IN THE COURT OF APPEALS AT TENNESSEE
WESTERN SECTION AT JACKSON

IN RE ADOPTION OF
AMH, a minor.

JERRY L. BAKER and wife
LOUISE BAKER,

Petitioners/Appellees,

v.

SHAO-QUIANG (JACK) HE and wife,
QIN (CASEY) LUO,

Respondents/Appellants.

W2004-01225-COA-R3-PT
(Trial Ct.#Ch-01-1302-3, Chancery Court, Thirtieth Judicial District at Memphis)

BRIEF OF AMICI CURIAE: CHILDLAW CENTER, VANDERBILT LEGAL CLINIC, CHILD ADVOCACY CLINIC, TENNESSEE ALLIANCE FOR LEGAL SERVICES

Christina A. Zawisza
Bar #022610
Associate Professor of Clinical Law
The University of Memphis
Child Advocacy Clinic
109 N. Main St. 2nd Floor
Memphis, TN 38103

901-523-8822, ext. 404
Counsel for Amici

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

17

Secondary Sources

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Appellants present 16 issues for review, while Appellees identify 12 questions for this Court. *Amici* will address only 4 issues. These were chosen in an effort to assist the court to cull the voluminous record and the lengthy briefs and to address "big picture" issues that affect not only these parties but all parents and children in Tennessee who might face termination of parental rights proceedings, particularly those who might have immigrant backgrounds. In addition, *amici* selected issues which were particularly within their expertise as academics and state leaders.

Amici will address these issues:

1. Whether §36-1-113 (g) and (i) of the Tennessee Code require a bifurcated, two-prong fact-finding process as follows:

   (a) a fault (or guilt) finding phase in which parental fitness or unfitness is determined by clear and convincing evidence before the court moves to (b) a dispositional (best interest) phase in which the court determines whether clear and convincing evidence demonstrates the need for termination of parental rights.

2. Whether §36-1-113 (g) and (i) of the Tennessee Code countenance a comparison of a child's birth parents with any potential adoptive parents.

3. Whether §36-1-113 (g) and (i) of the Tennessee Code supports fact-finding regarding living conditions in a child's prospective home country.

4. Whether the trial court correctly applied the definition of "abandonment" under §36-1-102 of the Tennessee Code and the "settled purpose" doctrine.

STATEMENT OF THE CASE

(A1 followed by the page number refers to amici's Appendix 1, the Trial Court Order; "He" followed by the page number refers to the Hes' Brief; "Baker" followed by the page number refers to the Bakers' Brief)

Amici offer the following statement of the case, which puts forward those aspects of a voluminous record on appeal that address the issues *amici* raise. The trial chancery court issued a lengthy Memorandum Opinion and Order of Judgment on Petition to Terminate Parental Rights and Petition to Modify Custody on May 12, 2004. (A1). A Petition for Adoption (Adoption Petition) and To Terminate Parental Rights (TPR Petition) was filed in the Memphis and Shelby County Chancery Court by Appellees Jerry L. Baker and Louise K. Baker (Bakers) on June 20, 2001 (A1-1). The TPR Petition sought to terminate the parental rights of Shaio-Qiang (Jack) He (Father) and Qin (Casey) Luo He (Mother) (A1-1).

The trial court, at the same trial, heard Mother's Petition to Modify Custody. This Petition had been filed in the Juvenile Court of Memphis and Shelby County on May 29, 2001. This Petition sought to set aside the Juvenile Court's Consent Order awarding custody to the Bakers (A1-1). Apparently the Bakers and the Hes agree that the jurisdiction of the Juvenile Court over this Petition to Modify was suspended when the Bakers filed their Adoption and TPR Petition in the Chancery Court (He-4; Baker-176). The trial court's Order recognizes that the Petition to Modify was transferred to it under §36-1-116(f)(1) of the Tennessee Code (A1-2).

By its order of May 12, 2004, the trial court terminated the parental rights of Mother and Father. The court, however, held the Bakers' Petition for Adoption in abeyance and has not ruled on that Petition (A1-71-72). Mother and Father are appealing the trial court's order terminating their parental rights and denying the Mother's request for custody (He-5).

STATEMENT OF THE FACTS

Appellants' and Appellees' Statements of the Facts are sizeable and demonstrably difficult to follow and digest. Finding it impossible to agree or disagree with either side's recitations, *amici*, in anticipation of the arguments they intend to address, summarize relevant aspects of the trial court order (A1-1-72).

The trial court summarized the procedural posture of the case and identified testifying witnesses. The court remarked that it "carefully observed the demeanor of each witness who testified," and otherwise reviewed the record and applicable law (A1-1-2). The court then referred to the statutory provisions governing termination of parental rights (TPR) contained in §36-1-113 (k) of the Tennessee Code (fault finding phase)and noted the constitutional deference accorded natural parents. The court did not cite §36-1-113 (I) of the Tennessee Code, which governs the best interest phase of termination of parental rights proceedings. The court outlined the purposes of the adoption statute, which include a consideration of the potential adoptive home of the child. (A1-4).

The court next outlined "Generally Significant Facts." In Paragraphs 1-8 and 26-31, the court described the Bakers and facts related to the legal posture of the case. The court then turned in Paragraphs 9-25 to a description of Father, Mother and Child (A1-4-8). Next, the court turned to "Litigant Credibility," again describing Father and Mother and then the Bakers. The court described the Bakers in glowing terms such as sincere, honest, loving, caring and concerned. The court did not attach glowing characteristics to Father and Mother (A1-8-14). The "Litigant Credibility" section of the Order does not address the statutory grounds for termination of parental rights.

The court next turned to the "Credibility of Other Witness" (A1-14-18). The court found Dr. John Copper, an expert witness in Chinese culture and a Rhodes College professor (witness on behalf of Father and Mother), to be totally lacking in credibility because of statements he

made on behalf of himself in a bankruptcy proceeding (A1-14). The court found all of the expert witnesses on behalf of the Bakers as well as the Guardian ad Litem to be honest and forthright. The court found all of the lay witnesses for the Bakers to be honest and forthright (A1-15-18).

Subsequently the court turned to "Due Process Factors," a description of the course of events leading up to the Child's arrival in the home of the Bakers and various legal proceedings (A1-18-23). (As these do not relate to the issues *amici* will discuss, they are not summarized here.)

The next section of the trial court's order addressed "Abandonment Factors," divided into various parts related to the "Chronology of Events," child support and visitation (A1-23-51). The court then addresses the "settled purpose doctrine" (A1-51-52). In this section, the court makes numerous findings about the events leading to the initial foster care placement of AMH in the Bakers' home and the subsequent temporary custody agreement memorialized by the Consent Order Awarding Custody (A1-23-36). Throughout this section the court emphasizes its finding that the Hes had considered giving the child up for adoption prior to her birth. The Court also emphasizes its finding that the Hes understood the import of the Consent Order in spite of language barriers and in spite of Mrs. He's absence from the meeting with attorney Kevin Weaver. (A1-36-40). Interestingly, the court notes that the Hes visited with their daughter weekly during the ninety-day foster care period. (A1-27). The court also describes the events surrounding the Bakers' calling the police on the Hes during a January 28, 2001 visit. (A1-40-41). The court did not find credible the Hes' assertion that having the police called deterred them from future visits. (A1-42-43).

In the Section called "Willful Failure to Support", the court finds that the Hes failure to pay support was willful. (A1-44-46). The court actually finds that, in signing the June 4, 1999 Consent Order (which did not call for any child support), the Hes intended to absolve themselves of all parental obligations regarding AMH. (A1-40). The court also acknowledges in this

section that the Hes made approximately eighty visits to their daughter between June 4, 1999 and January 28, 2001, when the police were called on them. (A1-46). The court notes that Mrs. He filed a second Petition to Modify the Consent Order Awarding Custody in May of 2001, seeking to regain custody, but did not include prayer for visitation in that petition (A1- 48-49). The court found that:

> Mrs. He's willful failure to seek reinstatement of visitation with AMH demonstrates that her goal in filing the Petition to Modify to regain custody was for the sole purpose of remaining in the United States and avoiding deportation. Mrs. He's failure to ask the Court to reinstate visitation with AMH, when she could have easily done so, evinces Mrs. He's willful abandonment of AMH. (A1-49).

The court characterized the Hes' visits with their daughter from June 4, 1999 through June 20, 2001 (there were admittedly eighty from June 4, 1999 through January 28, 2001 when the police were called) as "so sporadic, and of such short duration that it evinced a desire to forego their parental responsibilities as to AMH." (A1-52) Finally, the court found that "(f)rom June 4, 1999 through June 20, 2001, the frequency and duration of the Hes' visits with AMH evinced their intention to have only enough contact with AMH to serve the Hes' stated objective to avoid deportation." (A1-52).

Before the court made a decision about whether the above evidence constitutes clear and convincing evidence of any of the grounds for termination of parental rights, the court moved into a discussion of "Best Interest Factors," and various psychological evaluations of the Child (A1-52-60). The court noted some risks in transcultural placement of the Child with the Bakers, but provided a lengthy comparison of the negative attributes of the Father and Mother in comparison to the Bakers. In this section of the Order, the court noted as significant deciding factors, the potential employment prospects or living conditions of the Father and Mother in the Peoples Republic of China, the "one-child-per-one-family" rule in China, and the death rate for female Chinese children (A1-27-58).

The court ended with "Conclusions of Law," starting with a recitation of constitutional

law (A1-60-63). Before establishing that "grounds" for TPR had been established by clear and convincing evidence, the court first ruled that TPR is in the best interests of the child under a section called "General Conclusions of Law" (A1-67, ¶265). The court finally addressed the following "grounds" for termination of parental rights: 1) knowing and willful abandonment by Mother and Father by knowingly and willfully failing to provide child support and visitation for four consecutive months immediately preceding the filing of the Petition (¶¶269-270); 2) Father was not the legal parent or guardian (¶272); 3) Father did not manifest an ability and willingness to assume legal and physical custody of the child (¶272, 3); (4) Child would be at risk of substantial harm physically and psychologically if placed with Father (¶272,4).

The court affirmatively held that the following "ground" for TPR was not sustained by clear and convincing evidence: that Father's and Mother's mental conditions are so presently impaired and likely to remain so that it is unlikely that Father and Mother will be able to assume or resume the care of and responsibility for the Child in the near future (¶¶273-74). The court also affirmatively held that the provisions of §36-1-113 (g)(3)(A)(I), (ii) and (iii) of the Tennessee Code do not apply to either Mother or Father (¶¶275-76). (These provisions deal with the ability of a parent to correct the conditions which might prevent the child's safe return home if the child has been removed from the home of the parent or guardian by a court for a period of six months.) The court ends with again addressing the law's "best interests" factors, again comparing Father and Mother to the Bakers (A1, 70-74).

STATEMENT OF INTEREST

A. Interest of Amici

1. **ChildLaw Center, located at Loyola University of Chicago School of Law.**

The ChildLaw Center is a program of the Loyola University Chicago School of Law, whose mission is to prepare law students and lawyers to be ethical and effective advocates for children and promote justice for children through interdisciplinary teaching, scholarship and service. Through its Child and Family Law Clinic, the ChildLaw Center also routinely provides representation to child clients in domestic relations, child protection, and other types of cases involving children. The Child Law Center maintains a particular interest in matters affecting the regulation of relationships between children, their parents and other adults.

2. **Vanderbilt Legal Clinic, located at Vanderbilt University School of Law.**

The Vanderbilt Legal Clinic offers clinical courses on civil, criminal, domestic violence, community and economic development, business and juvenile practice. Students enrolled in clinical courses represent clients under close supervision by members of the Law School's clinical faculty. The mission of the Legal Clinic is to prepare students to be reflective practitioners with respect to the duties and responsibilities they have towards clients, themselves, adversaries, third parties, courts and the public interest. Students in the Juvenile Practice Clinic represent children and family members, including parents, in proceedings in juvenile court that include custody related to child protection, termination of parental rights, and adoption. The Juvenile Practice Clinic has a strong interest in assuring that justice is achieved in child/family matters and in preserving families whenever possible.

3. **Child Advocacy Clinic, located at The University of Memphis School of Law.**

Similar to the Vanderbilt Legal Clinic, the Child Advocacy Clinic at The University of Memphis provides representation to children and sometimes parents in a variety of legal matters including dependency and custody proceedings, special education and delinquency dispositions.

Student Attorneys work under direct supervision of a faculty member. The Clinic emphasizes the highest values of the legal profession as a complement to classroom instruction as follows: integrity, ethics and professionalism, collaboration, vigorous client and community service, and social justice obligations. Through giving a vulnerable group "voice," tomorrow's litigators, advocates, counselors, lawmakers and judges develop a spirit of compassion, a sense of fairness, and an understanding of equal justice. As such the Child Advocacy Clinic has a strong interest in seeking clarity about the statutory framework and the procedures governing termination of parental rights proceedings in Tennessee.

4. **Tennessee Alliance for Legal Services.**

TALS is a statewide non-profit organization whose mission is to ensure that low-income Tennesseans have access to the civil legal justice system and to identify and correct conditions that adversely affect them. It supports eight legal services providers in Tennessee who have given hope and justice to many women, men, and children who otherwise would not have an alternative. TALS, too, has a strong interest in establishing a clear framework for the litigation of termination of parental rights cases which recognizes each party's right to substantive and procedural fairness. Lawyers for the legal services field programs under the TALS umbrella have argued issues involving the constitutionally protected rights of natural parents before the Tennessee Supreme Court on several occasions.

Expertise of Amici[1]

All *amici* are staffed by highly experienced lawyers, many of whom have specialized in the representation of children and families for years. The staff of the three Law School *amici* (ChildLaw Center, Vanderbilt Legal Clinic, and Child Advocacy Clinic) are university professors who are nationally recognized leaders in the field of child welfare law and policy. Professors Bruce Boyer at Loyola Chicago, Susan Brooks at Vanderbilt and Christina Zawisza at the University of Memphis have considerable expertise in the law regarding termination of parental rights proceedings and have filed numerous appellate briefs in courts throughout the country. They have drafted child welfare legislation and court rules, have developed a high degree of knowledge about the ethical requirements of representation in child welfare proceedings, have participated in research in the field, and have produced scholarship on topics related to child custody, termination of parental rights and adoption.

Due to the expertise of the clinical amici faculty members at the three Law Schools, *amici* and the amici statewide leadership on issues related to low-income litigants demonstrated by TALS *amici* approach this Court with considerable proficiency. The case at bar is a highly complex chancery court case with a voluminous record. *Amici* can assist this court in resolving this controversy, not only through an analysis of Tennessee law, but also with reference to and reflection upon similar proceedings in other states.

---

[1]Academic amici do not purport to speak for the universities or law schools at which they work.

SUMMARY OF ARGUMENT

Termination of parental rights (TPR) is the death knell of a family, both for the parents and the child. Lassiter v. Department of Social Services, 452 U.S. 18, 27 (1981). A court's decision to sever the family relationship forever, therefore, must be accomplished according to strict due process standards and with the utmost attention to statutory details in an effort to reduce the risk of a wrong result. Santosky v. Kramer, 455 U. S. 745, 753 (1982).

Based on federal constitutional authority, it is now well-established in a majority of the states that termination of parental rights trials are conducted in a "bifurcated" fashion, consisting of two phases: (1) a fault (or guilt) finding phase in which permanent parental fitness or unfitness is determined, followed by (2) a dispositional (or best interests) phase in which it is determined whether termination of parental rights is in the child's best interest. Strict statutory standards govern each phase. Tennessee has also embraced such rigorous procedures. See, TENN. CODE ANN. §§36-1-113 (c) (1) and (2) (2004).

The trial court here did not bifurcate the proceedings but considered evidence of fault interchangeably with evidence regarding "best interests" and prospective adoptive parent fitness.[2] The danger in the failure to "bifurcate" and to follow strict statutory procedures is that a subjective view of a child's "best interests," prematurely determined by psychological evaluations and other evidence that would be inadmissible in the fault-finding phase colors a court's determination of fault. In addition, the interests of the parties differ in each phase, a factor trial courts are required to appreciate. At the fault-finding stage, both parents and child share a vital, mutual interest in preserving the family unit and preventing an erroneous result. It is only at the dispositional stage that the court may assume that the interests of the parents and the child diverge. Santosky, 455 U.S. at 760.

---

[2]Indeed, the trial court relied on Tennessee's adoption statute, although it did not rule on the Adoption Petition.

Consideration of the child's "best interests" and prospective adoptive parent fitness prior to a determination of fault also impermissibly led the trial court to compare the birth parents to the prospective adoptive parents. TPR proceedings do not allow for a determination of whether a "better" set of parents might be available. Rather, they require a determination only regarding whether the birth parents meet minimal child-caring standards. Santosky, 455 U.S. at 759.

Furthermore, in considering the child's "best interests," the trial court exceeded statutory guidelines by treading in constitutionally impermissible waters. The trial court addressed potential living conditions in the parents' country of origin: China. The selection of a home country for a child is completely within the constitutional prerogative of the child's parents, as long as the parents are otherwise fit. Neither constitutional law nor Tennessee statutes permit any such intrusion on parental choice.

The trial court also erred as a matter of law by determining that §36-1-113 (g) (3) (A) (i), (ii) and (iii) of the Tennessee Code did not apply to this case. This section contemplates that the parent will be given an opportunity to remedy the conditions which led to the child's removal from home or impede the child's safe return. The lower court held that this section applied only when the child was removed from home by the state's Department of Children's Services. On its face, the statute states that it applies when the child is removed by the court. When a court fails to allow remedial measures, precipitous termination of parental rights might result in the death of a family that otherwise might recuperate and prosper through the provision of social services.

Finally, the court incorrectly applied the proper definition of abandonment that has evolved through approximately fifty years of case law. Since 1951 Tennessee statutes have defined abandonment as the willful failure to support or visit a child for the four months preceding a petition to terminate parental rights. Recognizing that a parent's right to the care and custody of his or her child is a fundamental liberty interest requiring the highest constitutional protections, Tennessee courts have consistently refused to terminate parental rights for

abandonment unless the parent had evinced a settled purpose to forego all parental rights and responsibilities.

In an attempt to streamline the adoption process, the Tennessee General Assembly enacted sweeping changes to the laws governing termination of parental rights and adoption. Among other changes, the new law eliminated the qualification of willfulness from the definition of abandonment for failure to support creating an irrebuttable presumption that failure to support was willful failure to support. The new statute also attempted to preclude courts from applying the "settled purpose" standard in abandonment cases. The Tennessee Supreme Court ultimately found that the new definitions were unconstitutional in that they allowed for the termination of parental rights without an individualized determination that a parent was unfit in light of the totality of the circumstances.

The trial court has improperly applied a mechanistic application of the statutory definition without consideration of the constitutional implications and the litany of relevant Tennessee case law. This resulted in a finding of abandonment that is totally unsupported by clear and convincing evidence.

ARGUMENT

I. FAILURE TO BIFURCATE FAULT-FINDING AND DISPOSITIONAL PHASES ELEVATED RISK OF ERRONEOUS TERMINATION

A. Clearly Established Federal and State Precedent Mandates Bifurcated Proceedings To Assure Fundamental Fairness

The lengthy order and voluminous record in this case, although difficult to sort through and digest, portray one inescapable scenario. The trial court here did not conduct a traditional termination of parental rights trial according to strict legal requirements. A legally sufficient TPR proceeding requires two phases: 1) a fault-finding phase in which the court determines whether at least one statutory element of "fault" is met by clear and convincing evidence; and 2) a dispositional phase in which the court determines, only after finding parental fault, that the statutory elements forming the "best interests of the child" have been established. Rather than accomplishing the targeted inquiry, the lower court held three trials in one: (1) a fault-finding trial; (2) a best interests trial; and (3) a fitness for adoption trial, repeatedly and seamlessly moving among the three types of inquiry. The failure to divide the proceedings according to law constitutes impermissible error.

The standard of review in this court is *de novo* review upon the record with a presumption of correctness of the findings of fact by the trial court as well as *de novo* review of the trial court's legal conclusions. Tenn. Dept. Of Children's Services v. Tabitha Stewart, 124 S.W. 3d 609, 619 (Tenn. Ct. App. 2002). The erroneous commingling of fault, best interests, and adoption fitness inquiries stymies the required appellate review.

1. Federal Precedent Requires Bifurcation

When it established that parental rights can only be terminated after fault grounds are established by clear and convincing evidence, the United States Supreme Court in Santosky v. Kramer, 405 U.S. at 748, acknowledged that such hearings are two-pronged: a fact finding hearing, followed by a dispositional hearing. Indeed, scholars have characterized the first

hearing as "jurisdictional," examining whether the biological parent, by behavior, has forfeited all rights in the child. This hearing focuses on the action or inaction of the parent. The dispositional question is whether terminating parental rights would be in the best interests of the child. This hearing focuses on the child. If it is decided that the biological parent's behavior does not violate minimum standards of parental conduct so as to render the parent unfit, then the analysis ends and termination is denied. Orman Ketcham and Richard Babcock, Jr., *Statutory Standards for the Involuntary Termination of Parental Rights*, 29 RUTGERS L. REV. 530, 539 (1976).

Such fundamentally fair protections in termination proceedings are required for constitutionally driven reasons. Natural parents have a fundamental liberty interest in the care, custody and management of their children, as well as freedom of personal choice in matters of personal life. Santosky v. Kramer, 455 U.S. at 753. Indeed, the integrity of the family is protected not only by the Due Process Clause of the Fourteenth Amendment (e. g. Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) and Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977), but also by the Equal Protection Clause of the Fourteenth Amendment (e. g. Skinner v. Illinois, 316 U.S. 535, 541 (1942)), the First Amendment (e. g. Wisconsin v. Yoder, 406 U.S. 205, 229 (1972)), and the Ninth Amendment (e.g. Griswold v. Connecticut, 381 U.S. 479, 496 (1965)).

The fundamental constitutional interest of natural parents in the care of their children does not evaporate simply because they have not been model parents or have lost temporary custody of their child. Santosky, 455 U.S. at 753. The State registers no gain when it separates children from the custody of fit parents. Stanley v. Illinois. 405 U.S. 645, 652 (1972). Heightened procedural protections are obligatory in court proceedings "even when blood relationships are strained," and are even more critical, if anything, "when persons face forced destruction of their family life," for "parents retain a vital interest in preventing the irretrievable destruction of their family life." Santosky, 455 U.S. at 753-754. Termination of parental rights

denies the natural parents physical custody, as well as the right to ever visit, communicate with, or regain custody of the child. Santosky, 455 U.S. at 750. Termination is a death sentence for a family.

A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is a commanding one. Lassiter v. Department of Social Services, 452 U.S. at 27. The failure to separate termination proceedings into a guilt-finding prong and a dispositional prong increases the chances of an inaccurate or unjust result. When testimony regarding "fault," "best interests," and "fitness to adopt" is viewed interchangeably, the tendency is to operate by a presumption of parental "unfitness." As was the case in the Illinois Department of Children's Services prior to the Stanley opinion, decision makers often find it is more convenient to operate by presumption rather than undertaking the arduous task of holding separate hearings, sifting through facts, and measuring them against statutory standards. But such corner-cutting procedures do not assure that risk of error of a wrong result is minimized. Stanley, 405 U.S. at 658.

2. Tennessee Precedent Mandates Bifurcation

Under §36-1-113 (c)(1) and (2), of the Tennessee Code, termination procedures are likewise a two-pronged process: a court must base rulings on (1) a finding by clear and convincing evidence that the grounds for termination of parental rights have been established; and (2) that termination of parental rights is in the best interests of the child. TENN. CODE ANN. §36-1-113 (c)(1) and (2) (2004). Tennessee TPR statutes are firmly grounded on federal constitutional principles. See, e. g., State of Tenn. Dept. of Children's Services, 124 S.W. 3d at 619, (citing Santosky and Stanley). Tennessee courts now recognize heightened due process standards as a reflection of the serious interests at stake in the termination of parental rights and the community's judgment of the proper allocation of the risk of error among the litigants. O'Daniel v. Messier, 905 S.W. 2d 182, 187 (Tenn. Ct. App. 1995).

Under Tennessee case law, a petitioner for termination of parental rights can only meet the fault prong by establishing at least one ground for termination listed under § 36-1-113. In the Matter of D. L. B., A Minor, 118 S.W. 3d, 360, 367 (Tenn. 2003). See also, Means v. Ashby, 130 S.W. 3d 48 (Tenn. Ct. App. 2003); In the Matter of M.W.A., Jr. et. al., 980 S.W. 2d 620 (Tenn. Ct. App. 1998). Only after establishing the first prong, i.e.–that a sufficient statutory ground for termination exists–may a court move on to examine the "best interest" prong. Bond v. McKenzie, 896 S W. 2d 546, 547 (Tenn. 1995); see also, State of Tenn., Dept. Of Children's Services v. A.W.S. and E S., No. E2002-02227-COA-R3-JV, 2004 WL 73271 at *4 (Tenn. Ct. App. 2004); In the Matter of A.D.A., 84 S.W. 3d 592, 596 (Tenn. Ct. App. 2002); and In re C.W., N.W., Z.W. & A.L.W ., 37 S.W. 3d 467 (Tenn. Ct. App. 2000) for specific applications of this rule.

Hawk v. Hawk, 855 S.W. 2d 573 (Tenn. 1993) is persuasive because it addresses a situation in which a private party, not the state, seeks to interfere with a parent's constitutional rights. In Hawk, the Supreme Court espoused Tennessee's historically strong protection of parental rights and the reasoning of federal constitutional cases to recognize that parental rights constitute a fundamental liberty interest under Article I, Section 8 of the Tennessee Constitution. Hawk, 855 S.W. 2d at 579. Paternal grandparents had sought to challenge the parents' fundamental privacy interest by seeking court-ordered visitation solely based on the "best interests of the children." The Court held that a court may not constitutionally impose its own subjective notions of the "best interest of the child" when a fit nuclear family is involved, absent "substantial danger of harm" to the child. Id. Petrosky v. Keene, 898 S.W. 2d 726, 728 (1995) reiterates the "substantial threat of harm to the child" standard. Hawk also firmly embraced the two-step process required to interfere with a parent's constitutional right to family integrity, stating: "the state cannot consider a child's 'best interests' until the natural parents have been

declared unfit." 855 S.W. 2d at 581.

Well-established Tennessee precedent, therefore, requires the division of termination of parental rights hearings into two phases. Because these procedures were not followed here, both parents and child face the risk of an erroneous result.

3. National Precedent Favors Bifurcation

While it is clear that federal and Tennessee constitutional law require bifurcated TPR proceedings, *amici* call this court's attention to the volume of similar court opinions throughout the country. The two-step process, first establishing grounds for termination and then examining whether the child's best interests require termination, is well entrenched.[3]

Several examples illustrate the "flavor" of such opinions. One of the most in-depth rationales for bifurcation comes from Nevada in Champagne v. Welfare Division of the Nevada

---

[3]See, e. g., M.H.S. & L.S.S.v. State Dept. of Human Resources, 636 So 2d 419 (Ala. Ct. App. 1994); J.H.V. State of Alaska, Dept. of Health & Soc. Serv., 30 P. 3d 79 (Ala.2001); Michael v. Arizona Dept. of Eco.Sec., 995 P. 2d 682 (Ariz. 2000); In the Interest of K.S. & M.S., 515 P. 2d 130 (Col.Ct. App. 1973); In re Felicia B., 743 A. 2d 1160 (Conn. Ct. App. 2000); Black v. Gray, 540 A. 2d 431 (Del. 1988); In the Interest of K.N., 590 S. E. 2d 792 (Ga. Ct. App. 2003); Woodruff v. Keale, 637 P. 2d 760 (Haw. 1981); Brown v. State of Idaho, 736 P. 2d 1355 (Id. Ct. App. 1987); In re C. W., 766 N.E. 2d 1105 (Ill. 2002); In the Matter of the Termination of the Parent-Child Relationship of R. M., 582 N.E. 2d 417 (Ind. Ct. App. 1991); In the Interest of M.S. And T.S., 519 N.W. 2d 398 (Iowa 1994); In re Guardianship of Williams, 869 P. 2d 661 (Kan.1994); In the Interest of J.M., J.P.M., and M.M., 837 So. 2d 1247 (La. 2003); In re Thomas D., 854 A. 2d 195 (Maine, 2004); In re Adoption No. 09598 In the Circuit Court for Prince Georges County, 551 A. 2d 143 (Md. Ct. App. 1989); Adoption of Ramona, 309 N. E. 2d 547 (Mass. Ct. App. 2004); Dept. of Soc. Serv.v. McIntyre, 480 N. W. 2d 293 (Mich. Ct. App. 1991); In the Matter of the Welfare of the Children of R.W., 678 N. W. 2d 49 (Minn. 2004); Lauderdale Cty. Dept. Of Human Serv. v. T.H.G. & L.D.G., 614 So.2d 377 (Miss. 1992); In the Interest of Q. D.D., 2004 WL 1925924 (Mo. Ct. App. 2004); In re the Interest of Crystal C., 676 N.W. 2d 378 (Neb. Ct. App. 2004); In the Matter of the Parental Rights as to T. M. C., 52 P. 3d 934 (Nev. 2002); In re Juvenile 2003-195, 843 A. 2d 318 (N. H. 2004); In the Matter of Elizabeth H., 47 P. 3d 859 (N. M. Ct. App. 2002); In re J.L.K., 598 S.E. 2d 387 (N. C. Ct. App. 2004); Carignan v. State of Oklahoma, 469 P. 2d 656 (Okla. 1970); State ex. rel. State Office for Services to Children and Families, 1 P. 3d 500 (Ore. Ct. App. 2000); Helsel v. Blair Cty. Children and Youth Serv., 519 A. 2d 456 (Penn. Sup. Ct. 1986); In re Raymond, 751 A. 2d 281 (R. I. 2000); In the Matter of D.J., 100 S. W. 3d 658 (Tex. Ct. App. 2003); State of Utah in the Interest of C.K. and J.K., 996 P. 2d 1059 (Utah Ct. App. 2000); In re Welfare of H.S., 973 P. 2d 474 (Wash. Ct. App. 1999); In re the Termination of Parental Rights to Preston T.B., 648 N. W. 2d 402 (Wisc. 2002).

State Department of Human Resources, 691 P. 2d 849 (1984). Here the Court relied upon Ketcham and Babcock, 29 RUTGERS L. REV. at 539 to call the fault-finding phase of TPR "jurisdictional." Champagne, 691 P. 2d at 854. The gravity of the fundamental constitutional liberty interests drives the jurisdictional requirement. Id. The Supreme Court of New Jersey notes that the fault finding hearing and the best interests hearing should be separated by a period of time, so that a "report" regarding the child's best interests (similar to the psychological and psychiatric evaluations contained in this record) is prepared only after grounds for termination have been established. In the Matter of the Adoption of Children by D., 293 A. 2d 171 (N. J. 1972). The Supreme Court of West Virginia pointedly explains that the "unfitness" phase of the procedures must stand on its own facts. In the Matter of Ronald Lee Willis, 207 S.E. 2nd 129, 140-41 (W. Va. 1973).

The cases around the country that require bifurcation of TPR proceedings span over 30 years of jurisprudence and are so consistent in their conclusions that it is obvious that there is a national consensus on this issue. This case could not have been tried the way it was tried in the lower court and withstood appellate review in any of these other states.

B. Failure to Bifurcate Proceedings Impermissibly Infused Fact Finding With Notions of a Child's "Best Interests"

Seemingly as a time-saving measure, the trial court prematurely allowed a consideration of what the court labeled "Best Interest Factors," including extensive psychiatric and psychological evidence about the child's future well-being, to determine that the natural parents deserved to have their parental rights terminated. This "Best Interests" section of the trial court's order preceded the section dealing with "fault grounds" for termination. Similarly, under a section entitled "Conclusions of Law," the trial court first concluded that termination was in the best interests of the child, and then issued a finding of parental fault/permanent unfitness. Such evidentiary commingling heightened the court's chances of reaching an erroneous result and

makes it impossible for an appellate court to exercise its appropriate scope of review. For example, is the court's conclusion that the child would be at risk of substantial harm a finding of fault under Section 36-1-113 (g)(9)(A)(v) of the Tennessee Code (placing custody of the child in the person's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child). Or is it a finding of "best interests" under Section 36-1-113 (i)(5) of the Tennessee Code (the effect a change of caretaker and physical environment is likely to have on the child's emotional, psychological and medical condition)?

The primary reason for bifurcating the termination prongs is that both children and parents share the same vital interest in preservation of their family unit in the fact-finding stage. Trial courts cannot presume that the child and the parents are adversaries in this first stage because the interests of the child and the natural parents coincide at this point to favor error-reducing procedures. The interests of parent and children may begin to diverge only in the disposition phase of termination, after the parent has been found to be unfit. Santosky, 455 U.S. at 760-61. Put another way, the natural parents and the child deserve a chance to prove that their family relationship is salvageable.

An important policy reason also favors splitting the fault-finding phase from the dispositional phase. Psychological and psychiatric evidence often used for placement purposes tends to color the fact finding with emotion or unprovable assumptions. Much criticism has been leveled at the use of such evidence to reliably predict long-term placements outcomes for children. The most psychological or other mental health testimony can offer the court, according to Dr. Matthew B. Johnson, is to contribute relevant information that might otherwise be unavailable to the court. Matthew B. Johnson, *Examining Risks to Children in the Context of Parental Rights Termination Proceedings,* 22 N.Y.U. REV. L. & SOC. CHANGE 397, 401,403 (1996). Mental health professionals will note, however, that experts often offer conclusions and recommendations without a sufficient accounting of the data and reasoning that led to their

conclusions. Id. And the "psychological parent" theory (the notion that it is the day to day interaction, companionship and shared experience–as opposed to biological connections–that is of prime importance to childhood bonding), so often used to support the "best interest" factors, has been the subject of much criticism. One example is significant disagreement over whether children can actually embrace many relationships with various parent figures without suffering substantial harm. Johnson, 22 N.Y.U. REV. L. & SOCIAL CHANGE at 404-11. While such information might be helpful for dispositional purposes, it certainly does not rise to the level of clear and convincing evidence of parental fault.

The U. S. Supreme Court has explicitly refused to sanction the termination of parental rights based solely on purported notions about the "best interests" of the child. Stanley, 405 U. S. at 652-53; DeBoer v. DeBoer, 114 S. Ct. 1, 2 (1992) (denying petition for stay of judgment). Courts are called upon in numerous and varied circumstances to make hard decisions about the best interests of children, as an inescapable aspect of the judicial function. Yet the business of determining "best interests" of children for whom the court has dispositional jurisdiction should not be confused with the antecedent inquiry of whether dissolving a family unit is warranted in the first place.

Even if it were permissible to colligate the jurisdictional fact-finding with the best interests inquiry, it is both unwise and unworkable from a policy standpoint. The "best interests" standard, despite years of legislative effort to define more objective factors to be considered, remains inherently indeterminate. Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards,* 27 STAN. L. REV. 985 (1975); Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case for the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371 (1996). Because of its subjectivity, such a standard is susceptible to widely varying interpretations, reflecting disparate attitudes, values and norms. Note, *Developments in the Law–The Constitution and the Family*, 93 HARV. L. REV. 1156, 1318 (1980); Bruce Boyer

and Steven Lumet, *The Kidnapping of Edgardo Mortara: Contemporary Lessons in the Child Welfare Wars*, 45. VILL. L. REV. 245, 287-88.[4] A constitutional standard that permits termination of parental rights solely on the basis of "best interests" would be an inherently unreliable measure that would increase the risk of an erroneous result.

C. Failure to Bifurcate Proceedings Led Trial Court to Impermissibly Compare Birth Parents to Prospect Adoptive Parents

Another result of the trial court's failure to split this matter into separate trials is the lower court's invariable comparison of the birth parents to the potential adoptive parents. The court consistently spoke glowingly about the attributes of the prospective adopters, but was not so kind in its description of the natural parents.

It is clear error to compare the natural parents with another set of parents at the fact finding hearing. The United States Supreme Court recognized in Santosky that the fact finding hearing "does not purport to determine whether the natural parents or the foster parents would provide the better home." Santosky, 455 U.S. at 759. The fact that important liberty interests of the child and its foster parents may also be affected by the outcome of the permanent neglect hearing does not justify denying the natural parents constitutionally adequate procedures. Santosky, 455 U.S. at 754, note 7. A foster family, almost by definition, has a lesser constitutional interest in remaining together at the expense of the disruption of the natural family.

---

[4]Commentators have discussed society's tendency to accept leniency in child welfare matters for middle class families while approving intervention and intrusion in low-income families and discounting the cultural backgrounds and solid parenting skills of poor parents. Stack, *Cultural Perspectives on Child Welfare*, 12 N.Y.U. REV. L. & SOC. CHANGE, 539-547 (1983-84); Garrison, 22 N.Y.U. REV. L. & SOC. CHANGE 371 at 397. The United States Supreme Court has also recognized that decision makers often reflect a "bias that treats the natural parents' poverty and lifestyle as prejudicial to the best interests of the child." Smith, 431 U.S. at 833-34 (reporting statistics and studies about the disproportionate number of poor and minority children in foster care). The highest court previously opined that termination proceedings are often vulnerable to judgments based on cultural or class bias because parents subjected to such proceedings are often poor, uneducated or members of minority groups. Santosky, 455 U.S. at 763.

Smith, 431 U.S. at 855.

Several state courts have eloquently addressed the dangers of comparative fitness determinations. In Champagne, supra, the Supreme Court of Nevada spoke to the dilemmas faced by poor and marginally adequate parents who find themselves in a classic "Catch-22" situation: contact with their children is made difficult or impossible, they are thrust into counseling and parenting programs that have little chance of success, and their children are likely to have grown used to neater, cleaner, and more intelligent, possibly more permissive parents. That Court concluded:

> We agree that children's interests should be paramount; but their interests cannot displace established liberty interests of natural parents. Children cannot be taken from poor parents and placed permanently in the home of substitute parents simply because their 'emotional needs' would be better served or because they might have a cleaner, neater or richer environment.

Champagne, 691 P. 2d at 856.

The Supreme Court of New Jersey, likewise, has expressed dismay at the thought of a constitutional standard permitting a search for "better" parents. New Jersey Division of Youth and Family Services v. C.S. and J.G. cited Stanley and Santosky to decree that parental rights may not be terminated by merely showing that the child would be better off with a prospective adoptive parent, saying:

> We emphasize at the outset that the 'best interests' of a child can never mean the better interests of the child. It is not a choice between a home with all the amenities and a simple apartment, or an upbringing with all the classics on the bookshelf as opposed to the mass media, or even between parents or providers of vastly unequal skills.

New Jersey Div. of Youth & Fam. Serv., 842 A. 2d 215, 236 (N. J. 2004).

The Tennessee Supreme Court also shunned a comparison between natural parents and third parties. In the context of forced grandparent visitation and relying upon the scholarship of Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 U. LOUISVILLE J. FAM. L. 393, 441 (1985-86), this state's highest court explained that courts cannot make significant decisions

concerning custody of children merely because they could make a better decision or disposition, saying:

> For the state to delegate to the parents the authority to raise a child as the parents see fit, except when the state thinks another choice would be better, is to give the parents no authority at all. 'You may do whatever you choose, so long as it is what I would choose also' does not constitute a delegation of authority.

Hawk, 855 S.W. 2d at 580-81.

Hawk approved the logic of Santosky, which applies a two-step process to child protection cases. "This procedure assures parents that a "best interests of the child" analysis will not pit them against potential foster parents; rather, the state cannot consider a child's "best interest" until the natural parents have been declared unfit," the Tennessee Supreme Court unqualifiedly pronounced. Hawk, 855 S W. 2d at 581. In addition to the Bean article, the Court accepted as persuasive Justice Lambert's dissent in a Kentucky case, King v. King, 828 S.W. 2d 630 (Ky.), *cert. denied* 506 U.S. 941 (1992), in which he explained that a mere improvement in the quality of life is not a compelling state interest and is insufficient to justify invasion of constitutional rights. Hawk, 855 S.W. 2d at 582.

Along these same lines, the Tennessee Supreme Court extended Hawk to protect the interests of an unwed biological father who sought to legitimate his child versus the interests of a couple who sought to adopt in Nale v. Robertson, 871 S.W.2d 674 (Tenn. 1994). The Court cited with approval the following language of the Court of Appeals' decision:

> 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 an infant or young child. 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."

871 S.W. 2d at 677-78.

Whatever the faults of the natural parents here might be, it is constitutionally

unacceptable to compare them against another set of parents and terminate their parental rights because they do not measure up. Biological parents are not required to demonstrate that they are perfect before they can be granted custody of their children. Ray v. Ray, 83 S.W. 3d 726, 734 (Tenn. Ct. App. 2002). Because the decision below was so infused with such an impermissible inquiry, the risk of an erroneous result has been heightened.

D. Failure to Bifurcate Proceedings Led Trial Court to Impermissibly Rely on Unauthorized Cultural Factors

The lower court decision also is infused with references to the birth family's country of origin, amid the court's fears that if given custody of their child they would remove her to China, a country whose family values are different from those here. But the grounds for termination of parental rights in Tennessee do not allow for ending a family unit based on the lifestyle a child would have in another country. Tenn. Code Ann.§36-1-113 (g) (2004). Nor is a country's culture one of the statutory factors for whether termination is in the child's best interests. Tenn. Code Ann. §36-113 (i) (2004).

Tennessee's TPR statute does not approve such cultural factors, of course, because they would be unconstitutional. Parents have a fundamental right to choose to raise their children as they see fit, Meyer v. Nebraska, 262 U.S. 390, 399 (1923), a right that the United States Supreme Court has reaffirmed on many occasions. In Pierce v. Society of Sisters, for example, the Court invalidated a statute that prohibited parents from choosing private education over public schooling for their children. Such a law would unreasonably interfere with the liberty of parents to direct the upbringing and education of their children. 268 U.S. 510, 534-35 (1925). Similarly the Court upheld the right of Amish parents to withdraw their children from public schools after the eighth grade in order to educate them at home. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972). In addition to this parental autonomy line of Supreme Court cases, the parents' right to choose how to raise their children is also protected by the right to privacy and freedom of

choice line of cases, which establish zones of privacy in matters concerning family life that the state cannot touch. Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

The Tennessee Supreme Court adopted both the parental autonomy and the freedom of choice lines of federal cases in Hawk and recognized that parents have a fundamental liberty interest under Article I, Section 8 of the Tennessee Constitution as well. Hawk, 855 S.W. 2d at 577-79. Hawk noted that the Amish children in Yoder would not be inherently harmed by receiving an Amish education rather than a public education, the children in Pierce would not be inherently harmed by going to private schools, and the children in Meyer would not be inherently injured by instruction in the German language. Hawk also took notice that the state's desire to foster a homogeneous people with American ideals was not a sufficient justification to deprive a parent of constitutional rights. Hawk, 855 S.W. 2d at 580. So, too, the child subject to this appeal constitutionally deserves to grow up in the country of her parents' choice, even though that country is not imbued with American cultural ideals.[5]

This is not the first court to face a custody determination involving debate about a child's cultural roots. Bruce Boyer and Steven Lubet describe two such situations. One is the 19th century case of Edgardo Mortara, a six year old Italian Jewish child forcibly removed from his family so that he could be raised by Christians, seemingly because he had been baptized by an

---

[5]According to one scholar, most countries share a commitment to parenthood, although they may be politically at odds. When children become political "footballs" caught up in debate about differing political ideologies, poor legal decisions result and the child suffers detrimental psychological results. Marcia M. Reisman, *Where to Decide the 'Best Interests' of Elian Gonzalez: The Law of Abduction and International Custody Disputes*, 31 U. MIAMI INTER-AM. L. REV. 323, 340-41 (2000). One federal court, in fact, has grappled with the parents' rights even to bring up their child as atheists or Communists. Polovchak v. Meese, 774 F. 2d 731 (7th Cir. 1985). United States immigration authorities here had granted a mature minor political asylum without notifying his Russian resident alien parents. The court's decision instructed the immigration authorities to weigh the parents' substantial interest in decision-making against the sanctions the 17 year old would face if returned to the Soviet Union. But, unlike this case, the child's age and maturity were critical factors in the court's holding.

illiterate Catholic housemaid. Edgardo was eventually adopted by Pope Pius IX and was never returned to his Jewish parents. Raising the age old tension between the rights of families to autonomy and state parens patriae obligations, Edgardo's legal case is still labeled a "kidnapping," apparently because the appellate process was viewed as unfair and unsympathetic to the child's cultural roots. Boyer and Lubet, 45 VILL. L. REV. at 247-250, 287-88.

The second case is that of Baby Richard, the infant child of a Czech immigrant whose mother had concealed his birth from his father and had placed the boy for adoption. The trial court found the father unfit because he had not demonstrated sufficient interest in the baby in the first 30 days of the child's life, a period in which the father had searched for him and could not find him. The trial court's finding was eventually reversed on appeal. In re Doe, 627 N.E. 2nd 648 (Ill. Ct. App. 1993), rev'd 638 N.E. 2nd 181 (Ill. 1994). Boyer and Lubet, 45 VILL. L. REV. at 257-61.

The most publicized custody case involving a child from a country with a widely differing political ideology is that of Elian Gonzalez, the six year old Cuban child who reached the shores of America on a raft after his mother perished in the seas off Florida. Elian's case set off an international custody dispute between his Cuban birth father and his maternal uncle living in Miami. The family court judge assigned the case applied the plain language of Florida law to resolve the controversy. According to Florida law, an award of custody to an extended family member over the objection of a natural parent may be granted only upon a finding, by clear and convincing evidence, that the parent is unfit due to abuse, abandonment or neglect. In the Matter of Lazaro Gonzalez, as Custodian of Elian Gonzalez, 2000 WL 292102 (Fla. Cir. Ct.).

The family court judge movingly articulated the legal standard that must be applied in situations such as Elian's, which so starkly provoked strong community reactions wrought by cultural differences. It fittingly provides guidance to the resolution of the case at bar and illustrates that trial courts needlessly increase the chances of an erroneous result by succumbing

to community emotion. Judge Jennifer Bailey wrote:

> A black robe is not a license for a judge to intervene in many of society's tragedies. The most difficult aspect of being a judge is watching horrible situations unfold and knowing that despite the awesome power of the judiciary, you are powerless to intervene. This case is one of those situations. This case has brought out strong feelings, passions, nowhere more visibly than in the streets of the city where this courthouse sits. Along with the people of the world, this court has watched the struggle between a family fighting for love and freedom and a father fighting for love and family....
>
> As family judges sitting in downtown Miami, we see case after case where families are separated because of oppression and tyranny in Cuba. We handle divorce cases where fathers and mother are divorcing spouses and children left in Cuba, whom they may never see. We see the pain in their faces when we ask them about their children....
>
> Every parent who has for a moment imagined their world without their child in it, the total fear and overwhelming emptiness, can empathize with Juan Miguel Gonzalez-Quintana. Some feel the father is selfish by insisting his son be returned to him-but what parent really believes that anyone else could raise his child with the same degree of love and devotion as he?....
>
> The difference between the United States and Cuba is far wider than the 90 miles of the Florida Straits. Here, we live under a system of laws, not of men....This court is sworn to uphold the laws and the Constitution of the State of Florida, and is not free to substitute her individual opinions....Our nation, and this state, guarantees the precious right to parent your children, in privacy, without unfettered intrusion of others. That freedom necessitates this result....

In the Matter of Lazaro Gonzalez, 2000 WL 492102 at *11-12.

II. FAILURE TO PROPERLY APPLY STATUTE RESULTED IN LACK OF OPPORTUNITY FOR PARENTAL REMEDIAL MEASURES

According to Section 36-1-113 (g) (3) (A) of the Tennessee Code, one of the grounds for termination of parental rights is the failure of the parents to remedy at an early date the conditions which prompted the child's removal from home or which, unless corrected, would cause the child to suffer further abuse or neglect so that the child could be reunited with the parents. One scholar, indeed, characterizes the "remedial measures" language as creating a third step in the termination process, requiring after the fault-finding phase an inquiry about whether reunification of parent and child is at all feasible. Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care-An Empirical Analysis in Two States,* 29 FAM. L. Q. 121, 136 (1995). Often referred to as a "reasonable efforts" requirement, this provision of Tennessee law was adopted in order to comply with the federal Adoption and Safe Families Act, 42 U. S. C. §671 (2004), which encourages efforts to preserve and reunify families to the extent possible. Katherine A. Hort, *Is Twenty-two Months Beyond the Best Interest of the Child? ASFA's Guidelines for the Termination of Parental Rights*, 28 FORDHAM URB. L. J. 1879, 1886, 1891-97 (1998).

The trial court stated that the remedial provision did not apply to this case because the child was not removed from home by the Department of Children's Services, but on its face, the statute applies when a child is removed by a court (here by juvenile court order). Tenn. Code Ann. §36-1-113 (g) (3) (A) (2004). The plain and ordinary language of a statute must prevail unless it is ambiguous. In the Matter of D.L.B., 118 S.W. 3d 360, 365 (2003). There is no ambiguity in the phrase "by the court".

In addition, courts must give effect to the legislative intent of a statute. D.L.B. 118 at 365. A statutory purpose of Chapter 36 is to assure that "[c]hildren are removed from the homes of their parents or guardians only when that becomes the only alternative which is consistent

with the best interest of the child." TENN. CODE ANN. §36-1-101(a)(1)(2004). This intent clause supports termination only as a last resort. The likelihood that conditions in the home will be remedied is surely an important consideration to the legislature and should be to trial courts as well.

While in most instances, it is the Department of Children's Services that makes efforts to assist families to remediate the circumstances which brought a child into state custody, In re C.M.M., 2004 Tenn. App. LEXIS 160, parents are also expected to make reasonable efforts to preserve, repair or restore the parent-child relationship. In re R.C.V., 2002 WL 31730899 at *12 (Tenn. Ct. App.). Tennessee, at four months, has one of the shortest length-of-time-out-of-custody statutes in the country, a time frame that may not allow a reasonable amount of time for a parent to demonstrate that he or she can provide an appropriate home for the child or to make considerable progress in remedying unsafe conditions. Jennifer Ayres Hand, *Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Ground for Termination of Parental Rights*, 71 N. Y. U. L. REV. 1251, 1286 (1996). Conditions such as a dirty house and four months of non-support or visitation, even if they are factually demonstrated, are certainly curable. It is reasonable for trial courts to engage in a three-pronged proceeding to allow parents the opportunity to take remedial measures so that TPR is only a last resort.

III. THE TRIAL COURT'S FAILURE TO APPLY THE PROPER DEFINITION OF ABANDONMENT UNDER T.C.A. § 36-1-102 RESULTED IN AN ERRONEOUS FINDING THAT GROUNDS EXISTED TO TERMINATE THE APPELLANTS' PARENTAL RIGHTS

On the first page of its Memorandum Opinion and Order of Judgment, the trial court found that the appellants had willfully abandoned their daughter for a period exceeding four months. Significant portions of the court's lengthy Findings of Fact and Conclusions of Law evince an apparent misunderstanding of the proper standards by which to evaluate petitions to terminate parental rights based upon allegations of abandonment. In finding that the Hes abandoned their daughter within the meaning of T.C. A. 36-1-102 by willfully failing to visit or provide support to her, the trial court has apparently ignored a substantial body of Tennessee case law that has evolved over approximately fifty years since the earliest, and essentially unchanged, statutory definition of abandonment. As a result, the court has reached conclusions of law that are in no way supported by clear and convincing evidence in the record.

Of particular concern is ¶ 204 in the court's Finding of Facts, in which the court states that "the 'settled purpose doctrine' was repealed legislatively in 1996 and no longer has any force or effect in the law in Tennessee". This statement ignores the fact that the Tennessee Supreme Court subsequently found significant portions of the definition of the adoption statute to which the court refers to be unconstitutional, necessitating the application of prior law. The court also seems to ignore the fact that courts have applied the "settled purpose doctrine" since the 1995 amendments in consideration of the Court's decision in In Re Swanson, 2 S.W.3d 180 (Tenn. 1999). In ¶ 204, the court goes on to state that despite its conclusion that the "settled purpose" doctrine is no longer legally relevant , "the

Hes evince a settled purpose to forego all parental rights and responsibilities." In the context of the body of relevant Tennessee case law, there is simply not supported by the record. Although the court pays homage to the constitutionally protected interests of natural parents, the result of its failure to take into account the totality of the facts and circumstances surrounding the appellants' failure to pay child support has resulted in termination of their parental rights without a compelling state interest in violation of substantive due process principles established in the state and federal constitutions.

A. The Settled Purpose Doctrine -- Abandonment Has Consistently Been Defined By Tennessee Courts As A Willful Relinquishment Of All Parental Duties And Responsibilities In The Context of Adoption

Regardless of the existing statutory definition of abandonment, Tennessee courts have long held that, in the context of adoption or termination of parental rights proceedings, abandonment of a child was tantamount to an abdication of all parental rights and responsibilities in light of the entire circumstances. In the 1960 case of Ex Parte Wolfenden, 349 S.W.2d 713 (Tenn. Ct. App. 1960), the Court of Appeals for the Middle Section, quoting from 1 Am. Jur. Adoption of Children, Section 42, adopted the following principle of law:

> Abandonment imports any conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. It does not follow that the purpose may not be repented of, and, in proper cases all parental rights again acquired. . . . but when abandonment is shown to have existed, it becomes a judicial question whether it really has been terminated, or can be, consistently with the welfare of the child.

Ex Parte Wolfenden, 349 S.W.2d at 714.

In Fancher v. Mann, 432 S.W.2d 63, (Tenn. Ct. App. 1968), the Court of Appeals for the Middle Section held that to find parental abandonment evidence must show a "conscious disregard or indifference" for parental obligations and that there had been "an actual desertion, accompanied with an intention to entirely sever . . . the parental relationship and throw off all obligations growing

out of the same." Id. at 66.

In 1982 the Tennessee Supreme Court stated that "[a]bandonment imports any conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. . . ." In re Adoption of Bowling, 631 S.W.2d 38 (Tenn. 1982), *(quoting* Ex Parte Wolfenden, 349 S.W.2d 386, 389).

At the time of the Bowling decision the pertinent adoption statute said:

> 36- 102 Definitions - . . . .
> * * * * * *
> (5) For purposes of this chapter an 'abandoned child' shall be:
> 1. A child whose parents have willfully failed to visit or have willfully failed to support or make payments toward his support for four (4) consecutive months immediately preceding institution of an action or proceeding to declare the child to be an abandoned child. . . .

Bowling, at 388.

In spite of the statutory language, the Court expressly opted to use the standard set forth in the Wolfenden case before finding abandonment sufficient to justify adoption. Id. at 389. The Court stated "these important determinations with respect to abandonment in adoption cases have been standing unaltered for the past 23 years since the Wolfenden decision was handed down; we are given no good reason to alter them now and we decline to do so." Id.

In holding that non-payment of support alone is not a sufficient basis for finding abandonment to terminate parental rights, the Court of Appeals for the Western Section cited the following language from Koiva v. Irwin, 721 S.W.2d 803, 807 (Tenn. Ct. App. 1986):

> Abandonment, as it pertains to an adoption proceeding, is defined in this state as any conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. Evidence of an abandonment must be clear and convincing. The evidence must clearly show a conscious disregard or indifference to the parental obligations for a court to forfeit the parental rights and obligations . . . .

In Re Adoption of Self , 836 S.W.2d 581, 583 (Tenn. Ct. App. 1992).

The Court went on to state "[I]t is one thing for the court to hold that a parent's actions have been such that a child cannot stay under his roof, but it is quite another thing to hold that his actions are such that the court by decree states 'this is no longer your child'." Id. at 584.

Following the standards used in Ex Parte Wolfenden, and Fancher v. Mann, courts have considered the following factors in considering whether an abandonment has occurred:

> (1) the parent's ability to support the child; (2) the amount of support the parent has provided to the child; (3) extent and nature of the contact between the parent and the child; (4) the frequency of gifts on special occasions; (5) whether the parent voluntarily relinquished custody of the child; (6) the length of time the child has been separated from the parent; and (7) the home environment and conduct of the parent prior to the removal of the child. (citations omitted) No single factor is controlling. Abandonment inquiries are heavily fact-oriented, so the courts may consider any fact that assists in deciding whether the parent's conduct demonstrates a conscious or willful disregard of all of his or her parental duties.

O'Daniel v. Messier, 905 S.W.2d 182, 187 (Tenn. Ct. App. 1995).

B. The Tennessee General Assembly Enacts Sweeping Changes to Adoption Law and Attempts to Legislatively Repeal the Settled Purpose Doctrine

In 1995 the Tennessee General Assembly enacted a new statutory scheme for adoption, with sweeping change from prior law. T.C.A. 36-1-101 *et seq.* (1996 and Supp.1998). Among other grounds, the new law provided for termination of parental rights for "abandonment" as defined in Tenn. Code. Ann. § 36-1-102 and Tenn. Code. Ann. § 36-1-113(g)(1).

Tenn. Code. Ann. § 36-1-102(1)(A) stated:

> "Abandonment" means, for purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, that:
> (i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or make reasonable payments toward the support of the child;

* * * * * *

(B) For purposes of this subdivision (1) "token support" means that the support, under the circumstances of the individual case, is insignificant given the parent's means;

(C) For purposes of this subdivision (1) "token visitation" means that the visitation, under the circumstances of the individual case, constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child;

(D) For purposes of this subdivision (1) "willfully failed to support" or "willfully failed to make reasonable payments towards the child's support" means that, for a period of four (4) consecutive months, no monetary support was paid or that the amount of support paid is token support;

(E) For purposes of this subdivision (1) "willfully failed to visit" means the willful failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation;

(F) Abandonment may not be repented of by resuming visitation or support subsequent to the filing of any petition seeking to terminate parental or guardianship rights or seeking the adoption of the child; and

(G) "Abandonment" and "abandonment of an infant" do not have any other definition except that which is set forth in this section, it being the intent of the general assembly to establish the only grounds for abandonment by statutory definition. Specifically, it shall not be required that a parent be shown to have evinced a settled purpose to forego all parental rights and responsibilities in order for a determination of abandonment to be made. Decisions of any court to the contrary are hereby legislatively overruled; . . . .

Id. (Emphasis added.)

As far back as 1951, Tennessee's adoption laws had defined an "abandoned child" as one whose parents "have willfully failed to visit or have willfully failed to provide support or make payments toward his support for four consecutive months immediately preceding institution of an action or proceeding to declare the child to be an "abandoned child" Tenn. Pub. Acts, ch 227, § 1 (codified as Tenn. Code Ann. § 36-102 (5) (Supp. 1962). Nevertheless, as mentioned above, Tennessee courts had consistently applied the less wooden Wolfenden standard in actions to terminate parental rights for abandonment. It is submitted that a survey of the litany of cases interpreting "abandonment" reveals that courts were reluctant to sever parental rights in strict interpretation of the statutory definition because of the constitutional implication of an arbitrary termination (See, Ex Part Wolfenden, supra; Funches v. Mann, supra; In re Adoption of Bowling,

supra; Koira v. Irwin, supra; In re Adoption of Self, supra; and O'Daniel v. Messier, supra.)

The 1995 amendment to the adoption statutes represented three clear changes with respect to the concept of abandonment. First, the new Act defined willful failure to support as failure to provide support for a period of four months, removing entirely any element of intent. Second, it sought to eliminate the ability to "repent" from an abandonment so that if there had been no support or visitation in the four months immediately before a petition was filed there were automatically grounds for termination, regardless of what happened thereafter. Third, it sought to preclude courts from applying the Wolfenden standard by stating that the statutory definition was the only definition of abandonment and that a petitioner did not have to demonstrate that a parent had "evinced a settled purpose to forego all parental rights and responsibilities" in order to terminate his or her rights. *See* Tenn Code Ann. §36-1-102(1)(G) (1996 & Supp. 1998). The obvious intent of these changes was to make it easier to terminate parental rights to clear the way for adoption.

C. In Re Swanson – The Tennessee Supreme Court Holds The Definitions of Abandonment in the 1995 Statute Unconstitutional

The Tennessee Supreme Court considered the constitutionality of the 1995 version of the adoption law, as it relates to abandonment, in the case of In Re Swanson, 2 S.W.3d 180 (Tenn. 1999). The Court first observed that it was "abundantly clear from the language used by the General Assembly that it intended to limit the discretion of trial judges when making a determination as to whether abandonment has occurred." Id. at 186.

The Court proceeded to review the litany of cases emphasizing the protections afforded to a parent's rights to the "custody and upbringing of his or her child" under both the United States and Tennessee Constitutions. Id.

Ultimately the Court stated:

> We hold that those definitions [of abandonment] are unconstitutional. The statutory definitions simply do not allow for the type of individualized decision-making which

> must take place when a fundamental constitutional right is at stake. Therefore they impermissibly infringe upon a parent's right to the care and custody of his or her children. The federal and state constitutions require the opportunity for an individualized determination that a parent is either unfit or will cause substantial harm to his or her child before the fundamental right to the care and custody of the child can be taken away. Stanley, 405 U.S. at 658-59, 92 S.Ct. 1208. Bond, 896 S.W.2d at 548. As the Supreme Court noted in Stanley, a procedure which elevates a presumption over a requirement of proof of unfitness may be cheaper and easier to administer than an individualized determination, but it "needlessly risks running roughshod over the important interests of both parent and child." 405 U.S. at 658, 92 S.Ct. 1208.

Id.

The Court concluded that unless or until the legislature amended the definition of abandonment, the definition that was in effect under prior law would be in effect. Id. at 189.

In light of the Swanson ruling, Tennessee courts continued to apply the Wolfenden standard and would only find abandonment when there is clear and convincing evidence of conduct that evinces a settled purpose to forego all parental duties and relinquish all parental claims.

In March of 2000, very soon after the Swanson decision, the Court of Appeals for the Middle Section noted that the Tennessee Supreme Court had struck down the statutory definitions of "willfully failed to support" and "willfully failed to make reasonable payments toward such child's support" in the abandonment statute and that the Court had instructed that the definitions in effect under prior law should be applied. Martin v. Martin, 2000 WL 298247 (Tenn.Ct.App.). That court proceeded to apply the Wolfenden, or "settled purpose" standard to uphold the trial court's refusal to find a mother's failure to pay support to constitute abandonment when a Consent Order between the parties made no mention of support. Id. The facts of the Martin case are strikingly similar to those in the case at bar in that in both instances there were consent orders entered, which made no mention of the non-custodial parents' obligation to pay child support, throwing into issue whether non-payment was willful.

In 2001, this Court applied the "settled purpose" doctrine of Ex Parte Wolfenden in upholding a trial court's refusal to find abandonment when there had been no support or visitation for well over four months, but the child's custodial parent had interfered with visitation and refused support. Spencer v. Aydlotte, 2001 WL 1683698 (Tenn.Ct.App.). Like the Middle Section, this Court noted the Swanson decision and the Supreme Court's holding that the definitions of abandonment from prior law would apply. Id. This case is also similar to the case at bar in that in both cases there are substantial allegations of interference with visitation by the child's custodian and referral of child support.

In 2003, the Middle Section Court of Appeals again applied the "settled purpose" doctrine from Ex Parte Wolfenden and reversed a trial court's finding that a mother had abandoned her child by failing to visit and support the child while he was in foster care, because of the lack of support and cooperation from the Tennessee Department of Children's Services. State v. Demarr.2003 WL 21946726 (Tenn.Ct.App.) Once again, the court cited the Tennessee Supreme Court's striking down the statutory definitions of abandonment in Swanson and the Court's holding that the definitions from prior law would apply.

Eventually, the Tennessee General Assembly did act on the Tennessee Supreme Court's invitation in Swanson to amend the definitions of what constitutes "abandonment" and returned the concept of willfulness to the ground of termination for failure to support a child. See., Tenn. Code Ann. § 36-1-102(1)(A), (B), and (D). (Supp. 2003). This essentially returns the statutory definition of abandonment to that which it had been since 1951 and under which the Ex Parte Wolfenden "settled purpose" standard came about. Nonetheless, courts that have addressed abandonment since the latest statutory amendment have refrained from specifically citing Ex Parte Wolfenden. See, In re Muir, 2003 WL 22794524 (Tenn.Ct.App.); In re S.M., 149 S.W.3d 632 (Tenn.Ct.App. 2004); and State v. Calabretta, 148 S.W.3d 918 (Tenn.Ct.App. 2004).

However, those cases continue to emphasize the Swanson Court's mandate that there be an individualized determination of whether the facts demonstrate, by clear and convincing evidence, a willful intent to abdicate parental responsibilities rather than a mechanistic, wooden application of an inflexible standard. Id. To do less would violate the substantive due process rights of parents faced with potential termination.

In November of 2003, the Middle Section Court of Appeals addressed the issue of what constitutes willfulness under the recently amended Tennessee statute. In re Muir, 2003 WL 22794524 (Tenn.Ct.App.) relying on case law from other jurisdictions, the court found that:

> (f)ailure to support a child is "willful" when a person 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. Shorter v. Reeves. 72 Ark.App. 71, 72, S.W.3d 758, 760 (Ark.Ct.App. 2000); In re B.S.R., 965 S.W.2d 444, 445 (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., 640P.2d 73, 76 (Wyo. 1982). A biological parent's willful failure to support or visit is not excused by a custodial parent's or third party's conduct unless the conduct either actually prevents the parent from performing his or her duty to support or visit In re Adoption of Lybrand, 329 Ark. 165, 946 S.W.2d 946, 950 (Ark. 1997), or amounts to a significant restraint or interference with the parent's efforts to support or develop a relationship with his or her child. In re Serre, 77 Ohio Micc.2d 29, 665 N.E.2d 1185, 1189 (OhioCt.C.P. 1998); Panter v. Ash, 177 Or.App. 589, 33P.3d 1028, 1031 (Or.Ct.App. 2001) Id. at 5.

The court went on in a footnote to explain that:

> "(c)onduct that amounts to a significant restraint or interference with a parent's efforts to support or develop a relationship with a child include(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 the 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, 1286 (N.J. 1999; Panter v. Ash, 33P.3d at 1031. Id.

Although the court did not mention Ex Parte Wolfenden or the settled purpose doctrine, the factors the court settled upon to determine whether abandonment was willful were quite similar to the seven factors enunciated by the state Supreme Court to determine whether there

had been an abandonment in O'Daniel v. Messier, supra, which was decided under the "settled purpose" standard. It is very doubtful that there is sufficient evidence to conclude that the Hes failure to support or visit are "willful" under the definition cobbled by the court in In re Muir.

In January of 2004, the Middle Section addressed the issue again in In re S.M., 149 S.W.3d 632 (Tenn.Ct.App. 2004). Noting that termination of parental rights relegated a parent to the role of a complete stranger to his or her child, the court found that "both the federal and state constitutions require an individualized determination of the existence of the required grounds before the court may terminate a biological parent's parental rights. Stanley v. Illinois. (citation omitted); In re Swanson (citation omitted); In re A.D.A., 84 S.W.2d 582, 596 (Tenn.Ct.App. 2002)." Id. at 642.

The court went on to articulate the same standards enunciated in In re Muir, supra, to determine whether failure to support or visit was willful. Id. The court ultimately reversed the trial court's finding that the natural father had abandoned the child by failing to support or visit. This case is also analogous to the case at bar in that the respondents are foreign nationals and language and cultural barriers played a major role in determining whether there was willful abandonment.

Later, in January of 2004, this Court reversed the trial court's termination of parental rights based on abandonment, finding that a father had not willfully failed to support his child within the final months preceding the filing of the petition, even though he had paid no support. State v. Calabretta, 1485 S.W.3d 919 (Tenn.Ct.App. 2004). Citing Swanson, the court stated:

> In order to safeguard a parent's fundamental right to the care and custody of his child, parental rights may not be terminated based on abandonment for failure to support, unless clear and convincing evidence shows that parent's failure to make reasonable payments toward the support of his child was willful. (Citation omitted.) Requiring and showing that the failure to support the child was willful allows "for the type of individualized decision-making which must take place when a fundamental right is at stake" (citation omitted). The issue then is whether Father's failure to make any meaningful support

payments in the final months preceding his incarceration was "willful". Id at. 5

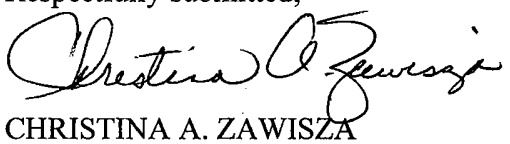
The court went on to apply the four factors articulated by the Middle Section Court of Appeals as in In re Muir and In re S.M., supra to find that the non-support was not willful. Once again, there is a strong analogy to the case at bar in that the petitioner alleged failure to provide support as grounds for termination, but the evidence revealed that no demand for support had been made of the respondents and there was substantial doubt that the respondents knew that they had a duty to provide financial support at the risk of losing their parental rights.

In the end of the day, the issue of whether the "settled purpose" doctrine is the law in Tennessee is largely a semantical one which turns on whether T.C.A. 76-102(1)(6) was implicitly repealed by the Swanson decision in light of the subsequent statutory amendment; what is crystal clear, however, is that the Swanson decision stands for the principle that "(t)he federal and state constitutions require the opportunity for an individualized determination that a parent is either unfit or will cause substantial harm to his or her child before the fundamental right to the care and custody of the child can be taken away." Swanson, supra at 186. The Swanson case equates abandonment with parental unfitness that will cause substantial harm to a child understanding that nothing less will justify the state's interference with a natural parent's rights. Whether by applying the "settled purpose" doctrine or a definition of "willful" like that used by recent courts, it is clear that a court cannot properly terminate parental rights unless there is clear and convincing evidence that the parent's abdication of parental responsibility is so severe that it renders them unfit to exercise parental responsibility. Such evidence simply does not exist in the case at bar. To the contrary, the evidence establishes that there has been no abandonment by the Hes. Consequently, amici respectfully request that the trial court's decision be reversed.

CONCLUSION AND RELIEF REQUESTED

Because of the finality of termination of parental rights, courts must make every effort to assure the strictest due process procedures. The failure to appropriately bifurcate the hearing process, the consideration of inappropriate evidence comparing the natural parents with prospective adoptive parents, and the reference to inapplicable cultural concerns so tainted the result in this case that the only available remedy is a remand for a new trial. The evidence I viewed in light of proper legal standards does not support the finding of abandonment. To the contrary, the evidence demonstrates that there is no grounds for termination based upon abandonment. Therefore, the *amici* request a reversal of the trial court's order terminating upon abandonment.

Respectfully submitted,



CHRISTINA A. ZAWISZA
Bar #022610
The University of Memphis
Child Advocacy Clinic
109 N. Main St., 2nd Floor
Memphis, TN 38103

901-255-5404
Counsel for Amici

Certificate of Service

The undersigned hereby certifies that a copy of the foregoing Brief of Amicus Curiae was served by mail this 20th day of January, 2005 on the following:

David A. Siegel
Attorney for Appellant Jack He
5100 Poplar Avenue, Suite 2500
Memphis, TN 38137

Richard A. Gordon
Attorney for Appellant Casey He
264 Barry Road
Memphis, TN 38117

Larry E. Parrish
Attorney for the Bakers
The Crescent Center
6075 Poplar Avenue, Suite 420
Memphis, TN 38119

Kimbrough Mullins
50 N. Front St., Suite 1075
Memphis, TN 38103

Linda Holmes
142 N. 3rd St., 3rd Floor
Memphis, TN 38103

Douglas E. Dimond
425 Fifth Ave., North
P. O. Box 20207
Nashville, TN 37202-0207

A courtesy copy was served by mail this 20th day of January, 2005 on:

Bruce Boyer
Director, Loyola ChildLaw Clinic
16 E. Pearson St.
Chicago, IL 60611

Susan Brooks
Director, Juvenile Practice Clinic
Vanderbilt Legal Clinic
Vanderbilt University School of Law
Nashville, TN 37240

Gary Houspian
2005 Chair of the Board of Directors
1808 West End Building, Suite 1216
Nashville, TN 37203