



## UPDATE ON CASE LAW IN JUVENILE COURT PROCEEDINGS


**Hosted by:**

Tennessee Administrative Office of the Courts

**Presented by:**

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## ADVANCED CHALLENGES IN JUVENILE COURT PROCEEDINGS

- How to sue a DCS worker
  - Grandparents' Rights
  - What crime is NOT included in severe abuse
  - Can a GAL be sued?
  - New Ground for TPR – does “and” mean “or”
  - “Missing Witness Rule” & “Unclean Hands”
  - What date should be included in a TPR?
  - Beating severe abuse with best interest alone!
  - Can you withdraw from that client who never calls?
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ADVANCED CASE LAW:

*SCHULKERS V. KAMMER*, 367 F. SUPP. 626 (6<sup>TH</sup> CIR. MARCH 2020)

Facts: Mother receives false positive screen for methamphetamine after giving birth. DCS knows it is a false positive, yet they decide to interrogate children at school and further decide to maintain IPA.

- 6<sup>th</sup> Circuit finds social worker must have reasonable suspicion of child abuse before conducting an in-school interview without a warrant or consent
  - Parent's Attorneys: May be able to use this as leverage to prevent unlawful investigation
  - GAL: If a parent's attorney brings this case up, remember that the threshold for reasonable suspicion is very low



ADVANCED CASE LAW:

*COLEMAN V. OLSON*, 551 S.W.3D 686 (TENN. 2018)

Facts: Mother passed away and grandmother immediately filed for grandparent visitation. Father answered by stating that he did not oppose grandmother's visitation.

- Grandparent visitation under T.C.A. 36-6-306(a) is only applicable if lack of visitation would be detrimental to child AND visitation is refused.
  - Parent's Attorneys: Show that visitation was not refused by parent, focus on facts of when visitation availed
  - GAL: provided evidence showing strong bond between child and grandparent AND show efforts made by grandparent to have visitation, but failure of parent to provide that visitation



ADVANCED CASE LAW:  
*IN RE TREYLYNN T.*, 2020 TENN. LEXIS 597  
(TENN. DEC. 16, 2020).

Facts: Father entered nolo contendere plea for ***attempted*** aggravated child abuse. Mom entered best interest plea for child endangerment. Both trial court and COA found children D/N based upon Father's criminal plea. Supreme Court reversed.

- ***Attempted*** aggravated child abuse is not one of the offenses contained in the definition of severe abuse at T.C.A. 37-1-102(b)(27)(C)
  - **Parent's Attorneys: You must look at the specific pleadings in criminal court in order to determine whether they are applicable**
  - GAL: This case was reversed and returned to the trial court to determine whether d/n existed. Do not rely solely upon the criminal pleadings, but instead rely upon the facts.



ADVANCED CASE LAW:  
*RUNYON V. ZACHARIAS*, 556 S.W.3D 732  
(TENN. CT. APP. 2018)

Facts: GAL appointed in divorce action under Rule 40A. 18 year old client sues GAL claiming GAL disclosed confidential psychological records causing harm to child. GAL claimed quasi-judicial immunity.

- Trial court and COA dismissed lawsuit. GAL does not enjoy absolute immunity for his/her actions; however, the appointment order required the disclosure. Therefore, the case should be dismissed.
  - Parent's Attorneys: GALs can be held responsible for actions which are outside the scope of their representation
  - GAL: The attorney-client privilege survives the child reaching age 18; if an act is done in good faith, the child generally cannot prevail in a cause of action against you.



ADVANCED CASE LAW:  
*IN RE NEVEAH M*, 2020 TENN. LEXIS 591  
(TENN. DEC. 10, 2020)

Facts: Several COA panels split on requirements under T.C.A. 36-1-113(g)(14) requiring TPR petitioner to show “a parent or guardian has failed to manifest, by act or omission, an ability *and* willingness to personally assume legal and physical custody or financial responsibility of the child.” The ultimate question was what is the definition of “and”?

- In order to prove ground, petitioner must show respondent parent either (1) failed to manifest an ability OR (2) failed to manifest willingness...
  - Parent’s Attorneys: Supreme Court further stated that petitioner must show return to parent’s custody would pose a risk of substantial harm to the physical or psychological welfare of the child; this could be a possible defense
  - GAL: Depending on circumstances, may wish to focus on one element rather than other



ADVANCED CASE LAW:  
*IN RE MATTIE L.*, 2020 TENN. LEXIS 293  
(TENN. AUG. 11, 2020)

Facts: TPR proceeding by mom and step-dad. Father was arrested two weeks prior to trial and incarcerated at the time of trial. Trial court invoked “missing witness rule” and “unclean hands doctrine” granting termination.

- Missing Witness Rule may apply in bench trial; however, it creates an inference and not a presumption
- Unclean Hands Doctrine only applies to petitioners
  - Parent’s Attorneys: You may claim unclean hands as a defense
  - GAL: If the respondent does not show for the hearing, you may wish to explain the missing witness rule



ADVANCED CASE LAW:  
*IN RE JUSTINE J.*, 2019 TENN. APP. LEXIS  
505 (TENN. CT. APP. OCT. 10, 2019)

Facts: Petitioners filed TPR claiming abandonment and later amended petition claiming different date to determine abandonment. Trial court used yet another date for the four months to begin.

- Respondent was denied due process as he did not know what date the trial court would use and he could not defend himself
  - Parent's Attorneys: Specifically determine the date that the four months for abandonment begins in order to assert your defense
  - GAL: make sure that the four month period is specifically plead and argued in the record



ADVANCED CASE LAW:  
*IN RE ALLYSON P.*, 2020 TENN. APP. LEXIS 279  
(TENN. CT. APP. JUNE 17, 2020)

Facts: Mom pulled over with children in car and police found methamphetamine in car and in one of child's toys. Juvenile court entered order finding D/N and severe abuse. TPR filed, but prior to TPR mother entered into drug rehab program.

- COA reversed ground of abandonment by failure to provide a suitable home due to mother's then existing circumstances as she was in rehab. COA further reversed best interest due to meaningful relationship with child and mom
  - Parent's Attorneys: Focus on relationship between parent and child; obtain bonding assessment?
  - GAL: Focus on extent of mother's actions and choices and history of those choices. Will she continue to make them?



ADVANCED CASE LAW:  
*IN RE A.P.*, TENN. APP. LEXIS 163 (TENN. CT.  
APP. MAR. 29, 2019)

Facts: TPR trial in which appointed counsel withdrew on day of trial due to lack of communication with client.

- COA reverses TPR finding that appointed counsel did not present enough materials in the record to show that s/he would withdraw on the morning of trial.
  - Parent's Attorneys: In order to withdraw, you must make a record that you communicated with your client and s/he failed to respond
  - GAL: Do not allow appointed counsel for respondent to withdraw on the morning of trial. This may invite reversible error.

## NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN (NACC)

In the next portion of the video, David talks about the NACC.

The National Association of Counsel for Children is a non-profit professional membership and advocacy organization dedicated to advancing justice for children, youth, and families.

For more information about the NACC, please go to <https://www.naccchildlaw.org/default.aspx>



## REASONABLE EFFORTS PRACTICE

- The next portion of the video focuses on the use of a reasonable efforts motions related to placement concerns. **The following slides contain basic, introductory information about reasonable efforts for your information.**
- For more information about reasonable efforts, refer to the American Bar Association or materials by Judge Leonard Edwards, author of *Reasonable Efforts: A Judicial Perspective*, available at <http://www.judgeleonardedwards.com/>.
- Also please stay tuned for a dedicated reasonable efforts motions training, coming soon!



## REASONABLE EFFORTS PRACTICE

- The responsibility for placement of the child lies with the title IV-E agency (472(a)(2)(B) of the Social Security Act).
  - While the court cannot direct placement, the court can and should hear placement concerns that an advocate believes are related to DCS's failure to provide reasonable care and diligence in the services provided to a child and their family (TCA § 37-1-166).
  - Upon hearing Motioner's argument that DCS failed to provide reasonable efforts, the court must determine if the agency has demonstrated reasonable efforts assisting the family as required by federal and state statutes.



## WHEN REASONABLE EFFORTS ARE REQUIRED

- Reasonable efforts must be made to do the following:
  - To prevent the need for removal of the child from the child's family,
  - To make it possible for the child to return home,
  - To place the child in a timely manner in accordance with the permanency plan, and
  - To complete whatever steps are necessary to finalize the permanent placement of the child if continuation of reasonable efforts is determined to be inconsistent with the permanency plan for the child (TCA § 37-1-166)

## WHEN REASONABLE EFFORTS ARE NOT REQUIRED

- Reasonable efforts shall not be required if a court has determined that any of the following apply:
  - The parent has subjected the child or any child in the household to aggravated circumstances, including any of the following:
    - Abandonment of a child or an infant
    - Aggravated assault
    - Aggravated kidnapping or especially aggravated kidnapping – Aggravated child abuse and neglect
    - Aggravated sexual exploitation of a minor or especially aggravated sexual exploitation of a minor
    - Aggravated rape, rape, rape of a child, or incest
    - Severe child abuse, as defined in § 37-1-102
  - The parent has committed murder or manslaughter of any sibling or other child residing in the household, or aided, abetted, or attempted such crime.

continued...



## WHEN REASONABLE EFFORTS ARE NOT REQUIRED

- The parent has committed a felony assault that resulted in serious bodily injury to any child residing in the household.
- The parental rights of the parent to another child have been terminated involuntarily (TCA § 36-1-102(9); 37-1-166)



## CONSEQUENCES OF NO REASONABLE EFFORTS FINDING

- If the court finds that reasonable efforts to achieve the permanency goal were not made, the child is ineligible for Title IV-E funding from the end of the month in which the finding was made. Title IV-E funding may be restored as soon as the court makes a finding that reasonable efforts were achieved.

