36-1-102(1)(A)(i) “requires that the willful failure to visit, support, or make reasonable payments toward the support of the child must have occurred in the four months immediately preceding the filing of the petition currently before the court.”** *Id.* at 366, (emphasis added).

*In re Audrey S.*, 182 S.W.3d 838 (Tenn. Ct. App. 2005). The trial court terminated the mother’s parental rights based on abandonment pursuant to subsections (i) and (iv) of T.C.A. § 36-1-102(1)(A) and two other grounds. **The Court of Appeals reversed the termination based on abandonment as defined at T.C.A. § 36-1-102(1)(A)(i) finding that mother’s failure to visit or pay child support for the four months prior to the filing of the petition was not willful. The court reasoned that mother was incarcerated during this period which prevented her from earning a weekly paycheck. In addition, the fathers testified they refused to allow their children to be brought to the prison for visitation.**

*In re S.M.*, 149 S.W.3d 632 (Tenn. Ct. App. 2004). One issue on appeal was whether the father failed to visit or pay support the child for four months preceding the filing of the petition. The petitioner, a child-placing agency, filed the original petition to terminate the father’s parental rights and two amended petitions, each alleging abandonment pursuant to T.C.A. § 36-1-102(1)(A)(i). The Court of Appeals acknowledged this complicated the determination of the applicable four month period and addressed the four months preceding each of petitions. **The Court opined that father’s failure to support or visit during the four months prior to the original petition was not willful because he justifiably believed that the child was deceased as he was told this by the mother and members of her family.** Nor, as the petitioner asserted, did the father have an obligation to launch an independent investigation to determine if his child was in fact deceased. As to the amended petitions, the Court again determined that father’s failure to visit and pay support was not willful. First, **the Court found the petitioner was not promoting a relationship between the father and child “because it knew that doing so would undermine the placement and the planned adoption... (the agency) essentially took the position to force R.G.L. (father) to litigate if he desired to develop a relationship with his child.”** *Id.* at \*27. The Court also **took into account the father’s “limited education and a limited command of English” in assessing how much he understood of the process** initiated by the agency. *Id.* Finally, the Court was not willing to penalize father for the failure of the juvenile court to timely adjudicate his paternity petition, set child support and visitation. **The Court held the father had a “justifiable excuse for failing to support or visit” the child.** *Id.* at \*28.

*In re M.J.B.*, 140 S.W.3d 643 (Tenn. Ct. App. 2004).-Court of Appeals reversed the finding of willful abandonment but affirmed the termination of parental rights on other grounds. **Proof of abandonment requires more than showing that parent did not pay support. Burden of producing clear and**

**convincing evidence requires that proof be shown that parent was able to provide support and voluntarily chose not to do so.** The Court of Appeals held:

**Terminating parental rights based on failure to support presupposes (1) that the parent is aware of his or her duty to support, (2) that the parent is able to provide financial support, either through income from private employment or qualification for government benefits, and (3) that the parent has voluntarily and intentionally chosen not to provide financial support without a justifiable excuse.** *In re Adoption of Muir*, 2003 Tenn. App. LEXIS 831, 2003 WL 22794524, at \*5. *Id.* at 654.

*In re A.D.A.*, 84 S.W.3d 592 (Tenn. Ct. App. 2002). Court of Appeals reversed the finding of willful abandonment but affirmed the termination of parental rights on other grounds. DCS filed a termination of parental rights petition alleging, among other grounds, abandonment in that: 1) the mother willfully abandoned the child because she failed to visit or support the child for more than four consecutive months preceding the filing of the petition pursuant to T.C.A. § 36-1-102(1)(A)(i). The child was placed in a foster home more than two hours away from the mother's home. **The Court of Appeals found that the mother's efforts to visit the child were hampered by her lack of transportation. In addition, it was not sufficient that DCS agreed to transport the child half way to the mother's home. The Court held the record did not support a finding of clear and convincing evidence of "intentional" abandonment pursuant to T.C.A. § 36-1-102(1)(A)(i).** *Id.* at 598.

*In re Chelbie F.*, No. M2006-01889-COA-R3-PT; 2007 Tenn. App. Lexis 272 (Tenn. Ct. App. April 27, 2007). The father appealed the termination of his parental rights based on the ground of abandonment for failure to visit or support his child and asserted he did not willfully abandon the child because he was pursuing court intervention to establish support and visitation. The father had filed three separate petitions. **The Middle Section relied on *In re Adoption of A.M.H.*, 215 S.W.3d 793 (Tenn. 2007) in reversing the termination.** The Court found the same principle in *A.M.H.* should be applied to a parent who is attempting to establish support through court proceedings. The Court noted, in regard to visitation there were different facts in the present case and *A.M.H.* in that there were "no recent efforts to visit or acrimonious confrontations shortly before or during the four-month period. However, it is undisputed that (the mother) did nothing to foster or encourage visitation by or support from (the father). In fact, she conceded that ever since their final visitation in October 1999, she did not want (the father) to visit Chelbie F. and that she did not want to accept any financial support from him." *Id.* at \*19-20. **The Court held, the father's "pursuit of a judicial remedy is inconsistent with a finding that he willfully failed to support or visit Chelbie F. during the four months immediately preceding the filing of the petition."** *Id.*

*In re M.B.*, No. M2005-02120-COA-R3-PT, 2006 Tenn. App. LEXIS 262 (Tenn. Ct. App. April 25, 2006). On appeal of the termination of her parental rights, one issue raised by the mother was whether there was clear and convincing evidence to terminate her rights for failure to support. The Middle Section **held her failure to support was "involuntary"** and reversed the termination on this ground. *Id.* at \*17. The mother voluntarily placed the children in custody of DCS after being evicted from her home. Her husband had left the home pursuant to a safety plan developed by DCS and provided her no support. She had not graduated from high school and had little work experience. During the four months preceding the petition she attempted to work to support herself and the children, though her wages were not enough to do both.

*In re K.C.*, No. M2005-00633-COA-R3-PT, 2005 Tenn. App. LEXIS 636 (Tenn. Ct. App. October 4, 2005). One issue on appeal of the termination of parental rights case was whether the mother willfully failed to support. Though there was no direct monetary support to the caregiver, the mother claimed she

supported the child at visits and through gifts. The Middle Section held “(s)imply proving failure to pay support is not in and of itself sufficient to prove that the failure was willful or intentional.” *Id.* at \*27. The court opined that T.C.A. §37-2-403(a)(2) did not apply since DCS was not involved and the child was not in foster care. However, the Court acknowledged “the legislature's concern with the fairness of using abandonment as a ground without notice that provides an opportunity to avoid the conduct establishing that ground does have some application.” *Id.* at \*31-32. Although there was court order requiring mother to pay support, the caregiver did not testify that she informed mother of the order (mother was not present at the hearing that set support); nor did she seek enforcement of the order or ask mother for any financial support. The mother testified she was told she did not have to pay and this testimony was not disputed. The Court held there was not clear and convincing evidence of willful failure to support.

*In re C.M.C.*, No. E2005-00328-COA-R3-PT, 2005 Tenn. App. LEXIS 458 (Tenn. Ct. App. August 3, 2005). One issue on appeal was whether the mother had willfully failed to visit or support the children. DCS filed a petition to terminate the mother’s parental rights in August 2004. A no contact order between the mother and children was issued by the trial court in April 2004. In addition, the mother was ordered to pay child support by court order in October 2003 and pursuant to the permanency plan. **The Eastern Section reversed the trial court’s finding of abandonment based on willful failure to visit because there was a no contact order in place four months prior to the filing of the petition and, preceding the no contact order, visitation was at the discretion of DCS and the foster care providers. The Court also reversed the finding of abandonment based on willful failure to support. The court concluded that, even though there was an order to support, the child support was also included in the permanency plan and it was undisputed that the mother failed to pay the support, there was not clear and convincing evidence that the mother had the ability to pay support during the four months preceding the filing of the petition.** There was not evidence in the record regarding how much the mother earned while she was intermittently employed during the four months prior to the filing of the petition. Also, mother began having seizures in July 2004. The Social Security Administration approved the mother’s benefits in October 2004. The court opined that after the onset of seizures in July 2004, any failure to pay support was not willful.

*In re Kleshinski*, No. M2004-00986-COA-R3-CV, 2005 Tenn. App. LEXIS 275. (Tenn Ct. App. May 4, 2005). This is a termination of parental rights case in which the parents were divorced, father remarried and father and stepmother filed a petition to terminate and allow the stepmother to adopt the children. The trial court terminated parental rights based on the mother’s willful failure to support or visit during the four months preceding the filing of the petition and mother appealed. **The Western Section held the mother’s failure to pay support was not willful since she was under no duty to provide support.** The Court referenced the divorce decree wherein mother did not have a support obligation. The Court also weighed the fact that the mother was never asked to pay support by the children’s father and stepmother. In fact, the evidence showed that the father and stepmother discouraged offers of money and gifts from mother believing their acceptance would entitle mother to visitation. The Court reversed the termination based on failure to support.

As to visitation, it was undisputed the mother did not visit the children for “well over” the four month period prior to the filing of the petition. Mother claimed her failure to visit the children was due in large part to threats of bodily harm by the father and stepmother. Citing, *In re Z.C.G.*, 2001 Tenn. App. LEXIS 783, No. M2000-02939-COA-R3-CV, 2001 WL 1262609, at \*7 (Tenn. Ct. App. Oct. 22, 2001), the Court reaffirmed the **non-custodial parent’s obligation to work to foster the relationship between the non-custodial parent and the child. “While ‘mere efforts to frustrate or discourage visitation or support do not necessarily justify’ the non-custodial parent’s inaction, however, such efforts justify the non-custodial parent’s failure to visit or support only if they amount to a significant restraint or**

**interference.** See *V.D. v. N.M.B.*, 2004 Tenn. App. LEXIS 465, M2003-00186-COA-R3-CV, 2004 WL 1732323, at \*6 (Tenn. Ct. App. July 26, 2004)” *Id.* at \*66. The Court, relying on the trial judge’s determination of the credibility of the witnesses, upheld the finding that mother had failed to visit her children by determining her claims of fear were not credible. Mother had testified the neither father nor stepmother took any steps to prevent her visitation within the year prior to the petition.

*In re M.J.M.*, No. M2004-02377-COA-R3-PT, 2005 Tenn. App. LEXIS 221 (Tenn. Ct. App. April 14, 2005). Mother’s rights were terminated for willful failure to visit or support the children for four months preceding the filing of the petition, among other grounds. The mother visited regularly until DCS changed the city in which the visits occurred. The Middle Section held there was **not clear and convincing proof that the failure to visit was willful because of DCS’ decision to move the visitation to a less convenient location; mother had problems with transportation; and during the period, she spent time in jail and residential treatment. The Court also reversed the termination on the ground of failure to support finding that the permanency plan did not require child support, nor had the juvenile court ordered child support.** The Court opined the reason no support was required was because the mother was not able to support the children as she was dealing with methamphetamine addiction, was not employed, had no transportation and lacked support of family or friends.

*In re Z.J.S.*, No. M2002-02235-COA-R3-JV, 2003 Tenn. App. LEXIS 415 (Tenn. Ct. App. June 3, 2003). One issue raised by the mother on appeal of the termination of her parental rights was whether there was clear and convincing evidence that she willfully abandoned the children for failure to provide support. The trial court found she had provided only “token support.” **The Middle Section found that support of a child may be considered “token” only if it is “insignificant” in light of the parent’s “means.” The Court held “(a) finding of ‘insignificance under Tenn. Code Ann. § 36-1-102(1)(B) cannot be made without evidence regarding both a parent’s actual financial support of his or her child and a parent’s ‘means.’”** *Id.* at \*40 (emphasis added). **DCS failed to present evidence regarding the mother’s ability to support the children.** The Court vacated the portion of the judgment related to abandonment.

*In re D.M.*, No. M2002-01317-COA-R3-JV, 2003 Tenn. App. LEXIS 135 (Tenn. Ct. App. February 20, 2003). Middle Section held DCS failed to prove abandonment by clear and convincing evidence for failure of the mother to visit or support her children. The mother was a minor when she gave birth to both children. She was placed in foster care before the birth of her second child. Upon turning 18 years old, the mother was released from custody and entered the Army. Both children remained in custody. The permanency plan required the mother maintain visitation and pay child support “as ordered by the court.” **The Court held there was no proof the mother failed to visit her children during the four months preceding the filing of the petition as she visited while on leave from the Army. The Court also found that, though the mother did not pay child support, there was no court order regarding child support and “DCS did not give her adequate guidance in this matter.”** *Id.* at \*10.

See also:

*In re M.L.D.*, 182 S.W.3d 890 (Tenn. Ct. App. 2005).

*In re S.L.R.*, No. M2004-01565-COA-R3-PT, 2004 Tenn. App. LEXIS 880 (Tenn. Ct. App. December 28, 2004).

*In re Adoption of S.M.F.*, No. M2004-00876-COA-R9-PT, 2004 Tenn. App. LEXIS 826 (Tenn. Ct. App. December 6, 2004).

*In re B.L.*, No. M2003-01877-COA-R3-PT, 2004 Tenn. App. LEXIS 714 (Tenn. Ct. App. November 1, 2004).

*In re T.A.R.*, No. M2003-02801-COA-R3-PT, 2004 Tenn. App. LEXIS 618 (Tenn. Ct. App. September 20, 2004).

4.02 (c) T.C.A. § 36-1-102(1)(A)(iv) – Incarcerated Parent: Failure to Support/Visit within 4 Months of Incarceration or Wanton Disregard

*In re S.L.A.*, 223 S.W.3d 295 (Tenn. Ct. App. 2006). On appeal of the termination of her parental rights, the mother contended there was not clear and convincing proof that she abandoned her child through conduct that amounted to wanton disregard. The mother was incarcerated prior to her one-month old child being placed in foster care for manufacturing methamphetamine. The child was born prematurely; tested positive at birth for opiates; and the mother admitted to using drugs during and after her pregnancy. A methamphetamine lab was found at the mother's home when the child was removed, where the mother stored her breast milk. The Court of Appeals held the evidence supported conduct of wanton disregard.

*In re Audrey S.*, 182 S.W.3d 838 (Tenn. Ct. App. 2005). The trial court terminated the mother's parental rights based on abandonment pursuant to subsections (i) and (iv) of T.C.A. § 36-1-102(1)(A) and two other grounds. In reviewing the finding of **abandonment under T.C.A. §36-1-102(1)(A)(iv)**, **the Court of Appeals first opined that this definition contains two distinct tests. The first being whether the parent has willfully failed to visit or support the child for four consecutive months immediately preceding the incarceration. The second test is whether the parent, prior to incarceration, has engaged in conduct which exhibits a wanton disregard for the welfare of the child.** The Court examined the legislative intent behind the definition. The first test prevents a parent from relying on his or her criminal behavior and incarceration as a defense to a termination proceeding. The second test acknowledges that incarceration is a "strong indicator" that other problems may exist in the home that are contrary to the welfare of the child. However, incarceration as a sole factor is not enough to prove wanton disregard. The Court opined that "incarceration serves only as a triggering mechanism that allows the court to take a closer look at the child's situation to determine whether the parental behavior that resulted in incarceration is part of a broader pattern of conduct that renders the parent unfit or poses a risk of substantial harm to the welfare of the child." *Id.* at \*57-58.

Using this analysis the Court determined there was clear and convincing evidence that the mother had willfully failed to support or visit her children for four months prior to her incarceration and affirmed the decision of the trial court as to the first test. In reviewing the second test, the Court acknowledged that neither the case law nor its practice had been consistent in determining whether the behavior constituting wanton disregard was confined to the four months immediately preceding the incarceration. The Court looked to the plain meaning of the text in the statute to determine whether there are time limitations on the second test. The Court determined that the two tests described two distinct categories of parental behavior, each with its own behavioral and temporal elements. **The Court held the statute does not specify a time limitation for determining conduct that exhibits a wanton disregard. Thus the trial court properly considered evidence of the mother's incarcerations, criminal behavior and substance abuse that occurred prior to the four months preceding her incarceration.**

*In re C.T.S.*, 156 S.W.3d 18 (Tenn. Ct. App. 2004). Western Section affirmed termination of incarcerated mother's parental rights. Court found Mother had engaged in conduct prior to incarceration which exhibited a **wanton disregard** for the welfare of the child. **"Mother ingested crack cocaine during her pregnancy and immediately before the birth of C.T.S., knowing the effects it would have on her child. Mother's knowledge of these effects, moreover, was more than theoretical as she previously had given birth to a child who also was born addicted to cocaine. Such conduct clearly exhibits a wanton disregard for the welfare of the child."** *Id.* at 25.

*State v. Calabretta (In re J.J.C.)*, 148 S.W.3d 919 (Tenn. Ct. App. 2004). Father appealed the termination of his parental rights. One issue on appeal was whether DCS had proven by clear and convincing evidence that the father abandoned his children for failure to pay child support the four months preceding

his incarceration. Father conceded he did not provide any money to DCS during the children's stay in foster care but **argued his failure to make support payments was not "willful" as he was not aware of his obligation to pay support.** The Western Section held:

Failure of a parent to pay support under the termination statutes is "willful" if the parent "is aware of his or her duty to support, has the capacity to provide the support, makes no attempt to provide support, and has no justifiable excuse for not providing the support." *In re Adoption of Muir*, 2003 Tenn. App. LEXIS 831, No. M2002-02963-COA-R3-CV, 2003 WL 22794524, at \*5 (Tenn. Ct. App. Nov. 25, 2003) (citing cases from other jurisdictions). *Id.* at 926.

**The Court found there was no evidence DCS explained to the father that he was obligated to pay support and that if he did not pay support his parental rights would be terminated; and the permanency plans implied he was not required to pay support unless there was a court order to do so.** The Court cited *State v. Demarr*, 2003 Tenn. App. LEXIS 569, No. M2002-02603-COA-R3-JV, 2003 WL 21946726 (Tenn. Ct. App. Aug. 13, 2003). **The Court held the failure to pay support was not willful and vacated and remanded the termination of parental rights as to the father.**

*In re C.W.W.*, 37 S.W.3d 467 (Tenn. Ct. App. 2000). **The Court of Appeals held the mother's drug habit, her related criminal activity and leaving the children unsupervised with very little food constituted conduct exhibiting a wanton disregard for her children and affirmed the termination of her parental rights.**

*State Dep't of Children's Servs. v. J.A.H.*, No. E2005-00860-COA-R3-PT, 2005 Tenn. App. LEXIS 824 (Tenn. Ct. App. December 28, 2005). Father was incarcerated prior to and at the time the termination of parental rights petition was filed in June 2004. DCS pled abandonment alleging the father had failed to visit the child for the four months preceding his incarceration. In November 2003, father's visitation with child was suspended by court order and could resume if he submitted to an alcohol and drug assessment and random drug tests. Father did not comply and had not visited with the child since October 2003. The trial court terminated father's parental rights finding that father had abandoned the child. The trial court opined that **father's refusal to cooperate with the drug assessment and testing constituted a willful decision to discontinue visits with the child.** The Eastern Section affirmed the trial court's ruling.

*In re M.W.M.*, No. M2005-00053-COA-R3-PT, 2005 Tenn. App. LEXIS 449 (Tenn. Ct. App. August 1, 2005). The Middle Section affirmed the trial court's finding that mother had **exhibited wanton disregard by her "habitual physical abuse of her children, the children's repeated stints in foster care in three different states, the danger R.M. (mother) exposed the children to when she was evading arrest, and R.M.'s continued psychological abuse of her children."** *Id.* at 14.

*In re W.B.*, No. M2004-00999-COA-R3-PT, 2005 Tenn. App. LEXIS 262 (Tenn. Ct. App. April 29, 2005). The trial court terminated the father's parental rights based on abandonment pursuant to subsection (i) of T.C.A. § 36-1-102(1)(A) (failure to visit or support for four months preceding the filing of the termination of parental rights petition). The petition was filed 11 days after the father's release from prison in November 2003 and he was incarcerated from February to October of 2003. The Middle Section held the ground alleged in the petition was not, as a matter of law, applicable to the father and reversed the termination based on abandonment. **The Court found the applicable definition of abandonment is found at subsection (iv) of T.C.A. § 36-1-102(1)(A) and therefore the trial court did not use the correct four month period in determining whether the father had abandoned the child by failure to pay support of visit the child. The correct time period was the four months prior to the father's incarceration and the petition failed to allege any willful failure to support during the four months**

**preceding the father's incarceration.** The Court cited *In re C.W.W.*, 37 S.W.3d 467 (Tenn. Ct. App. 2000).

*In re H.A.L.*, No. M2005-00045-COA-R3-PT, 2005 Tenn. App. LEXIS 240 (Tenn. Ct. App. April 25, 2005). One issue on appeal was whether the father had willfully failed to visit or support the child within four months preceding his incarceration. The trial court determined the father willfully failed to visit because he failed to seek relief from the initial protective custody order that placed the child in DCS custody and prevented him from having contact with the child. The Middle Section held the “**statutory definition of abandonment does not encompass failing to challenge a facially valid "no contact" order.**” *Id.* at \*16. As to the issue of failure to support, **the Court found the father was never ordered to pay support by a court and DCS never entered into a permanency plan with the father requesting support. DCS presented some evidence at the termination hearing that the father had been employed but failed to establish evidence of his income, expenses, or ability to pay support for the four months prior to his incarceration.** The Court held DCS failed to present clear and convincing evidence that the father willfully failed to support or visit the child.

Father also challenged the trial court's finding that he abandoned the child by exhibiting wanton disregard for the child's welfare. The Court affirmed the termination on this ground **finding the father had been incarcerated for over half of the child's life and while he was not in jail, he chose to use drugs rather than parent his child. The Court held this conduct amounted to wanton disregard.**

*State Dep't of Children's Servs. v. L.L.T.*, No. E2003-00501-COA-R3-JV, 2003 Tenn. App. LEXIS 955 (December 30, 2003). Permission to appeal denied by *State Dep't of Children's Servs. v. L. L. T.*, 2004 Tenn. LEXIS 328 (Tenn., Apr. 19, 2004). Two of the four issues raised on appeal of the termination of the mother's parental rights involved the ground of abandonment. The first was whether there was clear and convincing evidence that the mother failed to visit the child for four months preceding her incarceration. The Eastern Section held that though she attended most of the visits it amounted to “token visitation.” The Court stated:

**“Visitation” is much more than a mere physical presence...Mother spent her visitation sessions applying makeup, sleeping, and arguing with Father, rather than properly focusing her attention on and caring for the child. Such "perfunctory" presence with the child does not preclude a finding of abandonment under the statute.** *Id.* at \*12-13.

The second issue was whether there was clear and convincing evidence presented that she failed to pay child support as she did not know she was supposed to. The Court held payment of child support is not conditioned on a court order, citing *State Dep't of Human Services v. Manier*, No. 01A01-9703-JV-00116, 1997 WL 675209, 1997 Tenn. App. LEXIS 755 (Tenn. Ct. App. October 31, 1997).

*Henderson v. State, Dep't of Children Serv., (In re T.L.P.)*, No. W1999-01940-COA-R3-CV, 2001 Tenn. App. LEXIS 638 (Tenn. Ct. App. August 22, 2001). The mother appealed the termination of her parental rights alleging, among other issues, that there was not clear and convincing evidence of abandonment. The Western Section **held because she was incarcerated during the four months immediately preceding the filing of the petition, her failure to visit and/or to support the children was not intentional.** The termination of parental rights was affirmed on other grounds.

*In re M.C.G.*, No. 01A01-9809-JV-00461, 1999 Tenn. App. LEXIS 327 (Tenn. Ct. App. May 26, 1999). Western Section affirmed termination of mother's parental rights pursuant to T.C.A. § 36-1-102 (1)(A)(i) and (iv). Court of Appeals held that **where abandonment was alleged and mother was incarcerated**

**for a portion of the four months preceding the filing of the petition to terminate parental rights, the critical time period for determining abandonment is the four-month period preceding the parent's incarceration pursuant to T.C.A. § 36-1-102 (1)(A)(iv).**

See also:

*In re B.P.C.*, No. M2006-02084-COA-R3-PT; 2007 Tenn. App. Lexis 235 (Tenn. Ct. App. April 18, 2007).

*State Dep't of Children's Servs v. Stinson*, No. W2006-00749-COA-R3-PT; 2006 Tenn. App. LEXIS 701 (Tenn. Ct. App. October 30, 2006). Permission to appeal denied at 2007 Tenn. LEXIS 106 (Tenn., February 5, 2007).

*In re T.A.R.*, No. M2003-02801-COA-R3-PT, 2004 Tenn. App. LEXIS 618 (Tenn. Ct. App. September 20, 2004).

*State Dep't of Children's Servs. v. F. E. B.*, No. E2001-00942-COA-R3-JV, 2003 Tenn. App. LEXIS 121, (Tenn. Ct. App. Feb. 12, 2003).

*State Dep't of Children's Services v. Wiley*, No. E1999-01216-COA-R3-CV, 1999 Tenn. App. LEXIS 773 (Tenn. Ct. App. November 24, 1999). Permission to appeal denied (Tenn. April 24, 2000).

*In re Shipley*, No. 03A01-9611-JV-00369, 1997 Tenn. App. LEXIS 651 (Tenn. Ct. App. September 29, 1997).

4.02 (d) T.C.A. § 36-1-102(1)(A)(ii) – Child Removed by Dependency Petition, Placed in Custody of Agency & Parent Failed to Locate Suitable Home within 4 Months of Removal

*In re C.L.M.*, No. M2005-00696-COA-R3-PT, 2005 Tenn. App. LEXIS 536 (Tenn. Ct. App. August 25, 2005). One issue on appeal was whether DCS proved the mother abandoned her children pursuant to the definition at T.C.A. § 36-1-102(1)(A)(ii). The Middle Section reviewed the reasonable efforts provided by DCS and found that under the second and third permanency plans, DCS did provide reasonable efforts. However, the Court held:

**The difficulty in a fact-intensive inquiry when applied to this case and to “abandonment” under the statutory definition lies in the timing of reasonable efforts on the part of both DCS and the parent.** The statute provides in pertinent part: “and for a period of **four (4) months following the removal**, the department or agency has made reasonable efforts to assist the parent(s) or guardian(s) to establish a suitable home for the child, but that the parents(s) or guardian(s) have made no reasonable efforts to provide a suitable home.” Tenn.Code Ann. § 36-1-102(1)(A)(ii). **When isolating this four-month period, the record does not establish by clear and convincing evidence that abandonment has been sustained.** *Id.* at \*28-29.

*In re M.J.M.*, No. M2004-02377-COA-R3-PT, 2005 Tenn. App. LEXIS 221 (Tenn. Ct. App. April 14, 2005). **Middle Section held DCS failed to establish abandonment based on this ground as it failed to prove by clear and convincing evidence that it made reasonable efforts to assist the mother in obtaining suitable housing for the children within the four months after removal of the children.** For a detailed description of the case see Section 4.01 (b) above.

See also:

*In re D.P.M.*, No. M2005-02183-COA-R3-PT; 2006 Tenn. App. LEXIS 597 (Tenn. Ct. App. September 8, 2006).

*In re M.J.J.*, No. M2004-02759-COA-R3-PT, 2005 Tenn. App. LEXIS 219 (Tenn. Ct. App. April 14, 2005).

4.02 (e) T.C.A. § 36-1-102(1)(A)(iii) – Father Failed to Support/Visit Child’s Mother within 4 Months Preceding Child’s Birth

***In re D.L.B.***, 118 S.W.3d 360 (Tenn. 2003). The Court of Appeals upheld the termination of parental rights pursuant to T.C.A. § 36-1-102(1)(A)(iii) and found the payments made by the father to the mother immediately preceding the child’s birth were unreasonable. **The Supreme Court held the Court of Appeals erred in affirming the termination pursuant to T.C.A. § 36-1-102(1)(A)(iii) because it failed to address the required element of “willfulness.”** *Id.* at 367.

See also, *In re Adoption of S.M.F.*, No. M2004-00876-COA-R9-PT, 2004 Tenn. App. LEXIS 826 (Tenn. Ct. App. December 6, 2004). (Father did not know of the mother’s pregnancy or that she claimed he was the father during part of the four month period prior to the child’s birth.)

4.03 **Substantial Noncompliance with Permanency Plan {T.C.A. § 36-1-113(g)(2)}**

***In re Valentine***, 79 S.W.3d 539 (Tenn. 2002). **Supreme Court held TCA 37-2-403(a)(2)(C) requires the trial court, at the termination of parental rights hearing, find the terms of the permanency plan were reasonable and related to remedying the conditions that necessitate foster care placement in conjunction with the determination of substantial noncompliance of the permanency plan. The conditions that necessitate foster care placement include conditions related to both the child’s removal and to family reunification.** The Court reversed the termination of parental rights and remanded the case to the juvenile court.

Child was placed in foster care because of physical abuse by his mother. The permanency plans required the mother attend parenting classes, vocational classes or obtain a GED, and individual counseling; maintain stable housing and supervised visitation; and complete a neuropsychiatric evaluation. The trial court found the mother failed to attend parenting classes; participate in vocational classes or obtain a GED; maintain stable housing or a supervised visitation schedule. There was no finding regarding the counseling or neuropsychiatric evaluation. The Supreme Court held the mother complied with the requirements of attending parenting classes and maintaining housing; partially complied with maintaining supervised visitation; and was obtaining some counseling. The Supreme Court stated, “(t)he record contains no evidence even remotely suggesting that the abuse of Oliver by Ms. Wallace was related to her lack of vocational training or a GED. Similarly, there was no proof that attending vocational classes or obtaining a GED was related to returning Oliver to Ms. Wallace’s care.” *Id.* at 547.

In reviewing “substantial compliance” with the permanency plan the Court found that:

**In the context of the requirements of the permanency plan, the real worth and importance of noncompliance should be measured by both the degree of noncompliance and the weight assigned to that requirement. Terms not reasonable and related are irrelevant, and substantial noncompliance with such terms is irrelevant.** *Id.* at 548-9.

The Supreme Court found an order approving the permanency plan is not a final order. The Court also found that a parent’s improvement towards compliance of the permanency plan should be considered in a parent’s favor.

***State v. T.M.B.K.***, 197 S.W.3d 282 (Tenn. Ct. App. 2006). An issue on appeal was whether the mother had failed to substantially comply with the permanency plan. In first reviewing whether the conditions of the permanency plan were reasonable and related to remedying the conditions that resulted in the child being removed from the home, the Court of Appeals found the order of removal was conclusory and did

not provide the specific facts for the removal; nor was the dependency petition included in the record. There was evidence of one domestic violence episode precipitating the removal of the children, though statements by counsel in the record also alluded to the “instability” in the home. **The Court found that due to the inadequate record it could not determine what constituted “instability” and reviewed the reasonableness of the conditions only as related to remedying the domestic violence.** The Court found the plan did not contain a provision for the mother to terminate her relationship with the perpetrator of the violence and that the conditions of paying bills, participating in budget counseling, demonstrating the ability to prioritize and obtaining assistance with a learning disability were not related to the violence. The Court held there was clear and convincing evidence the mother failed to substantially comply with those conditions it found reasonable and related to remedying the domestic violence.

*In re A.W.*, 114 S.W.3d 541 (Tenn. App. 2003). On appeal of the mother’s termination of her parental rights, one issue raised was that she had substantially complied with the requirements of the permanency plans. The Court of Appeals **found the mother had substantially corrected all but one of the conditions** existing in the home at the time of removal. The remaining condition was the mother’s mental illness that could only be treated with medication. **The trial court acknowledged the mother had made a “dramatic improvement” since she began taking the medication after the termination proceeding was initiated; however the court found the improvement came “too little, too late.”** *Id.* at 546. The Court of Appeals affirmed the termination.

*In re B.P.C.*, No. M2006-02084-COA-R3-PT; 2007 Tenn. App. Lexis 235 (Tenn. Ct. App. April 18, 2007). The father appealed the termination of his parental rights based on substantial noncompliance with the permanency plan, among other grounds. In finding that DCS failed to establish this ground, the Western Section held:

**This Court has previously held that the relevant permanency plan must be admitted into evidence before the trial court, or a reviewing appellate court, can determine whether clear and convincing evidence supports a finding of substantial noncompliance with permanency plan requirements.** *In re A.J.R.*, No. E2006-01140-COA-R3-PT, 2006 Tenn. App. LEXIS 746, 2006 WL 3421284, at \*4-5 (Tenn. Ct. App. Nov. 28, 2006) (no perm. app. filed); *Dep’t of Children’s Servs. v. D.W.J.*, No. E2004-02586-COA-R3-PT, 2005 Tenn. App. LEXIS 372, 2005 WL 1528367, at \*3 (Tenn. Ct. App. June 29, 2005)(no perm. app. filed). **Nor is the DCS caseworker’s testimony a sufficient substitute for establishing the plan’s terms.** *In re A.J.R.*, 2006 Tenn. App. LEXIS 746, 2006 WL 3421284, at \*5; *Dep’t of Children’s Servs. v. D.W.J.*, 2005 Tenn. App. LEXIS 372, 2005 WL 1528367, at \*3. *Id.* at \*24-25.

*State Dep’t of Children’s Servs v. P.M.T.*, No. E2006-00057-COA-R3-PT; 2006 Tenn. App. Lexis 608 (Tenn. Ct. App. September 15, 2006). The Eastern Section held there was not clear and convincing proof the parents failed to substantially comply with the statement of responsibilities in the permanency plan. The Court stated: **“Tenn. Code Ann. § 36-1-113(g)(2) does not require substantial compliance with a permanency plan’s ‘[d]esired outcome[s],’ rather, it requires substantial compliance with a plan’s statement of responsibilities, i.e., the actions required to be taken by the parent or parents.”** *Id.* at \*23-24.

*In re C.M.C.*, No. E2005-00328-COA-R3-PT, 2005 Tenn. App. LEXIS 458 (Tenn. Ct. App. August 3, 2005). One ground for terminating the mother’s parental rights was her failure to substantially comply with the permanency plan. Eastern Section vacated the termination as to this ground as DCS failed to prove it provided reasonable efforts to reunify the family based on clear and convincing evidence. The Court stated, **“(e)ssentially, DCS told Mother to get a job, a home, and counseling but gave her no**

**guidance or assistance on how to comply or what resources might be available to her.”** *Id.* at \*30-31.

*In re A.L.B.*, No. M2004-01808-COA-R3-PT, 2005 Tenn. App. LEXIS 399 (Tenn. Ct. App. July 6, 2005). In reversing the trial court’s order to terminate the parental rights of both parents on the ground of substantial noncompliance with the permanency plan, the **Middle Section held that the trial court failed to make a finding that the requirements in the permanency plan were reasonably related to why the children were removed from the home. Therefore, the issue was reviewed without a presumption of correctness**, citing *In re Valentine*, 79 S.W.3d 539 (Tenn. 2002) and *In re Z.J.S.*, No. M2002-02235-COA-R3-JV, 2003 Tenn. App. LEXIS 415 (Tenn. Ct. App. June 3, 2003).

*In re J.L.E.*, No. M2004-02133-COA-R3-PT, 2005 Tenn. App. LEXIS 384 (Tenn. Ct. App. June 30, 2005). Mother’s rights were terminated on the ground of substantial noncompliance with the permanency plan and persistence of conditions, among other grounds. The Middle Section found **DCS did not prove by clear and convincing evidence that it made reasonable efforts to reunify the family** and reversed the termination. (For detailed discussion of case, see Section 4.01 (b) above). One concern mentioned by the Court was that the **permanency plan gave the mother one year to meet the goal and DCS filed the termination petition after only six months. The Court stated its concern was “based on the fundamental unfairness inherent in providing the parent with notice of one set of expectations and acting inconsistently with that notice.”** *Id.* at \*43.

*State Dep’t of Children’s Servs. v. D.W.J.*, No. E2004-02586-COA-R3-PT, 2005 Tenn. App. LEXIS 372 (Tenn. Ct. App. June 29, 2005). The mother’s rights were terminated based on substantial noncompliance with the permanency plan and persistence of conditions. The permanency plan was filed with the clerk but never admitted into evidence at the termination hearing. **The Eastern Section held Rule 28(c) of the Rules of Juvenile Procedure requires documents be properly admitted into evidence before they may be considered as evidence.** The Court found that though “witnesses referred in their testimony to the permanency plan and its contents, their testimony was only an incomplete and vague description of the contents of the plan.” *Id.* at 11. The Court determined that, **without the permanency plan admitted into evidence, neither the trial judge nor the appellate court could make the required determinations** that the plan was reasonable and related to remedying the conditions that led to removal of the children; that DCS made reasonable efforts to reunify the family; and that the mother failed to substantially comply with the plan. The Court reversed the termination.

*In re M.J.M.*, No. M2004-02377-COA-R3-PT, 2005 Tenn. App. LEXIS 221 (Tenn. Ct. App. April 14, 2005). Mother’s parental rights were terminated on the ground of substantial noncompliance with the permanency plan, among other grounds. DCS offered assistance during the months immediately following the first permanency plan; however, the mother continued to use methamphetamine, failed to maintain regular contact with DCS, spent time in jail for prior drug possession charges, and made little effort to complete any of her responsibilities in the permanency plan. Six months prior to the completion deadline of the permanency plan, DCS filed a termination of parental rights petition. Subsequent to the petition, the mother was released from jail and entered a drug treatment program. After essentially completing the program, she moved into an apartment in her grandmother’s house; found employment and began paying rent; actively participate in AA, NA and a local church; had access to transportation; cleared up her pending legal charges; and obtained a referral for a mental health assessment. Five months after the petition was filed, the court terminated the mother’s parental rights.

The Middle Section held the mother had substantially complied with the permanency plan and reviewed the judge’s finding that her efforts were truly at the “11<sup>th</sup> hour” and therefore, “too little too late.” In its review the Court looked at the research of methamphetamine and its effects on the body and found it “not surprising” that the mother. was not able to control her addiction within a few months of entering into the

permanency plan. *Id.* at \*33-34. In addition, the plan had provided for completion within one year and DCS chose to file the petition after six months and stopped providing reasonable efforts. The court held that, **“(w)hile the concept (“too little too late”) has merit in proper circumstances, the courts should not permit the Department to use it as a convenient way to circumvent its obligation to continue to provide reasonable support to a parent during the permanency plan's rehabilitation period.”** *Id.* at \*35. [See, *State Dep't of Children's Servs. v. C.M.B.*, No. E2006-00841-COA-R3-PT, 2006 Tenn. App. LEXIS 785 (Tenn. Ct. App. December 13, 2006). DCS filed termination of parental rights petition four months prior to date of completing responsibilities on the second permanency plan. Mother had failed to comply with the permanency plan requirements for more than a year before the filing of the petition.]

*State v. Baruchman*, No. W2004-02071-COA-R3-PT, 2005 Tenn. App. LEXIS 174 (Tenn. Ct. App. March 29, 2005). Western Section held DCS failed to prove it provided reasonable efforts to assist the mother with the requirements of the permanency plan and reversed the termination based on substantial noncompliance with the plan. **The Court held that placing the burden on the mother to seek treatment for her mental illness would not accomplish the goal to alleviate her mental illness and the record contained no evidence showing that DCS attempted to assist the her in obtaining counseling.** The Court found that partial failure of the mother to comply with two of the five responsibilities on the plan that were not the main barriers to reunification did not constitute substantial noncompliance.

*V.D. v. N.M.B.*, No. M2003-00186-COA-R3-CV, 2004 Tenn. App. LEXIS 465 (Tenn. Ct. App. July 26, 2004). The child was placed in the custody of the paternal grandmother who subsequently filed a petition to terminate parental rights. Mother appealed the terminating her parental rights. One issue on appeal was whether there was clear and convincing proof as to the ground of non-compliance with the permanency plan. **The Middle Section found the child was never placed in foster care and nothing in the record suggested a permanency plan meeting the statutory requirements ever existed. Though the mother failed to comply with previous court orders regarding education and employment, those orders did not constitute a permanency plan and non-compliance did not satisfy this specific statutory ground for termination.**

*Dep't of Children's Servs. v. C. L.* No. M2001-02729-COA-R3-JV, 2003 Tenn. App. LEXIS 606 (Tenn. Ct. App. August 29, 2003). Parents appealed the termination of their parental rights to nine children. One issue on appeal was whether DCS proved by clear and convincing evidence that the parents failed to substantially comply with the permanency plan. In applying the standards for review to a termination of parental rights based on TCA § 36-1-113(g)(2), as stated in *In re Valentine*, 79 S.W.3d 539 (Tenn. 2002), the Middle Section **held the trial court must find the permanency plan requirements the parent did not fulfill were specific, reasonable, and related to remedying the conditions which necessitate foster care placement pursuant to TCA § 37-2-403(a)(2)(C). The finding must be made in conjunction with the ruling of noncompliance by the parent. Should the trial court fail to make this finding, the appellate court must review the decision of the trial court *de novo* without a presumption of correctness. In addition, review of whether the parent failed to substantially comply is a question of law that also must be reviewed without a presumption of correctness.**

DCS alleged the father did not comply with the requirement of securing a safe environment for the children and asserted he failed to substantially comply because he jeopardized his housing by allowing the mother to live with him when her name was not on the lease. The Court held the evidence failed to support DCS's position.

As to the mother, the Court found the trial court made the specific findings required as to only two of the requirements, child support and visitation, and only those findings would be reviewed with a presumption of correctness. The Court held the evidence preponderated against both findings that there was substantial

non-compliance. The Court found the requirement to provide adequate housing as it was interpreted by DCS during its involvement with the family lacked the required specificity, therefore the mother could not be found to have failed to “substantially comply with a specific requirement of the Plan regarding housing.” *Id.* at \*69. The Court held the requirement of a GED was not related to the conditions of the removal. Though the mother attended parenting classes, DCS was not satisfied she could demonstrate sufficient improvement in her parenting skills. The Court found the mother complied with the “specific” requirement to attend parenting classes. *Id.* at \*70. Mother was required to have a psychological evaluation and follow recommendations. The Court held she complied with the evaluation but DCS did not prove she was aware that counseling was recommended and failed to inform her of the same; and the agency providing counseling did not find a diagnosis to justify treatment. The Court reversed and remanded the termination on this and other grounds.

***In re D.M.***, No. M2002-01317-COA-R3-JV, 2003 Tenn. App. LEXIS 135 (Tenn. Ct. App. February 20, 2003). **Middle Section held DCS failed to prove substantial noncompliance by the mother with the permanency plan by clear and convincing evidence.** The mother was a minor when she gave birth to both children. She was placed in foster care before the birth of her second child. Upon turning 18 years old, the mother was released from custody and entered the Army. Both children remained in custody. The mother signed three permanency plans for each of the children. Her responsibilities were to complete parenting classes, submit to random drug screens, regular visitation, weekly telephone contact with DCS, provide a safe and stable home, and pay child support “as ordered by the court.” The Court found the mother made “substantial progress” before and after she was in foster care. She earned a GED; held gainful employment; enlisted in the Army; made an effort to maintain contact with her children; enrolled in parenting classes; made an effort to acquire housing for the children while in the Army and to qualify for special educational benefits. *Id.* at \*11-12.

***In re T.K.C.***, No. W2001-03017-COA-R3-JV, 2002 Tenn. App. LEXIS 937 (Tenn. Ct. App. December 30, 2002). The mother appealed the judgment to terminate her parental rights. One issue on appeal was whether there was clear and convincing evidence that she failed to substantially comply with the responsibilities of the permanency plan. The mother had made progress in complying with the plan subsequent to the filing of the petition to terminate parental rights. The Western Section **held that based on the mother’s “propensity for recidivism” during the children’s entire period in foster care substantial compliance with the permanency plan would require more than just attending classes and counseling. In this case, substantial compliance would require proof that she could apply “parenting skills in the stressful context of day-to-day life with five active children” and that she be “able to maintain sobriety for a substantial period of time.”** *Id.* at \*46.

***State Dep’t of Children’s Servs. v. B.J.A.L.***, No. E2002-00292-COA-R3-JV, 2002 Tenn. App. LEXIS 674 (Tenn. Ct. App. September 19, 2002). **Eastern Section held the evidence preponderated against the trial court’s finding of substantial non-compliance with the permanency plan.** The Court found that partial failure to complete two of six requirements of the permanency plan did not amount to substantial non-compliance with the plan. The termination of parental rights was affirmed on other grounds.

***In re D.D.V.***, No. M2001-02282-COA-R3-JV, 2002 Tenn. App. LEXIS 126 (Tenn. Ct. App. February 14, 2002). Middle Section reversed the trial court’s order terminating the parental rights of the mother because the grounds of abandonment, non-substantial compliance with the permanency plan and persistence of conditions were not proven by clear and convincing evidence. The Court held the mother complied with most of the responsibilities on the permanency plan, except for obtaining a stable home. **The Court held “the Department did not make reasonable efforts to help her meet this requirement, so we cannot place the blame for this failure entirely upon her.”** *Id.* at \*26.

*State v. D. S.*, No. M2000-02380-COA-R3-JV, 2001 Tenn. App. LEXIS 340 (Tenn. Ct. App. May 9, 2001). **Middle Section reversed termination of parental rights because of lack of clear and convincing evidence of persistence of conditions and failure to comply with the permanency plan.** The plan was not admitted into in evidence at the hearing.

*State Dep't of Children's Servs.*, No. 01A01-9806-JV-00275, 1998 Tenn. App. LEXIS 817 (Tenn. Ct. App. December 3, 1998). Petition to appeal denied. Eastern Section found that the **State's burden to show, by clear and convincing evidence, that the mother did not substantially comply with the plan of care was not met.** The Court of Appeals reversed the judgment of the trial court terminating the mother's parental rights and returned custody to the mother.

*Department of Children's Servs. v. Epps (In re Dave)*, No. 03A01-9710-JV-00485, 1998 Tenn. App. LEXIS 297 (Tenn. Ct. App. April 30, 1998). **Mother attended parenting classes and received counseling, but was still unable to provide for children's needs.** Eastern Section affirmed termination of mother's parental rights. Children, all under 7 years, were found alone in apartment to which mother had not returned in at least two days. DHS obtained temporary custody. Mother took parenting classes and received counseling. Physical custody of the children was returned to the mother who was still unable to provide for their needs and the children were returned to foster care. Visitation thereafter was erratic and the children were not well cared for when they stayed with mother. The mother displayed a lack of interest in returned custody.

See also:

*Stokes v. Arnold*, 27 S.W.3d 516 (Tenn. Ct. App. 2000).

*In re M.W.A.*, 980 S.W.2d 620 (Tenn. Ct. App. 1998).

*State Dep't of Human Servs. v. Defriece*, 937 S.W. 2d 954 (Tenn. Ct. App. 1996).

*Department of Human Servs. v. Norton*, 928 S.W.2d 445 (Tenn. Ct. App. 1996).

*Drinnon v. Brown, (In re Drinnon)*, 776 S.W. 2d 96 (Tenn. Ct. App. 1988).

*Tennessee Dep't of Human Services v. Riley*, 689 S.W. 2d 164 (Tenn. Ct. App. 1984).

*State v. B.B.M.*, No. E2004-00491-COA-R3-PT, 2004 Tenn. App. LEXIS 767 (Tenn. Ct. App. November 17, 2004).

*In re Z.J.S.*, No. M2002-02235-COA-R3-JV, 2003 Tenn. App. LEXIS 415 (Tenn. Ct. App. June 3, 2003).

*Department of Children's Servs. v. Galvin*, No. 03A01-9807-CV-00233, 1999 Tenn. App. LEXIS 257 (Tenn. Ct. App. April 16, 1999). Permission to appeal denied, 1999 Tenn. LEXIS 445.

*Department of Children's Servs. v. Bottoms*, No. 01A01-9706-JV-00249, 1998 Tenn. App. LEXIS 197 (Tenn. Ct. App. March 20, 1998).

*Farmer v. Department of Children Servs.*, No. 01A01-9610-JV-00485, 1997 Tenn. App. LEXIS 938 (Tenn. Ct. App. December 30, 1997).

*Department of Human Servs. v. Manier*, No. 01A01-9703-JV-00116, 1997 Tenn. App. LEXIS 755 (Tenn. Ct. App. October 31, 1997).

*Department of Children Servs. v. Taylor*, No. 01A01-9610-CV-00472, 1997 Tenn. App. LEXIS 128 (Tenn. Ct. App. February 26, 1997).

#### 4.04 Persistence of Conditions {T.C.A. § 36-1-113(g)(3)}

*In re Valentine*, 79 S.W.3d 539 (Tenn. 2002). **Supreme Court held all three factors of T.C.A. 36-1-113(g)(3) must be proven by clear and convincing evidence in order to terminate parental rights.** The Court held the burden of persuasion rests with the party seeking to terminate parental rights. The Court found DCS failed to prove by clear and convincing evidence that the condition that led to removal

persisted, specifically that the mother had not learned to control her temper. It also noted the trial court seemed more concerned with the father who resided in the home and had a history of domestic violence against the mother. There was no evidence the father had abused the child or that his prior abuse of the mother affected her relationship with or the parenting of the child.

*State v. T.M.B.K.*, 197 S.W.3d 282 (Tenn. Ct. App. 2006). The trial court terminated the mother's parental rights finding that domestic violence that led to the children's removal persisted and that other conditions (mother's involvement with the perpetrator of the domestic violence, limited education, learning disability, inability to drive, series of health and emotional problems and unstable housing) existed that would subject the children to further abuse or neglect. The Court of Appeals found the record of the termination of the mother's parental rights supported only one incident of domestic violence precipitating the removal of her children. **The Court held, based on the limited proof in the record, there was not clear and convincing evidence the domestic violence that led to the removal continued to persist or that the children would be subject to neglect or abuse as a result of the other conditions.**

*In re Audrey S.*, 182 S.W.3d 838 (Tenn. Ct. App. 2005). The trial court terminated the mother's parental rights based on persistence of conditions, among other grounds. The Court of Appeals held "**T.C.A. 36-1-113(g)(3) applies as a ground for termination of parental rights only where the prior court order removing the child from the parent's home was based on a judicial finding of dependency, neglect, or abuse.**" *Id.* at \*82. The Court reviewed the prior orders in the case and found that the temporary custody order that resulted from a preliminary hearing contained "an implicit judicial finding of *probable cause* that Audrey S. was dependent, neglected, or abused. It does not contain a finding, either explicit or implicit, that Audrey S. was *in fact* dependent, neglected, or abused. The juvenile court never held an adjudicatory hearing ...." *Id.* at \*85 (emphasis added).

*State v. C.H.K.*, 154 S.W.3d 586 (Tenn. Ct. App. 2004). The trial court terminated the mother's parental rights based on persistence of conditions because the mother was "unavailable" to care for the child at the time of removal as she left him in a hotel room alone; and she remained "unavailable" to care for the child at the termination hearing as she was incarcerated. The Court of Appeals found that DCS failed to show the conditions that led to removal persisted as she had not "demonstrated an intention to neglect him as she did when he was removed from her custody." *Id.* at \*592. The Court also determined that other conditions that would result in further abuse of the child were not present. The Court held:

**(I)t is our determination that the legislature did not intend that the incarceration of a parent constitutes a condition which would cause the child to be subject to abuse or neglect except under specified circumstances.** We are compelled to reach this conclusion because Tenn. Code Ann. § 36-1-113(g)(6) allows initiation of parental termination if "the parent has been confined in a correctional or detention facility of any type, by order of the court as a result of a criminal act, under a sentence of ten(10) or more years, and the child is under eight (8) years of age at the time the sentence is entered by the court." We believe that this subsection of the statute manifests an intent that there must be proof that the parent is incarcerated under a sentence of at least ten years before the mere fact of incarceration will constitute grounds for termination of parental rights. Such proof has not been presented in this case. *Id.* at \*592 -593.

*In re C.D.B.*, 37 S.W.3d 925; (Tenn. Ct. App.2000). Permission to appeal denied. **Issue on appeal was whether the trial court erred in terminating the mother's parental rights on the ground of persistence of conditions because she had custody and care of a child born subsequent to DCS removing the children who are the subjects of the termination proceeding.** In citing, *In re Baker*,

1999 Tenn. App. LEXIS 870, 1999 WL 1336044 (Tenn. Ct. App. 1999), the Court of Appeals held the two sets of children were not necessarily the same and each situation was independent of the other.

*In re B.S.G.*, No. E2006-02314-COA-R3-PT; 2007 Tenn. App. Lexis 332 (Tenn. Ct. App. May 24, 2007). The mother's parental rights were terminated based on the ground of persistence of conditions because of her limited mental capacity and the child's special needs. **The mother contended on appeal that her mental limitations should not have been addressed within the ground of persistence of conditions because of the specific ground for termination of mental incapacity at T.C.A. § 36-1-113(g)(8). The Court held the "parent's mental incapacity can provide a sufficient factual predicate for a finding that persistent unremedied conditions exist which prevent the safe return of the child or children to that parent's care." *Id.* at \*19.**

*In re B.P.C.*, No. M2006-02084-COA-R3-PT; 2007 Tenn. App. Lexis 235 (Tenn. Ct. App. April 18, 2007). On the appeal of the father, **DCS conceded it did not prove the ground of persistence of conditions by clear and convincing evidence because the child was not removed from the father's home and he was not involved in the events that led to the child's removal.** In holding the trial court erred in terminating the father's parental rights on this ground, the Western Section cited: . *In re T.L.*, No. E2004-02615-COA-R3-PT, 2005 Tenn. App. LEXIS 682, 2005 WL 2860202 (Tenn. Ct. App. Oct. 31, 2005), perm. app. denied (Tenn. Feb. 17, 2006); and *In re D.L.B.*, No. W2001-02245-COA-R3-CV, 2002 Tenn. App. LEXIS 575, 2002 WL 1838147 (Tenn. Ct. App. Aug. 6, 2002), reversed on other grounds at 118 S.W.3d 360 (Tenn. 2003). *Id.* at \*23.

*In re K.C.*, No. M2005-00633-COA-R3-PT, 2005 Tenn. App. LEXIS 636 (Tenn. Ct. App. October 4, 2005). One issue on appeal of the termination of parental rights case was whether there was clear and convincing proof of persistence of conditions. Citing *Audrey S.*, 182 S.W.3d 838, 2005 Tenn. App. LEXIS 539 (Tenn. Ct. App. 2005). The Middle Section reiterated that this ground for termination applies only to cases in which the prior order granting custody to the non-parent was based on a judicial finding of dependency, neglect or abuse, be it explicit or implied in the order. Examining the 1994 order, **the Court determined that although no express finding of dependency was made, the finding that "the parents are not financially or emotionally able to care for the minor child" was implied and arose out of a dependency petition. *Id.* at \*36. Thus, the ground could be applied in this case.** However, upon applying the facts the Court determined that they did not amount to clear and convincing evidence. Specifically, the petitioner argued the mother continued to lack financial stability because she relied on government benefits. **The Court concluded that it could not "hold that a parent's eligibility for and receipt of government benefits creates the reasonable probability a child in the parent's home will be neglected.** There is no other proof that it would not be safe for a child to be placed in Mother's home." *Id.* at \*38-39.

*State Dep't of Children's Servs. v. D.W.J.*, No. E2004-02586-COA-R3-PT, 2005 Tenn. App. LEXIS 372 (Tenn. Ct. App. June 29, 2005). The mother's rights were terminated based on substantial noncompliance with the permanency plan and persistence of conditions. The Eastern Section held DCS failed to prove by clear and convincing evidence that the children had been removed from the home for a period of six months and that conditions that led to the removal persisted. **No documents were admitted into evidence at the termination hearing.** The Court found, as to the issue of removal of the children for six months, submission of the certified order removing the children would have been sufficient evidence. However, **"passing references" during testimony as to the children's removal did not constitute clear and convincing proof. *Id.* at \*13. DCS also failed to prove that the conditions that led to removal persisted by relying on unauthenticated medical and criminal records, pleadings and other documents from the child dependency proceedings that were never admitted as exhibits at the termination trial.**

*In re M.J.M.*, No. M2004-02377-COA-R3-PT, 2005 Tenn. App. LEXIS 221 (Tenn. Ct. App. April 14, 2005). Mother's parental rights were terminated on the ground of persistence of conditions, among other grounds. DCS filed the petition to terminate the mother's parental rights six months prior to the deadline for completion on the permanency plan. DCS argued T.C.A. § 36-1-113(g)(3) requires, that within six months of the removal of the child, the parent must remedy the conditions that led to the removal. **The Middle Section held the statute states only that the child must be removed from the home for six months and the time for compliance is established in the permanency plan.**

*In re M.E.*, No. M2003-00859-COA-R3-PT, 2004 Tenn. App. LEXIS 526 (Tenn. Ct. App. August 16, 2004). A **termination proceeding based on the persistence of conditions ground, pursuant to T.C.A. 36-1-113(g)(3), requires DCS to demonstrate by clear and convincing evidence that reasonable efforts have been made to reunify the child and parent.** The record reflected that DCS had provided numerous services to the mother, yet failed to provide **the most obvious and essential** service that the mother needed. Specifically, DCS failed to provide the services recommended from a mental health evaluation. The Court opined that failure to provide the recommended psychological therapy to the mother rendered the services that had been provided **"a waste of time and money."** *Id.* at 24. Middle Section reversed the decision of the juvenile court to terminate the mother's parental rights finding that DCS had not made reasonable efforts to reunify the children with their mother.

*In re B.B.*, No. M2003-01234-COA-R3-PT, 2004 Tenn. App. LEXIS 363 (Tenn. Ct. App. June 9, 2004). Trial court terminated mother's parental rights based on persistence of conditions. Middle Section reversed holding that **DCS failed to prove by clear and convincing evidence** that conditions exist that in all reasonable probability would subject the children to further neglect and prevent their safe return home and **"that any conditions preventing the children's return could not be remedied with sufficient training, support, and assistance by the Department in furtherance of its obligation to make reasonable efforts to reunify the family."** *Id.* at \*39. After years in foster care, the children began exhibiting behaviors consistent with children who are victims of physical and sexual abuse and mother's visits were terminated by a court order. Subsequently, DCS realized the foster home was part of the problem and removed the children from the foster home but never restarted visits with the mother. DCS made no visits to the mother's home after 1999 and presented no evidence regarding the mother's current situation; her ability to parent the children; or any attempt to provide training to the mother to assist her in parenting the children. In addition, there was no proof that from a treating mental health professional as to the type of environment the children required.

*State Dep't of Children's Servs. v. T.L.C.*, No. M2003-00509-COA-R3-JV, 2003 Tenn. App. LEXIS 848 (Tenn. Ct. App. December 3, 2003). Father appealed the termination of his parental rights. **The Middle Section held DCS failed to prove persistence of conditions by clear and convincing evidence.** The Court vacated and remanded the proceeding. The Court summarized the original conditions that led to the child's removal as the father's lack of parenting skills; his financial inability to provide basic necessities; and the parents' separation resulting in instability in the home. In reviewing each condition designated by the trial court in the order terminating parental rights, **the Court found there was not clear and convincing proof that in all reasonable probability any of the conditions would cause the child to be subjected to abuse or neglect.** These conditions included: 1) the father's five different residences during the 18-month period preceding the filing of the petition (there was no proof any were unsafe or unhealthy for the child); 2) the parents' sporadic work history and that at the time of removal the electric services had been discontinued because the father was unemployed (no proof was presented that the father was without services subsequent to the removal); 3) at times visitation was not exercised by the parents; 4) the instability of the parents' relationship; 5) domestic violence (trial court failed to make specific findings of the circumstances and only addressed the issue in the "best interest" analysis). In addition the Court found the trial court's determination that the father did not complete high school was erroneous but, if that were

the case, this condition does not meet the criteria that in all reasonable probability it would cause further abuse.

*In re M.A.*, No. M2002-02701-COA-R3-JV, 2003 Tenn. App. LEXIS 706 (Tenn. Ct. App. October 1, 2003). Mother appealed the termination of her parental rights. One issue on appeal was whether DCS proved persistence of conditions by clear and convincing evidence. The conditions that led to the children's removal were the sexual abuse of one of the children by the mother's boyfriend and her failure to report the abuse. The juvenile court had adjudicated this issue during the child dependency proceedings. During their stay in foster care, it became obvious the boyfriend had physically and emotionally abused the two other children. **Despite the judicial finding of abuse, the efforts to inform the mother of the facts surrounding the reporting of the abuse, the statements and fear of her children, and an attempt to work through the issues in a therapeutic setting, the mother continued to deny the abuse.** *Id.* at \*31. The Middle Section held there was clear and convincing proof that the conditions that led to the removal persisted and conditions existed that in all reasonable probability would subject the children to further abuse or neglect

*Department of Children's Services v. Whaley*, No. E2001-00765-COA-R3-CV, 2002 Tenn. App. LEXIS 383 (Tenn. Ct. App. May 30, 2002). **Eastern Section reversed the termination of the parental rights of mother because DCS failed to prove the conditions that led to removal persisted.** The child was removed from the home because the mother was visually impaired, was unable to care for the child, was not medicating or feeding the child properly, and there were no relatives willing to assist her. The Court held the mother's visual impairment had not prevented her from being somewhat self sufficient; fully complying with the permanency plan; attending almost every visitation with her son over a five-year period; completing vocational training; and obtaining a job. A psychologist testified at the termination hearing that the primary concern was the mother's ability to care for a child with asthma and perform appropriate breathing treatments. The Court held there was no evidence anyone ever attempted to teach the mother how to properly medicate the child or that she was unable to do so. The case was remanded to the juvenile court to investigate the possibility of placing the child and mother in the home of certified foster parent and neighbor of the mother who had contacted DCS more than once prior to the termination hearing to offer her home to the mother and child.

*In re T.J.H.*, No. 01A01-9712-CH-00736, 1998 Tenn. App. LEXIS 371 (Tenn. Ct. App. June 12, 1998). The Middle Section affirmed termination of the parental rights of two mentally ill parents whose conditions were unlikely to improve because of their inability to manage their psychological disorders and noncompliance with medication. **Expert testimony supported the conclusion of a substantial threat of harm to the children if the relationship continued.**

*Department of Human Servs. v. Kersey*, No. 03A01-9507-JV-00211, 1996 Tenn. App. LEXIS 326 (Tenn. Ct. App. May 28, 1996.) **An alcoholic parent is not, per se, an unfit parent.** Western Section reversed and remanded the judgment of the juvenile court terminating parental rights. The Court of Appeals held that there was not clear and convincing evidence of persistence of conditions, substantial noncompliance with the foster care plan or that it would be in the children's best interest to terminate parental rights. Both parents had serious drinking problems and both had been arrested on numerous occasions for driving under the influence or public drunkenness. The children were taken into care when their mother was arrested for driving under the influence and the four children were in the car with her. The Court stated: "we recognize that alcoholism is a very serious disease; however, **we are not willing to find that an alcoholic parent is, per se, an unfit parent.** Thus, while alcoholism itself does not provide a statutory basis for termination of parental rights, the potential effects of a parent's alcoholism, such as neglect or abuse, may provide grounds for termination." *Id.* at \*12-13. The Court found that the State failed to establish that the parents were "consistently unable to care for their children due to their

alcoholism. We are also unable to conclude, based on the efforts the Kerseys have made to overcome their alcohol addiction, that a lasting adjustment is ‘not reasonably possible.’” *Id.* at \*17-18.

See also:

*R.M.S. v. Orange*, 223 S.W.3d 240 (Tenn. Ct. App. 2006).

*Stokes v. Arnold*, 27 S.W.3d 516 (Tenn. Ct. App. 2000).

*State Dep't of Human Servs. v. Defriece*, 937 S.W. 2d 954 (Tenn. Ct. App. 1996).

*Department of Human Servs. v. Norton*, 928 S.W.2d 445 (Tenn. Ct. App. 1996).

*Drinnon v. Brown*, (*In re Drinnon*), 776 S.W. 2d 96 (Tenn. Ct. App. 1988).

*In re A.J.R.*, No. E2006-01140-COA-R3-PT, 2006 Tenn. App. LEXIS 746 (Tenn. Ct. App. November 28, 2006).

*In re D.P.M.*, No. M2005-02183-COA-R3-PT; 2006 Tenn. App. LEXIS 597 (Tenn. Ct. App. September 8, 2006).

*In re C.M.C.*, No. E2005-00328-COA-R3-PT, 2005 Tenn. App. LEXIS 458 (Tenn. Ct. App. August 3, 2005).

*In re S.L.R.*, No. M2004-01565-COA-R3-PT, 2004 Tenn. App. LEXIS 880 (Tenn. Ct. App. December 28, 2004).

*State Dep't of Children's Servs. v. Carey* (*In re D.C.*), No. W2004-00472-COA-R3-PT, 2004 Tenn. App. LEXIS 723 (Tenn. Ct. App. November 3, 2004.)

*V.D. v. N.M.B.*, No. M2003-00186-COA-R3-CV, 2004 Tenn. App. LEXIS 465, (Tenn. Ct. App. July 26, 2004).

*In The Matter of T.S.*, No. M1999-01286-COA-R3-CV, 2000 Tenn. App. LEXIS 451 (Tenn. Ct. App. July 13, 2000)

*Department of Children Servs. v. Bardin*, No. 03A01-9705-JV-00152, 1997 Tenn. App. LEXIS 764 (Tenn. Ct. App. November 3, 1997). Permission to appeal denied.

#### 4.05 Severe Child Abuse {T.C.A. § 36-1-113(g)(4) – Defined at T.C.A. § 37-1-102(b)(21)}

*Nash-Putnam v. McCloud*, 921 S.W.2d 170 (Tenn. 1996). **A mother’s failure to protect her child from severe physical abuse by the father constituted “substantial harm” sufficient to terminate mother’s parental rights in this case.** The Supreme Court found that the mother was guilty of severe child abuse and sentenced to more than 2 years imprisonment. The Supreme Court rejected her contention that T.C.A. § 37-1-147(d)(2) was only meant to apply to the actual abuser: **“Allowing a child to be abused is egregious abuse.”** *Id.* at 176. (Emphasis added.)

*State Dep’t of Children’s Servs. v. M.P.*, 173 S.W.3d 794 (Tenn. Ct. App. 2005). **The Court of Appeals held, in order to make a finding of severe child abuse pursuant to T.C.A. § 37-1-102(b)(21)(B), opinion testimony of “qualified experts” is required.** The Court concluded, because no expert testimony was presented, the finding of severe child abuse defined in subsection (B) was not supported by clear and convincing evidence.

*In re H.E.J.*, 124 S.W.3d 110 (Tenn. Ct. App. 2003). Permission to appeal denied. Trial court terminated the father’s parental rights of his twin girls on numerous grounds including severe child abuse. The trial court held that the father, who was also the stepfather of the child’s mother, committed incest of the children’s mother. **The father argued that this ground was inapplicable because there was no evidence he ever abused the twins. Court of Appeals agreed there was no evidence of abuse of the twins but there was clear and convincing evidence he abused his stepdaughter, the children’s mother.** Father also argued there was no corroboration of the mother’s testimony and if he abused the mother it was not during the lifetime of the twins and did not meet the requirements of T.C.A. § 36-1-

113(g)(4). The Court held both issues were without merit and affirmed the trial court's termination of the father's parental rights.

*Department of Human Servs. v. Hauck*, 872 S.W.2d 916 (Tenn. Ct. App. 1993). On the issue of defendant's responsibility for severe abuse of a sibling, the trial court found that there was not clear and convincing proof that defendant injured the child, but it was clear that **he failed to obtain medical attention which constituted severe child abuse by utter and total neglect of the child's welfare.**" *Id.* at 921. The Court of Appeals agreed with the trial court's conclusion.

*State v. R.R.'s*, No. E2006-02785-COA-R3-PT; 2006 Tenn. App. LEXIS 751 (Tenn. Ct. App. November 29, 2006). Permission to appeal denied at 2007 Tenn. LEXIS 276 (Tenn., Mar. 9, 2007) and 2007 Tenn. LEXIS 307 (Tenn., Mar. 12, 2007). At the trial of the parents' termination of their parental rights, the trial court denied the request to admit a deposition offered to prove that the children were never sexually abused. The trial court relied on the adjudicatory finding that the children had been sexually abused. On appeal, the parents argued the trial court abused its discretion in not allowing the deposition. DCS contended the doctrine of collateral estoppel applied based on the adjudicatory finding; and the parents countered the adjudicatory order was not a final order. The Eastern Section **held the adjudicatory order finding sexual abuse was a final order. As the parents did not appeal that order they were barred from raising the issue regarding the sexual abuse of the children.**

*Dep't of Children's Servs. v. McClure (In re T.M.)*, No. M2005-02433-COA-R3-PT, 2006 Tenn. App. LEXIS 484 (Tenn. Ct. App. July 20, 2006). On appeal of the parents' termination of their parental rights, the Western Section held **reasonable efforts to reunify the family are not required when termination is based on the ground of severe child abuse.** For a detailed description of the case, see Section 4.01(a) above.

*In re M.J.J.*, No. M2004-02759-COA-R3-PT, 2005 Tenn. App. LEXIS 219 (Tenn. Ct. App. April 14, 2005). Mother appealed the termination of her parental rights. One issue on appeal was the finding of the trial court that she **committed severe child abuse by using methamphetamine during her pregnancy and this exposed the child to a substantial risk of great bodily injury pursuant to T.C.A. § 37-1-102(b)(21)(A).** The Western Section agreed with the trial court. The Court also found that the mother ingested other drugs during her pregnancy and, as a result of ingesting illicit drugs, the child was born with tremors. The Court found the child was otherwise healthy and held **"the healthy development of the child in this case does not diminish the severity of the harm to which the child was exposed."** *Id.* at \*24-25.

*In re R.C.P.*, No. M2003-01143-COA-R3-PT, 2004 Tenn. App. LEXIS 449 (Tenn. Ct. App. July 13, 2004). Mother appealed the termination of her parental rights based on the ground of severe child abuse in that she failed to protect the child from severe the sexual abuse of the mother's paramour. Middle Section affirmed the termination. In reaching its decision the Court discussed the terms "knowing" and "knowingly." The Court concluded that the juvenile court erred in applying the criminal definition of "knowing" and "knowingly" to determine if the mother had severely abused her child pursuant to T.C.A. 37-1-102(b)(21). Instead the Court utilized the words' natural and ordinary meaning "constru(ing) them in the context of the entire statute and the statute's general purpose. *Id.* at \*24. In doing so the Court defined "knowing" and "knowingly" in the context of T.C.A. § 37-1-102(b)(21) as: **1) "actual knowledge of the relevant facts and circumstances" or 2) "deliberate ignorance of or in reckless disregard of the information that has been presented."** *Id.* at \*25. Thus a parent need not have been present when the severe abuse occurs to meet the "knowing" requirement. The "knowing" requirement will also be met if there is proof that the **"parent had been presented with sufficient facts from which the parent could have and should have recognized that severe child abuse had occurred or that it was highly**

**probable that severe child abuse would occur. *West Va. Dep't of Health & Human Res. Ex rel. Wright v. Doris S.* 475 S.E.2d at 878-879.” *Id.* at \*26.**

*State v. NFGWP*, No. E2001-01996-COA-R3-CV, 2002 Tenn. App. LEXIS 550 (Tenn. Ct. App. July 29, 2002). Eastern Section affirmed the judgment of the trial court terminating the mother’s parental rights. The Court held **“the mother was never willing to admit the abuse happened, and would not take responsibility for failing to protect the children.”** *Id.* at \*6.

*In re S.M.C.*, No.01A01-9807-JV-00358, 1999 Tenn. App. LEXIS 365 (Tenn. Ct. App. June 11, 1999). Parental rights were terminated on numerous grounds including severe child abuse pursuant to T.C.A. § 37-1-102(b)(21)(B). The trial court found that **the parents’ abuse of one child resulted in severe developmental delay and severe impairment of her ability to function adequately in her environment.** Western Section affirmed termination of parental rights.

*Department of Children’s Servs. v. Galvin*, No. 03A01-9807-CV-00233, 1999 Tenn. App. LEXIS 257 (Tenn. Ct. App. April 16, 1999). Permission to appeal denied, 1999 Tenn. LEXIS 445. Eastern Section reversed and remanded the judgment of the circuit court. The circuit court dismissed the termination of parental rights petition finding that there was not clear and convincing evidence of severe child abuse, failure to comply with the permanency plan or persistence of conditions. At the termination hearing, the prior order of the juvenile court finding severe child abuse and the criminal conviction of the father for aggravated assault (reduced from attempted aggravated rape) were introduced by DCS. The circuit court found that the “guilty plea was understandable given the circumstances . . . [and] “did not mean Mr. Galvin was guilty.” *Id.* at 6. The circuit court also found that there was insufficient proof of severe child abuse under any prior court order or in the termination hearing. The Court of Appeals found clear and convincing evidence of severe child abuse and persistence of conditions. **The Court held that two courts (juvenile and criminal) found the father guilty of severe child abuse and the orders were res judicata as to the issue of severe child abuse.**

*Department of Children’s Services v. N.A.A.*, No. 01A01-9709-JV-00476, 1998 Tenn. App. LEXIS 693 (Tenn. Ct. App. October 16, 1998). **Parental rights were terminated based on severe child abuse of niece who died in the home.** Middle Section affirmed termination of parental rights. Four children, ages 7 to 13 years, were removed from their parents and placed in custody of the Department of Children’s Services after the two year old niece died in the home of multiple blunt trauma to the head. The mother was found guilty of criminally negligent homicide. The Court of Appeals opined that the mother could not collaterally attack the criminal conviction in the termination proceeding.

*Department of Children’s Servs. v. Sipe (In re Sipe)*, No. 01A01-9704-JV-00185, 1998 Tenn. App. LEXIS 178 (Tenn. Ct. App. March 6, 1998). **Record supported finding under definition of severe abuse of child or sibling.** In addition, father could not accept diagnosis and severity of mental illness (bipolar disorder). Mother could not protect child, who had special needs.

*Department of Children’s Servs. v. Malone*, No. 03A01-9706-JV-00224, 1998 Tenn. App. LEXIS 83 (Tenn. Ct. App. February 5, 1998). Permission to appeal denied, 1998 Tenn. LEXIS 382. **There was evidence that mother cohabited with man who sexually abused mother’s third child, justifying termination of rights to all three children who could not be protected from him.**

*Farmer v. Department of Children Servs.*, 1997 Tenn. App. LEXIS 938, No. 01A01-9610-JV-00485, (Tenn. Ct. App. December 30, 1997). In this consolidated appeal, the Court of Appeals found one **mother demonstrated “either an inability to come to grips with the obvious effects of the sexual abuse perpetrated on her children by her brothers or if recognizing such to exist and (sic) inability to**

**protect the children from continued abuse.”** *Id.* at \*23. (Emphasis added.) Middle Section affirmed judgment of juvenile court terminating the parental rights of parents of two sets of children living in the same home when the children were removed. One mother made efforts to comply with plan of care but her low level of functioning and attachments to her family rendered it unlikely that she would be able to protect her children from sexual abuse and function as a caregiver for them.

See also:

*In re N.T.B.*, 205 S.W.3d 499 (Tenn. Ct. App. 2006).

*Department of Human Servs. v. Purcell*, 955 S.W.2d 607 (Tenn. Ct. App. 1997).

*In re D.P.M.*, No. M2005-02183-COA-R3-PT; 2006 Tenn. App. LEXIS 597 (Tenn. Ct. App. September 8, 2006).

*In re S.M.L.*, 01A01-9710-JV-00596, 1998 Tenn. App. LEXIS 376 (Tenn. Ct. App. June 12, 1998).  
Permission for rehearing denied, 1998 Tenn. App. LEXIS 432.

#### **4.06 Sentence of Two or More Years/Severe Child Abuse of Child {T.C.A. § 36-1-113(g)(5)}**

*In re Thomas P.*, No. E2005-01367-COA-R3-PT; 2006 Tenn. App. Lexis 357 (Tenn. Ct. App. May 31, 2006). Permission to appeal denied at 2006 Tenn. LEXIS 821 (Tenn., September 5, 2006). The mother’s parental rights were terminated pursuant to T.C.A. § 36-1-113(g)(5). At trial, DCS introduced the judgment of her guilty plea to child neglect and two-year sentence, and the arrest warrant. **On appeal the mother contended there was no evidence supporting a conviction of conduct constituting severe child abuse** because the facts of the conviction were not proven. The Eastern Section found: **“We agree with Mother’s contention that the warrant was admitted into evidence for the sole purpose of proving that charges were lodged against her. However, it is not the warrant that proves Mother is guilty of the facts underlying the warrant; it is Mother’s plea of guilt to the facts contained in the warrant that proves those facts.”** *Id.* at \*13.

The mother also asserted the language contained in T.C.A. § 36-1-113(g)(5) is inconsistent, as it refers to a sentence of “more than two years” and defines a sentence as “two or more years,” and should be narrowly construed as “more than two years.” The Court read the statute as a whole and determined a sentence of two years is sufficient, holding there was clear and convincing evidence to support the ground for termination. *Id.* at \*14-15.

#### **4.07 Confinement to Correctional Institute For 10 or More Years/Child Under Eight Years {T.C.A. § 36-1-113(g)(6)}**

*In re M.L.P.*, 228 S.W.3d 139 (Tenn. Ct. App. 2007). Permission to appeal denied at 2007 Tenn. LEXIS 441 (Tenn., Apr. 30, 2007). On appeal, the father contended his parental rights should not have been terminated pursuant to T.C.A. § 36-1-113(g)(6) because of his intent to pursue postconviction relief of his conviction resulting in a sentence of 18 years. The Court of Appeals stated:

We have consistently held that a trial court should not consider appeals and postconviction relief proceedings in deciding whether grounds for termination of parental rights exist pursuant to Tenn. Code Ann. § 36-1-113(g)(6). See, e.g., *In re Audrey S.*, 182 S.W.3d at 876; *M.P.P. v. D.L.K.*, No. E2001-00706-COA-R3-CV, 2002 Tenn. App. LEXIS 214, 2002 WL 459010, at \*4-5 (Tenn. Ct. App. E.S., filed Mar. 26, 2002); *In re C.M.R.*, No. M2001-00638-COA-R3-JV, 2002 Tenn. App. LEXIS 105, 2002 WL

192562, at \*4 (Tenn. Ct. App. M.S., filed Feb. 7, 2002); *In re Adoption of Copeland*, 43 S.W.3d 483, 489 (Tenn. Ct. App. 2000). *Id.* at 145.

***In Re the Adoption of J.K.W.***, No. E2006-00906-COA-R3-PT; 2007 Tenn. App. Lexis 32 (Tenn. Ct. App. January 23, 2007). Father appealed the termination of his parental rights **challenging the constitutionality of TCA 36-1-113(g)(6)**, claiming the statute was not narrowly tailored to serve a compelling state interest. The father had raised the issue as an affirmative defense in his answer to the termination of parental rights petition. In its analysis, the Eastern Section reviewed those cases in which the constitutionality of the statute had been discussed. In the case of *In re Adoption of E.N.R.*, 42 S.W.3d 26 (Tenn. 2001), the Supreme Court concluded that the constitutional attack had not been timely raised and it “would not consider a constitutional attack raised for the first time on appeal ‘unless the statute involved is so obviously unconstitutional on its face as to obviate the necessity for any discussion.’ *Id.* at 32-33 (quoting *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983)). The High Court went on to hold that T.C.A. § 36-1-113(g)(6) is not blatantly unconstitutional. *Id.* at 33. Thus, in the present case, we know, at a minimum, that T.C.A. § 36-1-113(g)(6) is not ‘blatantly unconstitutional.’” *Id.* at \*11-12.

In reviewing whether the statute serves a compelling state interest (the first prong of the strict scrutiny test), the Court cited *Worley v. Dep’t of Children’s Servs.*, No. 03A01 9708 JV 00366, 1998 Tenn. App. LEXIS 103, 1998 WL 52098 (Tenn. Ct. App. February 10, 1998). “*Worley* holds that the Legislature has expressed a compelling state interest that minor children not remain permanently in foster care. *Worley* further states that a proper parental role in the life of a child under eight years old is ‘crucial’ to the child’s welfare and there is ‘a compelling need for the State to protect the best interests of the child in this regard.’ 1998 Tenn. App. LEXIS 103, [WL] at \*1.” *Id.* at \*16.

In analyzing whether the statute is narrowly tailored to serve the compelling state interest (the second prong of the strict scrutiny test), the Court reviewed Judge William C. Koch, Jr.’s dissenting opinion in *In re Adoption of a Female Child, E.N.R.*, No. 01A01-9806-CH-00316, 1999 Tenn. App. LEXIS 662, 1999 WL 767795 (Tenn. Ct. App. M.S., September 29, 1999). [Supreme Court’s published opinion of *E.N.R.* discussed above]. Judge Koch’s dissenting opinion that the statute was not narrowly tailored to serve a compelling interest because it did not require a separate finding of harm to the child, formed the basis of the father’s argument in this appeal. *Id.* at \*17-22. The Court also reviewed the case of *In re Marr*, No. M2001-02890-COA-R3-CV, 2003 Tenn. App. LEXIS 45, 2003 WL 152640 (Tenn. Ct. App. W.S., January 23, 2003), [which was vacated by the Supreme Court on other grounds in *Osborn v. Marr*, 127 S.W.3d 737 (Tenn. 2004)]. In *In re Marr*, the Western Section found there was substantial harm to the child by virtue of the parent’s inability to care for the child because of the incarceration. *Id.* at \*23-24. Finally, the Court held that *In re Audrey S.*, 182 S.W.3d 838 (Tenn. Ct. App. 2005) is controlling. There, the mother argued the statute was unconstitutional because it does not require a separate finding of harm and the Court of Appeals (opinion authored by Judge Koch) failed to require a separate finding of substantial harm to the child. *Id.* at \*27-33. The Court held, based on *Worley* and *In re Audrey S.*, that **T.C.A. 36-1-113(g)(6) is narrowly tailored to serve a compelling state interest.** *Id.* at \*34.

***In Re E.M.P.***, No. E2006-00446-COA-R3-PT; 2006 Tenn. App. LEXIS 524 (Tenn. Ct. App. August 3, 2006). The mother was sentenced to two prison terms of eight years and three years consecutively. **Mother contended on the appeal of her termination of parental rights that the two consecutive sentences cannot be combined in order to meet the requirements of the statute. The Eastern Section rejected this argument**, citing *H.M.R v. J.K.F.*, No. E2004-00497-COA-R3-PT, 2004 Tenn. App. LEXIS 578 (Tenn. Ct. App. September 1, 2004). *Id.* at \*18.

***M.P.P. v. D.L.K., (In re C.E.P.)***, No. E2001-00706-COA-R3-CV, 2002 Tenn. App. LEXIS 214 (Tenn. Ct. App. March 26, 2002) Eastern Section upheld partial summary judgment of the trial court

that there was clear and convincing evidence the father was confined in a correctional or detention facility by order of a court as a result of a criminal act, under a sentence of ten or more years, and the child was under eight years of age. **The father argued the proof was insufficient because he would not serve his full sentence as a result of good behavior.** The Court, citing *In re Copeland*, 43 S.W.3d 483 (Tenn. Ct. App. 2000), held the **language of T.C.A. § 36-1-113(g)(6) clearly shows the statute applies to the length of the sentence and the age of the child, not the amount of time served.** The Court vacated and remanded for further proceedings the partial summary judgment that found the termination of parental rights to be in the best interest of the child.

*In re C.M.R.*, No. M2001-00638-COA-R3-JV, 2002 Tenn. App. LEXIS 105, (Tenn. Ct. App. February 7, 2002). Middle Section affirmed termination for parental rights on the grounds that the parents had received a sentence of ten years or more and the children were under the age of eight at the time the sentence was imposed and that the parents had been sentenced to more than two years for severe child abuse of one child. The father asserted the termination proceeding should have been continued pending disposition of the motion for a new trial in the criminal proceeding. **The Court held there was no basis for requiring a child to remain ineligible for adoption and the possibility of a permanent home while the parent pursues a reversal of a criminal conviction.**

See also:

*Fisher v. Young (In re K.B.H.)*, 206 S.W.3d 80 (Tenn. Ct. App. 2006). Permission to appeal denied at 2006 Tenn. LEXIS 638 (Tenn., July 24, 2006).

*In re Audrey S.*, 182 S.W.3d 838, (Tenn. Ct. App. 2005).

*Graham v. Copeland (In re Copeland)*, 43 S.W.3d 483 (Tenn. Ct. App. 2000).

*State Dep't of Children's Servs. v. F. E. B.*, No. E2001-00942-COA-R3-JV, 2003 Tenn. App. LEXIS 121 (Tenn. Ct. App. February 12, 2003).

#### **4.08 Mental Illness/Deficiency of Parent {T.C.A. § 36-1-113(g)(8)}**

*State, Dep't of Human Services v. Smith*, 785 S.W.2d 336 (Tenn. 1990). Child was removed from home on complaints of abuse and truancy. There was no evidence of physical abuse, but mother exhibited bizarre behavior and was diagnosed paranoid schizophrenic. She would not take medication. Father refused to acknowledge her diagnosis and allowed her to be the dominant figure in the home. Several months after child's placement in foster care, DHS sought to terminate parental rights. The chancellor terminated the Smith's parental rights, but the Court of Appeals vacated and remanded because the Smiths were not competent to represent themselves. Counsel and a guardian ad litem were appointed on remand. At the rehearing the chancellor again terminated parental rights. The Court of Appeals reversed the termination order because Mrs. Smith's conduct, as a result of mental illness, was not willful.

The Supreme Court reversed, noting that the Court of Appeals decision lacked support in either the controlling statutes or the case law of this or other jurisdictions. The Supreme Court stated "the Court of Appeals is not in accord with prior decisions of that court in *State Department of Human Services v. Ogle*, 617 S.W.2d 652 (Tenn. App. 1980), and in *Tennessee Department of Human Services v. Riley*, 689 S.W.2d 164 (Tenn. App. 1984)." *Id.* at 338. **There is no violation of due process in terminating parental rights of a mentally ill parent. The state's procedures place the children's welfare first, by requiring return to the parents whenever possible, but allow change of custody when the conditions leading to removal persist, "and are not likely to ever change."** *Id.* at 337.

*State v. Baruchman*, No. W2004-02071-COA-R3-PT, 2005 Tenn. App. LEXIS 174 (Tenn. Ct. App. March 29, 2005). The Western Section held the **ground for termination regarding the mental illness of**

**a parent is not a ground that requires DCS make reasonable efforts to reunify the family prior to filing the termination petition.** The Court cited *In re C.M.M.*, No. M2003-01122-COA-R3-PT, 2004 Tenn. App. LEXIS 160, at \* 21 (Tenn. Ct. App. Mar. 9, 2004).

*State Dep't of Children's Servs. v. R.M.M.*, No. E2001-02678-COA-R3-JV, 2002 Tenn. App. LEXIS 679, (Tenn. Ct. App. September 23, 2002). **Eastern Section held DCS failed to prove by clear and convincing evidence the father's mental condition was so impaired that he would not be able to resume the care and responsibility of the child.** A clinical psychologist testified on behalf of DCS that the father probably would not continue to take medication if the child was returned. The Court found that that contingency alone was not sufficient to warrant termination of parental rights. The termination was reversed and remanded.

*State Dep't of Children's Servs. v. Whaley*, No. E2001-00765-COA-R3-CV, 2002 Tenn. App. LEXIS 383 (Tenn. Ct. App. May 30, 2002). **Eastern Section reversed the termination of the parental rights of mother because DCS failed to prove the mother who was diagnosed as mildly mentally retarded was incompetent to such a degree that she was unable to care for her child presently or would be unable to in the future.**

See also:

*In re S.R.C.*, 156 S.W.3d 26 (Tenn. Ct. App. 2004).

*Dep't of Children's Servs. v. M.R.N.*, No. M2006-01705-COA-R3-PT, 2007 Tenn. App. LEXIS 25 (Tenn. Ct. App. January 17, 2007).

*In re M.E.W.*, No. M2003-01739-COA-R3-PT, 2004 Tenn. App. LEXIS 250 (Tenn. Ct. App. April 21, 2004).

#### 4.09 Non-legal Father {T.C.A. § 36-1-113(g)(9)}

Editor's Note: T.C.A. § 36-1-113(g)(9)(A) was amended effective June 2, 2003 to add the italicized wording below and now reads:

The parental rights of any person who, *at the time of the filing of a petition to terminate the parental rights of such person or, if no such petition is filed, at the time of the filing of a petition to adopt a child*, is not the legal parent or guardian of such child or who is described in § 36-1-117(b) or (c) may also be terminated based upon any one (1) or more of the following additional grounds . . . .

*In re D.A.H.*, 142 S.W.3d 267 (Tenn. 2004). **Supreme Court held the amendment to T.C.A. § 36-1-113(g)(9)(A), effective June 2, 2003, may not be applied retroactively to this case.** Pre-adoptive parents filed a termination of parental rights petition in juvenile court. Father subsequently filed a petition to establish paternity. A consent order was entered establishing paternity prior to the hearing on the termination of parental rights petition. The trial court terminated father's parental rights on several grounds applicable to those who are not legal parents. Relying on *Jones v. Garrett*, 92 S.W.3d 835 (Tenn. 2002), the Court of Appeals reversed the termination because the father was adjudicated the legal father prior to the termination hearing. Supreme Court vacated the order terminating the father's parental rights.

*Dep't of Children's Servs. v. Blacketer*, No. E2006-01302-COA-R3-CV, 2007 Tenn. App. LEXIS 187 (Tenn. Ct. App. April 2, 2007). The trial court terminated the father's parental rights pursuant to T.C.A. § 36-1-113(g)(9). The father appealed and DCS, in its brief, contended Blacketer was not the child's legal father. **The Court held DCS did not rebut by clear and convincing evidence the presumption that**

**Blacketer was the child's father; and, therefore his rights could not be terminated pursuant to T.C.A. § 36-1-113(g)(9).** This statute only applies to non-legal fathers. The child was born in Missouri and Blacketer was listed on the child's birth certificate. Pursuant to Missouri law, he would have been required to sign an acknowledgment of paternity in order to be listed on the birth certificate. Given this fact, he met the definition of a legal parent pursuant to T.C.A. § 36-1-102(28)(D). *Id.* at \*9-10.

*In re Adoption of S.M.F.*, No. M2004-00876-COA-R9-PT, 2004 Tenn. App. LEXIS 826 (Tenn. Ct. App. December 6, 2004). This is an interlocutory appeal from the trial court's denial to terminate the father's parental rights. One issue on appeal was the applicability to this case of the ground for termination pursuant to T.C.A. § 36-1-113(g)(9)(A). The prospective adoptive parents argued that this ground was applicable to the father because the amendment became effective June 2003, prior to the order of February 2004, establishing the father as the "legal" father of the child. The Middle Section opined that the "application of the 2003 amendment depends on when the acts alleged in the termination petition occurred, not the date on which the order establishing parentage was filed." *Id.* at \*21. **Citing the Tennessee Constitution, Article I, Section 20, the Court concluded that to apply the date of the parentage order would violate the prohibition of "retrospective application of laws when doing so will impair vested rights."** *Id.* **The Court held the father's constitutional right as a parent vested when the child was born** (November 2, 2001). The Court found the trial court was correct in not applying this ground retroactively to the father.

#### 4.10 Best Interests of the Child

*In re Adoption of Female Child, Bond v. McKenzie*, 896 S.W.2d 546 (Tenn. 1995). **"In a contest between a parent and a nonparent, a parent cannot be deprived of the custody of a child unless there has been a finding, after notice required by due process, of substantial harm to the child. Only then may a court engage in a general 'best interest of the child' evaluation in making a determination of custody."** *Id.* at 548. (Emphasis added.) Supreme Court rejected the notion that custody may be awarded to a non-parent as in the best interest of the child" even if the natural parent was not found unfit.

*In re S.L.A.*, 223 S.W.3d 295 (Tenn. Ct. App. 2006). In determining whether termination of parental rights is in the child's best interest, the court must consider the factors outlined at T.C.A. § 36-1-113(i). The Court held **the "list is not exhaustive, and the statute does not require every factor to appear before a court can find that termination is in a child's best interest,"** citing *State of TN Dept. of Children's Svcs. v. T.S.W.*, No. M2001-01735-COA-R3-JV, 2002 Tenn. App. Lexis 340, 2002 WL 970434 (Tenn. Ct. App. May 10, 2002); and *In re I.C.G.*, No. E2006-00746-COA-R3-PT, 2006 Tenn. App. LEXIS 707, 2006 WL 3077510 (Tenn. Ct. App. Oct. 31, 2006)." *Id.* at 12.

*In re Giorgianna H.*, 205 S.W.3d 508 (Tenn. Ct. App. 2006). In determining there was clear and convincing evidence that it was in the children's best interest to terminate the parents' parental rights the Court of Appeals stated:

The ultimate goal of every proceeding involving the care and custody of a child is to ascertain and promote the child's best interests. However, as important as these interests are, they do not dominate every phase of a termination of parental rights proceeding. The best interests of the child do not become the paramount consideration until the trial court has determined that the parent is unfit based on clear and convincing evidence of one or more of the grounds for termination listed in Tenn. Code Ann. § 36-1-113(g). **Once a parent has been found to be unfit, the interests of the parent and the child diverge.**

**While the parent's interests do not evaporate upon a finding of unfitness, *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394-95, 71 L. Ed. 2d 599 (1982), the focus of the proceedings shifts to the best interests of the child.**

**While a finding of parental unfitness is a necessary prerequisite to terminating a parent's rights, a finding of unfitness does not necessarily require that the parent's rights be terminated.** *White v. Moody*, 171 S.W.3d 187, 193 (Tenn. Ct. App. 2004); *Steven V. v. Kelly H. (In re Alexander V.)*, 2004 WI 47, 271 Wis. 2d 1, 678 N.W.2d 856, 863 (Wis. 2004). **Not all parental misconduct is irredeemable.** Thus, Tennessee's termination of parental rights statutes recognize the possibility that terminating an unfit parent's parental rights is not always in [\*\*36] the child's best interests. *Id.* at 522.

**The child's best interests must be viewed from the child's, rather than the parent's, perspective.** *White v. Moody*, 171 S.W.3d at 194; *In re Hammett*, 2003 Mich. App. LEXIS 2715, No. 245221, 2003 WL 22416515, at \*2 (Mich. Ct. App. Oct. 23, 2003); *In re L.N., Jr.*, 2004 SD 128, 690 N.W.2d 245, 247 (S.D. 2004); *In re Marriage of Pape*, 139 Wn.2d 694, 989 P.2d 1120, 1130 (Wash. 1999). A focus on the perspective of the child is the common theme running through the list of mandatory factors specified in Tenn. Code Ann. § 36-1-113(i). By the time the court reaches the best interests analysis, it will have already made a finding, supported by clear and convincing evidence, that the parent is unfit or poses a risk of substantial harm to the welfare of the child. Accordingly, **the exclusive focus on the perspective of the child in the best interests analysis does not contravene the parent's constitutional rights.** *Id.* at 523.

*State v. Calabretta (In re J.J.C.)*, 148 S.W.3d 919, (Tenn. Ct. App. 2004). The Court of Appeals held that **a parent's fundamental constitutional rights require that the clear and convincing standard of proof apply when determining whether it is in the best interest of the child to termination of parental rights.** The Court cited *In re C.M.R.*, 2002 Tenn. App. LEXIS 105, No. M2001-00638-COA-R3-JV, 2002 WL 192562 at \*3 (Tenn. Ct. App. Feb. 7, 2002). *Id.* at 925.

*White v. Moody*, 171 S.W.3d 187 (Tenn. Ct. App. 2004). This is the third appeal of the termination of parental rights proceedings. In the first appeal, the Court of Appeals reversed and remanded the order terminating the father's parental rights as the trial court did not perform the best interest analysis as statutorily required. (See, *White v. Moody*, No. M2000-01778-COA-R3-CV, 2001 Tenn. App. LEXIS 369 (Tenn. Ct. App. May 18, 2001.) In the second appeal, the Court reversed and remanded the termination for the trial court to hold an evidentiary hearing on the best interest analysis. (See, *White v. Moody*, No. M2002-01287-COA-R3-CV, 2003 Tenn. App. LEXIS 517 (Tenn. Ct. App. July 25, 2003.) One issue in the current appeal was the **failure of the trial court, pursuant to T.C.A. § 36-1-113(k), to complete written findings of fact and conclusions of law within 30 days of the hearing on best interest. The Court determined, though the "appropriate remedy" was to remand the case for the entry of written findings of fact and conclusions of law, it would not do so because the case had been remanded on two other occasions resulting in a delay of three years of the final resolution.** *Id.* at 192. The Court proceeded to review the trial court's oral findings of fact.

The Court of Appeals discussed the need for a fact-intensive inquiry when determining whether termination of parental rights is in the child's best interest:

Ascertaining a child's best interests in cases of this sort does not call for a rote examination of each of Tenn. Code Ann. § 36-1-113(i)'s nine factors and then a determination of whether the sum of the factors tips in favor of or against the parent. **The**

**relevancy and weight to be given each factor depends on the unique facts of each case. Thus, depending upon the circumstances of a particular child and a particular parent, the consideration of one factor may very well dictate the outcome of the analysis.** *Id.* at 194.

*In re Adoption of A.K.S.R.*, 71 S.W.3d 715 (Tenn. Ct. App. 2001). Permission to appeal denied. T.C.A. § 36-1-115(g)(1), that provides foster parents shall be given first preference to adopt a child if the child has resided in the foster home for twelve months or more, applies when a child is available for adoption due to termination or surrender of parental rights. The Court held there is not a preference for placement with a relative under the adoption code provisions. In this case the foster parents with whom the children had resided for more than one year filed a petition to terminate parental rights and for adoption. The paternal aunt and DCS filed intervening petitions. The trial court held a bifurcated hearing; terminated the parents' rights; and awarded custody of the children to the paternal aunt. The Court of Appeals stayed the order in regard to the transfer of custody. The Court held T.C.A. § 37-2-403(a)(1) and (d), that create a preference for family placement, apply to the foster care of children but not to adoption. **The Court found that since there is not a preference for family placement pursuant to the adoption code, the best interest of the children is paramount. The Court held the continuity of placement was the most important factor in considering the children's best interest in this case. The trial court's decision was reversed and the foster parents' petition for adoption granted.**

*In re C.W.W.*, 37 S.W.3d 467 (Tenn. Ct. App. 2000). The Court of Appeals **sustained the finding of the trial court that termination of the mother's parental rights was in the best interests of the children though she had completed five months of a two-year treatment program, remained drug-free and was making progress.** In reviewing best interests the Court found the mother was not able to provide a home for the children at the time of trial; she provided no time frame for providing a home or other support; she was not employed and had no means to support her children beyond a small stipend; she had not used any of her funds to provide the children with gifts or basic necessities; and had not offered to pay even token support.

*In re M.W.A.*, 980 S.W.2d 620 (Tenn. Ct. App. 1998). **The Middle Section found it would not be in the children's best interest to place them with relatives who had filed for custody just prior to the termination of parental rights hearing.**

*In re D.P.M.*, No. M2005-02183-COA-R3-PT; 2006 Tenn. App. LEXIS 597 (Tenn. Ct. App. September 8, 2006). The Middle Section reversed the termination of the mother's parental rights based on the children's best interest. In discussing the difference between the grounds for termination and best interest, the Court noted: "One important distinction is that grounds are generally established on the basis of the parent's past actions. Best interest, by its nature, must focus on the current situation and, to some extent, is based on a prediction of future events." *Id.* at \*36-37. Two experts testified about the strong relationship between the eldest child and mother but had contrary opinions regarding whether termination of parental rights was in the children's best interest. In arriving at its decision, the Court considered the eldest child's "frequently expressed desire for family reunification, Mother's determination to remain connected with her children, and Dr. Cardona's opinion as to the importance to D.P.M. of the family connection." *Id.* at \*42.

*In Re C.B.W.*, No. M2005-01817-COA-R3-PT, 2006 Tenn. App. LEXIS 427 (June 26, 2006). The Middle Section reversed the termination of the mother's parental rights finding that the petitioner, maternal grandmother, failed to prove by clear and convincing evidence that termination was in the child's best interest. **The Court concluded it appropriate to consider events that occurred after the filing of the termination petition. "(C)ourts should not disregard any evidence about the child's**

**situation at the time the best interest determination is made.” *Id.* at 19. The petition in this case was filed by a private party and not DCS. The Court found many of the factors listed at T.C.A. § 36-1-113(i) apply to situations where children are placed in foster care.**

Because of the wording of some of these factors, it is easy to understand why courts, attorneys, and parties often appear to be under the impression that a denial of termination results in an automatic change of custody to the biological parent. The first factor, for example, has to do with conditions in the parent's home so "as to make it safe and in the child's best interest to be in the home of the parent or guardian." Similarly, the seventh factor has to do with the environment in the parent's home. Another requires consideration of the effect on the child of a change of caretakers. Tenn. Code Ann. § 36-1-113(i)(5). Obviously, whether return to the parent's home is likely to be possible in the near future is an important part of the best interest analysis when the alternative is long term foster care. So is the effect on the child of a reunification in the near future. If return to the parent in the short term is not likely or beneficial, terminating rights so that the child can be adopted is in the child's interest. Denying a petition to terminate in that situation does not, however, result in an automatic return of the children to the parent's custody. Neither does it in the situation before us. (Footnote omitted). *Id.* at \*23-24.

***In re C.M.S.*, No. W2004-00295-COA-R3-PT, 2004 Tenn. App. LEXIS 800 (Tenn. Ct. App. November 19, 2004). The Eastern Section upheld the trial court's finding of the ground of persistence of conditions. One issue on appeal was whether it was in the child's best interest to terminate parental rights. The child, age 14, was a special needs child with an IQ of 49 and functioned on the level of a child of six years old or less. The Court opined that the "trial court's conclusion that termination is in C.M.S.' best interest because the continuation of the parent/child relationship would hinder DCS' efforts to find a suitable adoptive home for C.M.S. is not well founded." *Id.* at \*22. In considering the factors regarding best interest, the Court found the evidence was not favorable to the mother but stated it "must balance this evidence with the situation as it pertains to C.M.S." *Id.* at \*17. The Court noted the trial judge's statements from the bench concerning best interests and her request that DCS continue visitation between child and mother until an adoptive placement could be located, and finding an adoptive family that might also continue the visitation after adoption. The Court also took into consideration the testimony of the case manager and foster parent who stated the mother and child had a bond and the child enjoyed the time she spent with her mother. Further, the Court did not give much weight to the child's testimony that she would not be upset should her visits with her mother stop, and expressed concern over the child's ability to understand the gravity of terminating parental rights given her mental capacity. **The Court held there was not clear and convincing evidence that the termination was in the child's best interest.****

***In re C.E.P.*, No. E2003-02410-COA-R3-PT, 2004 Tenn. App. LEXIS 635 (Tenn. Ct. App. September 29, 2004). This is the second appeal of this termination of parental rights case. In the first appeal the Eastern Section vacated and remanded for further proceedings the partial summary judgment that found the termination of parental rights to be in the best interest of the child (See *M.P.P. v. D.L.K.* below.) On remand, the trial court found the termination to be in the best interest of the child. **The Court reviewed the factors set forth in T.C.A. §36-1-113(i).** In reviewing the first factor, the Court determined that father had made an adjustment of circumstances by obtaining vocational education and receiving treatment of substance abuse and mental health issues, all while incarcerated. The court also relied on father's behavior upon his release which included a request to live in a halfway house in Knoxville to be close to his child and subsequently establishing his own residence; obtaining employment; and, paying off debts incurred before his incarceration. The Court concluded it would be safe for the child to be in the father's home to allow visitation. In reviewing the fourth factor, whether a meaningful relationship has**

been established between the parent and the child, the Court agreed that there was no meaningful relationship. However, the Court found the father was prevented from developing a relationship because of the incarceration. The Court found the fifth factor regarding the change in caregivers inapplicable since the father was asking that visitation be awarded and not custody. The Court found the other factors not applicable or absent of clear and convincing proof. **The Court held the relationship between the stepfather and the child, relied on by the trial court as in the best interest of the child, was not enough to justify terminating the father's rights and reversed and dismissed the petition.**

*In re M.E.W.*, No. M2003-01739-COA-R3-PT, 2004 Tenn. App. LEXIS 250 (Tenn. Ct. App. April 21, 2004). Trial court denied the termination of parental rights petition filed by DCS as termination was not in the best interest of the children and DCS appealed. On appeal DCS argued that the express public policy of Tennessee established by legislation and case law, where a child cannot be returned to the parent in the foreseeable future, is that it is in the best interest of the child to be permanently integrated into an adoptive home rather than remaining in the uncertainty of foster care. Middle Section held **“a general public policy favoring adoption, which must be preceded by termination of parental rights, over long term foster care cannot substitute for an individualized determination of the best interest of the child who is the subject of the termination proceeding...each situation must be analyzed according to the facts of the case, the statutory factors listed in *Tenn. Code Ann. § 36-1-113(i)*, and any other relevant factors, including the effect of termination on the child.”** *Id.* at \*36-7.

*In re D.M.*, No. M2002-01317-COA-R3-JV, 2003 Tenn. App. LEXIS 135 (Tenn. Ct. App. February 20, 2003). The Middle Section reversed the termination of the mother's parental rights. In its analysis of “best interest” the Court found “there was no testimony as to any adoptive parents waiting in the wings. The record shows so far, D.M., has been in four different foster homes, and that M.M. has been in the birthing center and three foster homes.” *Id.* at \*14. The court noted that the lack of a permanent home at that point in time factored into its finding that DCS had not met its burden of proving by clear and convincing evidence that the termination was in the children's best interests.

*State v. R.S.P.*, No. E2002-00442-COA-R3-JV, 2002 Tenn. App. LEXIS 792 (Tenn. Ct. App. October 31, 2002). Permission to appeal denied by *State Dep't of Children's Servs. v. R.S.P.*, 2003 Tenn. LEXIS 306 (Tenn., Mar. 17, 2003). The child was adopted by his paternal grandparents and their rights were terminated based on the ground of persistence of conditions. The adoptive mother appealed. The Eastern Section affirmed the judgment of the trial court. The Court **reviewed the findings of the trial court as to the best interest determination and held that the most important factor was “the adoptive mother's intellectual, educational and emotional limitations formed the basis for all of her problems as a mother, and that in light of these shortcomings, it would be in the best interests to terminate her parental rights.”** *Id.* at \*11.

*State Dep't of Children's Servs. v. D.G.B.*, No. E2001-02426-COA-R3-JV, 2002 Tenn. App. LEXIS 647 (Tenn. Ct. App. September 10, 2002). Eastern Section reviewed the trial court's finding that it was not in the best interest of the child to terminate parental rights. The Court reversed the decision finding the termination of parental rights was in the best interest of the child. The child had been in the DCS custody for over four years when the petition was filed. The child had been severely abused by his parents. A psychologist testified that both parents suffered from psychological problems and were not capable of safely parenting the child. The trial court found the child had mental and physical impairments and essentially was not adoptable. The trial court also found the child and parents could have a meaningful relationship but this could not be continued without the assistance of DCS. Because of these reasons the trial court found it would not be in the best interest of the child to terminate the relationship, even though the parents would never be able to safely care for the child.

The Appellate Court held the statutory scheme of T.C.A. Titles 36 and 37 is to return children to the care of their parents and not simply to establish a “meaningful relationship” while maintaining the child in foster care. The Court determined the trial court used the wrong legal standard to determine best interest. Pursuant to T.C.A. § 36-1-113(i)(1)-(9), since the child can never be returned to the care of his parents, the development of a meaningful relationship without more is insufficient to support a finding that it is not in the best interest of the child to terminate parental rights. **The Court held there was no direct evidence to support the contention that the child was unadoptable. Because of the child’s mental and physical impairments finding an adoptive placement may be more difficult “but this does not mean that such placement is impossible.”** *Id.* at \*24.

*C.J.H. v. A.K.G.*, No.M2001-01234-COA-R3-JV, 2002 Tenn. App. LEXIS 581 (Tenn. Ct. App. August 9, 2002). After the child’s birth, mother and father filed a joint petition for legitimation. The petition was granted and father was ordered to pay child support and reasonable visitation. The father never visited the child after the child’s birth. The mother and father subsequently filed a joint petition to terminate father’s parental rights. At the termination of parental rights hearing the father admitted he had not visited and did not desire to establish a parental relationship with the child and the mother had adequate means to financially care for the child and strong family support. **The trial court held it was not in the child’s best interest to terminate parental rights and the Middle Section affirmed the judgment. The Court held the loss of a child’s right to future support from a parent is an appropriate factor to consider in determining whether termination of parental rights is in the child’s best interest.** The Court found that in some instances Tennessee statutes allow a voluntary surrender of parental rights (i.e., T.C.A. § 36-1-102(47), 111, and 117(f) and (g)) but only in the context of an adoption. *But see: In the Matter of Rainey*, No. W2000-00504-COA-R3-CV, 2001 Tenn. App. LEXIS 190 (Tenn. Ct. App. March 20, 2001).

*M.P.P. v. D.L.K., (In re C.E.P.)*, No. E2001-00706-COA-R3-CV, 2002 Tenn. App. LEXIS 214 (Tenn. Ct. App. March 26, 2002) **Eastern Section vacated and remanded for further proceedings the partial summary judgment that found the termination of parental rights to be in the best interest of the child as there was a genuine issue of material fact.** The Court upheld the partial summary judgment of the trial court that there was clear and convincing evidence the father was confined in a correctional or detention facility by order of a court as a result of a criminal act, under a sentence of ten or more years, and the child was under eight years of age.

*Dep’t of Children’s Serv. v. Gorrell*, No. E2001-01363-COA-R3-JV, 2002 Tenn. App. LEXIS 220 (Tenn. Ct. App. March 25, 2002). **The trial court declined to terminate the parental rights to one child finding it was not in the child’s best interest.** The trial court awarded permanent custody of the child to DCS and it appealed. The Court of Appeals affirmed the trial court’s finding that it was not in the best interests of the child to terminate parental rights. The child in question wanted to maintain a relationship with her mother. **The Court found it would be harmful to the child to sever the relationship with her mother due to the age of the child and the trauma she had experienced.** The child had been in the care of a foster mother for several years and wanted to remain there. The Court found that if the matter was appealed to the Supreme Court, the child would be within one year of her majority by the time the issue was resolved.

*In re D.I.S.*, No. W2000-00061-COA-R3-CV, 2001 Tenn. App. LEXIS 358 (Tenn. Ct. App. May 17, 2001). The juvenile court, *sua sponte*, dismissed the Court Appointed Special Advocate’s (CASA) petition to terminate the mother’s parental rights finding the termination was not in the child’s best interest. The Western Section affirmed the trial court’s decision finding that “D.I.’s (the child) relationship with her Mother is a deeply troubled one, and the source of great anguish for D.I. D.I.’s heartache over her mother appears to stem from her love for Mother, juxtaposed against the inevitable

disillusionment when Mother again fails her.” *Id.* at \*15. **The Court held it was not in the child’s best interest to terminate parental rights.**

***Sorrells v. Sorrells***, No. E1999-01658-COA-R3-CV, 2000 Tenn. App. LEXIS 675 (Tenn. Ct. App. October 5, 2000). Eastern Section reversed and dismissed father’s termination of parental rights because the **trial court failed to make a specific finding that termination was in the child’s best interest.** (Editor’s Note: In *White v. Moody*, No. M2000-01778-COA-R3-CV, 2001 Tenn. App. LEXIS 369 (Tenn. Ct. App. May 18, 2001), the holding was the same but instead of reversing and dismissing the case the matter was remanded for a determination of best interest of the child.)

***In re S.B.***, No. M1999-00140-COA-R3-CV, 2000 Tenn. App. LEXIS 308 (Tenn. Ct. App. May 12, 2000). The trial court, after a bifurcated hearing that included judgment to terminate of parental rights and to determine who should adopt the children, allowed one child to be adopted by the non-relative foster parents where the child had been placed for 10 months. Relatives who had cared for the sibling were allowed to adopt that child. The relatives appealed the judgment to allow the child to be adopted by the non-relatives and argued that it was not in the children’s best interest to sever the relationship of the siblings or of the child’s extended family members and requested they be allowed to adopt both children. The Court affirmed the judgment of the trial court as in the best interest of the child.

In determining best interest the Court reviewed T.C.A. § 37-2-403(a)(1) that establishes a preference for placement with family over placement through adoption with non-relatives; and applies to the time DCS prepares the permanency plan. The Court also examined T.C.A. § 37-2-403(d) that provides for the preference for placement with a “fit and willing” relative immediately after the child is removed from the home and a preference for adoption by the relative with whom such initial placement has been made. **The Court also addressed the preference of keeping siblings together holding that this preference is a factor to be considered in determining best interest of the child but “must give way to other considerations if the best interest of a child so dictates.”** *Id.* at \*15, citing *Rice v. Rice*, 983 S.W.2d 680, 684 (Tenn. Ct. App. 1998). Though the foster parents did not meet the requirements of T.C.A. § 36-1-115(g)(1), the court did review this statute and the preference for adoption by foster parents who have cared for the child for 12 months or more. The Court held this statute “expresses the legislature’s recognition of the importance of stability in a child’s life”, *id.* at 21, and cited *Talyor v. Taylor*, 849 S.W.2d 319, 328 (Tenn. 1993) holding that there is a strong presumption for continuity of placement.

***Department of Children Servs. v. Taylor***, No. 01A01-9610-CV-00472, 1997 Tenn. App. LEXIS 128 (Tenn. Ct. App. February 26, 1997). **Middle Section affirmed termination of mother’s parental rights despite older children’s testimony that they would like to return to parents and held it was not in their best interests to do so.**

See also:

*Petrosky v. Keene*, 898 S.W.2d 726 (Tenn. 1995).

*Nale v. Robertson*, 871 S.W.2d 674 (Tenn. 1994).

*State, Dep’t of Human Services v. Smith*, 785 S.W.2d 336 (Tenn. 1990).

*O’Daniel v. Messier*, 905 S.W. 2d 182 (Tenn. Ct. App. 1995).

*Drinnon v. Brown*, (*In re Drinnon*, 776 S.W. 2d 96 (Tenn. Ct. App. 1988). *Tennessee Dep’t of Human Services v. Riley*, 689 S.W. 2d 164 (Tenn. Ct. App. 1984).

*Ex Parte Wolfenden*, 48 Tenn. App. 433, 348 S.W.2d 751 (1961).

*In re B.L.R.*, No. W2004-02636-COA-R3-PT, 2005 Tenn. App. LEXIS 461 (Tenn. Ct. App. August 4, 2005).

*In re Kleshinski*, No. M2004-00986-COA-R3-CV, 2005 Tenn. App. LEXIS 275. (Tenn Ct. App. May 4, 2005).

*State v. K.L.K.*, No. E2003-2452-COA-R3-PT, 2004 Tenn. App. LEXIS 443 (Tenn. Ct. App. July 6, 2004). (TPR reversed on best interest.)

*In re S.M.C.*, No.01A01-9807-JV-00358, 1999 Tenn. App. LEXIS 365 (Tenn. Ct. App. June 11, 1999).

*In re M.C.G.*, No. 01A01-9809-JV-00461, 1999 Tenn. App. LEXIS 327 (Tenn. Ct. App. May 26, 1999).

## 5.0 MISCELLANEOUS

### 5.01 Federal Indian Child Welfare Act

***In re Morgan***, 02A01-9608-CH-00206, 1997 Tenn. App. LEXIS 818 (Tenn. Ct. App. November 19, 1997). **This is a case of first impression in Tennessee regarding the interpretation of the federal Indian Child Welfare Act (ICWA).** The Western Section affirmed the trial court's denial of the motion to intervene in an adoption proceeding filed by the Tohono O'odham Indian Nation. After an extensive analysis and review of case law from other states, **the Court adopted the "existing Indian family doctrine," and refused to apply the ICWA to cases where the children have had little or no exposure to an Indian family prior to their removal to a non-Indian family.**

The Court held that the intent of the ICWA is to remedy the removal of Indian children from an "existing Indian family unit." The Court found the ICWA inapplicable under the "existing Indian family doctrine." The mother and child were "nondomicillary" members of the Tohono O'odham Indian Nation, as the mother had not lived with the tribe or on the reservation for fifteen years. At the birth of the child, she surrendered her parental rights to an adoption agency. The mother was not married at the time of the child's birth and the father was not an American Indian. He never claimed paternity or acknowledged the child.

See also: *Powell v. Crisp*, No. E1999-02539-COA-R3-CV, 2000 Tenn. App. LEXIS 671 (Tenn. Ct. App. October 18, 2000).

### 5.02 Paternity

***In re T.K.Y.***, 205 S.W.3d 343 (Tenn. 2006). Mr. and Mrs. Y were married when she had an affair with Mr. P and gave birth to a child. Mr. P filed a paternity petition when the child was almost two years old, Mrs. and Mr. Y filed an answer and counter-petition wherein Mr. Y asked to be declared the child's "legal" father and to terminate Mr. P's parental rights. They also filed a petition for a restraining order. More than two years later, the case was tried and stipulated that Mr. P was the biological father based on a DNA test that indicated a 99.95% probability. Initially, the trial court heard the termination petition without adjudicating the paternity of the child and terminated Mr. P's parental rights, summarily dismissing Mr. P's parentage petition. That case was appealed, reversed and remanded to the trial court to adjudicate paternity prior to hearing the termination petition. On remand, the trial court declared Mr. P to be the legal father of the child and set child support and visitation. An appeal was taken from that judgment and the Court of Appeals held, pursuant to T.C.A. § 36-2-304, both men were presumed to be the father. Mr. Y was presumptively the father because of his marriage to Mrs. Y at the time of birth and holding the child out as his child. Mr. P was presumptively the father because of the genetic testing. The Court of Appeals determined that Mr. Y was the legal father because of the stability of the family, his relationship with, and financial support of the child. Mr. P appealed.

**The Supreme Court held Mr. P was the child's legal father.** In reviewing T.C.A. § 36-2-304, the Supreme Court found that "under the definition of 'father' in the parentage statute, whomever is the *biological* father of a child is the child's father." *Id.* at \*350. The Court stated the Court of Appeals should have looked at the "entire statutory scheme governing parentage." *Id.* In its determination of the "legal father," the Supreme Court considered the adoption and termination statutes, where the "legal father may or may not be the biological father of the child," referring to Tenn. Code Ann. § 36-1-102(10), (28), (36) *Id.* at \*351-2. In determining Mr. P's legal father status, the Court stated, first, where a paternity petition is filed, it must be decided prior to a termination of parental rights, pursuant to T.C.A. § 36-1-117(b)(2).

“(O)nce paternity has been established, the biological father becomes the legal father, and his rights may only be terminated as “as provided by § 36-1-113 or otherwise provided by law.” *Id.* § 36-1-117(b)(3)(B). Thus, the statute implicitly recognizes that the rights of the biological father are superior to the rights of another would-be father.” *Id.* at 352. Second, the federal and state constitutions protect the rights of the biological parent. *Id.* The Court held the Court of Appeals had incorrectly applied a “best-interests-type analysis” in adjudicating Mr. Y as the legal father. *Id.* at \*353.

*In re C.A.F.*, 114 S.W.3d 524 (Tenn. Ct. App. 2003). The juvenile court terminated the parental rights of the mother and biological father, but did not terminate the rights of the man who filed a voluntary acknowledgment of paternity. Genetic testing proved conclusively that this man was not the child’s biological father. The juvenile court held DCS did not have standing to challenge the validity of the voluntary acknowledgment; and even if it did have standing, it failed to carry the burden of proving fraud, duress or material mistake in the execution of the acknowledgment pursuant to T.C.A. § 24-7-113(e)(1). *Id.* at \*7-8. The Department appealed. The Court of Appeals held T.C.A. § 24-7-113 establishes a simplified procedure for unmarried fathers to legally establish paternity without the need of a hearing as to paternity; and the document then becomes the basis for establishing a child support order. The Court of Appeals agreed with the Department’s position that **T.C.A. § 24-7-113 was not meant to allow a non-parent to obtain parental rights over a child without having to go through an adoption proceeding and that the use for such purpose violates public policy.**

### 5.03 Child Support

*State v. Wilson*, 132 S.W.3d 340 (Tenn. 2004) **Tennessee Supreme Court held that T.C.A. § 37-1-151 requires a trial court to set child support retroactive to the date a child is placed in State custody.** Trial court refused to order the parents pay child support retroactive to the date the child was placed in DCS custody voluntarily by the parents. The State filed the petition to set support almost two years after the child was placed in custody. The State appealed and argued the trial court was required to order back child support from the date the child was placed in custody pursuant to T.C.A. § 37-1-151(b)(1)-(4)(A). The Court of Appeals held where the provisions of T.C.A. § 37-1-151(b)(2), that provide, when a child is placed in custody of an agency of the State and no prior custody order exists the court shall immediately order child support or set a hearing to be held within 45 days, are not followed, an award of retroactive child support is limited to 45 days from the date the petition is filed. The Supreme Court reversing the Court of Appeals and remanding to the trial court held the directive that a hearing be held within 45 days of placement does not limit parental liability to the State for child support. The trial judge must set **“retroactive child support according to the guidelines found in Tennessee Code Annotated § 36-5-101(e), but may deviate from the guideline amount if the deviation is accompanied by a finding that the application of the guidelines would be unjust or inappropriate.”** *Id.* at 344.

*In re H.E.J.* 124 S.W.3d 110 (Tenn. Ct. App. 2003). Permission to appeal denied. Trial court terminated the father’s parental rights and held that he was liable for child support arrearages prior to the entry of the order terminating parental rights in the amount of \$14,404. **Middle Section reversed this portion of the judgment and held the trial court has jurisdiction to award past child support in termination of parental rights proceedings only if the trial court has adjudicated the issue.** The Court found there was no claim for relief regarding child support arrearages in the pleadings and the only evidence to support the judgment was testimony regarding the father’s earnings presented by the father on the issue of abandonment. The father was provided “no opportunity to address the propriety of a child support award, or challenge the calculations relied upon by the trial court. *Id.* at \*16.

***Jones v. Jones*, 930 S.W. 2d 541 (Tenn. 1996). This case contains language that indicates a court may deviate downward from the child support guidelines when the Department of Children’s Services has taken custody of the child, the parent is making reasonable efforts to secure the return of the child and it is in the best interest of the child.**

***In re T.S.R.*, No. W2003-01321-COA-R3-JV, 2004 Tenn. App. LEXIS 380 (Tenn. Ct. App. June 17 2004).** Trial court entered an order finding T.S.R. to be the father and ordered child support. Father failed to pay support and incurred an arrearage. Father petitioned the trial court for relief pursuant to Tenn. R. Civ. P. 60 and requested a paternity test. **The DNA test indicated he was not the father. The trial court relieved the father of the ongoing child support obligation but required him to pay the arrearage.** Father appealed and argued the trial court erred in failing to declare the original order finding him to be the father and setting child support null and void once the DNA test confirmed he was not the father. Western Section held that T.C.A. § 36-5-101 and the Supreme Court’s interpretation of the statute in *Rutledge v. Barrett*, 802 S.W. 2d 604 (Tenn. 1991) precluded the father’s argument that the original order should be declared null and void. The Court also found the father’s estoppel argument was held no merit. Appellees argued the father should not be given prospective relief of the child support obligation because he failed to timely petition for relief. The Court held the father “had no concrete evidence to form a basis for Rule 60.02 relief until the DNA test indicated that he was not the father.” *Id.* at \*10. The Court affirmed the trial court’s decision to relieve the father of future support.

See also:

*Lawson v. O’Malley*, No. W2003-00080-COA-R3-JV , 2004 Tenn. App. LEXIS 256, (Tenn. Ct. App. April 22, 2004).

*State ex rel. Whitehead v. Thompson*, 01A01-9511-CH-00538, 1997 Tenn. App. LEXIS 860 (Tenn. Ct. App. December 5, 1997).

#### 5.04 Visitation

***In re S.C.H.*** No. M2003-01382-COA-R3-CV, 2004 Tenn. App. LEXIS 863 (Tenn. Ct. App. December 20, 2004). The juvenile court ordered the father have no contact with his three year old daughter based on allegations that the father had sexually abused the child during a protracted hearing on the father’s petition to establish paternity and set visitation and support. The testimony included licensed psychologists and a DCS investigator who could not determine conclusively that the father had abused his daughter, though there were concerns regarding the child’s sexualized behavior. The order contained no findings as to the basis for denying visitation.

The Middle Section vacated the judgment and remanded the case for further consideration. The Court cited T.C.A § 36-6-301 as the authority of courts to regulate visitation rights of non-custodial parents. The court opined that barring all contact between a parent and child, “if permanent, would constitute termination of parental rights and would require procedural safeguards applicable to such proceedings, such as proof of grounds by clear and convincing evidence.” *Id.* at \*14. **In order to completely ban contact between a parent and child, the following findings must be made by “clear and definite evidence:” 1) father abused the child or 2) the child would be harmed physically, emotionally, or morally by any contact with the parent.** *Id.* at \*15-16.

***In re B.E.D.***, No. W2003-02026-COA-R3-JV, 2004 Tenn. App. LEXIS 177 (Tenn. Ct. App. March 22, 2004). Custodial parent appealed the trial court’s decision to award visitation to the child’s adult half-sister. Western Section vacated the order and held the adult half-sister had **no statutory claim to**

**visitation.** Because no statutory claim existed the question of whether a showing of substantial harm is required is moot.

See also, *In re Z.A.W.*, No. W2005-01956-COA-R3-JV, 2006 Tenn. App. LEXIS 393 (Tenn. Ct. App. June 12, 2006).

### 5.05 Placement Issues

*State Dep't of Children's Servs. v. E.G.P.*, No. E2003-00433-COA-R3-CV, 2003 Tenn. App. LEXIS 658 (Tenn. Ct. App. September 12, 2003). DCS challenged the Juvenile Court Judge's authority to order a placement for a sixteen-year-old mother and her two and one-half-year-old child. Time constraints were imposed upon DCS in terms of placement by the Court and DCS alleged in their appeal that the Juvenile Court lacked jurisdiction to adjudicate a placement. The Eastern Section held: "(t)he juvenile court cannot usurp the properly exercised functions of the DCS. Any action, not wholly discretionary, taken by DCS may be subject to judicial review in accordance with established procedure, but **initial determinations** respecting placements are the responsibility and prerogative of the Agency." *Id.*, at 8-9 (emphasis added).

*But see* T.C.A. § 37-1-129(e) as amended July 1, 2004, and the federal regulation, 45 CFR 1356.21 (g)(3).

Editors Note: The amendment to T.C.A. § 37-1-129(e) does not appear to allow the court to order a specific placement. However, pursuant to the federal regulation, 45 CFR 1356.21 (g)(3), 65 FR 4020 (1/25/00), it appears the juvenile court does have the authority to order a particular placement if an evidentiary hearing is held and all relevant testimony is allowed, including that of the Department. See also, Debra Ratterman Baker, Et Al., American Bar Association, *Making Sense Of The Asfa Regulations: A Roadmap For Effective Implementation* (Diane Boyd Rauber, Esq., ed., 2001).

T.C.A. §§ 37-1-129(e) does not limit the court's role in examining the goal for the child and assuring the responsibilities of the plan and the placement choice further the attainment of the goal. It is the court's duty to assure all parts of the plan are in the best interest of the child, including the appropriateness of a particular placement.

By virtue of its jurisdiction over the permanency plan, the court may convene an evidentiary hearing at any time an issue is raised concerning the plan. The court may hold a hearing to determine that the child's needs are being met in a manner consistent with those identified in the plan. For example, foster home placement may be inappropriate for a child whose needs are identified as in-patient drug treatment or sexual perpetrator treatment.

### 5.06 Challenging Constitutionality of Statute

*In re Adoption Of Female Child, E.N.R.* 42 S.W.3d 26 (Tenn. 2001) Father challenged the constitutionality T.C.A. § 36-1-113 (g)(6) and T.C.A. § 36-1-113(c)(2). He raised the constitutional challenge for the first time in closing argument at the termination of parental rights trial. The Supreme Court found the trial court did not affirmatively decide the issue of constitutionality. **The Court held the father failed to timely raise a challenge to the constitutionality of the two statutes. Therefore, his challenge was waived except to the extent the statutes were clearly or blatantly unconstitutional and held they were not. In addition, the Court found the issue was compounded by the fact that the Attorney General was notified of the constitutional challenge as required by statute and rule.**

See also, *In re S.M.N.*, No. E2005-01974-COA-R3-PT, 2006 Tenn. App. LEXIS 445 (Tenn. Ct. App. 2006)

### 5.07 Appellate Costs, Attorneys Fees, Frivolous Appeal

*In re M.L.D.*, 182 S.W.3d 890, 2005 Tenn. App. LEXIS 339 (Tenn. Ct. App. 2005). Permission to appeal denied. Mother and stepfather filed a petition to terminate father's parental rights. The trial court denied the petition and petitioners filed a motion to alter or amend the judgment pursuant to Rule 59.04 of the Rules of Civil Procedure raising, for the first time, the issue of whether the father was the legal parent. The trial court denied the motion. (For discussion of Rule 59 motion, see 3.03(b) above). Petitioner's filed an appeal to the Court of Appeals which affirmed the trial court. One issue presented by the father was the request for attorney's fees on the ground that the appeal was frivolous, pursuant to T.C.A. § 36-5-103(c). The Court disagreed stating that § 36-5-103(c) allows attorney fees when enforcing child support or custody decrees. However, the Court opined that **"when it appears to the reviewing court that an appeal from a court of record is frivolous or taken solely for delay, the court may award just damages, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.** Tenn. Code Ann. § 27-1-122 (2000)." *Id.* at \*18. The Court found the appeal to be frivolous citing petitioner's attempts to introduce new untried issues; and held the eighteen issues on appeal were without merit. The Court did state, given that a termination of parental rights proceeding is "the most serious and grave issue to be addressed," it was "loathe" to consider such an appeal as frivolous. *Id.* at \*19. The Court remanded the case to the trial court for assessment of damages in accordance with T.C.A. § 27-1-122.

*Tenn. Dep't of Children's Servs. v. R.G.T.* No. E2002-02804-COA-R3-JV, 2003 Tenn. App. LEXIS 408, (Tenn. Ct. App. May 30, 2003). Permission to appeal denied. Father filed a motion in the Court of Appeals requesting any costs that would be taxed to him be waived. **Eastern Section agreed to waive the appellate costs.**

### 5.08 Supreme Court Rule 40

*State v. Baruchman*, No. W2004-02071-COA-R3-PT, 2005 Tenn. App. LEXIS 174 (Tenn. Ct. App. March 29, 2005). One issue raised on appeal by the mother of the termination of her parental rights was whether the trial court erred in finding the termination was in the best interest of the child because the guardian ad litem failed to request appointment of a separate attorney for the child when the child's best interest and preference conflicted, pursuant to Supreme Court Rule 40(e). The Western Section held the issue was without merit for two reasons. First, the mother failed to raise the issue at the hearing on the termination. Second, **in reviewing the record the Court found that the child at different times expressed her desire to remain with her mother and to be adopted. The Court held this did not amount "to the level of a child 'urging' the guardian ad litem to take a position the guardian ad litem feels is contrary to the child's best interest. See Tenn. Sup. Ct. R. 40(e)(2) (2003)." *Id.* at \*35.**

### 5.09 Guardian ad Litem Fees

*In re M.A.R.*, 183 S.W.3d 652 (Tenn. Ct. App. 2005). In a termination of parental rights case, the trial court ordered the respondents pay the guardian ad litem's fees; and they subsequently filed a chapter 7 bankruptcy petition in federal court. On the appeal of the termination order the guardian ad litem requested the Court of Appeals rule that his fees awarded by the trial court were "in the nature of support

and not dischargeable under 11 U.S.C. § 523(a)(5) of the federal bankruptcy code.” *Id.* at 667. The Court held it did not have jurisdiction to determine the issue as jurisdiction was with the federal court.

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**PART III:**

**RESOURCES**

**FUNDING SOURCES**

How to pay for stuff – Revised March, 2005

Each funding source is listed below with an explanation of the target population as defined by the goals of the children, items covered by the funds, how to access the funds, any restrictions on use of the funds, and who is responsible for final decisions. To the greatest extent possible, the goal of the child will drive the choice of funding streams. There are some exceptions to this and those are explained below.

**CUSTODIAL FLEX FUNDS**

<b>Funding Source:</b>	<b>CUSTODIAL FLEX FUNDS</b> are allocated for use in the purpose areas of Time Limited Reunification, Reunification, and Adoption Promotions, Recruitment, and Placement. Regions are limited only by the total amount of the allocation and are not limited by purpose area. Expenditures however are linked to purpose areas by use of procedure codes. Below are guidelines in the use of funds.
	<b>Time Limited Reunification</b>
<b>Goal of Child:</b>	Children receiving these funds must have a goal of reunification or a dual goal that includes reunification.
<b>Purpose:</b>	To achieve reunification by providing treatment and intervention services to children, youth, and families where the children are: 1) in state custody for less than 15 months, and 2) currently in placement. (NOTE: Children with a goal of reunification who are residing in kinship foster care homes are considered to be “in placement” and are eligible for these funds if they meet all other requirements.)
<b>Examples of Proper Use of this Fund</b>	<p>These services may be provided for parents or children.</p> <ul style="list-style-type: none"> <li>• Non-TennCare covered individual, group, and family counseling</li> <li>• Non-TennCare covered in-patient, residential, or outpatient substance abuse treatment</li> <li>• Non-TennCare covered services such as counseling, homemaker, youth services, parent education services, and child care/sitter services.</li> <li>• Assistance to address domestic violence including child abuse</li> <li>• Specialized Child and Family Evaluations relating to child abuse and neglect</li> <li>• Transportation for children or parents to obtain any of the services</li> <li>• Therapeutic Visitation Services</li> <li>• Transportation services for parents or children to facilitate visitation for parents, children, and siblings.</li> </ul>
<b>What you CANNOT use this money for</b>	<p>You may not use these funds to purchase services that are available through TennCare or other insurance. If TennCare or insurance denies the service then you may proceed to purchase the service while appeals are being pursued.</p> <p>You may not use these funds to purchase tangible goods or services like rent, utilities, or furniture.</p> <p>You may not use these funds for children who are at home on a 30/90 day trial home visit.</p>

<p><b>Special Conditions that Must be Met</b></p>	<p>The goal stated in the permanency plan must be reunification, or there must be a dual goal that includes reunification.</p> <p>The maximum funding for each child is \$3,000 per fiscal year unless special circumstances exist.</p> <p>Children who receive or benefit from these services must be in out-of-home placement. This can include a relative or kinship placement as long as the goal is reunification.</p> <p>Children must be in the first 15 months of the current custody episode.</p>
<p><b>Who is responsible?</b></p>	<ul style="list-style-type: none"> <li>• The DCS case management staffs are responsible for identifying the needed services for the family.</li> <li>• The Regional Administrator or his/her designee is responsible for granting waivers to the \$3,000 limit.</li> <li>• DCS Central Office is responsible for assuring that a procedure code exists to process claims for purchases made within these guidelines.</li> </ul>
	<p><b>Reunification</b></p>
<p><b>Goal of Child:</b></p>	<p>Children receiving these funds must have a goal of reunification or a dual goal that includes reunification.</p>
<p><b>Purpose:</b></p>	<p>To achieve reunification by providing services and goods for children in state custody. These funds may be used for children who have been in care less than 15 months if Time Limited Reunification is not available to them, or for children who have been in custody longer than 15 months. These funds may be used for custodial children who are at home on a 30/90 day trial home visit.</p>
<p><b>Examples of Proper Use of this Fund:</b></p>	<ul style="list-style-type: none"> <li>• May purchase all services as described above in the “time limited reunification” caption.</li> <li>• May purchase tangible goods and services that meet basic needs, e.g. rent, food, clothing, transportation, etc.</li> <li>• May purchase in-home services to maintain home placements for custodial children who have been returned to the home, including those who are at home for a 30/90-day trial home visit.</li> </ul>
<p><b>What you CANNOT use this money for</b></p>	<p>You may not use the money to make purchases for non-custodial children. After the Department is relieved of custody, then purchased services must be bought through the FSS program.</p> <p>If a given situation would qualify for both Time Limited Reunification and Custodial Flex funds, then spend Time Limited Reunification dollars first.</p> <p>All medically necessary services should be provided through insurance or TennCare for insurance or TennCare eligible children and families. However, if TennCare or insurance denies the service then you may proceed to purchase the service while appeals are being pursued.</p>
<p><b>Special Conditions that Must Be Met</b></p>	<p>The child must have a goal of reunification.</p> <p>Expenditures for services may not exceed \$3,000 per child, per fiscal year unless the DCS Regional Administrator or his/her designee grants a waiver to that amount. Expenditures for any one tangible good or “basic need” type of payment may not exceed \$1500, unless a waiver is provided by the Regional Administrator or his/her designee.</p>

<b>Who is responsible?</b>	<ul style="list-style-type: none"> <li>The DCS case management staffs are responsible for identifying the needed services for the family.</li> <li>The Regional Administrator is responsible for granting waivers to the funding limits.</li> <li>DCS Central Office is responsible for assuring that a procedure code exists to process claims for purchases made within these guidelines.</li> </ul>
	<b>Adoption Promotions, Recruitment, and Placement</b>
<b>Goal of Child:</b>	The child must have a goal of adoption or a dual goal of adoption and some other type of permanent living arrangement such as independent living or permanent foster care. If there is a dual goal of reunification and adoption then TLR or CWLA Reunification funds may be used.
<b>Purpose:</b>	To provide services that will make it possible for children in state custody or guardianship to be adopted, when that goal is in the best interest of the child.
<b>Examples of Proper Use of this Fund:</b>	<ul style="list-style-type: none"> <li>May purchase services that a child needs in order to pursue the goal of adoption, such as pre-adoptive counseling.</li> <li>Can fund services that enable DCS to pursue termination of parental rights such as diligent searches, preparation of termination referrals, and pre-adoptive child profile.</li> <li>Child specific recruitment efforts.</li> <li>General recruitment for Adoptive Parents.</li> <li>Counseling and services geared toward preparation for adoption. (NOTE: Intensive medical and treatment services to stabilize a child with a goal of adoption shall be paid through the Medical DPA or the Needs Assessment Dollars.)</li> </ul>
<b>What you CANNOT use this money for</b>	You may not use these funds to purchase services for children who do not have a goal of adoption, or who are not identified as being appropriate for the adoptive process.
<b>Special Conditions that Must Be Met</b>	<p>For child specific services, there is a limit of \$3,000 per child, unless a waiver is obtained from the Regional Administrator or his/her designee.</p> <p>There is no cap on expenditures for general recruitment, other than the limits of the regional allocation.</p>
<b>Who is responsible for final decisions?</b>	<ul style="list-style-type: none"> <li>The DCS case management staff is responsible for identifying the needed services for the family.</li> <li>The Regional Administrator or his/ her designee is responsible for granting waivers to the \$3,000 limit.</li> <li>DCS Central Office is responsible for assuring that a procedure code exists to process claims for purchases made within these guidelines.</li> </ul>

**EMERGENCY PLACEMENT FUNDS**

<b>Funding Source:</b>	<b>EMERGENCY PLACEMENT FUNDS</b> are allocated for use within the DCS regions for the express purpose of meeting emergency placement needs as defined below.
<b>Goal of Child:</b>	The child may have any goal to receive this service.
<b>Purpose:</b>	To provide short term, emergency residential services for custodial children who are coming into care or transitioning to a new placement.
<b>Examples of Proper Use of</b>	<ul style="list-style-type: none"> <li>Short term, up to 72-hour placement for a custodial youth in any licensed</li> </ul>

<b>this Fund:</b>	child care agency. The agency must be licensed but need not have a contractual relationship with the State of Tennessee.
<b>What you CANNOT use this money for</b>	These funds should not be used to purchase a long-term or program placement.  These funds may not be used to purchase placement in an unlicensed facility, an unlicensed foster home, or in an agency that has been placed on administrative probation by the Quality Assurance Division.
<b>Special Conditions</b>	Children must be in state custody. (NOTE: Respite services for non-custodial children may be purchased through the FSS Flex Funds.)
<b>Who is responsible for final decisions?</b>	<ul style="list-style-type: none"> <li>• The Team Coordinator may grant a waiver for emergency placement funds to be used, for any one emergency placement episode, for a period of time longer than 72 hours but less than 7 calendar days.</li> <li>• The Regional Administrator must grant a waiver in order to use emergency placement funds for a child for more 7 days. If the emergency placement continues beyond 7 days, then the Regional Administrator must grant another waiver to re-authorize the continued use of these funds every 7 days, providing a copy of this waiver form to his/her Assistant Commissioner. Under no circumstances may a child continue in emergency placement status for longer than 30 days.</li> </ul>

**DPA (Direct Purchase Authority)**

<b>Funding Source:</b>	<b>DPA (Direct Purchase Authority)</b>
	<b>Wraparound DPA</b>
<b>Goal of Child:</b>	Children with any goal may be served through this fund as long as there is no other fund available to the child.
<b>Purpose:</b>	To meet needs of custodial children and some children who are subjects of a CPS investigation and for which there is no other resource. This fund is ALWAYS used to purchase initial and emergency clothing outlays, extraordinary foster parent travel, and respite for DCS foster parents. Beyond these items, this fund may be accessed for other type of goods or services for which there is no other available funding.
<b>Examples of Proper Use of this Fund:</b>	<ul style="list-style-type: none"> <li>• Initial and emergency clothing outlays</li> <li>• Extraordinary foster parent travel. Extraordinary travel does not include normal, routine travel like taking a child to school, to a local medical visit, or to a local treatment provider. Extraordinary travel is excessive or exceptional travel like traveling 100 miles round trip for a medical visit.</li> <li>• Respite services for foster parents.</li> <li>• Other items for which there is no funding source such as interpreter services for a youth in a YDC or interpreter services needed in a child protective services investigation.</li> </ul>
<b>What you CANNOT use this money for</b>	Cannot use the funds for any other type of goods or services that could be paid through some other fund.
<b>Special Conditions that Must Be Met</b>	There is a \$1500 limit on any one purchase for a child.  Initial and Emergency clothing outlay may not exceed the amount stated in foster care

	policy without a waiver granted by the Regional Administrator or his/her designee.
<b>Who is responsible for final decisions?</b>	<p>The team leader may approve routine clothing purchases that do not exceed the stated limits, foster parent travel claims for extraordinary travel, and foster parent respite services.</p> <p>The Regional Administrator and his/her designee must provide a waiver for any purchase more than \$1500.</p>
	<b>Medical DPA Custodial and some Non-custodial Children and Families</b>
<b>Goal of Child:</b>	Children receiving these funds may have any goal. Some may be non-custodial.
<b>Purpose:</b>	<p>To meet medical needs of custodial children that cannot be covered by insurance or TennCare. With verification that TennCare and insurance will not pay, this fund is to be used for payment of bills related to a medical or DSM-IV-TR diagnosis.</p> <p>NOTE: Potential vendors need to be aware that DCS will reimburse them at a % of the Medicaid or Medicare rate. More clarification on this point in the training.</p>
<b>Examples of Proper Use of this Fund:</b>	<ul style="list-style-type: none"> <li>• Medical device or therapeutic appliance not covered by TennCare</li> <li>• Psychological evaluations for children or parents as part of a child protective services investigation</li> <li>• Psychological evaluations for custodial children when TennCare and the Psychological Services contract are not available.</li> <li>• Any necessary medical procedure that TennCare will not cover</li> <li>• Medications that are not on the approved TennCare list.</li> <li>• Reimburses foster parents who had to purchase a prescription or a medical service for a child in an unusual or emergency situation.</li> <li>• Physical exams for children involved in a Child Protective Services investigation.</li> <li>• Intensive medical treatment services that are delivered to a child with a medical diagnosis or a DSM-IV diagnosis, and for which there is no other funding source. This category pertains to children with a goal of adoption, permanent foster care, or emancipation.</li> </ul>
<b>What you CANNOT use this money for</b>	Cannot use this fund for items that TennCare or insurance covers, with the exception of forensic medical exams for child protective services investigations.
<b>Special Conditions that Must Be Met</b>	<p>There is a \$1,500 limit on any one purchase for a child.</p> <p>With the exception of CPS related exams, there must be justification for the inability of TennCare or other insurance to pay these costs.</p>
<b>Who is responsible for final decisions?</b>	<p>There must be prior approval by the Regional Administrator or his/her designee.</p> <p>No individual expenditure should exceed \$1,500 without a waiver granted by the Regional Administrator or his/her designee</p>

**PSYCHOLOGICAL SERVICES CONTRACT**

<b>Funding Source:</b>	<b>PSYCHOLOGICAL SERVICES CONTRACT</b> is a specific contract for providing services on a statewide basis.
<b>Goal of Child:</b>	Children receiving these services may have any goal.
<b>Purpose:</b>	To identify or meet treatment needs through the purchase of evaluation and treatment services for youth or parents for whom there is no other funding source available
<b>Examples of Proper Use of this Fund:</b>	<ul style="list-style-type: none"> <li>• Purchase of psychological evaluation for a youth in detention or other hardware secure facility (who would be non TennCare eligible)</li> <li>• Purchase a psychological evaluation for a custodial child or his/her parent when TennCare or insurance has denied payment of this service.</li> <li>• May purchase group or individual therapy for youth for whom there is no other funding source.</li> </ul>
<b>What you CANNOT use this money for</b>	To purchase psychological services that would be available through insurance or TennCare.
<b>Special Conditions that Must be Met</b>	None, other than there is no other available funding source
<b>Who is responsible for final decisions?</b>	Regional Administrator is responsible for administration of the contract. The case manager must obtain prior approval of the DCS gatekeeper to gain access to these services.
<b>How to Access:</b>	Each DCS Region has an allocation of these services. DCS in each region has a mechanism to gain access to these services. Ask your supervisor.

**NON CUSTODIAL FUNDS**

<b>Funding Source:</b>	<b>NON CUSTODIAL FUNDS</b> are allocated for the purpose of funding targeted purchased services and flexible needs. As a guide, it is not anticipated that flexible needs exceed 10% of the total non-custodial funds.
	Flexible Uses
<b>Purpose:</b>	Provide funds to pay for tangible goods and services that meet basic needs of families with NON-CUSTODIAL children.
<b>Objective:</b>	To empower families to care for children safely within their homes and communities.
<b>Examples of Proper Uses of this Fund</b>	<ul style="list-style-type: none"> <li>• Paying rent for a family</li> <li>• Paying utility bills</li> <li>• Pay for auto repair</li> <li>• Purchase a bed</li> </ul>
<b>Special Conditions that must be met</b>	The children must be NON-custodial. The funds may not be used to acquire equity in a property. The maximum amount of funding per child, per year, is \$3,000 unless certain exceptional circumstances exist.
<b>What you CANNOT use the money for</b>	You cannot use these funds to pay for goods and items for custodial children.

	<b>Targeted Purchased Services</b>
<b>Purpose:</b>	Provides intervention and treatment services to children who are at imminent risk of state custody due to risk of child abuse/neglect, behavioral/treatment needs of the child, or family problems.
<b>Objective:</b>	To maintain children safely in their homes and communities.
<b>Examples of Proper Use of Funds</b>	The funds may be used to purchase any of the following services for children or parents, where there is no other commonly known, available funding source including private insurance and TennCare coverage (see note below): <ul style="list-style-type: none"> <li>• Intensive family preservation</li> <li>• Homemaker services</li> <li>• Non medically necessary drug/alcohol services</li> <li>• Child Care/Sitter Services</li> <li>• Electronic Monitoring</li> <li>• Respite Services</li> <li>• Non-medically necessary counseling services</li> <li>• Youth Services</li> <li>• Specialized child and family evaluations related to child abuse and neglect</li> </ul>
<b>What you CANNOT use this money for</b>	You may not use these funds to purchase goods and services for children in state custody.  You may not use these funds to purchase medically necessary services for a TennCare eligible client unless TennCare or insurance have denied the provision of services and the appeal process has begun.
<b>Special Consideration</b>	These services must be provided to children and families as an effort to achieve a specific goal in a written plan.  Children and families receiving these services must also be served by a DCS case manager who monitors and documents the provision of the services by the vendor.  There is a spending limit of \$3,000 per child, per fiscal year.

**NEEDS ASSESSMENT I, II**

<b>Funding Source:</b>	<b>NEEDS ASSESSMENT I, II</b> are allocated to the DCS regional and statewide cost centers consistent with Needs Assessment Implementation Plans.
<b>Purpose:</b>	These funds shall purchase goods and services for custodial children and their families as identified within the Brian A. Settlement Agreement. The children will have an adjudication of dependent & neglected or unruly.
<b>Objective:</b>	To maintain children safely and to enhance their well-being through supporting families, stabilizing placements, and meeting children’s individual needs.
<b>Examples of Proper Use of Funds</b>	The purchases may include: <ul style="list-style-type: none"> <li>• Goods or services for the child or the family that would aid in the pursuit of permanency for the child,</li> <li>• Goods or services that would support the family in visiting the child and in participating in child and family team meetings,</li> <li>• Counseling, evaluation, or treatment that would not meet the criteria of medical necessity and would not be covered by TennCare (note: services may be purchased while the appeal process is being pursued),</li> <li>• Goods or services that would help to stabilize and maintain the child's</li> </ul>

	<p>placement, and</p> <ul style="list-style-type: none"> <li>• Goods or services that would enrich the child's life and promote the child's well-being.</li> </ul>
<b>What you CANNOT use this money for</b>	<p>You may not use these funds to purchase goods and services for children who are adjudicated delinquent and are presently being served as delinquent children in the DCS system.</p> <p>You may not use these funds to purchase goods and services for non-custodial children and their families.</p> <p>You may not use these funds to purchase medically necessary services for a TennCare eligible client unless TennCare or insurance have denied the provision of services and the appeal process has begun.</p>
<b>Special Consideration</b>	<p>There is a spending limit of \$3,000 per child, per fiscal year. There is a limit of \$1500 on any one purchase.</p>
<b>Who is responsible for final decisions?</b>	<p>The Regional Administrator may waive the spending limits in special circumstances.</p> <p>DCS Central Office is responsible for assuring that a procedure code exists to process claims for purchases made within these guidelines.</p>

**DEPARTMENT OF CHILDREN'S SERVICES –  
HEALTH UNIT STAFF (01/08)**

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REGION	HEALTH ADVOCACY REPRESENTATIVE	NURSE	PSYCHOLOGIST
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**IN(TE)RDEPENDENT LIVING STAFF**

Revised 01/08

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**Tennessee Department of Children's Services  
Education Consultants/Education Attorneys  
By Region**

Rev 01/08

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## SUMMARY OF THE BRIAN A. SETTLEMENT

### General Principles of the Agreement

- All children should have the opportunity to grow up in a safe and nurturing environment.
- The state should make reasonable efforts to avoid foster care placement.
- Family ties should be maintained and children should be placed with relatives when possible.
- Foster care is temporary and children should be placed in a permanent home as quickly as possible.
- All children in need of welfare services should receive full and equal access to the best available services.
- Children should be in the least restrictive, most family-like setting possible, within close proximity to the home from which they were removed.
- Placements should meet the children's needs, services should address the trauma of foster care and the family problems that resulted in the removal.
- Families should participate in planning and decision-making.
- All parties in judicial proceedings should be provided a fair hearing and their constitutional and other legal rights should be enforced and recognized.
- The state shall provide monetary resources and documentation of the implementation of the agreement.

### Definition of the Class of Children to Whom the Agreement Applies

- Includes all dependent and unruly children who are or will be in custody of the Department of Children's Services.
- Excludes delinquent youth in custody of the Department.

### Regional Services

- A full range of community-based services shall be available in each region, including intensive family services for reunification transition period, intensive home-based crisis intervention services to prevent foster care disruption, and adoptive family intensive home-based crisis intervention services to prevent disruption.
- An independent expert shall conduct a statewide needs assessment of resources and placements to determine the need for new or different placements and services and where those are to be located. The needs assessment shall be completed by November 1, 2001 and updated annually.
- DCS shall maintain a statewide, regional and local program for recruitment of foster and adoptive homes.

### Placement of Children

- Children shall be placed within a 75-mile radius of the home from which they are removed.
- Children shall not remain in emergency facilities for more than 30 days and shall not be placed in more than one shelter within any 12-month period.
- Children shall be placed in the least restrictive most home-like setting.
- Siblings shall be placed together. If a sibling group is separated at the initial placement, the case manager shall make immediate efforts to locate or recruit a family where they can be reunited.
- Children with the permanency goal of adoption shall be placed with a pre-adoptive family.

- Foster homes shall have a maximum three foster children and a maximum six total children. Sibling groups of six or more may be placed in the same foster home.
- Children under the age of six shall not be placed in a group home.
- Children shall not be placed in a residential treatment center or group setting with a capacity in excess of eight children.
- Children shall not be placed in a detention facility unless charged with a delinquent offense or ordered by court.
- Exceptions to the criteria for placements may be made for children with exceptional needs.
- Children of appropriate age shall have access to a full range of independent living services.
- A resource management unit shall train staff on placement issues.

#### Educational/Medical/Psychological Needs

- Children shall be placed in community schools and have access to appropriate education, including special education services.
- All “in house” schools shall be evaluated, including schools in group, residential, and institutional facilities to assure access to appropriate educational services.
- An education specialist and a lawyer specializing in representing children’s educational needs shall be assigned to each of the twelve regions.
- Children shall receive an assessment including a medical evaluation and, if indicated, a psychological evaluation prior to or within 30 days of placement in custody.
- A medical director shall be hired.

#### Face to Face Contact Between Case Managers and Children

- Children shall be visited by the case manager as frequently as necessary to assure the child’s adjustment to the placement, that services are being received, and to address needs that are not being met
- At initial or new placements, the case manager must have a minimum of six contacts in first eight weeks, with three visits at the child’s placement. During the next eight weeks, the case manager shall visit once every two weeks, and twice a month thereafter
- Private contract agency caseworkers are likewise required to visit children in their placements.

#### Planning for Children

- A family conferencing meeting shall occur within seven days of custody between the case manager, parent(s) or guardian(s) and the child, if twelve years old or older. The purpose of the meeting is to discuss the problems that necessitated custody, determine the appropriateness of the child’s placement, identify possible relative placements, set visitation between the child and parent, begin an assessment of needs of child and family, arrange a schedule of contacts between the parents and case manager and begin a diligent search for absent parent(s).
- A permanency plan staffing shall occur within fifteen days of custody. The staffing shall be attended by the case manager, team leader, private agency contract worker, parent(s) or guardian(s), the child, if twelve years old or older, foster parent(s), guardian ad litem, CASA and the parent’s attorney. All reasonable efforts shall be made to enable the parents and foster parents to attend, including scheduling the staffing at a convenient time and arranging for childcare and transportation. The purpose of the staffing is to discuss the problems that necessitated custody, identify changes and services needed for the parents for reunification to occur, determine the appropriateness of the child’s placement, schedule and determine the reasonable efforts needed to allow visitation between the child and parent, arrange a schedule

of contacts between the parents and case manager and begin a diligent search for absent parent(s).

- In addition to the required court reviews, foster care review board hearings and the permanency hearing, DCS shall review all permanency plans of children at 6, 12, 15, 21 and 24 months of custody. The plan shall be reviewed every 3 months when the child is in custody for 2 or more years. The review shall include the case manager, team leader, private agency contract worker, parent(s), foster parent(s) (unless their attendance would be inappropriate), the child if twelve years old or older, guardian ad litem, CASA and parent's attorney. All reviews shall be scheduled to facilitate attendance by parents and child and shall be offered to be rescheduled if inconvenient, or assistance offered for childcare and transportation.
- Children may have concurrent goals.
- Children with the goal of reunification after twelve and fifteen months must be reviewed, documentation must show compelling reasons why child cannot be returned home within specified and reasonable time period, and additional services required must be identified
- Children may have a goal of relative placement if the relative is willing to assume long-term responsibility, has legitimate reasons for not wanting to adopt and it is in the best interest of the child. There must be a long-term placement agreement signed by the relative and DCS.
- Children must be fifteen or older to have a goal of permanent foster care/planned permanent living arrangement. The reasonable efforts made to return the child home, place with a relative or placed for adoption must be documented in the record.
- Children must be sixteen years or older to have a goal of independent living. (Editors note: this is not a goal allowed under ASFA but is a skill that age-appropriate children should receive.)

#### Parent-Child and Sibling Visitation

- Children with a goal of reunification must have parent-child visits in homelike settings. Parent-child visits start immediately after the child has entered foster care and occur, at a minimum, every two weeks for no less than one hour.
- Siblings who are not placed together shall have sibling visitation in the parent's home, foster home or the most homelike setting available at a minimum of once a month for an hour or more.

#### Discharge Planning for Children Who Return Home or Placed with Relative

- A discharge staffing shall be held for all children who return home or are placed with a relative to determine services necessary to ensure the child's safety and stability. The staffing shall be attended by the case manager, team leader, private agency contract worker, parent(s) or relative assuming custody, foster parent(s) (unless their attendance would be inappropriate), the child if twelve years old or older, guardian ad litem, CASA and parent's attorney.
- A 90-day trial home visit shall be recommended to the court. The case manager shall visit the child three times the first 30 days and two times per month the remaining 60 days. The case manager shall contact service providers and visit the school at least once per month.
- A final discharge staffing, including the case manager, child and parent or relative, shall be held to determine the appropriateness of final discharge.

### The Goal of Adoption

- Adoption process of seeking and securing an adoptive home shall begin as soon as the child's goal becomes adoption. A process shall be developed for making legal risk placements.
- A petition to terminate parental rights shall be filed within 60 days of the goal being changed to adoption.
- Cases must be transferred to the adoption unit.
- Children who have not been placed for adoption within three months after being legally freed for adoption must be reviewed by a specialized adoption team.
- Children who have not been placed for adoption within six months of being legally freed for adoption shall be referred to a private agency with success in obtaining adoptive homes.

### Staff Qualifications and Caseload Caps

- A CM 1 shall have a maximum caseload of a fifteen children. A bachelor's degree is required and a Social Work degree is preferred.
- A CM 2 shall have a maximum caseload of twenty children. A CM2 must be promoted from a CM 1 or have one year of field experience.
- A CM 3 shall have a maximum caseload of twenty children. A CM3 must be promoted from a CM 2 or have two years of field experience.
- An adoption CM shall have a maximum caseload of twelve children.

### Staff Training

- Regional training units
- Comprehensive child welfare training and retraining with identical training for contract agencies

### Disparate Treatment of African American Children

- An independent expert shall conduct a statewide evaluation of the disparities in placement, services and treatment of African American children and their families.
- A report and recommendations have been issued.

### Technical Assistance Committee (TAC)

- Child welfare neutral experts who consult and advise DCS. See Brian A. Implementation Monitors below.

### Quality Assurance Unit

- Assess reports of abuse and neglect of children in foster care.
- Establish a statewide-computerized information system.
- Provide periodic reports on issues addressed in the agreement.
- Conduct specialized case record reviews

Outcome and Performance Measures

- Outcomes will be measured in three time periods over five years to determine compliance with performance indicators.
- The required outcome is a foster care system that protects each child and allows each child to achieve permanency as quickly as possible.

**Brian A. Implementation Monitors**

Updated 10/05

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**INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN ACT (ICPC)****REGULATION NUMBER 7  
OUT OF STATE PLACEMENT OF CHILDREN**

When a court decides that priority placement of a child from one state into another state is necessary it must make the finding in a court order. A court may be requested to make this finding, it may initiate the motion itself, or it may give court approval to an existing finding. The order should include the name, address, telephone number, and, if available the FAX number of the judge and the court.

A court order stating that a child is entitled to a priority placement is not valid unless it contains an express finding that one or more of the following circumstances apply to the particular case and explains the facts on which it bases its finding:

- The person with whom a child is to be placed is a relative<sup>1</sup> belonging to the class of persons who, according to Article VIII (a) of the Interstate Compact on the Placement of Children, can receive a child from a person belonging to such a class without complying with the Interstate Compact on the Placement of Children and the child is either:
  - under two years of age;
  - in an emergency shelter; or
  - has spent a substantial amount of time in the home of a proposed placement recipient.
- The Compact Administrator in the receiving state has had a properly completed Interstate Compact Application Request to Place a Child (ICPC-100A) and the supporting documentation for 30 business days but the sending agency has not received a notice pursuant to Article III (d) of the Interstate Compact on the Placement of Children determining whether the child may or may not be placed.

**Procedures and time lines:**

The following are procedures and time lines for priority placements:

- Within two (2) business days, the court sends its order for priority placement to the county DCS.
- Within three (3) business days, DCS, at the court's request, transmits to the Tennessee's Compact Administrator, two documents. These include a signed court order and a completed form: Interstate Compact Request Application for the Placement of Children (ICPC-100A) and supporting documentation pursuant to Article III of the Interstate Compact for the Placement of Children.
- In no more than two (2) business days upon receiving the above information, Tennessee's Compact Administrator transmits to the Compact Administrator in the receiving state the priority request and its accompanying documentation. He or she must include a notice that the

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<sup>1</sup> Relative is defined as parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or his guardian. ICPC Article VIII(a)

request for placement must have priority processing. The Compact Administrator who sends the information shall transmit it by overnight mail together with a cover notice calling attention to the priority status of the request. ·

- In no more than 20 business days from the time that the Compact Administrator received the priority request by overnight mail, he or she should make a determination pursuant to Article III (d) of the Interstate Compact for the Placement of Children. He or she should immediately send by FAX to the Compact Administrator in the Tennessee the completed form titled: Interstate Compact Application Request to Place a Child (ICPC-100A.)
- If the Compact Administrator in the receiving state fails to complete the above action within the 20-day time period, the receiving state shall be deemed out of compliance with the Interstate Compact on the Placement of Children. In such a case, the Tennessee court that made the priority order may inform an appropriate court in the receiving state of the non-compliance, provide it with relevant documentation, and request its assistance. The court whose assistance has been requested, shall render such assistance within its jurisdiction and authority. This may include making appropriate orders for the purpose of complying with this Regulation and the Interstate Compact on the Placement of Children.

The foregoing does not apply if:

- 1) Within two (2) business days of receiving the Interstate Compact Request Application for the Placement of Children, the Compact Administrator in the receiving state decides that the documentation that he or she requested is substantially insufficient, specifies that additional information is needed and requests the additional information from DCS. He or she shall request the information by FAX or telephone when FAX is not available. ·
  - 2) Within two (2) business days of receiving the priority placement request, the Compact Administrator decides that the information is insufficient and notifies the Compact Administrator in Tennessee that more information is needed. Such a notice shall explain in detail what further information is needed. In such situations, the 20 business day period that the Compact Administrator has to complete an action shall be calculated from the date the Compact Administrator in the receiving state obtained the requested information.
  - 3) In cases where the court is not the sending agency, the sending agency is responsible to keep the state court that issued the priority order informed of the status of the priority request.
- Time periods in this regulation may be modified with a written agreement between the Tennessee court that made the priority order, DCS, and the Compact Administrators from Tennessee and receiving states. Any such modifications shall apply only to the single case to which it is addressed.
  - To meet its obligations under the Interstate Compact on the Placement of Children, a state and its local agencies should act as quickly and give as much attention to hardship cases between different states as hardship cases within their own state. If, in so doing, a Compact Administrator finds that extraordinary circumstances make it impossible for the state and its

local agencies to comply with the time requirements set forth in this regulation, the state may be excused from strict compliance. However, the Compact Administrator in the receiving state shall, within two (2) business days of determining the state's inability to comply, notify by FAX the Compact Administrator in the sending state of its inability to comply and set forth the date on or before which it will complete action. The notice shall contain a full identification and explanation of the extraordinary circumstances that are delaying compliance.

- Unless otherwise required or allowed by this regulation, all transmittals of documents or other written documents shall be by overnight express mail carrier services. Words and phrases used in this regulation have the same meanings as those ascribed to them in the Interstate Compact on the Placement of Children.

## **POWER OF ATTORNEY FOR CARE OF A MINOR CHILD ACT**

**By: Susan L. Brooks, Professor, Vanderbilt University School of Law**

Tennessee has a new law of great interest to families facing temporary hardships. It is called the “Power of Attorney for Care of a Minor Child Act, “ and was signed by Governor Bredesen on April 28, 2003. Currently, it can be found at Public Chapter 71, and it will be codified as §34-6-301 et seq.

The law came about, in part, as a direct result of the Statewide Kinship Summit, which was held in November of 2001. Over 100 grandparents raising grandchildren and other relative caregivers, state agency personnel, legislators, judicial officers, attorneys, along with other concerned citizens met over two days. A priority identified at the summit was the need to establish authority for relative caregivers to enroll a child in school or to obtain medical attention without having to file a petition in court in situations in which the family has agreed for the relative to care for the child.

Very often, a parent will agree to place a child temporarily with a relative on a short-term basis, for medical or other hardship-related reasons. Prior to this law, even if everyone in the family was in agreement as to the temporary placement of the child with the relative, that relative would have had to go to a court and file a petition for custody, simply to be able to enroll the child in school or to obtain medical treatment for the child. Such “lawsuits” created unnecessary stress within otherwise harmonious families. Family members essentially had to sue each other in order to obtain the legal documentation that was required to demonstrate they had authority simply to enroll the child in school or obtain medical attention for the child. Having to resort to this sort of drastic, adversarial action is costly (financially and otherwise), and also does not make sense when all family members are in agreement regarding the temporary arrangement.

These types of matters also placed a considerable strain on courts that were already dealing with too many cases and too little resources. Courts previously were forced to schedule judicial time and to administer the paper work necessary to process these cases. Using the courts’ precious resources and docket time in this manner was costly and inefficient from their standpoint as well.

In the end, the law was a product not only of the efforts of kinship care advocates, but also of a unique level of collaboration and cooperation by the Department of Education, the School Board Association, the Tennessee Secondary School Athletic Association, and the Department of Children’s Services. Additional support was provided by the AARP, the Administrative Office of the Courts, the Tennessee Council of Juvenile and Family Court Judges, and the Tennessee Bar Association. Moreover, excellent leadership was provided by the law’s legislative sponsors, both of whom happen to be lawyers: Representative Joe Fowlkes, and Senator Larry Trail.

As enacted, the new law includes, but is not limited to family members. Parents can transfer the temporary power of attorney to any adult, as long as all the adults involved with the child are in agreement.

The power of attorney can be executed using a simple form that is available at all offices of the Department of Children’s Services. It will also soon be available on the web site of the AARP in Tennessee ([www.aarp.org](http://www.aarp.org)). A Spanish language version of the form and the revocation form is also available.

Nevertheless, it should be understood that transferring the power of attorney for these limited purposes does not in any way confer custody on the relative caregiver. Parties seeking legal custody still need to go through the court process. The availability of the Power of Attorney also does not change any existing

laws regarding the reporting or investigation of alleged child abuse and neglect, or the need to file petitions for custody under certain circumstances.

Numerous states have enacted similar legislation, involving medical and/or educational consent. They include: Arkansas, Mississippi, Missouri, Florida, Virginia, Louisiana, Oklahoma, and North Carolina.

This legislation will be useful, for example, if a single parent becomes acutely ill or is involved in a car accident and needs a period of hospitalization or rehabilitation, and a relative or close family friend agrees to care for her child during that period of time. The parties can create a Power of Attorney to allow that relative or friend to enroll the child in school or obtain medical care for the child without having to file a court action. Another instance would be if a parent who has 'primary custody' needs to undergo substance abuse or mental health treatment and, again, a family member or other trusted adult agrees to step forward and care for their child during that time. The parties can capture their agreement on the Power of Attorney form rather than having to go to court, which, in addition to the significant drawbacks mentioned above, often results in a time lag, during which the child misses out on his or her education.

From the school officials' standpoint, this legislation is very useful in clarifying that they can look to the caregiver to sign the child's report card, give permission for field trips and extra-curricular activities, or to act as a surrogate parent for purposes of the special education program, once they receive a properly executed Power of Attorney form. As long as school or medical personnel act in good faith in honoring the executed form, they are also shielded from liability. On the other hand, if parents or caregivers enter into this agreement for improper purposes or provide false information, the law provides legal remedies for school officials. They can recoup the 'per pupil expenditure' for the child in question, along with any fees or cost associated with having to pursue this remedy.

In sum, by allowing family members to use the "Power of Attorney" vehicle in these consensual situations, harmonious families can now solve their own short-term difficulties and children can obtain necessary medical and educational services without unduly burdening families or the courts. With the passage of this law, Tennessee has now firmly established its status as a national leader in providing informal alternatives to support extended families that are trying to act responsibly to make arrangements on their own to care for otherwise vulnerable children.

(See PART IV: FORMS, below for the Power of Attorney forms.)

# PART IV: SAMPLE FORMS

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IN THE JUVENILE COURT FOR \_\_\_\_\_ COUNTY, TENNESSEE

STATE OF TENNESSEE	)	CHILD/CHILDREN UNDER
	)	THE AGE OF EIGHTEEN
IN THE MATTER OF	)	
	)	
_____	)	DOCKET NO. _____

**ORDER APPOINTING COUNSEL FOR INDIGENT PARTY IN DEPENDENCY OR TERMINATION OF PARENTAL RIGHTS PROCEEDING**

It appears to the Court from the affidavit of indigency filed in this matter that the respondent, \_\_\_\_\_, is entitled to court-appointed counsel pursuant to Tenn. Sup. Ct. Rule 13, Sec. 1(d)(2).

It is therefore ordered that \_\_\_\_\_ is appointed as counsel for this respondent and is entitled to compensation at the hourly rate and subject to the maximum compensation set forth in Tenn. Sup. Ct. Rule 13, Sec. 2(d) and (e).

Appointed counsel shall represent the respondent in the following matters, unless relieved of this appointment by this court in a subsequent order:

- \_\_\_\_\_ from the filing of the dependency petition through disposition; and in post disposition, foster care review and permanency proceedings;
- \_\_\_\_\_ from the filing of the termination of parental rights petition to conclusion of trial;
- \_\_\_\_\_ on appeal to circuit court, Tennessee Court of Appeals and/or Tennessee Supreme Court.

For purposes of compensation pursuant to Rule 13, each of the above is considered a separate proceeding. Counsel is entitled to submit separate claim forms for each proceeding and to be compensated up to the maximum amount allowed for each case as if it were the result of a separate appointment. Claims must be supported with a copy of the court order appointing counsel. Counsel is entitled to payment of expenses incident to appointed counsel's representation. Counsel is entitled to payment of specific expenses without prior approval as defined in Tenn. Sup. Ct. Rule 13, Sec. 4(e)(3). All other expenses must receive prior approval of this court and the director of the Administrative Office of the Courts in accordance with Tenn. Sup. Ct. Rule 13, Sec. 4(b).

Enter this the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
JUDGE/REFEREE

**IN THE JUVENILE COURT FOR \_\_\_\_\_ COUNTY, TENNESSEE**

<b>STATE OF TENNESSEE</b>	)	<b>CHILD/CHILDREN UNDER</b>
	)	<b>THE AGE OF EIGHTEEN</b>
<b>IN THE MATTER OF</b>	)	
	)	
_____	)	<b>DOCKET NO. _____</b>

**ORDER APPOINTING GUARDIAN AD LITEM AND ALLOWING DISCOVERY**

It appears to the Court that this matter involves a petition alleging dependency or termination of parental rights and that the appointment of a guardian ad litem for the above-named child(ren) is required, pursuant to T.C.A. § 37-1-149.

It is therefore ordered that \_\_\_\_\_ is hereby appointed as guardian ad litem for the above-named child(ren).

The guardian ad litem shall represent the child(ren) in the following matters, unless relieved of this appointment by this court in a subsequent order:

- \_\_\_\_\_ from the filing of the dependency petition through disposition; and in post disposition, foster care review and permanency proceedings;
- \_\_\_\_\_ from the filing of the termination of parental rights petition to conclusion of trial;
- \_\_\_\_\_ on appeal to circuit court, Tennessee Court of Appeals and/or Tennessee Supreme Court.

For purposes of compensation pursuant to Rule 13, each of the above is considered a separate proceeding. Counsel is entitled to submit separate claim forms for each proceeding and to be compensated up to the maximum amount allowed for each case as if it were the result of a separate appointment. Claims must be supported with a copy of the court order appointing counsel. Counsel is entitled to payment of expenses incident to appointed counsel's representation. Counsel is entitled to payment of specific expenses without prior approval as defined in Tenn. Sup. Ct. Rule 13, Sec. 4(e)(3). All other expenses must receive prior approval of this court and the director of the Administrative Office of the Courts in accordance with Tenn. Sup. Ct. Rule 13, Sec. 4(b).

It is further ordered that, for the purpose of preparing for the adjudication of matters pending before the Court, the guardian ad litem shall have access to all documents and records pertaining to the child(ren), including, but not limited to, all records of the Department of Children's Services and any other medical, health care, educational and/or psychological/psychiatric records. The guardian ad litem is further authorized to interview any individuals having contact with or providing services to the child(ren). Work products of the office of the District Attorney, counsel for the Tennessee Department of Children's Services or the police department and the identity of persons making reports/complaints to the Tennessee Department of Children's Services are excluded from this order for discovery.

Enter this the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
JUDGE/REFEREE

**UNIFORM AFFIDAVIT OF INDIGENCY**

**PART I**

- 1. Full Name: \_\_\_\_\_
- 2. Social Security No.: \_\_\_\_\_
- 3. Any other names ever used \_\_\_\_\_
- 4. Address: \_\_\_\_\_
- 5. Telephone Nos.: (Home) \_\_\_\_\_ (Work) \_\_\_\_\_ (Other) \_\_\_\_\_
- 6. Are you working anywhere? Yes ( ) No ( ) Where? \_\_\_\_\_
- 7. How much do you make? \_\_\_\_\_ (weekly, monthly, etc.)
- 8. Birthdate: \_\_\_\_\_
- 9. Do you receive any governmental assistance or pensions (disability, SSI, AFDC, etc.)?  
Yes ( ) No ( ) What is its value? \_\_\_\_\_ (weekly, monthly, etc.)
- 10. Do you own any property (house, car, bank acct., etc.):  
Yes ( ) No ( ) What is its value? \_\_\_\_\_
- 11. Are you, or your family, going to be able to post your bond? Yes ( ) No ( )
- 12. Are you, or your family, going to hire a private attorney? Yes ( ) No ( )
- 13. Are you now in custody? Yes ( ) No ( ) If so, how long have you been in custody? \_\_\_\_\_  
(If the defendant is in custody, unable to make bond and the answers to questions one (1) through eleven (11) make it clear that the defendant has no resources to hire a private attorney, skip Part II and complete Part III. If Part II is to be completed, do not list items already listed in Part I.)

**PART II**

- 14. Names & ages of all dependents:  
\_\_\_\_\_ relationship \_\_\_\_\_  
\_\_\_\_\_ relationship \_\_\_\_\_  
\_\_\_\_\_ relationship \_\_\_\_\_
- 15. I have met with following lawyer(s), have attempted to hire said lawyer(s) to represent me, and have been unable to do so:  
Name \_\_\_\_\_  
Address \_\_\_\_\_
- 16. All my income from all sources (including, but not limited to wages, interest, gifts, AFDC, SSI, social security, retirement, disability, pension, unemployment, alimony, worker's compensation, etc.):  
\$ \_\_\_\_\_ per \_\_\_\_\_ from \_\_\_\_\_  
\$ \_\_\_\_\_ per \_\_\_\_\_ from \_\_\_\_\_  
\$ \_\_\_\_\_ per \_\_\_\_\_ from \_\_\_\_\_
- 17. All money available to me from any source:  
A. Cash \_\_\_\_\_  
B. Checking, Saving, or CD Account(s)-give bank, acct. no., balance \_\_\_\_\_

C. Debts owed me \_\_\_\_\_

D. Credit Card(s)-give acct. no., balance, credit limit, and type (Visa, Mastercard, American Express, etc.)

\_\_\_\_\_  
E. Other \_\_\_\_\_

18. All vehicles/vessels owned by me, solely or jointly, within the last six months (including but not limited to cars, trucks, motorcycles, farm equip., boats etc.):

\_\_\_\_\_ value \$ \_\_\_\_\_ amt. owed \_\_\_\_\_  
\_\_\_\_\_ value \$ \_\_\_\_\_ amt. owed \_\_\_\_\_  
\_\_\_\_\_ value \$ \_\_\_\_\_ amt. owed \_\_\_\_\_

19. All real estate owned by me, solely or jointly, within the last six months (including land, lots, houses, mobile homes, etc.):

\_\_\_\_\_ value \$ \_\_\_\_\_ amt. owed \_\_\_\_\_  
\_\_\_\_\_ value \$ \_\_\_\_\_ amt. owed \_\_\_\_\_

20. All assets or property not already listed owned within the last six months or expected in the future:

\_\_\_\_\_ value \$ \_\_\_\_\_ amt. owed \_\_\_\_\_  
\_\_\_\_\_ value \$ \_\_\_\_\_ amt. owed \_\_\_\_\_

21. The last income tax return I filed was for the year \_\_\_\_ and it reflected a net income of \$ \_\_\_\_\_. I will file a copy of same within one week if required.

22. I am out of jail on bond of \$ \_\_\_\_\_ made by \_\_\_\_\_.  
The money to make bond, \$ \_\_\_\_\_ was paid by \_\_\_\_\_.

**PART III**

23. Acknowledging that I am still under oath, I certify that I have listed in Parts I and II all assets in which I hold or expect to hold any legal or equitable interest.

24. I am financially unable to obtain the assistance of a lawyer and request the court to appoint a lawyer for me.

25. I understand that it is a Class A misdemeanor for which I can be sentenced to jail for up to 11 months 29days or be fined up to \$2500.00 or both if I intentionally or knowingly misrepresent, falsify, or withhold any information required in this affidavit. I also understand that I may be required by the Court to produce other information in support of my request for an attorney.

This \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

Defendant \_\_\_\_\_

Sworn to and Subscribed before me this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Clerk

\_\_\_\_\_  
Judge

IN THE JUVENILE COURT FOR \_\_\_\_\_ COUNTY, TENNESSEE

STATE OF TENNESSEE	)	CHILD/CHILDREN UNDER
	)	THE AGE OF EIGHTEEN
IN THE MATTER OF	)	
	)	
_____	)	DOCKET NO: _____

**ORDER AUTHORIZING REIMBURSEMENT OF COSTS OF TRIAL TRANSCRIPT\***

This cause came on to be heard on the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, before the Honorable \_\_\_\_\_, Judge/Referee of the Juvenile Court for \_\_\_\_\_ County, Tennessee, upon the Motion For Reimbursement of Costs of Trial Transcript filed by \_\_\_\_\_.

Upon statements of counsel and the entire record, the Court FINDS that the Respondent was indigent at the trial of this (*child dependency/termination of parental rights proceeding*), continues to be indigent and shall proceed as such on appeal to the Court of Appeals. Further, the Court FINDS that the trial transcript is necessary to the effective representation of the respondent. Therefore, reimbursement for the costs of the trial transcript shall be authorized, pursuant to Tenn. Sup. Ct. Rule 13, Sec. 4.

It is therefore ORDERED, ADJUDGED and DECREED that the costs of the transcript of the trial of this matter heard on \_\_\_\_\_ shall be reimbursed by the Administrative Office of the Courts, pursuant to Tenn. Sup. Ct. Rule 13, Sec. 4. The estimated cost of the transcript is \$\_\_\_\_\_. Should the cost exceed this amount, counsel shall file another motion with the court requesting payment of the amount over and above the estimated cost. (*Name*) \_\_\_\_\_, court reporter shall be reimbursed at the rate of \$3.00 per page for the original and 1 copy as a set and \$.25 per page for each additional copy.

It is further ORDERED that counsel for the Respondent shall forward this order immediately for approval to the Administrative Office of the Courts, Nashville City Center, Suite 600, 511 Union Street, Nashville, TN 37243 (facsimile 615-532-9481); Attention: Indigent Defense

Enter this the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
JUDGE/REFEREE

\* A motion and order are not necessary in appeals of termination of parental rights cases involving the Department of Children’s Services. See Tenn. Sup. Ct. Rule 13, Sec. 4(c).

IN THE JUVENILE COURT FOR \_\_\_\_\_ COUNTY, TENNESSEE

STATE OF TENNESSEE

)

CHILD/CHILDREN UNDER  
THE AGE OF EIGHTEEN

IN THE MATTER OF

)

)

)

)

\_\_\_\_\_

DOCKET NO: \_\_\_\_\_

**ORDER DECLARING CASE COMPLEX AND/OR EXTENDED**

This cause came on to be heard the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, before the Honorable \_\_\_\_\_, Judge of the Juvenile Court for \_\_\_\_\_ County, Tennessee, upon the Motion to Determine Case Complex and/or Extended, filed by the court-appointed {guardian ad litem for the child(ren); counsel for mother or father of the minor child(ren); or attorney for the child(ren) appointed pursuant to Tenn. Sup. Ct. Rule 40}.

Upon statements of counsel and the entire record, the Court FINDS that this matter is complex and/or extended pursuant to Tenn. Sup. Ct. Rule 13, Sec. 2(e).

It is therefore ORDERED, ADJUDGED AND DECREED that this matter is complex and/or extended pursuant to Supreme Court Rule 13, Sec. 2(e). [List ALL the reasons why the representation is extended and/or complex as listed in the motion.

Enter this the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
JUDGE

IN THE JUVENILE COURT OF \_\_\_\_\_ COUNTY, TENNESSEE

STATE OF TENNESSEE )
) CHILD/CHILDREN UNDER
) THE AGE OF EIGHTEEN
IN THE MATTER OF )
)
)
) DOCKET NO: \_\_\_\_\_

PROTECTIVE CUSTODY ORDER

It appears to the Court from:

[ ] the sworn allegations of the petition filed by \_\_\_\_\_ in the this matter.

[ ] the sworn statements of \_\_\_\_\_ that there is probable cause to believe that the above-named child(ren), is/are a dependent and neglected child(ren) within the meaning of the law, that the child(ren) is/are subject to an immediate threat to the child(ren)'s health and safety to the extent that delay for a hearing would be likely to result in severe or irreparable harm, and there is no less drastic alternative to removal available which could reasonably and adequately protect the child(ren)'s health and safety pending a preliminary hearing; that it is contrary to the child(ren)'s welfare at this time to remain in the care, custody, or control of the parents/caretakers/custodians, because of the following (provide specific facts for each child): \_\_\_\_\_

The Court further finds that :

[ ] Reasonable efforts have been made and services have been rendered to prevent or eliminate the removal of said child(ren) from his/her/their home, including (if different services were provided for different children, specify below):

- [ ] Mental health counseling for child/children
[ ] Drug & alcohol counseling for child/children
[ ] Parenting classes
[ ] Community Intervention Services (CIS)
[ ] Structured After-School/Summer Activities
[ ] Day Treatment for \_\_\_\_\_
[ ] Non-Custodial Assessment
[ ] Intensive in-home case management
[ ] Sexual perpetrator treatment for \_\_\_\_\_
[ ] Residential Treatment for \_\_\_\_\_
[ ] Locating absent parent(s)
[ ] Other (specify) \_\_\_\_\_
(Detailed information)\_\_\_\_\_
[ ] Mental health counseling for parent
[ ] Drug & alcohol counseling for parent
[ ] Psychological evaluation for \_\_\_\_\_
[ ] Family Crisis Intervention
[ ] Probation/Aftercare
[ ] Intensive Case Management
[ ] Home Ties
[ ] Sexual abuse treatment for child
[ ] Homemaker services
[ ] Locating relatives
[ ] Respite Care

[ ] It was reasonable to make no efforts to maintain the child(ren) in the home based on an assessment of the family and the child(ren)'s circumstances that include: \_\_\_\_\_

- Reasonable efforts to prevent removal were not required because:
  - this court or another court of competent jurisdiction has previously determined that the parent has subjected the child(ren) to aggravated circumstances as defined in T.C.A. §36-1-102(9);
  - the parent has been convicted in a criminal court of one of the felony crimes against a child specified in T.C.A. §37-1-166(g)(4)(B); or
  - the parental rights of the parent to a sibling or half-sibling have been terminated involuntarily.
- The Department of Children’s Services failed to provide reasonable efforts to prevent the child(ren)’s removal from the home.

The Court further finds that it is in the best interest of the child(ren) and the public as follows, and

**IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED:**

1. The child(ren) \_\_\_\_\_ is/are hereby brought into the protective custody of this Court.
2. Temporary care and custody of the child(ren) \_\_\_\_\_ is/are placed with the State of Tennessee, Department of Children’s Services with authority to provide any appropriate plans for the care of said child(ren) and to consent to any necessary medical, surgical, hospital, educational, institutional, psychiatric, or psychological care pending further determination of the child(ren)’s custodial status by the Court.
3. The preliminary hearing in this cause is set for \_\_\_\_\_.
4. That \_\_\_\_\_ shall be appointed as guardian ad litem for the child(ren).
5. That \_\_\_\_\_ is appointed to represent the mother.
6. That \_\_\_\_\_ is appointed to represent the father.
7. It is further ordered \_\_\_\_\_
8. All state, county, or local agencies and any public or private medical or mental health treatment resources with information on records relevant to the child(ren)’s situation shall release such information or records as are necessary for the management of this case to the legal custodian named above and to any authorized representatives of the case management team of a community health agency, which is providing coordination of care and services with the legal custodian named above.

**ENTERED** this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
JUDGE/REFEREE

IN THE JUVENILE COURT OF \_\_\_\_\_ COUNTY, TENNESSEE

IN THE MATTER OF: \_\_\_\_\_ )
DOB: \_\_\_\_\_ ) NO: \_\_\_\_\_
DOB: \_\_\_\_\_ )
Child(ren) Under Eighteen (18) Years of Age )

BENCH ORDER - CUSTODY TO DCS

This cause came to be heard on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before the Honorable
\_\_\_\_\_, Judge of the Juvenile Court of \_\_\_\_\_ County, Tennessee, upon \_\_\_\_\_
filed by \_\_\_\_\_

- Present for the hearing were: [ ] the child(ren) \_\_\_\_\_
[ ] mother, \_\_\_\_\_ [ ] father, \_\_\_\_\_
[ ] attorney/guardian ad litem for chil(dren), \_\_\_\_\_
[ ] attorney(s) for parent(s), \_\_\_\_\_
[ ] other participant(s), \_\_\_\_\_

The Court, having considered the testimony and evidence presented and the entire record, finds as follows:

- [ ] there is probable cause to believe the child(ren) is/are dependent, neglected or abused in that
\_\_\_\_\_
[ ] there is clear and convincing evidence that the child(ren) is/are dependent and neglected in that
\_\_\_\_\_
[ ] there is clear and convincing evidence that the child is unruly and in need of treatment and rehabilitation
in that \_\_\_\_\_
[ ] This matter was referred to the juvenile-family crisis intervention program and it has been
certified that no other less drastic measure other than court intervention exists, pursuant to T.C.A.
§ 37-1-132(b)(2).
[ ] there is proof beyond a reasonable doubt that the child is delinquent and in need of treatment and
rehabilitation in that \_\_\_\_\_

The Court finds the continuation of the child(ren) in the home is contrary to the welfare of the child(ren), is not
in the child's best interest, and there is no less drastic alternative to removal based on the following facts:

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

The Court finds:

Reasonable efforts were made to prevent the child(ren)'s removal from the home, which include:

- |   |  |
|---|--|
| <input type="checkbox"/> Mental health counseling for child/children  | <input type="checkbox"/> Mental health counseling for parent       |
| <input type="checkbox"/> Drug & alcohol counseling for child/children | <input type="checkbox"/> Drug & alcohol counseling for parent      |
| <input type="checkbox"/> Parenting classes                            | <input type="checkbox"/> Psychological evaluation for _____        |
| <input type="checkbox"/> Community Intervention Services (CIS)        | <input type="checkbox"/> Family Crisis Intervention                |
| <input type="checkbox"/> Tutoring or Special Education Services       | <input type="checkbox"/> Victim Offender Services, i.e. VORP       |
| <input type="checkbox"/> Mentoring Services                           | <input type="checkbox"/> Structured After-School/Summer Activities |
| <input type="checkbox"/> Restitution                                  | <input type="checkbox"/> Community Service Work                    |
| <input type="checkbox"/> Day Treatment for _____                      | <input type="checkbox"/> Probation/Aftercare                       |
| <input type="checkbox"/> Intensive Probation                          | <input type="checkbox"/> Intensive Case Management                 |
| <input type="checkbox"/> Non-Custodial Assessment                     | <input type="checkbox"/> Home Ties                                 |
| <input type="checkbox"/> Intensive in-home case management            | <input type="checkbox"/> Sexual abuse treatment for child          |
| <input type="checkbox"/> Sexual perpetrator treatment for _____       | <input type="checkbox"/> Homemaker services                        |
| <input type="checkbox"/> Residential Treatment for _____              | <input type="checkbox"/> Locating relatives                        |
| <input type="checkbox"/> Locating absent parent(s)                    | <input type="checkbox"/> Other (specify)                           |

(Detailed information)

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

It was reasonable to make no efforts to maintain the child(ren) in the home based on an assessment of the family and the child(ren)'s circumstances that include: \_\_\_\_\_

Reasonable efforts to prevent removal were not required because:

this court or another court of competent jurisdiction has previously determined that the parent has subjected the child(ren) to aggravated circumstances as defined in T.C.A. §36-1-102(9);

the parent has been convicted in a criminal court of one of the felony crimes against a child specified in T.C.A. §37-1-166(g)(4)(B); or

the parental rights of the parent to a sibling or half-sibling have been terminated involuntarily.

The Department of Children's Services failed to provide reasonable efforts to prevent the child(ren)'s removal from the home.

It appearing to the Court that the following is the best interest of the child(ren) and the public.

**IT IS THEREFORE ORDERED:**

1. That temporary custody of the child(ren) \_\_\_\_\_ is hereby awarded to the State of Tennessee, Department of Children's Services, with the authority to consent to any ordinary or necessary medical, surgical, hospital, psychological, psychiatric, institutional or education care.

2. That all state, county, or local agencies with information or records relevant to the child(ren)'s situation, including any public or private medical or mental health treatment resources and all educational facilities, shall release such information or records as are necessary for the management of this case to the Department of Children's Services and to any authorized representatives of the case management team of a community services agency under T.C.A. 37-5-301 et seq. which is providing coordination of care and services with the Department of Children's Services.

3. This matter is set for \_\_\_\_\_ hearing on \_\_\_\_\_

4. \_\_\_\_\_

**ENTERED** this the \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_

\_\_\_\_\_  
Judge/Referee

IN THE JUVENILE COURT OF \_\_\_\_\_ COUNTY, TENNESSEE

IN THE MATTER OF: \_\_\_\_\_ )  
 \_\_\_\_\_ )  
 \_\_\_\_\_ DOB \_\_\_\_\_ ) NO: \_\_\_\_\_ )  
 \_\_\_\_\_ )  
 \_\_\_\_\_ DOB \_\_\_\_\_ ) NO: \_\_\_\_\_ )  
 \_\_\_\_\_ )  
 \_\_\_\_\_ DOB \_\_\_\_\_ ) NO: \_\_\_\_\_ )  
 Child(ren) Under Eighteen (18) Years of Age )

ADJUDICATORY/DISPOSITIONAL ORDER

This cause came on to be heard on the \_day of \_\_\_\_\_, 2\_\_\_\_\_, before the Honorable \_\_\_\_\_,  
 Judge of the Juvenile Court of \_\_\_\_\_ County, Tennessee, upon \_\_\_\_\_ filed by  
 \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

Present for the hearing were:

- the mother, \_\_\_\_\_  
 had notice and failed to appear     did not have notice     whereabouts unknown
- the father, \_\_\_\_\_  
 had notice and failed to appear     did not have notice     whereabouts unknown
- the child/children, \_\_\_\_\_
- guardian ad litem, \_\_\_\_\_
- attorney(s) for the parent(s), \_\_\_\_\_
- foster parent(s), \_\_\_\_\_
- other participant(s), \_\_\_\_\_

and representatives of the State of Tennessee, Department of Children's Services, \_\_\_\_\_

Upon the proof introduced at the hearing with all necessary parties properly before the Court either in person or by service of process; and the entire record, the Court finds by clear and convincing evidence that the child(ren) is/are dependent and neglected as follows (*specific findings of fact*): \_\_\_\_\_

The Court further finds that it is contrary to the child(ren)'s welfare to remain in the home and is in the child's best interest to be removed from the care, custody, or control of his/her \_\_\_\_\_ because:

and, there is no less drastic alternative to removal.

Reasonable efforts have been made and services have been rendered to prevent or eliminate the removal of said child(ren) from his/her/their home, including (if different services were provided for different children, specify below):

- |   |   |
|---|---|
| <input type="checkbox"/> Mental health counseling for child/children  | <input type="checkbox"/> Mental health counseling for parent  |
| <input type="checkbox"/> Drug & alcohol counseling for child/children | <input type="checkbox"/> Drug & alcohol counseling for parent |
| <input type="checkbox"/> Parenting classes                            | <input type="checkbox"/> Psychological evaluation for _____   |
| <input type="checkbox"/> Community Intervention Services (CIS)        | <input type="checkbox"/> Family Crisis Intervention           |
| <input type="checkbox"/> Structured After-School/Summer Activities    | <input type="checkbox"/> Probation/Aftercare                  |
| <input type="checkbox"/> Day Treatment for _____                      | <input type="checkbox"/> Intensive Case Management            |
| <input type="checkbox"/> Non-Custodial Assessment                     | <input type="checkbox"/> Home Ties                            |
| <input type="checkbox"/> Intensive in-home case management            | <input type="checkbox"/> Sexual abuse treatment for child     |
| <input type="checkbox"/> Sexual perpetrator treatment for _____       | <input type="checkbox"/> Homemaker services                   |
| <input type="checkbox"/> Residential Treatment for _____              | <input type="checkbox"/> Locating relatives                   |
| <input type="checkbox"/> Locating absent parent(s)                    | <input type="checkbox"/> Respite Care                         |
| <input type="checkbox"/> Other (specify) _____                        |   |

(Detailed information)

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

It was reasonable to make no efforts to maintain the child(ren) in the home based on an assessment of the family and the child(ren)'s circumstances that include: \_\_\_\_\_

Reasonable efforts to prevent removal were not required because:

this court or another court of competent jurisdiction has previously determined that the parent has subjected the child(ren) to aggravated circumstances as defined in T.C.A. §36-1-102(9);

the parent has been convicted in a criminal court of one of the felony crimes against a child specified in T.C.A. §37-1-166(g)(4)(B); or

the parental rights of the parent to a sibling or half-sibling have been terminated involuntarily.

The Department of Children's Services failed to provide reasonable efforts to prevent the child(ren)'s removal from the home.

**IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED:**

1. That \_\_\_\_\_ is/are a dependent and neglected child(ren) within the meaning of the law.

2. That temporary custody of said child(ren)  shall remain with the Department of Children's Services  is hereby awarded to the Department of Children's Services with the authority to consent to any necessary medical, surgical, hospital, or institutional care effective \_\_\_\_\_.
3. That this Order shall remain in effect subject to further Orders of this Court.
4. That child support is reserved.
5. This matter is scheduled for a \_\_\_\_\_ hearing on \_\_\_\_\_
6. \_\_\_\_\_

---

**ENTERED** this \_\_\_\_\_ day of \_\_\_\_\_, 2002.

\_\_\_\_\_  
JUDGE/REFEREE

IN THE JUVENILE COURT OF \_\_\_\_\_ COUNTY, TENNESSEE

IN THE MATTER OF: )  
 )  
 \_\_\_\_\_ DOB \_\_\_\_\_ ) NO: \_\_\_\_\_  
 )  
 \_\_\_\_\_ DOB \_\_\_\_\_ ) NO: \_\_\_\_\_  
 )  
 \_\_\_\_\_ DOB \_\_\_\_\_ ) NO: \_\_\_\_\_  
 )  
**Child(ren) Under Eighteen (18) Years of Age** )

PERMANENCY PLAN RATIFICATION ORDER

This cause came on to be heard as a hearing to ratify the permanency plan(s) on the \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_,  
 before the Honorable \_\_\_\_\_, Judge of the Juvenile Court of \_\_\_\_\_ County, Tennessee,  
 upon the \_\_\_\_\_ filed by \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_.

Present for the hearing were:

- the mother, \_\_\_\_\_  
 had notice and failed to appear     did not have notice     whereabouts unknown
- the father, \_\_\_\_\_  
 had notice and failed to appear     did not have notice     whereabouts unknown
- the child/children, \_\_\_\_\_
- guardian ad litem, \_\_\_\_\_
- attorney(s) for the parent(s), \_\_\_\_\_
- foster parent(s), \_\_\_\_\_
- other participant(s), \_\_\_\_\_

and representatives of the State of Tennessee, Department of Children’s Services, \_\_\_\_\_  
 \_\_\_\_\_

The Court FINDS and ORDERS as follows:

A.  The Court finds that the Permanency Plan/Plans prepared by the Department of Children’s Services on \_\_\_\_\_ is/are reasonable, necessary and in the best interests of the child/children and that pursuant to T.C.A. Section 37-2-403(a)(2)(C) the requirements in the Plan/Plans are reasonable and related to remedying the conditions which necessitate foster care placement; and therefore the Permanency Plan/Plans are hereby ratified.

B.  The Court does not find that the Permanency Plan/Plans prepared by the Department of Children’s Services on \_\_\_\_\_ is/are reasonable, necessary and in the best interests of the child/children or that

pursuant to T.C.A. Section 37-2-403(a)(2)(C) the requirements in the Plan/Plans are reasonable and related to remedying the conditions which necessitate foster care placement; and therefore orders that a new Permanency Plan/Plans be developed that incorporated issues and requirements raised at this hearing, as follows:

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

C.  The four page “Tennessee Department of Children’s Services Permanency Plan Criteria & Procedure for Termination of Parental Rights” document was given to the  mother,  father, and/or  guardian. Pursuant to T.C.A. § 37-2-403(a), the court explained to the  mother,  father, and/or  guardian, on the record, that failure to visit or support the child/ren may result in the termination of parental rights; and the right to seek counsel at a termination of parental rights proceeding.

D.  This matter is set for a \_\_\_\_\_ hearing on \_\_\_\_\_.

**ACCORDINGLY IT IS SO ORDERED.**

Entered this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
JUDGE/REFEREE

IN THE JUVENILE COURT OF \_\_\_\_\_ COUNTY, TENNESSEE

IN THE MATTER OF: \_\_\_\_\_ )
DOB: \_\_\_\_\_ ) NO: \_\_\_\_\_
\_\_\_\_\_ )
DOB: \_\_\_\_\_ )
Child(ren) Under Eighteen (18) Years of Age \_\_\_\_\_ )

PERMANENCY HEARING ORDER

This cause came to be heard on the \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_\_, before the Honorable \_\_\_\_\_, Judge of the Juvenile Court of \_\_\_\_\_ County, Tennessee, for a permanency hearing, with the appearance of

- the mother, \_\_\_\_\_
had notice and failed to appear did not have notice whereabouts unknown
the father, \_\_\_\_\_
had notice and failed to appear did not have notice whereabouts unknown
the child/children \_\_\_\_\_
guardian ad litem, \_\_\_\_\_
attorney(s) for parent(s), \_\_\_\_\_
foster parent(s)/pre-adoptive parents, \_\_\_\_\_
other participant(s), \_\_\_\_\_
DCS representative(s), \_\_\_\_\_

The Court, having considered the testimony and evidence presented and the entire record, finds as follows:

- 1. That the child/children came into custody on \_\_\_\_\_, and the current permanency hearing
is timely in that the last hearing which meets requirements of permanency hearing occurred on \_\_\_\_\_
is not timely in the last hearing which meets the requirements of a permanency hearing occurred on \_\_\_\_\_
2. The current placement of the child/children
is safe, appropriate and in the child/children's best interest in that \_\_\_\_\_
is not appropriate and in the child/children's best interest in that \_\_\_\_\_

3. **GOAL(S):** The Department of Children’s Services current plan and goal(s) as to the child/children is/are:

Reunification with parent(s), and

Substantial progress is being made toward reunification by parent(s), in that \_\_\_\_\_

\_\_\_\_\_

Reunification is appropriate based on the child(ren)’s developmental needs, and

The Court anticipates the safe return of the child to the parent(s) by \_\_\_\_\_

It is too early to set a specific date for the child’s return home because \_\_\_\_\_

\_\_\_\_\_

Is not an appropriate goal for the child(ren) because \_\_\_\_\_

\_\_\_\_\_

Legal and physical custody with relative: *(include why reunification is not appropriate and safe and what efforts were made by DCS toward the goal of reunification.):*

Is an appropriate goal for the child(ren) because \_\_\_\_\_

\_\_\_\_\_

Is not an appropriate goal for the child(ren) because \_\_\_\_\_

\_\_\_\_\_

Legal and physical custody of the child(ren) is awarded to \_\_\_\_\_ immediately.

It is not appropriate to award legal custody to the relative at this time because *(include reasons and estimated date of achieving goal)*: \_\_\_\_\_

\_\_\_\_\_

Permanent Guardianship: *(include why reunification is not appropriate and safe and what efforts were made by DCS toward the goal of reunification.):*

Is an appropriate goal for the child(ren) because \_\_\_\_\_

\_\_\_\_\_

Is not an appropriate goal for the child(ren) because \_\_\_\_\_

\_\_\_\_\_

Adoption (*include why reunification and relative placement are not appropriate and safe and what efforts were made by DCS toward those goals.*)

Is an appropriate goal for the child(ren) because \_\_\_\_\_

\_\_\_\_\_

Is not an appropriate goal for the child(ren) because \_\_\_\_\_

\_\_\_\_\_

The following is the timetable of DCS to petition for termination of parental rights and its plan for the child's adoption, including specific time and dates: \_\_\_\_\_

\_\_\_\_\_

Planned Permanent Living Arrangement (*include why reunification, relative placement and adoption are not appropriate and what efforts were made by DCS toward these goals.*)

Is an appropriate goal for the child(ren) because \_\_\_\_\_

\_\_\_\_\_

Is not an appropriate goal for the child(ren) because: \_\_\_\_\_

\_\_\_\_\_

The child(ren) have been placed with \_\_\_\_\_ who is fully capable of and committed to caring for the child(ren).

The child(ren) will be placed with \_\_\_\_\_ according to the following timetable (*include reasons and estimated date of achieving goal*):

\_\_\_\_\_

\_\_\_\_\_

4. The responsibilities set out in the permanency plan, signed by representatives of DCS on \_\_\_\_\_ and filed with the Court are:

reasonably related to the goal in that \_\_\_\_\_

\_\_\_\_\_

not reasonably related to the goal in that \_\_\_\_\_

\_\_\_\_\_

5. Compliance with the permanency plan is as follows:

DCS is in compliance in that \_\_\_\_\_

\_\_\_\_\_

DCS is not in compliance in that \_\_\_\_\_

\_\_\_\_\_

Mother is in substantial compliance in that \_\_\_\_\_

\_\_\_\_\_

Mother is not in substantial compliance in that \_\_\_\_\_

\_\_\_\_\_

Father is in substantial compliance in that \_\_\_\_\_

\_\_\_\_\_

Father is not in substantial compliance in that \_\_\_\_\_

\_\_\_\_\_

6. The Department of Children’s Services is:

making reasonable efforts toward the goal(s) of \_\_\_\_\_ by providing the following:

- |   |  |
|---|--|
| <input type="checkbox"/> Mental health counseling for child/children  | <input type="checkbox"/> Mental health counseling for parent(s)  |
| <input type="checkbox"/> Drug & alcohol counseling for child/children | <input type="checkbox"/> Drug & alcohol counseling for parent(s) |
| <input type="checkbox"/> Parenting classes                            | <input type="checkbox"/> Psychological evaluation for _____      |
| <input type="checkbox"/> Intensive in-home case management            | <input type="checkbox"/> Sexual abuse treatment for child        |
| <input type="checkbox"/> Sexual perpetrator treatment for _____       | <input type="checkbox"/> Homemaker services                      |
| <input type="checkbox"/> Residential Services/Treatment               | <input type="checkbox"/> Legal referral completed for TPR        |
| <input type="checkbox"/> Locating or placement with relative          | <input type="checkbox"/> Locating absent parent                  |
| <input type="checkbox"/> Locating or placement in a preadoptive home  |  |
| <input type="checkbox"/> Other (specify) _____                        |  |

\_\_\_\_\_

not making reasonable efforts toward reunification or toward making a permanent and appropriate placement for the child/children and toward preventing the child/children from continuing in foster care unnecessarily.

is making deligent efforts to locate/identify the absent parent, \_\_\_\_\_, whose whereabouts/identity is unknown including: *(specify specific efforts)* \_\_\_\_\_

is not making deligent efforts to locate/identify the absent parent, \_\_\_\_\_, whose whereabouts/identity is unknown.

7. Progress toward resolving the reasons the child/children is/are in foster care

has been made, but the following barriers still exist: \_\_\_\_\_

\_\_\_\_\_

has not been made in that \_\_\_\_\_

\_\_\_\_\_

8. The child is 16 years of age or older and needs the following services to assist the child transition from foster care to independent living: \_\_\_\_\_

\_\_\_\_\_

9. The child is placed in a home in a different state than the home of the child's parents, the placement continues to be appropriate and in the child's best interests for the following reasons {42 U.S.C. §675(5)(C)}:

\_\_\_\_\_

**IT IS THEREFORE ORDERED:**

That the child/children, \_\_\_\_\_, shall remain in foster care pending further order from this Court.

That the State of Tennessee, Department of Children's services is hereby relieved of the temporary care and custody of the child/children, and custody is awarded to \_\_\_\_\_ with the authority to consent to medical or educational needs of the child.

That the goal(s) shall continue to be \_\_\_\_\_

That the goal(s) shall be changed to \_\_\_\_\_ and a new permanency plan filed with the Court no later than \_\_\_\_\_ for ratification.

That the permanency plan signed by representatives of the Department of Children's Services and filed with this Court is hereby approved and incorporated by reference as a part of this order.

That the responsibilities in the permanency plan shall be modified as follows \_\_\_\_\_

\_\_\_\_\_

and the permanency plan shall be filed with the Court no later than \_\_\_\_\_ for ratification.

That the child is 16 years of age or older and the Department of Children's Services has provided an Independent Living Skills plan, which is hereby approved.

That the Department of Children's Services shall file a termination of parental rights petition on or before \_\_\_\_\_

That this matter is scheduled for review on \_\_\_\_\_

That the next Permanency Hearing shall be held on \_\_\_\_\_, 20\_\_\_\_\_.

**ENTERED** this the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Judge/Referee

IN THE JUVENILE COURT OF \_\_\_\_\_ COUNTY, TENNESSEE

IN THE MATTER OF: \_\_\_\_\_ )
DOB: \_\_\_\_\_ ) NO: \_\_\_\_\_
DOB: \_\_\_\_\_ )
Child(ren) Under Eighteen (18) Years of Age )

PERMANENCY HEARING - ADOPTION STATUS HEARING ORDER

The parental rights of the mother were terminated/surrendered on \_\_\_\_\_. The parental rights of the father were terminated /surrendered on \_\_\_\_\_. Said child was placed in the guardianship of the Tennessee Department of Children’s Services. The permanency goal for said child is Adoption.

This matter is before the Court for a Judicial Review pursuant to the requirements TCA § 37-2-409(a). Present for the hearing were the following people: \_\_\_\_\_

( ) The Adoption of the child was finalized on \_\_\_\_\_. It is therefore

ORDERED that this case BE and HEREBY IS CLOSED.

( )The Adoption of the child has not been finalized because \_\_\_\_\_

( )It appears from the report made by said Department that all reasonable efforts to finalize the permanent placement of said child have been made since this matter was last before the Court, in that:

\_\_\_\_\_

( )It appears from the report made by the Department has failed to make reasonable efforts to finalize the permanent placement of said child, in that: \_\_\_\_\_

\_\_\_\_\_

IT IS THEREFORE ORDERED that said child shall remain in the custody and control of Tennessee Department of Children’s Services pending finalization of the adoption.

The next steps for the Department are:

- 1. \_\_\_\_\_
2. \_\_\_\_\_

IT IS FURTHER THEREFORE ORDERED that said child shall be brought back before the Court for another review on \_\_\_\_\_, at \_\_\_\_\_ unless the Adoption has been finalized prior to that date, and a written request is submitted to the Court by the Department for termination of its custody and an order terminating the Department’s custody can be filed without necessity of further court hearing.

ENTERED this \_\_\_\_ day of \_\_\_\_\_, 200\_.

JUDGE/REFEREE

**DIRECT REFERRAL FOR JUDICIAL REVIEW BY  
FOSTER CARE REVIEW BOARD**

**IN THE MATTER OF:** )  
 )  
\_\_\_\_\_ ) **DOCKET NO:** \_\_\_\_\_  
A Child Under the Age of 18 )

\_\_\_\_\_ **This matter shall be scheduled for a hearing before the Judge/Referee within 10 days of this date.**

This Board finds the following conditions exist that constitute a risk of harm and directly compromise the health, safety or welfare of the child: \_\_\_\_\_

This Board recommends: \_\_\_\_\_

\_\_\_\_\_ **This matter shall be scheduled for a hearing before the Judge/Referee within 30 days of this date.**

This Board finds that the following conditions persist that constitute a deterrent to reaching the permanency goals and the conditions indirectly and chronically compromise the health, safety or welfare of the child: \_\_\_\_\_

This Board recommends: \_\_\_\_\_

\_\_\_\_\_  
Date

\_\_\_\_\_  
Foster Care Review Board Chair/Member

**ORDER**

Pursuant to T.C.A. § 37-2-406(c)(1), it is therefore **Ordered** that this matter be set for judicial review on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ at \_\_\_\_\_.

\_\_\_\_\_  
Judge

IN THE JUVENILE COURT OF \_\_\_\_\_ COUNTY, TENNESSEE

IN THE MATTER OF: )  
 )  
 \_\_\_\_\_ DOB \_\_\_\_\_ ) NO: \_\_\_\_\_  
 )  
 \_\_\_\_\_ DOB \_\_\_\_\_ ) NO: \_\_\_\_\_  
 )  
 \_\_\_\_\_ DOB \_\_\_\_\_ ) NO: \_\_\_\_\_  
**Child(ren) Under Eighteen (18) Years of Age**

ICPC PRIORITY PLACEMENT ORDER

It appearing to the Court that the above-named child is/children are in the temporary legal custody of the State of Tennessee, Department of Children’s Services, pursuant to an order of this Court; that an intervening petition for custody of the above-named children has been filed with this Court in compliance with the jurisdiction requirements; that the Petitioner is not a resident of the State of Tennessee as indicated in the petition for custody which is attached hereto and made a part hereof by reference; that an investigation into the Petitioner’s circumstances is required by the Interstate Compact on the Placement of Children (“ICPC”)[T.C.A. 37-4-201 et seq.]; that a priority placement of the children is necessary and that this request meets the requirements for priority placement because:

- \_\_\_ the proposed placement is with a relative as defined by Article VII(a) of ICPC (parent, stepparent, grandparent, adult sibling, adult uncle or aunt, or child’s guardian); and
- \_\_\_ the child is under two (2) years of age; or
- \_\_\_ the child is/children are currently in an emergency shelter; or
- \_\_\_ the child has/children have spent a substantial amount of time in the home of the proposed placement resource.
- \_\_\_ the receiving state Compact Administrator has had a properly completed ICPC-100A and supporting documentation for over thirty (30) days but the sending agency has not received a notice pursuant to Article III(d) of ICPC determining whether the child/children may or may not be placed. This documentation was sent to the Compact Administrator of the State of \_\_\_\_\_ on \_\_\_\_\_.

It is the opinion of the Court that it is in the best interest of the child/children, and the public as follows, and

IT IS, THEREFORE, ORDERED:

1. That within three (3) business days, the \_\_\_\_\_ County office of the Tennessee Department of Children’s Services shall transmit a copy of this order, a completed Form 100A, and all supporting documentation required pursuant to ICPC to the Tennessee Compact Administrator; and that within two (2) business days

thereafter, the Tennessee Compact Administrator shall transmit the priority placement request and its accompanying documentation to the Compact Administrator for the State of \_\_\_\_\_ as required by ICPC Regulation No. 7 for priority placement requests.

2. That the Tennessee Department of Children’s Services shall keep this Court informed of the status of this priority request and shall file the written report received from the State of \_\_\_\_\_ with this Court immediately upon its receipt; and that the pending Petition for Custody shall be set for adjudication and disposition after that report has been filed with the Court.

ENTERED this the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
JUDGE/REFEREE

IN THE JUVENILE COURT FOR \_\_\_\_\_ COUNTY, TENNESSEE

STATE OF TENNESSEE	)	CHILD/CHILDREN UNDER
	)	THE AGE OF EIGHTEEN
IN THE MATTER OF	)	
_____	)	DOCKET NO: _____

**NOTICE OF APPEAL TO CIRCUIT COURT FOR DE NOVO HEARING  
PURSUANT TO T.C.A. § 37-1-159**

Comes \_\_\_\_\_ and hereby gives Notice of Appeal pursuant to T.C.A. § 37-1-159 to the Circuit Court from the final order or judgment entered by the Juvenile Court in this matter, entered on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

Appellant asserts pursuant to this court’s previous finding of indigency that appellant is entitled to appeal this matter in forma pauperis and an oath of indigency is attached to this notice.

Respectfully submitted,

\_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of this Motion was forwarded by U.S. Mail, postage prepaid, to the following persons on this the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_:

*[List the names and addresses of each attorney/person/party noticed.]*

**IN THE JUVENILE COURT FOR \_\_\_\_\_ COUNTY, TENNESSEE**

**STATE OF TENNESSEE** )  
**DEPARTMENT OF CHILDREN'S SERVICES,** )  
**Petitioner,** )  
) )  
**vs.** )  
) )  
\_\_\_\_\_ )  
) )  
**UNKNOWN FATHER** )  
**whereabouts unknown** )  
) )  
**IN THE MATTER OF:** )  
**D.O.B. \_\_\_\_\_** )  
) )  
**A CHILD UNDER THE AGE OF EIGHTEEN** )  
**(18) YEARS,** )

**File No.** \_\_\_\_\_  
**Docket No.** \_\_\_\_\_

**ORDER FOR PUBLICATION**

In this cause, it appears to the Court from the allegations of the Petition filed by the Tennessee Department of Children's Services seeking to terminate forever the parental rights of (parents names), to (child/ren's names); which Petition may be obtained at the Office of the Juvenile Court of \_\_\_\_\_ County, Tennessee, at \_\_\_\_\_; that the ordinary process of law cannot be served upon said Respondents.

IT IS, THEREFORE, ORDERED that the appearance hearing in this matter is scheduled for \_\_\_\_\_, \_\_\_\_\_ at \_\_\_\_\_. A copy of this Order shall be published for four (4) consecutive weeks in the \_\_\_\_\_, a newspaper published in \_\_\_\_\_ County, Tennessee.

Failure of the Respondents to appear at the final hearing on \_\_\_\_\_, \_\_\_\_\_ at \_\_\_\_\_ may result in a judgment terminating parental rights being entered against the Respondents.

Enter this the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
JUDGE

IN THE JUVENILE COURT OF \_\_\_\_\_ COUNTY, TENNESSEE

IN THE MATTER OF: ) DOCKET NO: \_\_\_\_\_
)
)
)
A CHILD UNDER THE AGE OF 18 YEARS )

ORDER ESTABLISHING TRUST FOR THE BENEFIT OF THE MINOR CHILD

It appearing to the Court that a Petition has been filed to establish a trust for the minor child and that the same was filed with the Court on \_\_\_\_\_(date) and the sum of \$\_\_\_\_\_ was tendered to the Juvenile Court Clerk on \_\_\_\_\_(date).

It is therefore ORDERED, ADJUDGED AND DECREED that a trust in the amount of \$\_\_\_\_\_ shall be established for the benefit of the above captioned minor child.

It is further ORDERED, ADJUDGED, AND DECREED that these sums shall be placed in an interest bearing account by the Juvenile Court Clerk and that the account shall be placed at \_\_\_\_\_ (name of local bank) and that said sum shall be held in trust for the benefit of the minor child.

It is further ORDERED, ADJUDGED, AND DECREED that said sums or any part thereof shall be returned over to the minor child at the time he/she reaches majority and that a motion to encroach this Trust must be filed with this Court by an appropriate individual in the event it becomes necessary to obtain these funds or any part thereof before the child reaches majority.

Entered on this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Order was forwarded by U.S. Mail, postage prepaid, to the following persons on this the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_:
[List the names and addresses of each attorney/person/party noticed.]

\_\_\_\_\_

IN THE JUVENILE COURT OF \_\_\_\_\_ COUNTY, TENNESSEE

IN THE MATTER OF: ) DOCKET NO: \_\_\_\_\_

)  
\_\_\_\_\_)  
)

A CHILD UNDER THE AGE OF 18 YEARS )

=====
ORDER TO ENCROACH
=====

This cause came to be heard before the Honorable \_\_\_\_\_, Judge for the Juvenile Court of \_\_\_\_\_ County, Tennessee on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_ upon the Motion to Encroach filed by \_\_\_\_\_.

After hearing testimony from the Movant and considering the record as a whole, it was the opinion of the Court that the Motion to Encroach should be granted /not granted.

It is therefore ORDERED, ADJUDGED AND DECREED that this cause be dismissed.
OR

It is therefore ORDERED, ADJUDGED AND DECREED that the Petition be granted and that the sum of \$\_\_\_\_\_ be awarded to \_\_\_\_\_ (custodian, health care provider, school or other appropriate payee), to be used for the following purposes:

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

The Clerk shall disburse the funds accordingly.

Entered on this the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_.

\_\_\_\_\_  
JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Motion was forwarded by U.S. Mail, postage prepaid, to the following persons on this the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_:
[List the names and addresses of each attorney/person/party noticed.]

\_\_\_\_\_

**POWER OF ATTORNEY FOR CARE OF A MINOR CHILD\***

Use of this form is authorized by T.C.A. § 34-6-301 et seq. Completion of this form, along with the proper signatures, is sufficient to authorize enrollment of a minor in school and to authorize medical treatment. However, a school district may require additional documentation/information as permitted by this section of Tennessee law before enrolling a child in school or any extracurricular activities. *Please print clearly.*

**Part I:** To be filled out and/or initialed by parent(s).

1. Minor Child's Name \_\_\_\_\_

2. Mother/Legal Guardian's Name & Address  
 \_\_\_\_\_  
 \_\_\_\_\_

3. Father/Legal Guardian's Name & Address  
 \_\_\_\_\_  
 \_\_\_\_\_

4. Caregiver's Name & Address  
 \_\_\_\_\_  
 \_\_\_\_\_

5.  Both parents are living, have legal custody of the minor child and have signed this document;

**OR**

One parent is deceased;

**OR**

One parent has legal custody of the minor child and both parents have signed this document and consent to the appointment of the caregiver;

**OR**

One parent has legal custody of the minor child, and has sent by Certified Mail, Return Receipt requested, to the other parent at last known address, a copy of this document and a notice of the provisions in § 34-6-305; or the non-custodial parent has not consented to the appointment and consent cannot be obtained because \_\_\_\_\_.

6. Temporary care-giving authority regarding the minor child is being given to the caregiver because of the following type of hardship (**check at least one**):

the serious illness or incarceration of a parent or legal guardian;

the physical or mental condition of the parent or legal guardian or the child is such that care and supervision of the child cannot be provided;

the loss or uninhabitability of the child's home as a result of a natural disaster;

the need for medical or mental health treatment (including substance abuse treatment) by the parent or legal guardian; or,

other (please describe) \_\_\_\_\_

7.  I/We the undersigned, authorize the named caregiver to do one or more of the following:

enroll the child in school and extracurricular activities (including but not limited to Boy Scouts, Boys & Girls Club),

obtain medical, dental, and mental health treatment for the child, and

provide for the child's food, lodging, housing, recreation and travel.

I/We grant the following additional power to the named caregiver: \_\_\_\_\_.

\* To obtain this form in Spanish contact the Court Improvement Program.

- 8. ( ) I/We understand that this document does not provide legal custody to the caregiver. If at any time I/we disagree with a decision of the named caregiver or choose to make any healthcare or educational decisions for my/our child, I/we must revoke the power of attorney, in writing, and provide written documentation to the health care provider and the local education agency (i.e., school).
- 9. ( ) I/We understand that despite the execution of this document, I/We may retain certain rights under Federal law (i.e., the Individual with Disabilities Education Act, etc.).
- 10. ( ) I/We understand that this document may be terminated in another written document signed by either parent with legal custody or by any order of a court with competent jurisdiction.

**Part II:** To be initialed by caregiver.

- 11. ( ) I understand that this document, properly executed, gives me the right to enroll the minor child in the local education agency serving the area where I reside.
- 12. ( ) I understand that this document does not provide me with legal custody.
- 13. ( ) I understand that, prior to enrollment, the local education agency may require documentation of the minor child’s residence with a caregiver and/or documentation or other verification of the validity of the stated hardship.
- 14. ( ) I understand that, except where limited by federal law, I shall be assigned the rights, duties, and responsibilities that would otherwise be assigned to the parent, legal guardian or legal custodian pursuant to Tennessee Code Annotated Title 49.
- 15. ( ) I understand that, if the minor child ceases to reside with me, I am required by law to notify any person, school or health care provider to whom I have given this document.

**Part III:** To be initialed by parent(s) and caregiver.

- 16. ( ) ( ) We understand that, by accepting the power of attorney, if we enroll a student in a school system while fraudulently representing the child’s current residence or the parents’ hardship or circumstances for using the power of attorney, either or both of us is liable for restitution to the school district for an amount equal to the per pupil expenditure for the district in which the student is fraudulently enrolled. Restitution shall be cumulative for each year the child has been fraudulently enrolled in the system and may include costs and fees related to litigation.

I/We declare under penalty of perjury under the laws of the State of Tennessee that the foregoing is true and correct.

STATE OF TENNESSEE )  
COUNTY OF \_\_\_\_\_ )

\_\_\_\_\_ Date: \_\_\_\_\_

**Mother/Legal Guardian**

The Mother/Legal Guardian, \_\_\_\_\_, personally appeared before me this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_  
**NOTARY PUBLIC**

My commission expires:

\_\_\_\_\_

STATE OF TENNESSEE )  
COUNTY OF \_\_\_\_\_ )

\_\_\_\_\_ Date: \_\_\_\_\_  
**Father/Legal Guardian**

The Father/Legal Guardian, \_\_\_\_\_, personally appeared before me this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_  
**NOTARY PUBLIC**

My commission expires:  
\_\_\_\_\_

STATE OF TENNESSEE )  
COUNTY OF \_\_\_\_\_ )

\_\_\_\_\_ Date: \_\_\_\_\_  
**Caregiver**

The Caregiver, \_\_\_\_\_, personally appeared before me this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_  
**NOTARY PUBLIC**

My commission expires:  
\_\_\_\_\_

**NOTICE TO THE LOCAL EDUCATION AGENCY AND/OR HEALTH CARE PROVIDER:**

Pursuant to T.C.A. § 34-6-308, no person, school official or health care provider who acts in good faith reliance on a power of attorney for care of a minor child to enroll the child in school or to provide medical, dental or mental health care, without actual knowledge of facts contrary to those authorized, is subject to criminal or civil liability to any person, or is subject to professional disciplinary action for such reliance. This section shall apply even if medical, dental, or mental health care is provided to a minor child or the child is enrolled in a school in contravention of the wishes of the parent with legal custody of the minor child, as long as the person, school official or health care provider has been provided a copy of an appropriately executed power of attorney for care of a minor child, and has not been provided written documentation that the parent has revoked the power of attorney for care of a minor child.

Additionally, pursuant to T.C.A. § 34-6-310, a person who relies on the power of attorney for care of a minor child has no obligation to make any further inquiry or investigation. Nothing in this part shall relieve any individual from liability for violations of other provisions of law.

**REVOCATION OF POWER OF ATTORNEY FOR CARE OF A MINOR CHILD\***

As provided for in T.C.A. § 34-6-301 et. seq., revocation of any previously executed Power of Attorney for Care of a Minor Child must be in writing. Properly executed, this form meets all requirements of T.C.A. §34-6-301 et. seq. to properly revoke said Power of Attorney for Care of a Minor Child. **Please note, however, that use of this form is recommended, but not required to revoke a previously executed Power of Attorney for Care of a Minor Child.**

**Part I:** To be filled out by parent(s) of minor child:

- 1. Minor Child's Name \_\_\_\_\_
- 2. Mother/Legal Guardian's Name & Address \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
- 3. Father/Legal Guardian's Name & Address \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
- 1. Caregiver's Name & Address \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**Part II:** To be filled out by the parent(s).

I, \_\_\_\_\_, hereby revoke the Power of Attorney for Care of a  
 Name of Parent(s)  
 Minor Child for the child listed above in Part I, which was previously executed on \_\_\_\_\_ and given to  
 \_\_\_\_\_ to act said minor child's

\_\_\_\_\_  
 Date Name of Caregiver

Caregiver. All rights, power, and authority previously granted to said Caregiver pursuant to said Power of Attorney for Care of a Minor Child are hereby revoked, effective immediately. I understand that I must provide a copy of this Revocation to any health care provider and/or school that previously received a copy of the Power of Attorney.

IN WITNESS WHEREOF, I/We sign this Revocation of Power of Attorney for Care of a Minor Child and declare under penalty of perjury under the laws of the State of Tennessee that the foregoing is true and correct.

\_\_\_\_\_  
 \* To obtain this form in Spanish contact the Court Improvement Program.

STATE OF TENNESSEE )  
COUNTY OF \_\_\_\_\_ )

\_\_\_\_\_ Date: \_\_\_\_\_  
**Mother/Legal Guardian**

The Mother/Legal Guardian, \_\_\_\_\_, personally appeared before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
**NOTARY PUBLIC**

My commission expires:

STATE OF TENNESSEE )  
COUNTY OF \_\_\_\_\_ )

\_\_\_\_\_ Date: \_\_\_\_\_  
**Father/Legal Guardian**

The Father/Legal Guardian, \_\_\_\_\_, personally appeared before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
**NOTARY PUBLIC**

My commission expires: \_\_\_\_\_

# PART V: APPENDICES

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## EMERGENCY REMOVAL HEARING\*

*The preliminary protective hearing must take place within 72 hours, excluding non-judicial days, but no longer than 84 hours after the child's removal. T.R.J.P. 6(c). The evidentiary standard at this proceeding is probable cause. T.C.A. § 37-1-128(b)(2).*

### Persons who should be present:

- Judge or judicial officer
- Parents whose rights have not been terminated
- Relatives with physical custody
- Foster and pre-adoptive parents
- Age appropriate children
- Assigned caseworker
- Agency attorney
- Attorney for parents
- Legal advocate for child
- Court reporter/ suitable technology

### Key decisions the court should make after testimony:

- Has the agency made reasonable efforts to avoid removal of the child?
- Is there probable cause to believe that the allegations in the petition can be sustained?
- Should the child be returned safely home immediately or kept in foster care prior to the trial?
- What services will allow the child to remain safely at home?
- Are responsible relatives or other adults available?
- Is the placement proposed by the agency the most family-like and closest to home?

### The affidavit of reasonable efforts should answer the following questions:

- Was removal of the child necessary in order to protect the child, and, if so, what are the specific risks to the child that necessitated the removal;
- What specific services are necessary to allow the child to remain in or return to the home;
- What services has DCS provided to assist the family and child so as to prevent removal or to reunify the family;

- Has DCS provided services to the family and child, and, if not, what are the specific reasons why services have not been provided.
- Has a permanency plan been provided?
- Will implementation of the plan and the child's continued well-being be monitored? By whom?
- Are restraining orders, or orders expelling an allegedly abusive parent from the home appropriate?

### Additional activities:

- Review notice to missing parties
- Serve parties with copy of petition
- Advise parties of rights

### If child is placed outside the home:

- Describe who is to have custody and where the child is to be placed;
- Specify why continuation of child in the home would be contrary to child's welfare (best interests);
- Specify whether reasonable efforts have been made to prevent removal
- Describe services provided, if any, and why placement is necessary;
- Specify terms and conditions for parental visitation and sibling visitation;
- Specify financial support of the child.

### Schedule time and date of:

- Adjudication
- Ratification of permanency plan (if child is placed in DCS custody)

*\*The hearings checklists are adapted from Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases. National Council of Juvenile and Family Court Judges. 1995.*

**RATIFICATION OF THE PERMANENCY PLAN**

*The court must review the proposed permanency plan, make any modifications and ratify the plan within 60 days of foster care placement. T.C.A. § 37-2-403(a)(2)(A). DCS must prepare the plan within 30 days of foster care placement. T.C.A. § 37-2-403(a)(1).*

**Persons who should be present:**

- Judge or judicial officer
- Parents whose rights have not been terminated
- Relatives with physical custody
- Foster and pre-adoptive parents
- Age appropriate children
- Assigned caseworker
- Agency attorney
- Attorney for parents
- Legal advocate for child
- Court reporter/ suitable technology

**Key areas of inquiry:**

- Whether the plan as submitted is in the best interests of the child;
- Whether the goal stated in the plan is the appropriate goal for the child;
- Whether the plan includes a statement of specific responsibilities for the parent;
- Whether the responsibilities of the parents listed in the plan are reasonably related to achieving the stated goal;
- Whether the plan includes a statement of responsibilities for DCS;
- Whether the responsibilities of DCS listed in the plan are reasonably related to achieving the stated goal;
- Whether the plan includes definition of abandonment and the criteria and procedures for terminating parental rights;
- Whether the plan addresses specific reasons for placement for any goal other than reunification, placement with relatives, or adoption.

**The court shall notify parents or legal guardians:**

- Of the law relating to abandonment pursuant to T.C.A. § 36-1-102;
- That the consequences of failure to visit or to support the child will be termination of parental rights;
- That they have a right to counsel and that counsel will be appointed for them if they are indigent.

**The court's options are:**

- To ratify the plan as provided by DCS if the court finds the plan to be in the best interests of the child;
- To order modifications to the plan to be made by DCS;
- To order DCS to draft a new plan and submit it within 30 days, but not to exceed 60 days of foster care placement.

**ADJUDICATORY HEARING**

*The adjudication must be scheduled within 30 days of the child’s placement, if the child has been removed from the home, or within 90 days if the child is not in custody. T.R.J.P. 17(a). The evidentiary standard at the adjudicatory hearing is clear and convincing evidence. T.C.A. § 37-1-129(a). See T.C.A. §§ 37-1-102(b)(12) and 36-1-113(h) for statutory grounds for an adjudication of dependency and neglect. See T.C.A. §§ 37-1-166(g) and 36-1-113(h) for bases for reasonable efforts determinations.*

**Persons who should be present:**

- Judge or judicial officer
- Parents whose rights have not been terminated
- Relatives with physical custody
- Foster and pre-adoptive parents
- Age appropriate children
- Assigned caseworker
- Agency attorney
- Attorney for parents
- Legal advocate for child
- Court reporter/ suitable technology

- Ensure the agency is taking prompt steps to evaluate relatives as caretakers;
- Order the alleged perpetrator out of the home and to have no contacts with the child;
- Direct the agency to continue its efforts to notify noncustodial parents;
- If child is in foster care prior to disposition, set terms for visitation, support and other intra-family communication.

**The court’s written findings of fact and conclusions of law at the adjudication hearing should:**

**Key decisions the court should make:**

- Which allegations of the petition have been proven by clear and convincing evidence or admitted, if any;
- Whether there is a legal basis for continued court and agency intervention;
- Whether reasonable efforts have been made to prevent the need for placement or to safely reunify the family.

- Provide detailed findings that sustain the petition by clear and convincing evidence or dismiss the petition;
- List what specific services have been provided by DCS to prevent the need for removal of the child are needed to safely reunify the family;
- If child remains in DCS custody, provide detailed findings as to why it is contrary to the child’s best interest to return home.

**If the disposition does not occur within a short time after the adjudication, the court may need to:**

- Determine the placement of child prior to disposition;
- Order further testing or evaluation of parents or child in preparation for the disposition;

**Schedule time and date of:**

- Disposition; or
- Review hearing; or
- Permanency hearing.

## DISPOSITIONAL HEARING

*The disposition must take place within 15 days of the adjudication if the child has been removed, and within 90 days in other cases. T.R.J.P. 18(a). The rules of evidence are relaxed for dispositional hearings. T.C.A. § 37-1-129(d).*

**Persons who should be present:**

- Judge or judicial officer
- Parents whose rights have not been terminated
- Relatives with physical custody
- Foster and pre-adoptive parents
- Age appropriate children
- Assigned caseworker
- Agency attorney
- Attorney for parents
- Legal advocate for child
- Court reporter/ suitable technology

**When the agency recommends foster placement, an affidavit of reasonable efforts should contain:**

- The specific risks to the child which necessitate removal;
- The specific services necessary to allow the child to remain in the home;
- What services have been provided to the family and the child to prevent removal or reunify the family;
- If the department has not provided services, a list of specific reasons why services were not provided;
- A description of the placement and where it is located;
- Proposed arrangements for visitation;
- Placement of siblings, and proposed arrangements for visitation.

**Key decisions the court should make:**

- The appropriate statutory disposition of the case and long-term plan for the child;
- The appropriate safe placement for the child;

- Whether the plan proposed by the agency reasonably addresses the problems and needs of child and parent;
- Whether the agency has made reasonable efforts to eliminate or prevent the need for placement; and

**The court's written findings of fact and conclusions of law should:**

- Determine the legal disposition of the case, including custody of the child, based upon the statutory options provided under state law;
- State the long-term plan for the child;
- When applicable, specify why continuation of the child in the home is contrary to the child's welfare;
- Determine whether there is a plan for monitoring the implementation of the permanency plan;
- When placement or services are ordered that were not agreed upon by the parties, specify the evidence or legal basis upon which the order is made;
- Specify whether reasonable efforts have been made to prevent removal or eliminate the need for placement;
- Specify terms of sibling and parental visitation;
- Specify parental responsibilities for child support;

**Schedule time and date of:**

- Review hearing; or
- Permanency hearing.

## PERIODIC REVIEW HEARING

*Periodic reviews occur within 90 days of foster care placement and at least every six months thereafter. T.C.A. § 37-2-404(b) They may be conducted by the court or by a Foster Care Review Board. T.C.A. § 37-2-406(a)(3)*

### Persons who should be present:

- Judge or judicial officer
- Parents whose rights have not been terminated
- Relatives with physical custody
- Foster and pre-adoptive parents
- Age appropriate children
- Assigned caseworker
- Agency attorney
- Attorney for parents
- Legal advocate for child
- Court reporter/ suitable technology

### Key decisions to be made:

- Whether there is a need for continued placement of a child;
- Whether the court-approved permanency plan remains the best plan for the child;
- Whether the agency is making reasonable efforts to rehabilitate and reunify the family;
- Whether services and responsibilities set out in the plan of care need to be clarified or modified due to changed circumstances;
- Whether the child is in an appropriate placement which adequately meets all physical, emotional and educational needs;
- Whether the terms of visitation need to be modified;
- Whether any additional court orders need to be made to move the case toward successful completion;
- What time frame should be set forth as goals to achieve reunification or other permanent plan for the child.

### The court's written findings of fact and conclusions of law should:

- State why the child is in need of continued placement, including the specific risks to the child;
- Explain whether and why family reunification and an end to court supervision continues to be the long-term goal;
- Determine whether the agency has made reasonable efforts to eliminate the need for placement, with specific findings as to what actions the agency is taking;
- Specify whether the parents are in compliance with the case plan and identify specifically what further actions the parents need to complete;
- Order the agency to make additional efforts necessary to meet the needs of the family and move the case toward completion;
- Approve proposed changes in the permanency plan and set forth any court-ordered modifications needed as a result of information presented at the review;
- Identify an expected date for final reunification or other permanent plan for the child;
- Make any orders necessary to resolve the problems that are preventing reunification or the completion of another permanency plan for the child.

### Schedule time and date of:

- Further review, if necessary.
- Permanency hearing.

**PERMANENCY HEARING**

*The first permanency hearing must be held within 12 months of the date of foster care placement, and no less frequently than every 12 months thereafter. Permanency hearings must be conducted by the court. T.C.A. § 37-2-409.*

**Persons who should be present:**

- Judge or judicial officer
- Parents whose rights have not been terminated
- Relatives with physical custody
- Foster and pre-adoptive parents
- Age appropriate children
- Assigned caseworker
- Agency attorney
- Attorney for parents
- Legal advocate for child
- Court reporter/ suitable technology

**Key decisions to be made:**

- Whether the child is to be returned home and on what specific date;
- Whether the custody of a child will be placed with a relative or other suitable person on a permanent basis;
- Whether the child will be legally freed for adoption and the date DCS is to file a petition to terminate parental rights;
- Whether the child will be placed in planned permanent living arrangement and why other goals are not appropriate for the child;
- If the child is 16 or older, whether independent living skills have been provided.

**The affidavit of reasonable efforts should answer the following questions:**

- Was removal of the child necessary in order to protect the child, and, if so, what are the specific risks to the child that necessitated the removal;

- What specific services are necessary to allow the child to remain in or return to the home;
- What services has DCS provided to assist the family and child so as to prevent removal or to reunify the family;
- Has DCS provided services to the family and child, and, if not, what are the specific reasons why services have not been provided.

**The court’s findings of fact and conclusions of law should specify:**

- Which efforts were made by DCS to prevent removal of the child;
- Whether the circumstances leading to the removal of the child have been corrected;
- The frequency of recent visitation and its impact on the child;
- What efforts have been made to safely reunify the family;
- If the goal is adoption or other permanent living situation, which efforts, consistent with the goal, has DCS made to find place child;
- Facts and circumstances supporting a goal of termination;
- A plan to place the child for adoption.;
- A plan to ensure the stability of the placement.

**Schedule time and date of:**

- Further review, if necessary.

## TERMINATION OF PARENTAL RIGHTS HEARING

*Termination of parental rights must be found to be in the best interest of the child and must be based upon statutory grounds. T.C.A. § 36-1-113. For dependency and neglect cases, those grounds are listed at T.C.A. § 36-1-113(g). The standard of proof is clear and convincing evidence. T.C.A. § 36-1-113(g)(7)(B).*

### Persons who should be present:

- Judge or judicial officer
- Parents whose rights have not been terminated
- Relatives with physical custody
- Foster and pre-adoptive parents
- Age appropriate children
- Assigned caseworker
- Agency attorney
- Attorney for parents
- Legal advocate for child
- Court reporter/ suitable technology

### Key decisions the court should make:

- Whether the statutory grounds for termination of parental rights have been satisfied.
- Whether termination is in the best interests of the child.

### The court's written findings of fact and conclusions of law at the termination of parental rights hearing should:

- Indicate whether or not termination of parental rights is granted;
- Address whether the grounds for termination were satisfied and, if so, whether the termination was in the best interests of the child;
- Be sufficient for the purpose of appellate review;

### Schedule time and date of:

- Further review, if necessary.

## GLOSSARY OF SELECTED TERMS\*

**ABUSE:** Exists when a child is suffering from, has sustained, or may be in immediate danger of suffering from or sustaining a wound, injury, disability or physical or mental condition caused by brutality, neglect or other actions or inaction of a parent, relative, guardian or caretaker. T.C.A. § 37-1-102(1).

**AACWA:** The Adoption Assistance and Child Welfare Act of 1980. Comprehensive federal legislation that outlined states' responsibilities in preventing removal of children and reunifying families through the use of reasonable efforts; required each child have a plan for achieving a permanency goal; enlarged the scope of judicial oversight in juvenile court proceedings; and provided support for families adopting special needs children. (P.L. 96-272)

**ABANDONMENT:** In juvenile court, the willful failure by a biological parent or legal guardian to visit (more than token visitation) or to provide financial support to a child for a period of more than four consecutive months. Abandonment is one of the legal grounds for termination of parental rights. T.C.A. § 36-1-102, 113.

**ADJUDICATION/ADJUDICATORY HEARING:** In child welfare proceedings, the trial stage at which the court determines whether allegations of dependency, abuse or neglect concerning a child are sustained by clear and convincing evidence, and, if so, are legally sufficient to support state intervention on behalf of the child; provides the basis for the state intervention into a family, as opposed to the disposition hearing which concerns the nature of such intervention.

**ADOPTION:** Social and legal process of establishing by court order the legal relationship between parent and child. T.C.A. § 36-1-102(3).

**ADOPTION ASSISTANCE:** Title IV-E Adoption Assistance program designed to assist states in finding adoptive homes for eligible children with special needs. This open-ended entitlement program provides funds to states to assist in providing ongoing financial and medical assistance for adopted children with special needs. Funds also support staff training and administrative costs.

**ADOPTIVE PARENT:** The person who has been made the legal parent of a child by the entry of an order of adoption under the provisions of the laws of a state, territory or foreign country. T.C.A. § 36-1-102(7).

**AFDC:** Aid to Families with Dependent Children. This federal funding source has been replaced by Temporary Assistance to Needy Families funding. See TANF.

**AGENCY:** A child welfare agency, regardless of whether such agency is licensed or approved, and includes the department of children's services. T.C.A. § 37-2-402.

**APPEARANCE:** In some jurisdictions, the first hearing in a child protection case in non-emergency situations.

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\* This section is reproduced from MacLean, Cindy, *Tennessee Court Improvement Program for Juvenile Dependency Cases: An Assessment of Tennessee's Court Performance and A Plan for Improvements*, 1997, produced for the Tennessee Supreme Court and the U.S. Department of Health and Human Services, under the auspices of the Tennessee Court Improvement Program and the provisions of Section 13712 of Subchapter C, Part I of the Omnibus Budget Reconciliation Act of 1993: Grants to State Courts.

**ASFA:** Adoption and Safe Families Act of 1997, amended AACWA. Federal legislation aimed at improving states' response to children and families in the child welfare system. ASFA shortened the time line for achieving permanency, required reasonable efforts be made to find a permanent placement for the child when reunification is not possible, identified cases in which reasonable efforts to prevent removal and reunify the family may not be required, and dictated circumstances under which states must file petitions to terminate parental rights. The act also created incentives for states to increase adoptions. (P.L. 105-89.)

**BEST INTERESTS OF CHILD:** The guiding principle of all juvenile court proceedings, "best interests" is also a legal determination made by the juvenile court that incorporates particularized findings unique to the child who is the subject of litigation.

**BIFURCATED HEARINGS:** Proceedings in which issues are tried or heard separately. In juvenile dependency and neglect cases, the adjudication and disposition may be bifurcated.

**BIOLOGICAL PARENT:** Person, either man or woman, who physically or genetically conceived the child who is the subject of the adoption or termination proceedings.

**BRIAN A.:** Federal class action lawsuit on behalf of children in foster care in Tennessee. Refers to order of federal district court that provides for improvements in the state agency's response to dependent and unruly children in foster care. (*Brian A. v. Sundquist*, 149 F. Supp. 2d 941 (2000))

**CASA (COURT APPOINTED SPECIAL ADVOCATE):** A specially trained volunteer appointed by the court, who conducts an independent investigation of child abuse, neglect or other dependency matters, and submits a formal report offering advisory recommendations as to the best interests of the child.

**CHILD ABUSE:** To hurt or injure a child by maltreatment. *See* ABUSE.

**CHILD(REN):** Any person(s) under eighteen years of age. T.C.A. § 36-1-102(11). [A person 18 years or older may not be committed to or remain in the custody of the Department of Children's Services by virtue of being adjudicated dependent and neglected or unruly. T.C.A. § 37-1-102(4)(C).]

**CHILD DEPENDENCY:** A type of case filed exclusively in juvenile court, where there are allegations that a child has been harmed or that conditions in the child's home place the child at substantial risk of serious and irreparable harm. T.C.A. § 37-1-102.

**CLEAR AND CONVINCING EVIDENCE:** An evidentiary standard in which the proof as presented at the trial or hearing has a high probability of being the truth. This standard requires more proof than a "preponderance of the evidence" standard, but less than "proof beyond a reasonable doubt."

**CODIFY (CODIFIED):** The process of putting rules and regulations concerning a certain subject into statutes.

**COMMUNITY SERVICE AGENCY (CSA):** Quasi-governmental agencies which contract with the Department of Children's Services to provide needed services to families and children within the community. Each region within the Department of Children's Services is served by a different CSA.

**COURT:** Chancery, circuit, or general sessions court, including juvenile, probate and criminal court. Often the term "court" is used interchangeably with "judge" or "referee," as in the statement, "The lawyer presented evidence to the Court."

**CUSTODIAN:** Person, other than legal guardian or parents, who takes on the role of parent to the child or person to whom temporary legal custody has been given by order of the court. T.C.A. § 37-1-102(7).

**CUSTODY:** Control and actual physical care of the child; includes the right and responsibility to provide for physical, mental, moral and emotional well being of the child. Custody does not exist by virtue of mere physical possession of the child. T.C.A. § 37-1-102(8).

**DATE OF FOSTER CARE PLACEMENT:** The original date on which the child is physically placed in foster care. T.C.A. § 37-2-402.

**DCS:** Department of Children’s Services. The administrative agency in Tennessee that provides care and services to children in foster care and to children who are at risk of entering foster care. DCS strives to protect children from abuse and neglect; to provide prevention, early intervention, rehabilitative and educational services; to pursue appropriate and effective behavioral and mental health treatment; and to ensure that health care needs are met. T.C.A. § 37-5-102.

**DELINQUENT CHILD:** A child who has committed an act which would be considered a crime if committed by an adult, and is in need of treatment or rehabilitation.

**DEPENDENT AND NEGLECTED CHILD:** A child subject to the jurisdiction of the court because of abuse or neglect. T.C.A. § 37-1-102(12). See Child Dependency.

**DIRECT REFERRAL:** Process by which a foster care review board identifies an urgent issue that constitutes a risk of harm to the child or is a deterrent to reaching the permanency goal and brings it to the attention of the juvenile court. T.C.A. § 37-2-406(c)(1)(B).

**DISPARATE TREATMENT:** Differential treatment based upon a person’s race, color, religion, sex, national origin, or disability.

**DISPOSITION/DISPOSITIONAL HEARING:** The stage of the juvenile court process in which, after finding that a child is within the jurisdiction of the court, the court determines who shall have temporary custody of the child. Evidentiary standards are relaxed.

**DUE PROCESS:** A course of legal proceedings that enforce and protect individual rights; typically refers to adequate notice of all court proceedings, the right to be represented by an attorney and opportunity to be heard.

**EMANCIPATED:** A legal term referring to a person who turns 18 years of age, or a person under the age of 18 who is totally self-supporting, as recognized by the court.

**FLEX FUNDS:** Funds provided through the Department of Children’s Services to provide support services to children and families involved with the child welfare system.

**FOSTER CARE:** Temporary placement of a child in the custody of the Department of Children’s Services for care outside the home of child’s parents or guardian. Foster care ceases when the child is placed with individual(s) for purposes of adoption, or when petition to adopt is filed, or when the child is returned to or placed in care of the parents or relative. T.C.A. § 37-2-402(5).

**FOSTER CARE REVIEW BOARD:** A board of citizen volunteers appointed by the juvenile court to periodically review foster care cases. It serves the quasi-judicial function of advising the court concerning the status of the permanency process of each child in foster care. Depending upon the jurisdiction, the

board may review the cases of delinquents and status offenders in addition to abused and neglected children.

**FOSTER PARENT:** A person who has been trained to provide full-time temporary out-of-home care for children who cannot remain in their own home. T.C.A. § 36-1-102(21). *See* FOSTER CARE.

**GUARDIAN:** Person or entity, other than the parent of a child, appointed by a court as guardian as a result of surrender, parental consent, or termination of parental rights. The rights of a guardian of a minor child must be terminated by surrender or court action before an order of adoption can be entered. T.C.A. § 36-1-102(22)(C). Complete guardianship occurs only when all parental rights have been surrendered or terminated. T.C.A. § 36-1-102(23)(C)(I). Partial guardianship occurs pursuant to an order terminating less than all parental rights. T.C.A. § 36-1-1102(23)(D)(ii).

**GUARDIAN AD LITEM:** In juvenile court, an attorney appointed by the court to represent the best interests of a child. *See* Tenn. Sup. Ct. Rule 40.

**HOMETIES:** A 4 - 6 week intensive program of services within the home intended to preserve the family and to prevent removal of the child from the home.

**ICWA:** Indian Child Welfare Act. Federal legislation aimed at protecting the best interests of American Indian children and promoting the stability and security of American Indian tribes and families. Established minimum federal standards for the removal of American Indian children from their families and the placement of such children in foster or adoptive homes that reflect the unique values of American Indian culture, and provided for assistance to American Indian tribes in the operation of child and family service programs. (P.L. 95-608)

**INDEPENDENT LIVING ACT or FOSTER CARE INDEPENDENCE ACT:** Also referred to as the John H. Chafee Foster Care Independence Program, increases funds to states to assist youths in making the transition from foster care to independent living; recognizes the need for special help for children ages 18 to 21 who have already left foster care; offers states greater flexibility in designing programs to help foster children achieve independence; and establishes accountability for states in implementing those programs. (P.L. 106-169.)

**JUDGE:** *See* COURT.

**JURISDICTION:** The power and authority of a court to hear a case or controversy, and the power to render a decision or judgment.

**JUVENILE COURT:** Court dealing with juveniles, includes general sessions courts and some chancery courts in Tennessee except in those counties and municipalities in which special juvenile courts are provided by law.

**JUVENILE COURT REFEREE:** Person appointed by the juvenile court judge to hear certain types of cases. Orders concerning surrenders and revocations issued by the referee do not require confirmation of the juvenile judge. However, a referee's order recommending termination of parental rights does require a confirmation order by the judge. T.C.A. § 36-1-102(14)(C).

**KINSHIP FOSTER CARE PROGRAM:** Foster care placement of a child in custody of DCS with a relative who has complied with the regulations that are applicable to other foster parents. The kinship foster parent may receive foster care board payments.

**MEPA-IEP:** The Multiethnic Placement Act of 1994 and the Interethnic Placement Provisions. Together, these federal laws prohibit delaying or denying the placement of a child for adoption or foster care on the basis of race, color or national origin of either the child or the foster or adoption parents. (P.L. 104-118)

**NOTICE:** In legal use, communication that is intended to apprise a person of a proceeding in which his interests are involved.

**PARENT:** The biological parent or legal guardian, except in cases when guardianship is held by an agency pursuant to a determination of abandonment or surrender of parental rights. T.C.A. § 37-2-402.

**PARENTAL RIGHTS:** Legally recognized rights and responsibilities to act as a parent, to care for, to name, and to claim custodial rights with respect to a child. T.C.A. § 36-1-102(36).

**PETITION:** A formal written request that a court consider action on a certain matter.

**PERIODIC HEARING:** *See* REVIEW HEARING.

**PERMANENCY:** While not specifically defined in the statutes, the concept of permanency stems from a belief that it is in a child's best interests to be placed as quickly as possible in a safe environment that the child has a reasonable expectation of calling "home" throughout his or her life. The process of permanency begins as soon as the child comes into custody.

**PERMANENCY HEARING:** A formal court proceeding designed to reach a decision concerning the permanent placement of a child; the time of the hearing represents a deadline within which the final direction of a case is to be determined. Permanency Hearings must be conducted by the court within twelve months of a child's placement in foster care.

**PERMANENCY PLAN:** A written plan for a child placed in foster care with the department of children's services or another agency, which lists the reasons the child is brought into custody and which identifies a permanent goal for the child. The plan specifies the responsibilities of the parties, including the parents and the department, which must be accomplished in order to achieve the stated goal. T.C.A. § 37-2-402(5).

**PLAN OF CARE:** *See* PERMANENCY PLAN. The term Plan of Care is replaced under ASFA with the term Permanency Plan.

**PLANNED PERMANENT LIVING ARRANGEMENT (PPLA):** A goal for children in foster care for whom DCS has made every reasonable effort to return the child home, to place the child with appropriate family members, or to place the child for adoption. The person to whom DCS proposes to assign permanent caregiver status has demonstrated a commitment to assume long-term responsibility for the child.

**PRELIMINARY PROTECTIVE HEARING:** The first court hearing in a juvenile abuse or neglect case, referred to as emergency removal hearing; occurs either immediately before or immediately after a child is removed from the home on an emergency basis. The preliminary hearing is held within 3 days of the child's removal from the home. The judge must determine whether the Department has established probable cause to believe the allegations in the petition, that the child was in imminent danger of irreparable harm, and that removal was the least restrictive alternative available.

**QUARTERLY PROGRESS REPORT:** A report prepared by DCS that details the progress made by the department, parents, and child toward achieving the permanency goal for the child. T.C.A. § 37-2-404.

**REASONABLE EFFORTS:** The exercise of reasonable care and diligence by the department to provide services related to meeting the needs of the child and the family. T.C.A. § 37-1-166(g). The department must make reasonable efforts to prevent removal of the child, and to reunify the family if the child is removed. The court must make reasonable efforts findings at every dependency hearing.

**RELATIVE CAREGIVER PILOT PROJECTS:** Projects established in Davidson, Shelby and the Upper Cumberland counties to assist families in providing care for related children so that those children need not come into the state's foster care system.

**REPORT:** A written report by the foster care review board as provided in T.C.A. § 37-2-406 or by the department of children's services or by an agency having custody of the child. T.C.A. § 37-2-402.

**REVIEW HEARING/ 90-DAY AND 6- MONTH REVIEW/ PERIODIC HEARING:** Court proceedings which take place after disposition in which the court reviews the status of a case, examines the progress made by the parties since the dispositional hearing, provides for correction and revision of the case plan, and makes sure that cases progress and that children spend as little time as possible in temporary placement.

**SETTLEMENT CONFERENCE:** A hearing set aside prior to the adjudication in which the court convenes the parties with the goal of determining whether the case may be resolved without a contested trial.

**SIBLINGS:** Persons sharing a common biological or legal parent, including brothers, sisters, stepbrothers and stepsisters, etc.

**STATUS OFFENSES:** In juvenile law, a category of offenses which, if committed by an adult, would not be considered a violation of the law, such as truancy, unruly and curfew violations.

**SUBSTANTIAL COMPLIANCE/NONCOMPLIANCE:** In juvenile court, refers to the parent's standard of conformity with his or her responsibilities in the permanency plan. Substantial compliance is the minimum standard for parents' conformity under which a child may be returned to the home. Substantial noncompliance with the plan is a ground for termination of parental rights. T.C.A. § 36-1-113(g)(2).

**TANF:** Temporary Assistance to Needy Families is the federal financial assistance or "welfare" program. In Tennessee, it is called "Families First."

**TENNCARE:** A system of healthcare for Tennesseans who are Medicaid eligible or who lack access to health insurance. TennCare operates as a managed health care program.

**TERMINATION OF PARENTAL RIGHTS HEARING:** A formal proceeding usually sought by a state agency at the conclusion of dependency proceedings in which severance of all legal ties between parent and child is sought against the will of one or both parents, and in which the burden of proof must be by clear and convincing evidence.

**TPR:** See TERMINATION OF PARENTAL RIGHTS.

**TRUANT:** A child who willfully and unjustifiably fails to attend school when attendance is required by law. Truancy is a punishable offense within the juvenile system in some states and, in others, it is the basis of a petition for a child in need of services.

**UNRULY CHILD:** Child in need of treatment and rehabilitation who habitually and without justification is truant; who is habitually disobedient of the reasonable and lawful commands of the child's parent or guardian to the degree that the child's health and safety are endangered; who commits an offense applicable only to a child; is away from the home or legal placement without consent of parents or guardians ("runaway"). T.C.A. § 36-1-102(23)(A).

**VOLUNTARY SURRENDER:** In juvenile court, a legal process by which a parent intentionally relinquishes his or her parental rights.

**YOUTH SERVICE OFFICER:** A position established by the county to assist the juvenile court. Depending upon the jurisdiction, the YSO receives and examines complaints of child dependency, delinquency and status offenses; counsels children and their families; keeps records and transmits information as required by government entities; investigates, reports and makes recommendations to the juvenile court; makes appropriate referrals to public and private agencies; and makes predisposition studies and submits reports and recommendations to the court as required. T.C.A. § 37-1-106.

**YSO:** See YOUTH SERVICE OFFICER.

**REASONABLE EFFORTS CHECKLIST**

A thorough review might include, but is not limited to, the following elements:

- When did the agency first have contact with the family?
- Did the agency identify problems that placed the child at risk of harm?
- Did the agency assess the family to determine what services or other supports were necessary to remedy the problems?
- Did the agency provide the services determined to be necessary?
- Did the family request additional services?
- Did the agency provide those services to the family?
- Did the family accept services provided by the agency?
- Did any of these services remedy the problems?
- If the services did not remedy the problems, were additional services tried?
- Were any services suggested but not provided because they were unavailable?
- If services were unsuccessful, why?
- What other services designed to address these problems are available in the community that the agency has not provided?
- Why were these services not provided?
- Was there an emergency situation in which the child could not be protected without separation from the family prior to providing services?
- If so, what services did the agency consider providing as an alternative to separation from the family?
- Since the placement of the child in out-of-home care, has the agency provided services aimed at reunification? If not, why not?
- Have these services been successful?
- Does the agency have a plan for providing services aimed at reunification? If not, why not?
- Has the agency considered the family's requests in developing these services?
- Could the child be returned if appropriate services were provided?

<b>TABLE OF REQUIRED HEARINGS FOR JUVENILE DEPENDENCY CASES</b>			
HEARING	TIMING	PURPOSE	CONDUCTED BY
<b>Emergency Removal/ Preliminary Hearing</b> T.C.A. 37-1-128	Within <b>72 hours</b> of child's removal	To determine if there is <u>probable cause</u> to believe that the child is abused or neglected as defined by law. Court must find that the child is in immediate danger and that there is no less restrictive alternative to the removal.	<b>Court</b> -- formal hearing with notice to parties and counsel
<b>Initial Draft of Permanency Plan</b> T.C.A. 37-2-403	Within <b>30 days</b> of foster care placement	To document what efforts are required by DCS and the family to reunify the family or to accomplish the objectives served by the child's removal. The goal identified in the Plan may be family reunification, permanent placement with a relative, adoption, or planned permanent living arrangement. Concurrent goals may be appropriate	<b>DCS.</b> All parties and their counsel should be present.
<b>Adjudication</b> T.C.A. 37-1-128 T.C.A. 37-1-129 T.C.A. 37-1-166	Within <b>30 days</b> of removal or filing of petition if child not removed; not more than 90 days	Trial on the allegations of abuse and neglect found in petition, by a <u>clear and convincing</u> evidentiary standard. Court also determines if DCS has made reasonable efforts to prevent removal of child and/or to reunify family.	<b>Court</b> -- formal hearing with notice to parties, attorneys and foster parents
<b>Disposition</b> T.C.A. 37-1-129	Within <b>15 days</b> of adjudication if child has been removed; 90 days if child not removed	To determine who shall have temporary custody of child while reasonable efforts are made to reunify family (if that is the goal). <u>Evidentiary standards relaxed</u> . Court reviews services and the parties' progress on the permanency plan.	<b>Court</b> -- formal hearing with notice to parties, attorneys and foster parents
<b>Ratification of Permanency Plan</b> T.C.A. 37-2-403	Within <b>60 days</b> of foster care placement	Court reviews the Permanency Plan drafted by DCS and ratifies it or asks for modifications. Parents are provided opportunity to comment and to sign a statement of responsibilities.	<b>Court</b> .- formal hearing with notice to parties
<b>Status Reviews</b> -- 90-day -- 6-month T.C.A. 37-2-404 T.C.A. 37-2-406	Within <b>90 days</b> of foster care placement and <b>every 6 months</b> thereafter	To review the progress of all parties toward the goals specified in the Permanency Plan and to assess the appropriateness of the Plan: parents' compliance, child's safety, and the timely provision of services by DCS.	<b>Court or FCRB.</b> Requires notice to parties, attorneys and foster parents
<b>Permanency Hearing</b> T.C.A. 37-2-409	Within <b>12 months</b> of foster care placement (formerly 18 months)	Court makes a permanency decision for the child, based upon the progress of the family under the terms of the permanency plan. Court determines if DCS has made reasonable efforts to reunify family (if that is the goal).	<b>Court</b> -- formal hearing with notice to parties, attorneys and foster parents

### Timeline of Major Federal Child Abuse/Neglect Policy Enactments\*

In some areas of public policy for children – e.g., education and juvenile justice – states and localities have been the primary shapers of policy (and the federal role is relatively modest and specialized). However, in child abuse and neglect policy, the federal government has played a defining role. That role has changed over time, as societal views about preferred approaches to addressing child abuse/neglect have shifted.

1960s: Aid to Families with Dependent Children (AFDC)

- Federal government began to use AFDC to reimburse states for some of the costs of foster care for kids whose families were AFDC-eligible

1974: Child Abuse Prevention and Treatment Act (P.L. 93-247)

- Provided grants to improve states' capacity to prevent, identify and address child abuse and neglect
- Required that, in order to get funding, states must have mandatory reporting laws, prompt investigations of abuse/neglect reports, etc.

1978: Indian Child Welfare Act (P.L. 95-608)

- Recognized that too many Native American children were being removed from their families and tribes by states
- Required that tribes play a greater role in placement decisions affecting abused and neglected Native American children

1980: Adoption Assistance and Child Welfare Act (P.L. 96-272)

- Recognized that kids stayed in foster care too long
- Required that “reasonable efforts” be made to prevent unnecessary foster care placement and to reunify children with their families
- Required that each child in foster care have a plan for achieving a permanency goal (return home, adoption, independent living, etc.), and periodic court and administrative hearings to check on progress towards the goal
- Provided support for families adopting special needs children

1993: Family Preservation and Support Act (P.L. 103-66)

- Recognized that kids were *still* staying in foster care too long: almost all of the federal funds paid the costs of states' placements (in foster care or special needs adoptive homes), rather than services to kids and families
- Established a new funding stream for states to support services to prevent unnecessary foster care placement and to return children home (when appropriate)

1994: Multi-Ethnic Placement Act (P.L. 104-188)

- Recognized that placements for some children were being delayed because there were not enough foster and adoptive families of the same racial/ethnic group
- Prohibited delay or denial of foster care or adoptive placement on the basis of race, color or national origin of the child or prospective family

1997: Adoption and Safe Families Act (P.L. 105-89)

- Recognized that some interpretations of the “reasonable efforts” requirement and the “Family Preservation and Support” approach had left children in dangerous homes, and/or delayed their progress toward adoption (when appropriate)
- Set strict deadlines for states to file for “termination of parental rights” (necessary for adoption), made explicit the primacy of “child safety” in placement and permanency decisions, modified the family preservation program to also support adoption services (changing its name to Promoting Safe and Stable Families), and established new adoption incentive payments to states

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1999: Foster Care Independence Act (P.L. 106-169)

Expanded and enhanced the “Independent Living” program, to improve the outcomes of children aging out of foster care