

A review of the

# Tennessee Adoption Code

for the

# Tennessee Practitioner

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**FORMS INCLUDED**

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for the Tennessee Practitioner**

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# Faculty

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## **FOREWARD**

Tennessee adoption laws have evolved over many years. Unfortunately, this evolution did not always occur at the same pace across the adoption code. Accordingly, updates to one statute may have been overlooked in other similar statutes. Breaking down the adoption code into its individual components sheds new light on the correct procedures to be utilized. This seminar is designed to assist the practitioner in quickly finding answers to common everyday issues that come up as well as certain other more complex issues that occur less frequently. Where appropriate, the full statute has been included in the appendix section, together with common forms for use in your practice. Should answers to your specific issues or questions not be answered herein, please refer to a much more in depth treatise such as COPPOCK ON TENNESSEE ADOPTION LAW (5<sup>th</sup> ed. 2005), by Dawn Coppock.

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## **HISTORY OF ADOPTION IN TENNESSEE**

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## I. HISTORY OF ADOPTION IN TENNESSEE

Tennessee's adoption code dates back to at least Thompson's Shannon's Code. In 1917, the Tennessee Supreme Court was called upon to consider the nature of the adoption statutes then in effect in the case of In re Knott, 197 S.W. 1097 (1917). The Court stated:

"The right of adoption is not a natural one. It contravenes common right, and originated with the statute. It was known to the ancients of Greece and Rome, and probably other ancient people, and is of the remotest antiquity.

...  
The sections of the Code [Thompson's Shannon's] above set out are in derogation of the common law, and must be strictly construed."

This holding has remained in effect to this day. In fact, in Clements v. Morgan, 296 S.W.2d 874 (1956), the Tennessee Supreme Court stated:

"We are of the opinion that this statute must be complied with in all things.

The right of adoption is not a natural one and was unknown to the common law. Rogers v. Baldrige, 76 S.W.2d 655.

The adoption of a child is governed by statute and to effect a legal adoption it must be strictly complied with. Coonradt v. Sailors, 209 S.W.2d 859; In re Knott, 197 S.W. 1097."

Moreover, the Coonradt court stated:

"By the great weight of authority, the adoption of a child is governed by statute and to effect a legal adoption it must be strictly complied with."

Finally, the case of In re Van Huss' Petition, 338 S.W.2d 588 (1960), further emphasizes the strict compliance doctrine regarding adoptions. In that case, the adoption proceeding had fully complied with the adoption code except for the requirement that both petitioners be physically present in the state for more than one year preceding the filing of the adoption petition. Despite the fact that the every other factor supported the adoption by the petitioners, the trial court denied the petition. In upholding the trial court's decision, the Tennessee Supreme Court opined:

"Since there is no common law right of adoption, as observed in Clements v. Morgan, supra, no right of adoption exists in Tennessee, except such as is given by statute. As the law now stands, that right is given only by the 1959 statute carried at 36-105 1959 T.C.A. Supplement. If the Court is to ignore the provisions of that statute, then the right of adoption will not exist in Tennessee. If the 1959 statute is not to be ignored, then its requirements 'must be strictly complied with.'"

Equity has no power to declare an adoption. Additionally, adoption by estoppel is not recognized under



the laws of Tennessee.<sup>1</sup> Therefore, the authority for a court to grant an adoption comes from the statutes approved by the Tennessee legislature. If the statutes have not been strictly complied with, then the adoption petition is subject to being denied and a final order of adoption is subject to being set aside.

The current Tennessee Adoption Code is codified at T.C.A. § 36-1-101 *et seq.* The following sections explore the various requirements of the statutes contained therein.

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<sup>1</sup> Bank of Maryland v. Tapping, 393 S.W.2d 280 (1965).

**BASIS OF AUTHORITY**

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## II. BASIS OF AUTHORITY

The basis of authority for granting adoptions in Tennessee is governed by more than one statute. First, T.C.A. § 36-1-101 provides the general authority for courts. Additionally, T.C.A. § 36-1-117(a)(1) provides the manner in which the courts obtain the requisite authority to grant an adoption, as follows:

“Unless the parent, the legal parent, or the guardian, or, as provided in subsections (b) and (c), the putative biological father of the child has surrendered parental or guardianship rights to the child, has executed a parental consent that has been confirmed by the court, has waived such person's rights pursuant to § 36-1-111(w), or unless such person's rights have been terminated by the order of a court of competent jurisdiction, the legal parent(s), guardian of the person of the child or of an adult, and the biological parents of the child must be made parties to the adoption proceeding or to a separate proceeding seeking the termination of those rights, and ***their rights to the child must be terminated by a court to authorize the court to order the adoption of the child or adult by other persons.***” (Emphasis added)

As such, the court in which the adoption petition was filed does not have authority to grant the adoption unless and until the biological parents' parental rights (guardians and legal parents also) have been terminated.

This termination can occur as part of the adoption petition or in a separate proceeding. However, all biological parental rights to the child or children must be terminated before the court obtains the necessary authority to grant an adoption.

## **JURISDICTION AND VENUE**

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### III. JURISDICTION AND VENUE

Jurisdiction over adoptions in Tennessee is governed by T.C.A. § 36-1-115(a), as follows:

“Any person over eighteen (18) years of age may petition the **chancery** or **circuit** court to adopt a person and may request that the adopted person's name be changed.” (Emphasis added)

Additionally, T.C.A. § 16-10-108 is the statute that provides jurisdiction in the Circuit Courts of this state and T.C.A. § 16-11-110 is the statute that provides jurisdiction over adoptions in the Chancery Courts of this state.

Of course, termination actions may be filed in juvenile court, chancery or circuit court.<sup>2</sup> Practitioners should be aware that if a termination proceeding is pending when the adoption petition is filed, even if the two are in separate courts, the court in which the adoption petition is filed obtains exclusive jurisdiction until the adoption petition is adjudicated.<sup>3</sup> By way of example, in a situation where the Tennessee Department of Children's Services has filed a petition to terminate one or more parent's rights in the juvenile court of a given county, the prospective

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<sup>2</sup> T.C.A. § 37-1-104(c).

<sup>3</sup> T.C.A. § 36-1-116(f)(1) and (2).

adoptive parents may choose to file an adoption petition in chancery or circuit court and have that court determine the issue of termination of the parent's parental rights as well as the adoption itself. This has been used as a method of judge or forum shopping in the past and, until the statutes are modified, is allowed under the code.

For proper venue to exist in adoption cases in Tennessee, the requirements of T.C.A. § 36-1-114 must be met. This statute provides the following:

"The adoption petition may be filed in the county:

- 1) Where the petitioners reside;
- 2) Where the child resides;
- 3) Where the child resided when the child became subject to the care and control of a public or private child-caring or child-placing agency; or
- 4) In which is located any licensed child-placing agency or institution operated under the laws of this state having custody or guardianship of the child or to which the child has been surrendered as provided in this part."

It is advisable for the practitioner to consider whether a dependency and neglect petition has previously been filed in any county in the state to help determine the appropriate venue. However, it is important to note that a termination may occur voluntarily in any juvenile, chancery or circuit court in the state. As such, a practitioner should not rely on the termination proceeding, in and of

itself, to determine proper venue. The best gauge is to determine where the child has been residing and where the petitioners are residing.



**WHO MAY ADOPT**

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#### **IV. WHO MAY ADOPT**

Persons interested in adopting a child or adult are named "prospective adoptive parents."<sup>4</sup> In Tennessee, the persons eligible for filing a petition for adoption are identified at T.C.A. § 36-1-115. Specifically, prospective adoptive parents must be over the age of eighteen (18)<sup>5</sup>, they must have physical custody or be able to demonstrate to the court the right to physical custody at the time of the filing of the petition or they are filing an intervening petition for adoption.<sup>6</sup> Additionally, if the prospective adoptive parent is married, his or her spouse must join in the petition.<sup>7</sup> Other requirements are enumerated in subsections (d) through (g), including, but not limited to residency requirements.

The one tricky part about who may adopt is created by the language contained in T.C.A. § 36-1-115(b). This section provides that the petitioners must generally have physical custody unless that are the intervening petitioners. This statute seems to indicate that the scope of those persons eligible to file an adoption petition is

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<sup>4</sup> T.C.A. § 36-1-102(41).

<sup>5</sup> Id at (a).

<sup>6</sup> Id. at (b).

<sup>7</sup> Id. at (c).

open to third parties who do not have physical custody of the child nor have the right to physical custody. This creates a situation where third party family members and others may be allowed to file an intervening petition for adoption in order to convince the court that the child's best interest is best served in their care. This section is most often used by grandparents in these types of cases.

Tennessee courts are in the midst of determining whether gay or lesbian partners are allowed to adopt or whether gay or lesbian couples may adopt. These issues will not be covered herein, nevertheless, the practitioner should know that these issues are actively litigated before the appellate courts of this state and should be thoroughly researched if these issues are presented to your office.

**WHOSE RIGHTS MUST BE TERMINATED**

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## V. WHOSE RIGHTS MUST BE TERMINATED

T.C.A. § 36-1-117(a)(1) clearly requires the parental rights of the biological parent, legal parent, guardian or putative father be terminated before the court in which the adoption petition is filed obtains the authority to grant an adoption. The definition of biological parent is provided at T.C.A. § 36-1-102(10), as follows:

"Biological parents" means the woman and man who physically or genetically conceived the child who is the subject of the adoption or termination proceedings or who conceived the child who has made a request for information pursuant to this part."

Additionally, the definition of legal parent is found at subsection (28) of the aforementioned statute, as follows:

"Legal parent" means:

- (A) The biological mother of a child;
- (B) A man who is or has been married to the biological mother of the child if the child was born during the marriage or within three hundred (300) days after the marriage was terminated for any reason, or if the child was born after a decree of separation was entered by a court;
- (C) A man who attempted to marry the biological mother of the child before the child's birth by a marriage apparently in compliance with the law, even if the marriage is declared invalid, if the child was born during the attempted marriage or within three hundred (300) days after the

termination of the attempted marriage for any reason;

**(D)** A man who has been adjudicated to be the legal father of the child by any court or administrative body of this state or any other state or territory or foreign country or who has signed, pursuant to §§ 24-7-113, 68-3-203(g), 68-3-302 or 68-3-305(b), an unrevoked and sworn acknowledgment of paternity under the provisions of Tennessee law, or who has signed such a sworn acknowledgment pursuant to the law of any other state, territory, or foreign country; or

**(E)** An adoptive parent of a child or adult.”

The definition of guardian is found at subsection (24) of the same statute. A putative father is a man who has either alleged that he is the father, or of whom it has been alleged that he is or might be the father of the minor child. Such a person may or may not have filed a claim with the putative father registry pursuant to T.C.A. § 36-2-318. A putative father's rights may be adjudicated pursuant to T.C.A. § 36-1-117(a) (2) and (b).

In the only appellate decision on this issue, the Court of Appeals used its discretion in the case of In re Z.J.S. and M.J.P., 2003 Tenn. App. LEXIS 415 (June 3, 2003), to state affirmatively whose rights must be terminated. In that case, the Department of Children's Services has filed a petition to terminate the rights of the biological mother of the two (2) minor children, as

well as the two (2) biological fathers. The fathers were known to both the mother and the department, nevertheless, the department chose to provide service to the fathers via publication rather than personal service. The juvenile court terminate the rights of the natural mother and the two (2) biological fathers. The natural mother appealed the decision of the juvenile court. Despite the fact that the biological father's were not before the Court of Appeals, the Court utilized its power to consider issues not before it in the interest of justice. In doing so, the Court stated that pursuant to T.C.A. § 36-1-117(a) (1) both biological parents must be made parties to a termination proceeding. Moreover, the Court found that "[a]n adoption proceeding cannot proceed until both the biological mother's and the biological father's parental rights have been adjudicated." The Court went on to state that even "unknown fathers" parental rights must be terminated before the court obtains authority to grant an adoption.

The consideration of both the statute<sup>8</sup> and the interpretive case law<sup>9</sup> results in the inescapable conclusion that both biological parents, including any "unknown

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<sup>8</sup> T.C.A. § 36-1-117(a)(1).

<sup>9</sup> In re Z.J.S.

fathers", parental rights must be terminated **prior to** the granting of the petition for adoption.



**VOLUNTARY TERMINATIONS AND ADOPTIONS**

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## VI. VOLUNTARY TERMINATIONS AND ADOPTIONS

In Tennessee, a natural parent may voluntarily terminate his or her parental rights by filing a waiver of interest, by perfecting a surrender<sup>10</sup> and by giving his/her parental consent<sup>11</sup> to the adoption. These methods may be used in a separate termination proceeding or may be combined in an adoption petition. The remainder of this section will look at each of these methods individually in order to allow the practitioner to make an informed decision on which method to use in a given case.

In order to fully understand the statutory requirements for each, it is best to understand the statutory definitions of each. First, T.C.A. § 36-1-102 sets forth definitions of many of the terms found in the adoption code. Specifically, subsections 15, 37 and 47 provides the relevant definitions of surrender and parental consent. Subsection 15 defines "consent" as follows:

(A) The written authorization to relinquish a child for adoption, which is given by an agency such as the department or a public child care agency of another state or country or licensed child-placing agency of this or another state, which agency has the authority, by court order or by surrender or by operation of law or by any combination of these, to place a

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<sup>10</sup> T.C.A. § 36-1-102(47).

<sup>11</sup> T.C.A. § 36-1-102(37).

child for adoption and to give permission for the adoption of that child by other persons;

(B) The written permission of a parent pursuant to § 36-1-117(f) to permit the adoption of that parent's child by that parent's relative or by the parent's spouse who is the child's step-parent;

(C) The process described in § 36-1-117(g) by which a parent co-signs an adoption petition, with the prospective adoptive parents, for the purpose of agreeing to make the child available for adoption by the co-petitioning prospective adoptive parents, and that permits the court to enter an order of guardianship to give the adoptive parents custody and supervision of the child pending the completion or dismissal of the adoption proceedings or pending revocation of the consent by the parent. This process shall be called a "parental consent";

(D) The permission of a child fourteen (14) years of age or older given to the court, in chambers, before the entry of an order of adoption of such child;

(E) The permission of a guardian ad litem for a disabled child or an adult permitting the adoption of those persons pursuant to the procedures of § 36-1-117(i) and (j);

(F) The sworn, written permission of an adult person filed with the court where the adoption petition is filed that seeks the adoption of the adult;  
or

(G) The agreement for contact by the parties to the post-adoption records search procedures that may be required in §§ 36-1-127 - 36-1-141;

Of particular importance is subsection (C) which sets forth the process of "parental consent" by way of co-signing the adoption petition. The definition of "parental consent" is

more specifically set forth in subsection 37 of the same statute, as follows:

“Parental consent” means the consent described in subdivision (15) (C);

As such, parental consent is the act of co-signing the adoption petition pursuant to T.C.A. § 36-1-117(g) for the purpose of agreeing to make the child available for adoption. Subsection 47 further defines what the act of “surrender” means, as follows:

“Surrender” means a document executed under the provisions of § 36-1-111, or under the laws of another state or territory or country, by the parent or guardian of a child, by which that parent or guardian relinquishes all parental or guardianship rights of that parent or guardian to a child, to another person or public child care agency, or licensed child-placing agency for the purposes of making that child available for adoption; and ...

#### **A. RELATIVE ADOPTIONS**

Many uncontested adoptions in this state are normally referred to as relative adoptions. These adoptions involve the biological parents allowing some relative to adopt the child[ren]. The definition of “related” is found at T.C.A. § 36-1-102(42), which states that “[r]elated” means grandparents or any degree of great-grandparents, aunts or uncles, or any degree of great-aunts or great-uncles, or stepparent, or cousins of the first degree or any siblings

of the whole or half-degree.” It should be noted that all persons listed therein have some blood relation with the exception of the step-parent.

The importance of the related adoption is that certain requirements in the code may be waived in the event the prospective adoptive parents are related. Specifically, pursuant to T.C.A. § 36-1-117(f), parental consent given by the signing of the adoption petition as a co-petitioner by a biological parent has the effect of being a complete surrender resulting in that parent having no right to further notice or service of process. Additionally, there is no need for a formal surrender hearing, and the court may waive the six (6) month waiting period, orders of reference, the preliminary home study and home study, the order of guardianship or custody, and the final court report.<sup>12</sup> Nevertheless, there are disadvantages to this procedure. A parental consent can be revoked at any time prior to the entry of an order of confirmation.<sup>13</sup> Normally, however, relative adoptions result in the waiver of the six (6) month waiting period, therefore, the adoption can be finalized quickly by the filing of an Order of Confirmation and Final Order of Adoption. Despite this obvious risk,

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<sup>12</sup> T.C.A. § 36-1-119(b).

<sup>13</sup> T.C.A. 36-1-112(a)(2)(A).

this mechanism is most commonly used by the Tennessee practitioner in relative adoptions. It should be noted that some practitioners feel that the order of confirmation can be included in the final order of adoption in related cases.<sup>14</sup> However, this view is inconsistent with the language in T.C.A. § 36-1-117(g)(4) and § 36-1-120(a)(6)(D). Therefore, the better practice is to enter an order of confirmation as early as possible and then a final order of adoption, even if these are entered at the same time. A sample adoption petition by related persons and a final order of adoption with an order of confirmation is included in the Appendix section of these materials.

An additional mechanism is that of surrender. The definition of a surrender is set forth hereinabove. It is governed by T.C.A. § 36-1-111. With a surrender, the revocation period is only ten (10) days.<sup>15</sup> This shorter period of time may be preferred in certain situations where the surrendering parent may not be fully certain that he or she is doing what is best. However, there is no statutory provision that allows for the waiver of the home study in related adoption cases. In fact, the opposite is true.<sup>16</sup> Therefore, based on the expense of performing a home study,

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<sup>14</sup> DAWN COPPOCK, COPPOCK ON TENNESSEE ADOPTION LAW (5<sup>th</sup> ed.), at p. 22.

<sup>15</sup> T.C.A. § 36-1-112(a)(1)(A).

<sup>16</sup> T.C.A. § 36-1-111(d)(1) states that a surrender is not valid unless the home study has been performed and a court report based thereon is entered at the time of the surrender.

surrenders are not commonly used in related adoptions. Moreover, a surrender is not valid unless the person or persons or entity to whom the child is surrendered meets the requirements of T.C.A. § 36-1-111(d)(6)(A) - (D). This disqualifies prospective adoptive parents who do not have custody of the child.

Finally, a waiver of interest and notice<sup>17</sup> may be used by any father who is not listed on the child's birth certificate and is not the child's legal father.<sup>18</sup> The waiver of interest and notice, once signed under oath by the father, serves to waive his interest and right in the child and his right to notice of any further custody or adoption proceedings. Moreover, the father shall not be required to be named as a party to any adoption proceedings as opposed to the requirement at T.C.A. § 36-1-117(a)(1). The courts are expressly given jurisdiction to enter a final order of adoption based on the waiver of interest and notice.<sup>19</sup> The waiver of interest *may not* be revoked. In fact, the execution of the waiver of interest together with the entry of a final order of adoption shall irrevocably terminate all rights the alleged biological father may have

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<sup>17</sup> T.C.A. § 36-1-111(w).

<sup>18</sup> T.C.A. § 36-1-111(w)(3).

<sup>19</sup> Assuming all parent's parental rights have been properly adjudicated; *See* T.C.A. § 36-1-117(a)(1).

to the child.<sup>20</sup> However, it should be noted that if there is no final order of adoption entered, a parentage action may be initiated by or against the father resulting in the father becoming liable for child support and some or all of the actual medical and hospital expenses. Finally, the waiver of interest and notice may be executed at any time after the mother executes a sworn statement identifying the person as the biological father, or at any time after birth.<sup>21</sup> A sample waiver of interest and notice form is included in the Appendix section of these materials.

#### **B. NON-RELATIVE ADOPTIONS**

The most commonly used mechanism in Tennessee to terminate the biological mother's parental rights in a non-relative adoption is that of a surrender.<sup>22</sup> There are different requirements for a surrender to prospective adoptive parents rather than to an agency. If the surrender is directly to the prospective adoptive parents, then the prospective adoptive parents must obtain a home study and resulting court report prior to the surrender.<sup>23</sup> Otherwise, the surrender is invalid. The Department of Children's Services has promulgated a number of surrender forms which the practitioner should keep on hand.

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<sup>20</sup> T.C.A. § 36-1-111(w)(2)(A).

<sup>21</sup> T.C.A. § 36-1-111(w)(4).

<sup>22</sup> COPPOCK at p. 14.

<sup>23</sup> T.C.A. § 36-1-111(a)(1)-(2) and (d)(1).



To effectuate a valid surrender, there must be a surrender hearing before the judge or chancellor.<sup>24</sup> This hearing must be private between the judge or chancellor and the parent providing the surrender. The surrendering parent's legal counsel, court officer or other employee may also be present.<sup>25</sup> The judge or chancellor must ask for identification of the surrendering parent, as well as the prospective adoptive parents.<sup>26</sup> There is a surrender form to be used during the surrender hearing that is to be signed by the judge or chancellor and the surrendering parent.<sup>27</sup> A sample form has been included in the Appendix section to these materials. It is the duty of the judge or chancellor taking the surrender to witness the actual signing of the surrender form.<sup>28</sup> The judge or chancellor must also advise the surrendering parent of the parents' right of revocation and the time period and procedure for such revocation.<sup>29</sup> Additional information must be disclosed during the surrender hearing.<sup>30</sup> Certain other information must be attached to the surrender form.<sup>31</sup> Practitioners should also be aware of T.C.A. § 36-1-111(u) (1), which provides that

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<sup>24</sup> T.C.A. § 36-1-111(b); (k)(1)(C)(iii).

<sup>25</sup> T.C.A. § 36-1-111(k)(1)(C)(iii).

<sup>26</sup> T.C.A. § 36-1-111(g).

<sup>27</sup> T.C.A. § 36-1-111(e) and (k).

<sup>28</sup> T.C.A. § 36-1-111(k)(C)(i).

<sup>29</sup> T.C.A. § 36-1-111(b).

<sup>30</sup> T.C.A. § 36-1-111(k)(2)(A); (k)(2)(D); (k)(4)(A) and (k)(2)(E)-(F).

<sup>31</sup> T.C.A. § 36-1-111(a)(2); (k)(3)(B); (l)(1)-(2); and (m)(1)-(5).

the failure to fully comply with the provisions of this section or the failure to file the surrender within fifteen (15) days, or the failure to obtain an order of guardianship within thirty (30) days shall be grounds for removal of the child from the physical care and control of prospective adoptive parents or the agency.<sup>32</sup>

A revocation may occur for any reason within ten (10) days.<sup>33</sup> Once a revocation has been entered, the custody of the child reverts back to his or her pre-surrender legal status.<sup>34</sup> Some exceptions to this rule do exist.<sup>35</sup> As more fully discussed herein supra, a parent may request that a surrender be set aside outside the ten (10) days period. Nevertheless, the trial court does have the authority to set aside a surrender pursuant to T.C.A. § 36-1-118.

The procedure for parental consent is different in an unrelated adoption than it is in a related adoption. According to Dawn Coppock<sup>36</sup>, a parental consent in an unrelated adoption is "designed to be used when one parent wants to make an adoption plan, and it is anticipated that the other parent may contest the adoption." Of course, once the other parent(s) parental rights have been terminated,

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<sup>32</sup> Unless the prospective adoptive parents otherwise have legal custody.

<sup>33</sup> T.C.A. § 36-1-112(a).

<sup>34</sup> T.C.A. § 36-1-112(e)(1).

<sup>35</sup> T.C.A. § 36-1-112(e)(2)(A)-(B); (e)(4) and (f).

<sup>36</sup> COPPOCK ON TENNESSEE ADOPTION LAW (5<sup>th</sup> ed.) at p. 23.

the consenting parent then allows an order of confirmation to be entered which act irrevocably terminates that parents' parental rights. However, if the other parents' parental rights are not terminated, or if the adoption plan changes for any reason, the consenting parent may revoke his/her previous consent so long as the order of confirmation has not been entered.

The confirmation hearing takes place in a similar fashion and uses similar forms as that of a surrender.<sup>37</sup> However, the parent is given ten (10) calendar days written notice by the court of the appearance date for the required response before the entry of the order of confirmation of the parental consent.<sup>38</sup> If the consenting parent does not appear at the confirmation hearing, then his or her parental rights may be terminated by using any of the available grounds enumerated in T.C.A. § 36-1-113.<sup>39</sup> The practitioner should take special care to provide such grounds in the original petition for adoption that is signed by the consenting parent or amend the pleadings to add such grounds as necessary. It should be noted and understood that the act of co-signing an adoption petition by a parent for the purpose of giving his or her consent to

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<sup>37</sup> T.C.A. § 36-1-117(g)(3).

<sup>38</sup> Id.

<sup>39</sup> T.C.A. § 36-1-117(g)(3).

the adoption does **not** terminate that parents parental rights.<sup>40</sup> As discussed herein, *infra*, the court must first enter an order confirming the parental consent, an then, and only then, shall the court have the authority to enter an order terminating such parent's parental rights to the child.<sup>41</sup> The waiver of interest and notice is especially useful in non-related adoptions for terminating the father's parental rights and is discussed more fully in the preceding section.

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<sup>40</sup> T.C.A. § 36-1-117(g)(2).

<sup>41</sup> T.C.A. § 36-1-117(g)(4).

**INVOLUNTARY TERMINATIONS AND ADOPTIONS**

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## **VII. INVOLUNTARY TERMINATIONS AND ADOPTIONS**

The involuntary termination of a parent's parental rights is typically a highly emotionally charged area of litigation. Both biological parents whose parental rights may be terminated and the prospective adoptive parents are very emotionally attached to the child and are usually very firm in their respective beliefs regarding what is best for the child. This section is designed to help the practitioner with common procedures that are required to effectuate a valid termination of a parents parental rights.

### **A. PROCEDURE**

Because these materials are primarily focused on adoption law, this section will only encompass the termination procedures used in conjunction with an adoption petition. However, it should be noted that there may be a separate action filed in the same or different court to terminated one or more parent's parental rights. If a termination action is pending in the same or different court(s) and an adoption petition is filed, then the court in which the termination(s) were filed lose jurisdiction.<sup>42</sup> Pursuant to T.C.A. § 36-1-113(b), the prospective adoptive parents have the right to file a petition to terminated

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<sup>42</sup> T.C.A. § 36-1-116(f)(1) and (2).

parental rights, and, most commonly, file such petition inside the petition for adoption.

It is undisputed that a parent's parental rights to their child(ren) are constitutionally protected.<sup>43</sup> In order to properly terminate such parent's parental rights, it is necessary to obtain valid service of process on the parent.<sup>44</sup> This service must even be obtained over an "unknown father" via constructive service.<sup>45</sup> A judgment obtained over one or more parent who is not properly before the court is a void judgment.<sup>46</sup>

The Z.J.S. court opined that in the case of doubt as to who the father is, both any known and unknown potential father's parental rights must be terminated.<sup>47</sup> Practitioners must make reasonable efforts to discover the identity of the father. Once identified, if possible, reasonable efforts must be made to find them. Once located, service must be had. If, however, the father is "unknown", or is known but not able to be located, then service of process by publication is required.<sup>48</sup> However, T.C.A. § 36-1-117(m) (3) requires an affidavit of the party or their

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<sup>43</sup> U.S. Constitution, 5<sup>th</sup> and 14<sup>th</sup> Amendments; In re K.L.H., 2003 Tenn. App. LEXIS 863 (December 12, 2003)

<sup>44</sup> In re Z.J.S. and M.J.P., 2003 Tenn. App. LEXIS 415 (June 3, 2003).

<sup>45</sup> Id.

<sup>46</sup> Overby v. Overby, 457 S.W.2d 851 (1970).

<sup>47</sup> Id. at fn. 17.

<sup>48</sup> Id.

counsel stating all reasonable efforts made to locate and/or identify the father and a detailed list of what efforts were undertaken. The practitioner should be careful when using service by publication in an adoption matter and only file such an adoption in the chancery court as there is no enabling statute allowing service of process by publication in the circuit court.

If service of process by publication is to be used, then the notice must be designed to give actual notice to the father by providing as much detailed information as is available in the most appropriate newspaper(s) in the area.

T.C.A. § 36-1-113(d) sets forth the allegations that must be contained in either a termination petition or a contested petition for adoption. In either case, the petition must be verified.<sup>49</sup> The allegations must include: the child's birth name; the child's age or date of birth; the child's current residence address or county of residence; any other facts that allege the basis for termination and that establishes jurisdiction of the court; that the putative father registry has been consulted within ten (10) working days of the filing of the petition; whether any claim to the paternity of the child exists; states whether any other potential rights have been or need to be

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<sup>49</sup> T.C.A. § 36-1-113(d)(1).



terminated; the termination will have the effect of forever severing the parental rights of the parent(s); that the child will be placed in the guardianship of others; and that the parent shall have no further right to notice of adoption proceedings. Additionally, any parent, legal parent, guardian or putative father must be named as a party and served with a copy of the petition.<sup>50</sup> A sample petition for adoption that includes provisions for the termination of parental rights is enclosed in the Appendix section of these materials.

In many cases, one or more biological parent may fail to answer the petition within the time required. In these cases, a default may be taken as in other civil cases pursuant to Rule 55 of the Tennessee Rules of Civil Procedure. However, the practitioner should take special care to enter a final order of termination as quickly as is possible to begin the running of the thirty (30) day period for filing an appeal.

If a biological parent comes before the court and is unable to afford an attorney, there are provisions for the appointment of counsel in actions that may result in the termination of parental rights.<sup>51</sup> It is important to note

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<sup>50</sup> T.C.A. § 36-1-113(d)(3)(B).

<sup>51</sup> Tennessee Rules of Supreme Court 13 section 1(d).

that the parent must request the appointment of counsel. However, (d) (2) (D) requires the appointment of a guardian *ad litem* for the child in all contested termination proceedings.

Assuming one or more parent has answered the petition through retained or appointed counsel, and after a guardian *ad litem* has been appointed, the parties may begin the process of preparing the matter for trial to determine whether one or more parent's parental rights should be terminated.

#### **B. GROUNDS FOR TERMINATION**

In order to successfully terminate the parental rights of a parent, the prospective adoptive parents must establish by clear and convincing evidence at least one (1) of the grounds set forth at T.C.A. § 36-1-113(g). The grounds listed include, *inter alia*, abandonment; non-compliance with a permanency plan; the child has been removed from the parent(s) for more than six (6) months; the parent has committed severe child abuse against the child, sibling, half-sibling, or any other child residing in the home of the parent; the parent has been sentenced to two (2) or more years imprisonment for conduct towards the child, sibling, half-sibling or other child in the home (does not require serving the full two years); the parent

has been imprisoned for ten (10) or more years as a result of a criminal act and the child is under eight (8); the parent has been found guilty or civilly liable for the intentional and wrongful death of the child's other parent; and mental incompetency.<sup>52</sup> While many of the grounds are fairly self-explanatory, the ground of abandonment is a more difficult, and, therefore, more litigated concept. Abandonment is defined at T.C.A. § 36-1-102(1), as follows:

- (1) (A) 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, "abandonment" means 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 have willfully failed to make reasonable payments toward the support of the child;
  - (ii) The child has been removed from the home of the parent(s) or guardian(s) as the result of a petition filed in the juvenile court in which the child was found to be a dependent and neglected child, as defined in § 37-1-102, and the child was placed in the custody of the department or a licensed child-placing agency, that the juvenile court found, or the court

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<sup>52</sup> Id.

where the termination of parental rights petition is filed finds, that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child's situation prevented reasonable efforts from being made prior to the child's removal; and for a period of four (4) months following the removal, the department or agency has made reasonable efforts to assist the parent(s) or guardian(s) to establish a suitable home for the child, but that the parent(s) or guardian(s) have made no reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date;

(iii) A biological or legal father has either willfully failed to visit or willfully failed to make reasonable payments toward the support of the child's mother during the four (4) months immediately preceding the birth of the child; provided, that in no instance shall a final order terminating the parental rights of a parent as determined pursuant to this subdivision (iii) be entered until at least thirty (30) days have elapsed since the date of the child's birth;

(iv) A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and either has willfully failed to visit or has willfully failed to support or has willfully failed to make reasonable payments toward the support of the

child for four (4) consecutive months immediately preceding such parent's or guardian's incarceration, or the parent or guardian has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child; or

(v) The child, as a newborn infant aged seventy-two (72) hours or less, was voluntarily left at a facility by such infant's mother pursuant to § 68-11-255; and, for a period of thirty (30) days after the date of voluntary delivery, the mother failed to visit or seek contact with the infant; and, for a period of thirty (30) days after notice was given under § 36-1-142(e), and no less than ninety (90) days cumulatively, the mother failed to seek contact with the infant through the department or to revoke her voluntary delivery of the infant;

(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;

(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 a 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;

Simply put, abandonment can be proven if it is shown that the parent willfully failed to visit or support the child for four (4) months immediately preceding the filing of the petition, the child who was found to be dependent and neglected remained in the custody of the department for four (4) consecutive months following removal, the biological father willfully failed to support the mother for the four (4) months preceding the child's birth and an infant younger than 72 hours was voluntarily left at a facility pursuant to T.C.A. § 68-11-255.

It should be noted that "token support" and "token visitation" are not sufficient to defeat a claim of abandonment. There are too many cases involving the specifics of abandonment and defenses thereto to list in these materials. If faced with the issue of abandonment, the practitioner should thoroughly research the many cases in order to support or defeat the claim successfully.

Once the hearing is concluded, the trial court must make findings of facts and conclusions of law on all grounds pled before it within thirty (30) days of the hearing.<sup>53</sup>

#### **C. BEST INTEREST OF THE CHILD**

Once one or more grounds have been established by clear and convincing evidence, the trial court must determine whether the termination of a parent's parental rights is in the best interest of the child.<sup>54</sup> The statute sets forth certain factors that must be considered in determining whether a termination is in the best interest of the child.<sup>55</sup> These factors are:

(i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall

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<sup>53</sup> T.C.A. § 36-1-113(k).

<sup>54</sup> T.C.A. § 36-1-113(c)(2).

<sup>55</sup> T.C.A. § 36-1-113(i).

consider, but is not limited to, the following:

(1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;

(2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;

(3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

(4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;

(5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;



(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Of course, the factors may be weighed differently from one case to the next depending on the unique facts of each case.<sup>56</sup>

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<sup>56</sup> White v. Moody, 2004 Tenn. App. LEXIS 890 (December 30, 2004).

**ADOPTION PETITION**

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## VIII. ADOPTION PETITION

Many of the required allegations that must be contained in the petition for adoption have been discussed elsewhere in these materials in more depth. These include necessary parties, requirements for jurisdiction and venue and the required pleadings for the termination of parental rights. Still other requirements exist. The petition must be filed within thirty (30) days after a surrender of a child directly to the prospective adoptive parents.<sup>57</sup> T.C.A. § 36-1-116(b) requires an adoption petition to include the following:

(b) The petition to adopt must state:

(1) The full name of the petitioners;

(2) The name used for the child in the proceeding. In the petition or other orders related to the custody of the child and the final order of adoption, and in all other documents related to the case, the name selected by the petitioner as the name for the child may be used as the true and legal name of the child, and the original name of the child shall not be necessary. Only in the court report required by law on the investigation of the conditions and antecedents of the child sought to be adopted and on the form requesting the new certificate of birth by adoption shall the original name of the child given by the biological or prior legal parent or parents be necessary;

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<sup>57</sup> T.C.A. § 36-1-118(b).

(3) The birth date, state, and county or country of birth of the child, if known;

(4) The information necessary to show that the court to which the petition is addressed has jurisdiction;

(5) That the petitioners have physical custody of the child or that they meet the requirements of § 36-1-111(d)(6), and from what person or agency such custody was or is to be obtained;

(6) That it is the desire of the petitioners that the relationship of parent and child be established between them and the child;

(7) The desire of the petitioners, if they have such, that the name of the child be changed, together with the new name desired;

(8) The value of the personal and real property owned by the child or in which the child may have some legal or equitable interest;

(9) That the petitioners are fit persons to have the care and custody of the child and that it is in the best interest of the child for this adoption to occur;

(10) That the petitioners are financially able to provide for the child;

(11) That there has been full compliance with the law in regard to surrender of the child to the petitioners, or termination of parental or guardianship rights, or consent to the adoption of the child by the agency with rights to place a child for adoption, or that the petitioner intends to effect compliance with the requirements for termination of parental or guardianship rights or parental consents as part of the

adoption proceeding, and how such compliance will be effected. A copy of any orders obtained by the prospective adoptive parents terminating parental or guardianship rights and copies of any surrenders that were executed to the prospective adoptive parents shall be filed with the petition;

(12) (A) Whether the biological parent is giving parental consent for the adoption of the child as defined pursuant to § 36-1-102 and as executed pursuant to § 36-1-117(g), or that the parent is signing the petition pursuant to § 36-1-117(f) and that the parent understands that the child will be adopted by the relatives or stepparent of the child and that, in the case of the adoption by relatives, the parent will have no legal rights to the custody, control, or to visitation with the child in the future;

(B) In the case of a parental consent pursuant to § 36-1-102 and § 36-1-117(g), the petition must state that the parent understands that the entry of an order confirming the parental consent, without revoking the parental consent prior to the entry of such order, will terminate that parent's parental rights to the child forever and that the parent will have no legal rights to the custody, control, or to visitation with the child in the future;

(13) (A) That the petitioner has made inquiry to the putative father registry within ten (10) working days prior to the filing of the petition to determine whether any person claims a paternity interest in the child who is the subject of the proceeding by having entered a claim with the registry, the result of such inquiry, and that, if the child is less than thirty (30) days old at the time the petition is filed,

the petitioner provided notice of the filing of the adoption petition to the registry; and

(B) Whether there are any other persons known to the petitioner(s) who are entitled to notice under § 36-1-117 and the identity of such persons;

(14) Whether the child was brought into Tennessee for foster care or adoption, and, if so, that there has been full compliance with the ICPC or, if compliance has not occurred, a statement alleging good cause for such noncompliance. Evidence of compliance in the form of the ICPC Form 100A or other form from the department, if appropriate, or a sworn statement stating why such form is not required shall be included or attached as an exhibit to the petition;

(15) (A) Whether the child was brought into Tennessee for foster care or adoption from a foreign country, and, if so, evidence shall be attached to the petition showing approval of the government or legal authority in the country from which the child was brought that the child's placement with the petitioners was appropriate and that the petitioners have legal authority under that country's law to have the custody of the child;

(B) The petition shall exhibit evidence from the immigration and naturalization service, the department of justice or the department of state that the child has proper authorization to enter the United States;

(C) If a child who was the subject of an adoption decree from the foreign country must be re-adopted under Tennessee law to effect a valid adoption due to any interpretation of the United States government, the petition shall so state and state that

this is necessary for the child to be legally adopted in the United States, and the court shall have jurisdiction to enter an order of adoption for this purpose;

(D) If a child is in this country and the provisions of subdivision (b) (15) (A) cannot be met, the petitioners shall file an affidavit and any other available documentary evidence satisfactory to the court that shows why there is no approval available for the child from the foreign government or legal authority in the foreign country concerning the child's placement with the petitioners;

(16) (A) Whether the petitioners have paid, or promised to pay, any money, fees, contributions, or other remuneration or thing of value in connection with the birth, placement or the adoption of the child, and if so, to or from whom, the specific amount, and the specific purpose for which these were paid or promised;

(B) The disclosure required by this subdivision (b) (16) shall specifically include whether any attorney's fees or medical expenses or counseling fees and the other expenses permitted under §§ 36-1-108 and 36-1-109 or any other fees, remuneration, or contribution, were paid or promised in connection with the child's birth, placement, or adoption and if so, to whom, the specific amount and the specific purpose for which they were paid or promised;

(C) The disclosure required by this subdivision (b) (16) shall also specifically include the amount of fees paid to any licensed child-placing agency or licensed clinical social worker in connection with the placement of the child.

Sample adoption petitions are included in the Appendix section of these materials.



**FINALIZATION OF ADOPTION**

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## IX. FINALIZATION OF ADOPTION

Unless waived in the appropriate cases<sup>58</sup>, the petition for adoption must be on file for six (6) months prior to the entry of a final order of adoption.<sup>59</sup> Moreover, assuming no appeal is pending, the adoption must either be completed or dismissed within two (2) years of the filing of the petition.<sup>60</sup> If an appeal is pending, then the adoption must be finalized within one (1) year from the final judgment on appeal.<sup>61</sup> Additionally, the final court report **must** be filed.<sup>62</sup> The in chambers consent of a child aged fourteen (14) or older must also be taken.<sup>63</sup>

### A. ORDER OF CONFIRMATION

One area of great misunderstanding in the adoption code centers around the order of confirmation in parental consent cases. An order of confirmation is required to be filed in **all** parental consent cases.<sup>64</sup> Specifically, T.C.A. § 36-1-112(a)(2)(A) states, as follows:

(2) (A) A parental consent may be revoked at any time prior to the entry of an order of confirmation of the parental consent by the court.

Additionally, T.C.A. § 36-1-117(g)(4) states:

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<sup>58</sup> T.C.A. § 36-1-119(a), (b) and (c); § 36-1-117(j).

<sup>59</sup> T.C.A. § 36-1-119(a).

<sup>60</sup> T.C.A. § 36-1-119(d).

<sup>61</sup> T.C.A. § 36-1-119(e).

<sup>62</sup> T.C.A. § 36-1-116(e)(5)(B).

<sup>63</sup> T.C.A. § 36-1-117(i)(1).

<sup>64</sup> T.C.A. § 36-1-112(a)(2)(A) and § 36-1-117(g)(1)-(6).

(4) *Following* the satisfactory completion of such questions, which shall be recorded on the forms required pursuant to § 36-1-111, the court *shall enter* an order that confirms the parental consent, and ***the court shall then, and only then, be authorized to enter an order terminating such parent's rights to the child who is the subject of the adoption petition;*** provided, that a parental consent may be revoked at any time prior to the entry of an order of confirmation of the parental consent by the court by executing a revocation form as provided in § 36-1-112, and such revocation shall negate and void the parental consent executed pursuant to this subsection (g).

Clearly, the parent giving consent has the statutory right to revoke the consent, both in a related adoption and a non-related adoption, at ***any time prior to the entry of the order of confirmation.*** However, some practitioners have relied upon language in the final order of adoption to satisfy this requirement. Pursuant to T.C.A. § 36-1-117(g) (4), together with T.C.A. § 36-1-111(r) (1) (A), § 36-1-116(b) (12) (B) and § 36-1-120(a) (6) (D), it becomes clear that the order confirming the parental consent ***must*** be ***entered*** before the court has the authority to terminate the parent's parental rights and then the authority to grant the adoption.<sup>65</sup> Therefore, the correct practice is to file an order of confirmation immediately after the confirmation

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<sup>65</sup> T.C.A. § 36-1-117(a)(1).

hearing. This action triggers the authority of the court to terminate that parent's parental rights resulting in the court's authority to grant the adoption. Additionally, the earlier an order of confirmation is entered results in a shorter period of time for that parent to file a revocation of consent.

**B. FINAL ORDER OF ADOPTION**

Once all of the statutory requirements have been met and the parental rights of all applicable parents, legal parents, guardians and putative fathers have been properly terminated, then, and only then, the court obtains the necessary authority to enter a final order of adoption.<sup>66</sup>

**i. TIMING**

Pursuant to T.C.A. § 36-1-119, a final order of adoption may be filed under different time frames depending on the type of adoption before the court. Specifically, a final order of adoption may not be entered earlier than six (6) months from the filing of the adoption petition<sup>67</sup> unless the child is related to the petitioners<sup>68</sup> or has already resided with the petitioners for more than six (6) months.<sup>69</sup>

Otherwise, unless an appeal is pending, the final order of adoption must be filed within two (2) years of the

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<sup>66</sup> T.C.A. § 36-1-117(a)(1); § 36-1-120; and § 36-1-117(g)(4).

<sup>67</sup> Id. at (a).

<sup>68</sup> Id. at (b).

<sup>69</sup> Id. at (c).

filing of the petition.<sup>70</sup> If an appeal is pending the final order of adoption must be entered within one (1) year from the final judgment upon appeal.<sup>71</sup>

**ii. VALIDITY**

All of the statutory requirements discussed herein *infra* must previously be met before the filing of a final order of adoption. Otherwise, the final order of adoption may be set aside on appeal, or, depending on the violations, may be set aside by later collateral attack pursuant to Rule 60 as discussed herein *supra*.

Clearly, the court must have jurisdiction over the subject matter and all necessary persons before the final order of adoption will be valid. For example, juvenile courts do not have subject matter jurisdiction over adoption, and, consequently, may not enter a valid order of adoption.<sup>72</sup> Likewise, if a parent has not been served with process or his or her rights have not yet been terminated, then any order granting an adoption of the child would be void.<sup>73</sup> Additionally, if as a result of certain procedural defects the adoption court never obtained the appropriate authority either to terminate a parents parental rights or

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<sup>70</sup> Id. at (d).

<sup>71</sup> Id. at (e).

<sup>72</sup> In re Hatcher, 16 S.W.3d 792 (Tenn. Ct. App. 1999).

<sup>73</sup> In re Z.J.S.

to grant an adoption, then any final order of adoption entered will be void.

## **SETTING ASIDE AN INVALID ADOPTION**

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## **X. SETTING ASIDE AN INVALID ADOPTION**

A final order of adoption may be set aside for several different reasons and in a variety of ways. As such, and based on the emotional toil this takes on all parties involved, the practitioner should take special care to meet all of the statutory requirements needed to uphold a valid order of adoption.

### **A. APPEAL**

All termination of parental rights cases appeal directly to the Tennessee Court of Appeals irrespective of the court in which the case was heard.<sup>74</sup> The standard on appeal is governed by T.R.A.P. Rule 13(d). The review is *de novo* upon the record of the trial court, together with a presumption of correctness of the finding unless the preponderance of the evidence is otherwise. To overturn the findings of the trial court, the appellant must show that the facts do not clearly and convincingly establish the elements necessary to terminate the parent's parental rights.<sup>75</sup> As in the trial court, an appeal involving a

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<sup>74</sup> T.C.A. § 37-1-159(g) and T.R.A.P. Rule 3.

<sup>75</sup> In re M.J.B., 140 S.W.3d 643 (2004).



termination of parental rights is entitled to an expedited schedule on appeal.<sup>76</sup>

## **B. FINALITY**

The legislature has made an effort to limit the viability of an attack on a final order of adoption. Specifically, T.C.A. § 36-1-122, as discussed more fully in the next section, attempts to set certain time limits on attacking a final order of adoption based on procedural defects. The reason for this is to provide some measure of finality and protection.<sup>77</sup> Cases have held that a parent may not attack a final order of adoption on grounds that she did not sign the surrender form or that the prospective adoptive parents failed to obtain a home study as required if the attack is beyond the thirty (30) days allowed for an appeal. However, an attack based on Rule 60.02 is not barred as discussed later. Additionally, if the final order of adoption is void, this section does not apply.

## **C. T.C.A. § 36-1-122 (b) (1) and (2)**

Prospective adoptive parents may be able to rely on T.C.A. § 36-1-122 (b) (1) and (2) to defeat many post-

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<sup>76</sup> T.C.A. § 36-1-124(b).

<sup>77</sup> T.C.A. § 36-1-101(b)(3).

adoption challenges based on procedural defects.

Specifically, this statute states:

(b) (1) After the final order of adoption is entered, no party to an adoption proceeding, nor anyone claiming under such party, may later question the validity of the adoption proceeding by reason of any defect or irregularity therein, jurisdictional or otherwise, but shall be fully bound by the order, except for such appeal as may be allowed by law.

(2) In no event, for any reason, shall an adoption be overturned by any court or collaterally attacked by any person or entity after one (1) year from the date of entry of the final order of adoption by a court of competent jurisdiction. This provision is intended as a statute of repose.

First, for these provisions to apply, there must be a valid final order of adoption entered. If the final order of adoption that was entered was void as a result of a lack of subject matter jurisdiction, personal jurisdiction of a necessary party (parent) or the lack of authority, then this statute cannot apply. If, however, the final order of adoption is merely voidable, then section (b) (1) purports to prevent any challenges after thirty (30) days from the entry of the final order. Essentially, if applicable in a given case, the parents only mode of attack is by direct appeal within thirty (30) days or pursuant to Rule 60.02 of the Tenn. R. Civ. P. as discussed in the next section.

However, section (b) (2) seems to make the application of (b) (1) less clear. This statute was of particular importance to the appellate court in the Hatcher case discussed *supra*. As has been noted in other cases, this statute does not prevent a later attack of a final order of adoption under Rule 60.02.<sup>78</sup>

**D. RULE 60.02**

As discussed hereinabove, a challenge to the finality of a final order of adoption may be sought based on Rule 60.02 of the Tenn. R. Civ. P. In fact, a final order of adoption is subject to the provisions of Rule 60.02 providing that fraud, undue influence or mistake is present as grounds for vacating the final order. However, the physical and emotional welfare of all the parties requires assurance of the finality of the adoption order. Therefore, once a valid order of adoption is entered, a natural parent who consented to the adoption must present clear and convincing evidence in order to set aside the adoption order.<sup>79</sup>

Specifically, Rule 60.02 may be used to attack a final order of adoption for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud,

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<sup>78</sup> Parmon v. Swatzell, 1998 Tenn. App. LEXIS 801 (November 23, 1998).

<sup>79</sup> Hensleyv. Hamblin, 678 S.W.2d 471 (Tenn. Ct. App. 1984).

misrepresentation or other misconduct of an adverse party;  
(3) the judgment is void; (4) the judgment has been  
satisfied; or (5) any other reason justifying relief from  
the operation of the judgment. The first two reasons are  
limited to being filed within one (1) year. If the judgment  
is void, it may be attacked and set aside at any time with  
no time limit. If the reason for the motion falls under  
section (5), then the motion must be filed within a  
reasonable time.

**E. STANDING TO ATTACK FINAL ORDER OF ADOPTION**

Who has standing to attack a final order of adoption?  
Only those parties involved in the action prior to the  
entry of the order, or such other persons who were entitled  
to notice of the proceeding. If a parent has surrendered  
his or her parental rights, he or she may not rely on Rule  
60.02 to attack the final order of adoption based on  
procedural irregularities beyond the thirty (30) day limit  
established in T.C.A. § 36-1-122(b)(1), provided that the  
final order of adoption is not void and that the provisions  
of Rule 60.02 do not apply.<sup>80</sup>

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<sup>80</sup> Hatcher.

**ETHICS IN ADOPTIONS**

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## **X. ETHICS IN ADOPTIONS**

In Tennessee, the practitioner should take special care in considering the many ethical issues that may present themselves. Not only should the practitioner make sure that he/she is competent in the area of adoptions, the practitioner should also pay special attention to the fees charged for services rendered, confidentiality and conflicts of interest.

### **A. Competence**

The Tennessee Rules of Professional Conduct provide a road map for the Tennessee practitioner. Rule 1.1 state that "a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Due to the many pitfalls inherent in adoption law, it is strongly encouraged that the practitioner spend ample time researching the law in each adoption to make sure that all of the requirements have been met and that the procedures set forth have been followed. Otherwise, incompetency in this field may result in an adoption being set aside at some later point damaging the family structure and potentially causing irreparable harm to the child(ren).

## B. Attorney Fees

Rule 1.5 of the Tennessee Rules of Professional Conduct govern the issue of attorney fees charged generally. Specifically, the rule state, "a lawyer's fee and charges for expenses shall be reasonable..." In light of T.C.A. § 36-1-120(b)(1), the statute requiring the attorney to provide an Affidavit to the trial court detailing the fees charged for services rendered, the practitioner should make certain that all fees have been carefully thought out and reviewed before filing the Affidavit. It is recommended that the practitioner include language in the Final Order of Adoption finding that the fees are reasonable and are approved by the court. The language may include: "John Doe, attorney for petitioners, has filed the Affidavit required by T.C.A. § 36-1-120(b)(1) setting forth the attorney fees paid or to be paid in connection with this proceeding. That said fees appear to be reasonable and the same are hereby approved by the Court." Please reference the sample Final Orders of Adoption in the Appendix section at the end of these materials.

## C. Confidentiality

Rule 1.6 of the Tennessee Rules of Professional Conduct governs the issue of attorney-client confidentiality. There are many issues that may present

themselves in an adoption that require the practitioner to understand his/her role in the process and the requirement of client confidentiality. For example, consider the representation of the birth mother who tells you about certain information (i.e. name or location of birth father, past drug use, medical history, etc.) yet refuses to allow this information to be disclosed by you to the adoptive parents or to the court. What are your duties? Careful consideration of the rules and ethical opinions is a must.

What if the client is incapable of understanding the process, or, you are concerned that they are not capable of understanding. Do you demand counseling before the surrender or consent? What if you represent the prospective adoptive parents and during your interview of the biological parent you discover information that the biological parent does not want you to share with the prospective adoptive parents? Carefully consider your options before you before making an uninformed decision.

#### D. Conflict of Interest

Finally, Rule 1.7 of the Tennessee Rules of Professional Conduct set forth the rules governing conflict of interests. Additionally, comments 14, 17, and 20-23 have special importance to the adoption arena. In most private and uncontested adoptions, the prospective adoptive parents



come to the practitioner and ask that the attorney meet with the biological parent(s) to draft the necessary documents to effect an adoption. Unfortunately, the lines are to often blurred regarding who are the clients of the attorney. There are several classes of persons with whom an attorney may have some form of relationship during the adoption process. They may include:

1. Biological mother. The birth mother may be surrendering her rights or giving her parental consent to the uncontested adoption. What if she does not want a lawyer but refused to give the name of the biological father? What if there is more than one potential biological fathers?

2. Biological father/legal father/putative father. Under Tennessee law, there may be as many as three (3) sets of fathers as defined. Of course, there may be more than one potential father in any given class listed. For example, the biological mother may have been married to father1 during the time she conceived the child and gave birth, but father2, 3, and 4 may have all had sexual relations with the biological mother at or near the time of conception and father 5 may believe he is the father and he may file a claim with the putative father's registry. Now what?

3. Biological parent's family members. In Tennessee, the only parties required to be given notice are those listed in 1 and 2 above and any other persons who have legal or physical custody of the child. What about grandparents? Under Tennessee's current code, grandparent's may have certain rights if they have cared for the child for the requisite time or if other factors are present. Be sure you are aware of T.C.A. § 36-6-306 and 307.

4. Prospective adoptive parents. In light of the number of potential parents named above, whose parental rights do you advise the adoptive parents need terminating? What about future visitation or contact agreements with one or more biological parent? Any such agreements are non-binding. How do you advise all the parties of the non-binding nature of these agreements, especially when such an agreement is necessary for the biological parent's consent?

5. Foster parents. Do the foster parents have to rely on the Department to file a termination action and/or adoption? Will there assistance and foster payments stop upon adoption? Is there a preference for foster parents in the adoption code? See T.C.A. § 36-1-115(g).\

6. The licensed child placing agency. What if the entity with legal custody of the child is a licensed child placing agency? Are you required to have the same

confidentiality and do conflict of interests effect this representation in the same manner?

7. The Tennessee Department of Children's Services. What if the Department has legal and/or physical custody of the child? Do you name them in the petition for adoption?

8. A guardian ad litem. What if one of the parties is incompetent? What if it is a contested proceeding, must you make sure the court appoints a guardian for the child?

9. A child over the age of fourteen. Pursuant to statute, a child over the age of 14 must consent to the adoption in chambers before the adoption can be granted. What if the child refuses? Do you have a guardian ad litem appointed and try to force the adoption? Can you?

Finally, in communicating with the various parties in an adoption, it is all too easy to find yourself in the middle of a conflict. The best course of conduct is to realize this at the beginning and carefully guard against such a conflict arising. Nevertheless, the most careful practitioner will face the uneasy position of having represented prospective adoptive parents in successfully obtaining an adoption only to find that the biological parent has revoked his/her surrender or consent. Should the practitioner continue to represent adoptive parents in this action? Carefully consider all ethical requirements

throughout the adoption process to give yourself every opportunity to avoid such unsavory situations.

## **APPENDIX**

1. Relative Petition for Adoption
2. Non-relative Petition for Adoption
3. Petition to Terminate Parental Rights and for Adoption
4. Order of Confirmation
5. Surrender form
6. Final Order of Adoption - Relative
7. Final Order of Adoption - Non-relative
8. Order Terminating Parental Rights
9. Parent's Affidavit
10. Intervening Petition
11. Motion for Publication
12. Affidavit of Reasonable Efforts
13. Putative Father Registry Check
14. Affidavit of Attorney Fee