

Draft Proposal for
Amending the Child Abandonment Law
in Title 36 of the Tennessee Code

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SUMMARY

The child abandonment law in Title 36 of the Tennessee Code is not completely broken but needs clarifications and modifications. It is proposed that Title 36 be amended as follows.

- **36-1-102(1)**: Definitions for “willful failure to support” and “willful failure to visit” are amended by adding a requirement for knowing the legal consequence of the failure.
- **36-1-102(1)**: The time of “four (4) consecutive months” in the definition of abandonment is enlarged to twelve (12) months.
- **36-1-102(1)**: The references to “token visitation” and “token support” are deleted.
- **36-1-113**: A provision is added for a parent who successfully defended against a termination petition to recovery attorneys fees and costs.

INTRODUCTION

Parental rights are fundamental rights protected by the Fourteenth Amendment of the United States Constitution. Like all rights, parental rights are not absolute. The state and only the state has the power to terminate the parental rights of a parent. Termination of parental rights is the death penalty to the parent-child relationship because it is permanent and irreversible.

The primary purpose of Chapter 1 of Title 36 of the Tennessee Code is to provide adoption procedure and to protect the rights of parents and the interests of children in the adoption process. Title 36 provides that a court may terminate the parental rights of a parent for abandonment of a child upon the petition of private individuals. Abandonment is defined as the willful failure to provide support or visit a child for

four (4) consecutive months. This parental rights termination¹ statute is clearly punitive, as it serves to punish parents for their past conduct of failing to perform their parental duty. The punishment is severe and no repentance is allowed. The statutory period for abandonment is only four months and there is no operable definition of “willful failure” in the statute. There is also no definitive guidance from the case law.

The lack of clarity in Tennessee Code opened the door for resourceful individuals to take advantage of the law and infringe upon the parental rights of others. Indeed, as evidenced by the drawn-out A.M.H. case in which both the trial court and appellate court terminated Hes’ parental rights, the current Tennessee statute offers little safeguard for protecting parental rights. Disadvantaged parents are in a worse situation, as they lack the resource to effectively defend their rights in complex litigation. This has led to serious constitutionality concerns for the statute.

Based on our experience from the AMH case, the relevant parts of Title 36 of the Tennessee Code have the following problems:

- (1) There is no operable definition of “willful failure” that comports with the substantive due process required by the Fourteenth Amendment of U.S. Constitution.
- (2) There is no operable definition of “token visit” or “token support.”
- (3) The time limit for finding willful abandonment is only four months and too short.
- (4) There is a lack of provision for indigent parents to get the legal assistance they need to protect their rights.

In the subsequent sections, I will briefly analyze the legal issues with the current statute and propose the amendments to Title 36 of the Tennessee Code.

TERMINATION OF PARENTAL RIGHTS FOR ABANDONMENT IS A PUNITIVE STATE ACTION

To invoke the due process protection of the Fourteenth Amendment of the U.S. Constitution, state action must be involved. Termination of parental rights initiated by DCS under Title 37 is undoubtedly state action. In the AMH case, there was a dispute on whether termination of parental rights petitioned by private individuals under Title 36 is also state action. The Tennessee Court of Appeals concluded that termination proceedings initiated by private individuals such as the Bakers were not state action. *In Adoption of AMH*, No. W2004-01225-COA-R3-PT (Tenn. App. 11/23/2005).

In his amicus brief to the Tennessee Supreme Court², Dr. Dongxiao Yue (“Dr. Yue”)

¹ In the following, unless otherwise qualified, “termination of parental rights” only refers to involuntary termination due to the fault of parents.

² In the Tennessee Supreme Court decision on the AMH case, because the Court found that no willful abandonment facts existed, it did not reach the constitutional issues.

pointed out that since only a court can terminate parental rights and since a court is part of the state, a termination of parental rights proceeding initiated by private individuals is also state action. Thus, the parents in such termination proceedings must also be afforded the substantive due process and equal protection mandated by the Fourteenth Amendment of the U.S. Constitution.

Terminating a parent's parental rights for willful abandonment is clearly punitive. Although Title 36 is part of the Tennessee civil code, a "civil label is not always dispositive." *Allen v. Illinois*, 478 U.S. 364, 366 (1986). If "the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil," then a court will consider the statute to have established criminal proceedings for constitutional purposes. See *Kansas v. Hendricks*, No. 95-1649 (U.S. 06/23/1997).

In *KENNEDY v. MENDOZA-MARTINEZ*, the U.S. Supreme Court was called upon to decide whether certain sections of Nationality Act of 1940 and Immigration and Nationality Act of 1952 were constitutional. The sections of law in question had provisions to deprive the citizenship of Americans for avoiding wartime services. The U.S. Supreme Court, recognizing that "[c]itizenship is a most precious right...guaranteed by the Fourteenth Amendment to the Constitution," determined that those sections were "essentially penal in character and would inflict severe punishment," which "may not constitutionally be inflicted without a prior criminal trial with all the safeguards guaranteed by the Fifth and Sixth Amendments." See *KENNEDY v. MENDOZA-MARTINEZ*, 372 U.S. 144 (1963).

Compared to termination of citizenship for avoiding military service, termination of parental rights for willful abandonment is similar in nature but is far more severe. Termination of parental rights for abandonment meets the criteria as criminal proceedings: it (a) is intended to punish parents for their past conduct; (b) requires a finding of scienter.

Not only termination of parental rights for abandonment is or is like a criminal proceeding, it's akin to summary execution. Most criminal punishment, such as putting a wrongdoer in jail, is temporary suspension of a person's rights or freedom. Even those sentenced to death have many chances of appeal and stay. But termination of parental rights is quick, permanent and irreversible.

Clearly, involuntary termination of parental rights for abandonment is a state action to forever punish parents for their past conduct; therefore, parents must be afforded the substantive due process guaranteed by the U.S. Constitution.

Next we will analyze whether Tennessee law provides parents the protection that they are entitled to and how we can improve the Tennessee law.

ANALYSIS OF THE TENNESSEE CODE IN THE CONTEXT OF AMH CASE

A. Facts about the AMH case

- The parents of AMH, the Hes, were poor immigrants with no knowledge of the Tennessee abandonment law.
- The Bakers are affluent Americans who have access to legal resources.
- Because of extreme hardship, the Hes gave the temporary custody of AMH to Bakers, who offered to help the Hes without asking for child support.
- The Bakers later decided that they wanted to adopt AMH, but the Hes had no intention to give up their child.
- The Hes visited AMH at Bakers' home, averaging once a week.
- One day, there was an argument between the Bakers and Hes when Hes were visiting AMH at Bakers' house, the Bakers called police, and the police asked Hes not to come back.
- A couple of weeks later, the Hes went to Juvenile Court to complain. Under the advice of a court officer, they filed a petition to regain the custody of AMH.
- The Juvenile Court hearing for Hes' petition was scheduled to be held about four months later.
- Four months later, the Bakers filed a petition to terminate Hes' parental rights, alleging that the Hes abandoned the child by failing to visit for four months and failing to pay support for four months.
- The trial court found that the Hes willfully failed to visit AMH in the four months preceding Bakers' petition and Hes' past visits were token visits. The trial court also found that the Hes willfully failed to support AMH. The trial court further found terminating Hes' parental rights was in the best interest of AMH. Hes' parental rights were terminated.
- The Court of Appeals concluded that the statute only asks the court to look at the four months preceding Bakers' petition. On that basis, the court of appeals also concluded that the Hes willfully failed to visit after they were asked by the police not to come back to Bakers' house. The Court of Appeals affirmed the trial court's ruling.
- The Tennessee Supreme Court found that the Hes' failure to visit AMH was not willful.
- The high court also found that the custody order was temporary and condition for that temporary arrangement no longer existed. Accordingly, the custody of AMH is returned to the Hes.

B. The lack of operable definition for abandonment

Tennessee Code § 36-1-113(g)(1) provides that “[i]nitiation of termination of parental or guardianship rights may be based upon” the ground that “[a]bandonment by the parent or guardian, as defined in Tenn. Code. Ann. § 36-1-102, has occurred.”

The relevant part of the definition for abandonment is:

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 have willfully failed to make reasonable payments toward the support of the child.

Tenn. Code. Ann. § 36-1-102(1)(A)(i)

For the above, the statute makes the following definitions.

(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 toward such child's support” means the willful failure, for a period of four (4) consecutive months, to provide monetary support or the willful failure to provide more than token payments toward the support of the child;

(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;

Tenn. Code. Ann. §36-1-102(1)(B) – (E)

Although the statute attempts to define “abandonment,” the chain of definitions ended at “willful failure,” which is left undefined. Moreover, the definition for “token visitation” and “token support” are far from clear. Overall, the definition of “willfully

failed to support” in **36-1-102(1) (D)** does not seem to provide anything more specific than what is already in **36-1-102(1)(A) (i)**.

C. “Willful failure” as defined by Tennessee case law

Although “willful failure” is undefined in the Tennessee Code, case law established a four-prong test.

Failure to visit or support a child is "willful" when a person [1] is aware of his or her duty to visit or support, [2] has the capacity to do so, [3] makes no attempt to do so, and [4] has no justifiable excuse for not doing so.

In re Adoption of Muir, No. M2004-02652-COA-R3-CV
(Tenn.App. 11/16/2005) (numbering added)

Unfortunately, there are two major confusions about the four-prong test:

- (a) Whether the awareness of the duty should include the knowledge of the legal consequence for failing to perform the duty.
- (b) Whether the four tests must be satisfied simultaneously or some tests can be left out.

Regarding confusion (a), the trial court ruling of the AMH case is replete with examples of how Hes sent money for the support of their son Andy, and those were used as proof that the Hes were aware of their duty. However, if the “awareness of duty” test is interpreted in this way, then the test becomes plainly meaningless or redundant: every normal human being knows that a child needs to be fed and communications must be maintained to keep the parent-child relationship, a person who doesn’t have such instinct would be considered mentally defective.

Regarding confusion (b), the majority opinion on AMH appeal concluded that the “lack of knowledge regarding the need to visit A.M.H. is merely a factor in determining willfulness.” *In Adoption of AMH*, No. W2004-01225-COA-R3-PT (Tenn.App. 11/23/2005) (internal quotes removed). The majority further concluded that “[a] factor is, therefore, but one element to be considered, perhaps among many, in reaching a conclusion.”

Essentially, the majority in AMH appeal concluded that the awareness test of the four-prong examination of the willfulness question is not necessary but merely an optional component.

In his amicus brief to the Tennessee Supreme Court, Dr. Yue made a lengthy argument

that “awareness of duty” in the four-prong test should be interpreted as the awareness of “the state’s statutory definition of willful abandonment and the consequence of willful abandonment.” Put it simply, awareness of duty should be refined as “awareness of legal duty.”

Since the Tennessee Supreme Court disposed the AMH case by finding that the Hes made attempt to visit AMH, it did not reach the issues above.

D. Additional supporting arguments for the “awareness of legal duty” interpretation

In Dr. Yue’s amicus brief to the Tennessee Supreme Court, based on constitutional due process, he argued that the state cannot deprive one’s parental rights based on its statute unless the parent had prior knowledge of the consequence defined by the statute.

Dr. Yue’s argument can be summarized as follows

- (1) Parental rights are fundamental rights protected by the Fourteenth Amendment to the Constitution.
- (2) Termination of parental rights is state action.
- (3) The state legislature set an arbitrary “magic number” in the definition of abandonment of child. In Tennessee, this “magic number” is four (4).
- (4) Unless specifically made aware of this magic number, a person will have no idea that her fundamental parental rights are at risk for exceeding this number³.

Dr. Yue’s analysis and conclusion is consistent with U.S. Supreme Court precedent⁴. “[T]he standard for the statutory willfulness requirement is the ‘voluntary, intentional violation of a known legal duty.’ . . . [T]he issue is whether the defendant knew of the duty purportedly imposed by the provision of the statute or regulation he is accused of violating.” *Cheek v. United States*, 498 U. S. 192, 201 (1991). The U.S. Supreme Court concluded that willful violation of “complex” statutes “requires knowledge of the law.” See *Bryan v. United States*, 118 S.Ct. 1939, 141 L.Ed.2d 197 (U.S. 06/15/1998).

Even a licensed Tennessee lawyer may not know the “magic number” 4 and the exact definition of abandonment in Tennessee. Thus, the Tennessee abandonment statute is complex. The “willfulness” standard established by U.S. Supreme Court is therefore fully applicable in the context of termination of parental rights proceedings.

³ For instance, a California lawyer specializes in family law would assume that the length for finding abandonment is 12 months, she can find out about the number “4” only after researching the Tennessee Code. A Tennessee family law lawyer who hasn’t practiced for years will have to research the current statute to find out the exact definition of abandonment.

⁴ The Supreme Court precedents are criminal cases. As I pointed out earlier, despite its civil label, termination of parental rights on the ground of abandonment should be considered criminal proceedings.

PROPOSED AMENDMENTS TO THE TENNESSEE CODE

A. Amending the definitions for “willful failure”

We propose to amend the definitions for “willfully failed to support” and “willfully failed to visit” in **36-1-102(1)** as follows:

- (D) For purposes of this subdivision (1), “willfully failed to support” or “willfully failed to make reasonable payments toward such child's support” means the intentional failure to provide reasonable monetary support for a period of twelve (12) consecutive months, with the knowledge of the potential legal consequences of such failure;

- (E) For purposes of this subdivision (1), “willfully failed to visit” means the intentional failure to visit, for a period of twelve (12) consecutive months, with the knowledge of the potential legal consequences of such failure;

The proposed amended definitions above are different from the current definitions in the following aspects.

First, “willful failure” is changed to “intentional failure”. In the existing language, “willfully failed” is defined as “willful failure” for a four-month period. Courts have spent lengthy arguments to reach the conclusion that “willfulness” requires the finding of “intent.” The proposed amendment makes it clear that the failure must be intentional.

Second, there is no more reference to “token visit” or “token support”. Instead, the word “reasonable” was used. Without resorting to quantification, any attempt to precisely define “token support” or “token visit” would be futile and cause more confusion⁵.

Third, the time of four months is enlarged to 12 months.

Fourth, the phrase “with the knowledge of the potential legal consequences of such

⁵ In the AMH case, the Hes visits to AMH averaged once per week in the first two years, yet the trial court calculated that the total time of visitation was only four days and concluded that the visitation was “token visitation.”

failure” is added to emphasize that a court must find there is the awareness of the potential consequence⁶ of failing to perform the duty imposed by the Tennessee statute. The presence of this phrase leaves no ambiguity on what constitutes “willful failure” and eliminates the constitutionality question for Title 36.

In Title 37 of the Tennessee code, which deals with DCS cases, there is the notice requirement:

The permanency plan for any child in foster care shall include a statement of responsibilities between the parents, the agency and the caseworker of such agency. Such statements shall include the responsibilities of each party in specific terms and shall be reasonably related to the achievement of the goal specified in subdivision (a)(1). *The statement shall include the definitions of “abandonment” and “abandonment of an infant” contained in § 36-1-102 and the criteria and procedures for termination of parental rights.* Each party shall sign the statement and be given a copy of it.

§ 37-2-403 (a)(2)(B)(i) (emphasis added)

The intent of the notice requirement in Title 37 is to make sure that the parents know their duty as defined by Tennessee abandonment statutes: fail to visit or support for longer than 4 months and you may lose your parental rights under Tennessee law. This notice requirement comports with constitutional due process.

With the amended definition for “willful failure”, Title 36 will provide equal protection to parents who are facing termination proceedings initiated by private individuals. There is no prerequisite for a specific “notice” as required by Title 37. Instead, the petitioner will have the burden to prove intentional failure by the parents with the knowledge of the consequence of the failure. The effect is the same: a parent’s parental rights are not at jeopardy unless a court finds that she knowingly violated her duty imposed by the state.

B. Enlarging the time for finding abandonment from four months to twelve months

In the AMH case, the Juvenile Court scheduled Hes’ custody petition hearing at four months later, and the Bakers filed their petition to terminate Hes’ parental rights after four months. The slowness of the courts alone justifies increasing the length of time for finding abandonment. Many states have the relevant period set at one year. The

⁶ The consequence is “potential”, because a best interest determination must be also made for parental rights to be terminated.

short period in the Tennessee statute allows the possibility of setting up trap of abandonment. By making the time longer, most false abandonment claims can be eliminated.

Since termination of parental rights is such a drastic and irreversible measure, the courts should take it as the last resort. There is really no need to set a short period such as four months for finding abandonment. In case of temporary negligence or mistake by parents, lesser alternatives can be imposed.

C. Adding a provision for a parent who successfully defends a termination petition to recovery attorneys fees and costs.

In most of the parental rights termination cases, the parents whose rights are in jeopardy are indigent and have little resources to seek legal protection⁷. A provision for defending parents to recover attorneys fees and costs serves at least two purposes.

- (1) Helping parents to get the legal assistance they need to defend their fundamental rights.
- (2) Deterring frivolous petitions for termination of others' parental rights.

AN EXERCISE WITH THE PROPOSED AMENDMENTS

With the proposed amendments, it would be much harder for someone to take advantage of the law and others' ignorance of the law. In true abandonment cases, however, a petitioner can meet the additional burden of proof by making sure the parents understand their legal duty and consequence of failing to perform the duty.

OTHER LESSONS LEARNT FROM THE AMH CASE

The Hes filed a petition for regaining the custody of their daughter. The form did not have a place for requesting visitation. The trial court concluded that the Hes willfully failed to request visitation. Such problems can be avoided by improving the standard forms and procedures at the Juvenile Court.

CONCLUSION

As it stands, the abandonment law in the Tennessee Code may be unconstitutional. With some small changes, we can cure the deficiencies in the statute manifested by the AMH case.

⁷ The Hes are able to survive a six year legal struggle partly because they have two dedicated *pro bono* attorneys.