

# Happier Childhoods *and* Better Best Interest Factors

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By DAWN COPPOCK

**H**appy childhoods happen in healthy families. Childhood deprivation and trauma are the swamp that breeds most human suffering and societal ills. Medical and psychological understanding of attachment, trauma and child development has advanced rapidly since the 1970s when Tennessee's best interest factors came into being.<sup>1</sup>

Tennessee has new best interest factors for use in termination of parental rights cases, designed to bridge the knowledge gap and operationalize a modern understanding of child development, attachment and trauma.<sup>2</sup> Most lawyers and judges will need to learn about this information to effectively use the new best interest law. In addition to the mechanics of the statute, this article offers a very basic summary of the current understanding and links to sources of more information.

### Legal Mechanics of Termination of Parental Rights

Generally, termination of parental rights cases are filed after severe abuse of the child, when the parent does not actively seek return of the child or when the child has been out of the parent's custody for an extended period of time. If termination of parental rights is contested, the child must be represented by a GAL and contesting but indigent parents must be offered counsel at state expense.<sup>3</sup>

To terminate a parent's rights in Tennessee, a petitioner must have physical custody of the child and must prove at least one ground for termination of parental rights by clear and convincing evidence.<sup>4</sup> The Tennessee Code sets out a number of very technical grounds for termination of parental rights.<sup>5</sup> The finding of grounds constitutes a finding of parental unfitness.<sup>6</sup>

If a ground is proven, petitioners then must prove that termination of parental rights is in the child's best interest.<sup>7</sup> The best interest factors are not intended to protect a parent's relationship with the child. High standards for removal, relatively low standards for return, the requirement that the child be in the custody of another, the necessity of clear and convincing proof of grounds, and other constitutional safeguards provide protection for parents. Best interest factors are to guide the court, after determination of parental unfitness, in determining if the child is better off with or without the parental relationship. If the case reaches the best interest analysis, there is no thumb on the scales in favor of the parent. The law stated up to this point is established and unchanged by the new best interest factors.

CONTINUED ON PAGE 26 ➤

## Procedure and the New Factors

The “new” factors consider the same topic area considered by the prior factors, like safety, the parent’s capacity and the child’s relationships. There are now 20 factors, a significant increase over the previous nine. However, Courts are no longer required to make findings for each enumerated factor, but are directed to identify the factors relevant to the case at bar, including any other “child-centered factors” and to make specific findings of fact regarding only the factors considered.

Expert testimony is not required to prove or disprove any factor.<sup>8</sup> However, experts are not prohibited. The new factors are applied when the petition for termination of parental rights is filed on or after April 22, 2021. The previous factors are applicable to cases filed before that date.

## Individual Factors Considered Attachment

The heart of the best interest analysis in most cases will be the two factors considering whether the child has a healthy, parental attachment with the parent and with the caregiver.<sup>9</sup> The use of the word “attachment” significantly deepens the consideration of the quality of a child’s relationships with caregivers.

The prior factor considering the effect of a change in caregiver also opened up



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consideration of attachment and that factor is retained.<sup>10</sup> The prior consideration of the relationship between parent and child nebulously asked whether the relationship was “meaningful,” without specifying, meaningful to whom or specifying that the meaning be positive. “Meaningful” no longer appears in the factors.

We now appreciate the importance of child/caregiver attachment and understand better how to foster it and the harm that occurs when it is disrupted. Foster children are common subjects of attachment study because they comprise a large, well-documented group whose attachments are systemically disrupted.<sup>11</sup>

Discovery of this established body of knowledge about the impact of choices that we, child welfare professionals, make every day left me wide-eyed and eager to share the upstream solutions offered.

Children are not as resilient as we want to think. Deprivation or disruption of a healthy attachment causes significant, often devastating, harm to a child’s ability to function, and that damage follows the child into adulthood. Attachment, including and especially in the first months of life, is also foundational for development of higher brain functions, like learning to regulate emotions and behavior and just learning in general. So, there is a scientific reason why children we work with, whose caregivers are not emotionally responsive and loving, or those who did not receive that kind of care as babies, are bouncing off the walls, have no friends and are not progressing in school. This information creates more patience for these kids and determination to help all the kids we work with create and preserve healthy attachments with caregivers.

## Prompt and Permanent

The new best interest factors include an important overarching presumption.

“The prompt and permanent placement of the child in a safe environment is presumed to be in the child’s best interest.”<sup>12</sup> Speed is important to get the child home before the child forms an attachment to another caregiver. Stability of placement protects the child from disrupting attachments with other caregivers once formed.

Urgency of a parent’s action alone is also a factor.<sup>13</sup> Urgency is considered in seeking custody, “addressing the circumstance” and establishing parentage. Parental urgency not only demonstrates the strength of commitment necessary to successfully raise a child; urgency is critical to keeping separation between parent and child short.

Urgent parental action also increases the likelihood of successful reunification. Historically, there are few parental consequences for enjoying a little break after the child is removed but before beginning work to cure the parental shortcoming. However, without initial urgency, and sometimes even with initial urgency, momentum to regain custody often diminishes over time, at least until a termination of parental rights action is filed. Parental urgency helps everyone.

It is noteworthy that there are 12 references to “stability,” “continuity,” “lasting” and “consistently” appearing throughout the new factors. Some parents secure jobs, apartments and clean drug screens right before each court date only to lose it all right afterward. Others take their psychological medication or stop taking drugs only for the termination trial. These parents may be able to provide a safe home at the moment of trial but they cannot demonstrate the consistency. The long view intended appears in the very first factor: “The effect a termination of parental rights will have on the child’s critical need for stability and continuity of placement throughout the child’s minority.”<sup>14</sup>

These concepts aren’t new in Tennes-

see law. Case law consistently values “continuity of placement,” even in the absence of technical language that tracks the most modern understanding.<sup>15</sup> Stabilizing placement, so healthy attachments can form early, and preserving healthy attachments once formed, may be the most important things the legal system can do for children, beyond removing them from imminent danger.

### Visitation

Previously, regular visits weighed in favor of a parent, regardless of the child’s visitation experience. Parents sometimes got positive check marks for showing up and sleeping or for visits that resulted in night terrors for the child. Adding to the visitation factor using visits “to cultivate a positive relationship with the child” should incentivize positive emotional connection rather than prolonging perfunctory or even upsetting visits.<sup>16</sup>

### Safety and Trauma

Because removal and return turns on safety concerns, many parents in termination actions have a history of difficulty keeping their children safe. Safety is a fundamental concern under the previous factors and that priority remains unchanged.<sup>17</sup> But consideration of the impact of the parent or the parent’s home on the child’s prior trauma is entirely new:

- Whether the parent, parent’s home, or others in the parent’s household trigger or exacerbate the child’s experience of trauma or posttraumatic symptoms<sup>18</sup>; and
- Whether the child is fearful of living in the parent’s home.<sup>19</sup>

Most children, no longer in the care of their parents, have experienced significant trauma. Placement instability and activation of the child’s “trauma triggers” while their case is in court, can deter or prevent the child from “regulating”

his or her emotions and accessing the higher brain functions necessary to function normally and learn. Emotional regulation is the ability to control your own emotional state. While learning emotional regulation is a lifelong practice for us all, it is particularly critical work for children and babies. Trauma and early life deprivation can interfere with a child’s ability to emotionally regulate. At any age our emotions must be regulated for us to learn. Difficulty regulating emotions can cause a number of challenges common to the children we work with, such as developmental delays, impulsivity and poor academic performance.

A large Kaiser Permanente study conducted in 1990s was the first to dramatically highlight the relationship between trauma and health. The study identified 10 common traumatic life events that a child may experience and called them “adverse childhood experiences” or ACEs. The study’s results were shocking. The original ACEs study and similar subsequent studies verify that people who experienced four or more ACEs before age 18 are at significantly increased risk, not only of mental health and social challenges like depression, addiction, suicide and unemployment, but also of what we think of as purely medical problems like heart disease and asthma. Statistically, childhood trauma shortens life expectancy. Preventing and treating trauma are now not only a path to minimize human suffering and increase the likelihood of happy families, but they are also recognized as necessary to overall good health.<sup>20</sup>

“Trauma-informed” is now a goal for child welfare systems, schools and therapists. It is becoming a goal for lawyers and courts and other institutions, as well. In Tennessee, trauma training for courts and lawyers is most commonly directed to the criminal justice system to help professionals understand how

## TBA Adoption Law Section Instrumental in These New Factors

These new factors were drafted by the Tennessee Bar Association Adoption Law Section Executive Council and introduced as legislation by the late Rep. Mike Carter, R-Ooltewah, and Sen. Ferrell Haile, R-Gallatin, both of whom have championed adoption law reform and making Tennessee a national leader in adoption.

This is the third year in a row that legislation drafted by lawyers from the TBA Adoption Law Section has been enacted, and Rep. Carter and Sen. Haile have sponsored and ushered these bills through the legislature every year.

Sadly, Rep. Carter lost his battle with pancreatic cancer on May 15, 2021. He will be sincerely missed by all of us at the TBA.

— Berkley Schwarz

people “got that way.” However, the child welfare system is better positioned to keep people from “getting that way.”<sup>21</sup>

When child welfare lawyers get trauma training, it is usually limited to the ACEs study, which though still valid, is now 30 years old. Trauma research since the ACEs study, has revealed a great deal of information particularly useful when making child welfare decisions. To offer just one example, “He’s too young. He won’t remember it” is just wrong. Because the rate of a child’s brain growth is fastest at birth and declines over time, babies are quickly creating foundational patterns of understanding that will serve

CONTINUED ON PAGE 28 >

them to and throughout adulthood. The worst time to experience trauma or deprivation is early in life, particularly before the development of language and specific memory. Just this one shift in understanding has significant implications. For an overview of current understanding of trauma, impacts and effective interventions, see the books and articles of Dr. Bruce Perry.

Intergenerational trauma, describes how a person's trauma impacts his or her children, family culture and future generations. While research on intergenerational trauma continues, we can infer from what we do know that a parent who faces the risks associated with significant adverse childhood experience is more likely to need extra support to offer their own child a safe and happy childhood. Intergenerational trauma also sheds light on why the family histories of our clients in the child welfare or criminal justice systems include antecedents who were also in the same systems.

The nutshell on trauma for child welfare professionals is that there is no substitute for preventing trauma. That is what the child welfare system is for, and it is important work. When trauma isn't prevented, whether for parents or children, it can be identified and treated for the benefit of the traumatized person and their children. Lawyers are in an excellent position to see their client's trauma, conduct themselves in a trauma sensitive manner and refer clients to professionals who can help.

### **The Child's Needs**

The court is to consider if the parent understands the child's "basic and specific" needs<sup>22</sup>; and demonstrates the ability and commitment to meet those needs.<sup>23</sup> The reference to "specific needs" invites a very child-specific analysis, including consideration of the child's special needs.

The prior factors focused on the basic

physical safety of the parent's home and not on whether the home met the child's needs. At one spot the prior factors considered whether the home was in the child's best interest, but that was more circular than helpful. The ability to keep a child safe from physical harm versus the ability to understand and consistently offer what the child needs to thrive are very different standards. Maintaining clean drug screens or moving away from the partner who abused the child resolves the basic safety concern and would often be sufficient to secure the child's return to the parent prior to an action for termination of parental rights. The ability to consistently keep a roof over a child's head and get them to school and medical appointments is a higher standard. Because the factors are considered to determine the best interest of the child after a finding of parental unfitness and not at initial removal, considering what the child needs to thrive rather than what they need to stay out of the emergency room is appropriate.

### **Efforts, Adjustment**

In state agency cases, the Tennessee Department of Children's Services must provide reasonable efforts to help parents make lasting adjustments to the problematic circumstances. This requirement is unchanged. But a new factor is added applicable to all parents; it considers their efforts to use available social service programs. This is another way to measure commitment and urgency.

### **Parenting Experience**

Whether the parent has successfully parented a child before is an interesting, new factor.<sup>24</sup> A parent who has successfully parented a child before a problem arose, will face fewer barriers in resuming an acceptable level of care when the current problem is addressed. But if they are working to overcome their challenge

and at the same time trying to learn to be a parent, possibly to a special needs child, possibly with little prior emotional relationship to the child, then each additional challenge decreases the likelihood of parental success in a timeframe that is useful to the child. The child's needs and parent-child relationship are considered in other factors.

### **Financial Support**

The previous factor related to the parent's financial support of the child is modified to remove the reference to the Tennessee child support guidelines and substitutes the lower standard "more than token." The reference to the consistency of payments, an indicator of parental commitment, is retained.<sup>25</sup>

### **Broader Relationships and Heritage**

The impact of termination of parental rights on important relationships beyond the parent and caregiver is also a new factor that could carry weight in otherwise close cases.<sup>26</sup> The relationships between siblings, birth or foster, is specifically mentioned.

Access to information about the child's heritage is also a new factor.<sup>27</sup> The loss of biological family often includes a loss of family heritage information. If the birth and adoptive homes don't share the same larger culture, even more is lost. Often this factor will weigh in favor of birth parents. Though unlikely to be determinative alone, having heritage included in the analysis should heighten awareness and respect for the child's heritage and increase efforts to preserve healthy connections.

### **Practice Tips under the Better Best Interest Factors**

The biggest shifts to daily practice are the need for parents to make urgent progress toward regaining custody and to maintain or create a positive relationship with the child to decrease the risk

of termination of parental rights.

### Client Education

While factors to determine the best interest of a child with more focus on the child were sorely needed, the shift will surprise parents accustomed to less urgency and lower standards. Educating parents about heightened expectations will fall primarily to their lawyers but also social workers, guardian ad litem and judges. Most parents will be slower than professionals to appreciate the harm caused by early trauma, emotional deprivation, attachment disruption, drug exposure and instability. Many parents will be resistant to the information because they suffered some of those insults as well and deem themselves to be just fine. Recognition and compassion for the insults suffered by the parent and repetition of new information from multiple sources may help.

Parent education about attachment should include forewarning them that it is normal for their child, particularly a young child, to form a parental bond with whoever provides them daily care.<sup>28</sup> Parents think of their children when apart and imagine that this is reciprocal. So they are shocked, hurt and even angry at visits if the child is uncomfortable or cries for someone else. Advanced warning may head off this conflict and may also help the parent understand the urgency of regaining custody.

### The Big Decision

Lawyers with clients very likely to have their rights terminated should consider the emotional impact of a termination trial on their clients. Proof of grounds and best interest may include display in court of the worst things the parent has ever done. Failing at various treatments or being held to account and found wanting at various meetings and hearings also piles on shame, and further beats down people who are often already

downtrodden. There is dignity in following initial education about children's needs and the incline of the path ahead with, "Are you ready to really throw yourself into solving this problem right now?" If the answer is "no," helping a parent retain dignity by making a thoughtful long-term placement early may be the best way to protect the client.

If the answer is "yes," rabid advocacy may be required to promptly secure quality services for the parent. Tennessee has extremely limited resources for at-risk parents, children and families, including long waits for mental health services and nearly no affordable or effective treatment for chemical dependency. Services are most effective if provided to motivated parents. A delay of even a few days or a week can miss a critical window of opportunity. For so long as resources are scarce, parents actively seeking services and parents with the youngest children should go to the front of the line. Both the parent's attorney and the child's should seek initial services for the parent.

### Putative Fathers

Putative fathers who do not want their parental rights terminated need to become legal fathers immediately upon learning of the child. A man who is still only a putative father when the termination case is tried has accrued both grounds and has failed to demonstrate urgency in establishing parentage, a best interest factor, by virtue of that fact alone.<sup>29</sup>

### Visitation and Assistance

Motivated parents need as much safe contact with the child as possible; not just showing up, but learning and practicing attuned childcare and not only for four hours a month. Creating and deepening positive relationship between parent and child is particularly difficult

Check it out  
on page 40!

The Tennessee Bar  
Journal welcomes  
BUDDY STOCKWELL  
as a new columnist.

He will write "The  
Buddy System,"  
beginning this  
month, covering  
wellness and ways  
the Tennessee  
Lawyers Assistance  
Program can offer  
assistance.



if the parent didn't have a healthy attachment with his or her own caregiver. Parents cannot create what they have not experienced without some direction. Some parents spend visits looking at screens not because they don't care about their child, but because they feel uncomfortable and don't know what else to do.

Most parents' lawyers reflexively resist therapeutic visits. But the adversarial posture, initially assumed by many lawyers, can undermine the client's goals. Therapeutic visits normally include cueing the parent to smile at, comfort

CONTINUED ON PAGE 30 >

and respond to the needs of their child. Many parents require professional assistance and hands-on support to up their visitation game from checking attendance to fostering relationship. Lawyers for these parents should insist on therapeutic visitation. While supervised visits also have negative associations, informally asking a kind caregiver to stay for a few visits can keep the child calm enough to engage with the parent so creation of relationship is possible.

Professionals should consider whether an alliance between the parent and child's caregiver is possible. Successful reunification often includes the temporary caregiver becoming part of the family's long-term community of support. Early education that they need not be enemies can foster openness and keep both parties from early bridge-burning.

### Other planning

Parents' attorneys can and often do help the parents figure out for themselves the barriers to safe custody. Whether problems and possible solutions are discussed privately or become part of a formal plan including related services, the effort is helpful.

Preemptive planning can head off some common problems. A mother's progress toward reunification can be derailed when she becomes pregnant with another child or when she gets back together with a former partner who has significant problems of his or her own. The more complicated his or her life becomes, the harder it is to "work a plan." They probably know this on some level, but a gentle reminder may be helpful.

If the parent has a drug problem but is currently testing clean and soon expected to regain custody, consider how the child will be cared for in the event of the parent's relapse. Relapse is extremely common, even an expected event on the road to ultimate recovery. A parent with a plan and who quickly returns to

recovery is far more likely to retain custody through a relapse or have custody restored quickly than one who is arrested high with the child in a car.

Regardless of who you represent, if DCS has an open case and your client needs state services, oppose DCS closing their case and placing the child in the custody of the physical custodian. Social work services, legal services and some funding sources will end with state custody.

### Conclusion

Too often child welfare advocates take a traditional, adversarial stance, factionalizing around roles and interests, denying family weakness, ignoring the emotional and developmental needs of children, and fighting over children like prizes. The new best interest factors create incentives to direct everyone's focus toward the child. There is still plenty to fix. But the new factors are progress. ■■■

### NOTES

1. The pioneering work by John Bowlby on children's attachment to caregivers, *Attachment and Loss*, was published as a trilogy in 1973, 1980 and 1982. It establishes that children form psychologically essential attachments between birth and two years to the caregiver's who are consistently in proximity and sensitive and responsive to their needs. Bowlby established that the cycle of a baby's need, consistently followed by a caregivers loving response, is the foundation of the person's lifelong comfort in the world. Around the same time — 1973, 1979, 1986 — another landmark trilogy was published, currently revised and combined as *The Best Interests of the Child*, Goldstein, Solnit, Goldstein and Freud, The Free Press. That book, by experts in law and child psychiatry, is directed to legal decision makers, and emphasizes the value of maintaining continuity of relationships and respecting the child's sense of time in decision making.

2. Pub. Ch. 190 and *Tenn. Code Ann.* § 36-1-113(i).

3. *Tenn. Sup. Ct. Rule* 13(d)(2)(B) & (D), *Tenn. Code Ann.* § 37-1-150 & 37-1-126(a)(2)(B)(ii).

4. *Tenn. Code Ann.* § 36-1-115(b) (custody) and *Tenn. Code Ann.* § 36-1-113(c)(1) (must

prove grounds).

5. *Tenn. Code Ann.* § 36-1-113 (g).

6. *In re Giorgianna H.*, 205 S.W.3d 508; 2006 *Tenn. App. LEXIS* 192 (*Tenn. Ct. App.* March 21, 2006) and *Audrey S.* 182 S.W.3d 838 (*Tenn. Ct. App.* Aug. 25, 2005).

7. *Tenn. Code Ann.* § 36-1-113(c)(2).

8. *Tenn. Code Ann.* § 36-1-113(i)(4).

9. *Tenn. Code Ann.* § 36-1-113 (i)(1)(D)&(H).

10. *Tenn. Code Ann.* § 36-1-113 (i)(1)(B).

11. For a collection of such studies see *Handbook of Attachment, Theory, Research and Clinical Applications*, 3rd Ed., edited by Cassidy and Shaver, The Guilford Press 2016.

12. *Tenn. Code Ann.* § 36-1-113(i)(2).

13. *Tenn. Code Ann.* § 36-1-113(i)(1)(M).

14. *Tenn. Code Ann.* § 36-1-113(i)(1)(A).

15. *In Re S.B.*, No. M1999-00140-COA-R3-CV (*Tenn. Ct. App.* May 12, 2000); *In re A. K. S. R. and A. T. S. R.*, M2000-03081-COA-R3-CV (*Tenn. Ct. App.* Oct. 12, 2001); *Burton v. McCary*, W2005-01695-COA-R3-PT (*Tenn. Ct. App.* Feb. 10, 2006); *In re Jada T.L.P.*, No. E2011-00291-COA-R3-PT (*Tenn. Ct. App.* July 28, 2011); *In re Sahara W.*, No. E2013-00510-COA-R3-PT (*Tenn. Ct. App.* Sept. 24, 2013).

16. *Tenn. Code Ann.* § 36-1-113 (i)(1)(E).

17. *Tenn. Code Ann.* § 36-1-113(i)(1)(C), (-J), (M), (O), (R) and (T).

18. *Tenn. Code Ann.* § 36-1-113(i)(1)(G).

19. *Tenn. Code Ann.* § 36-1-113(i)(1)(F).

20. "Adverse Childhood Experiences (ACEs)," Centers for Disease Control and Prevention, <https://www.cdc.gov/violenceprevention/aces/index.html>.

21. The National Child Traumatic Stress Network was created in 2000 by the U.S. Congress to raise the standard of care for children who have experienced trauma. The Network offers materials about trauma-informed practice for judges and attorneys.

22. *Tenn. Code Ann.* § 36-1-113 (i)(1)(P).

23. *Tenn. Code Ann.* § 36-1-113 (i)(1)(Q).

24. *Tenn. Code Ann.* § 36-1-113(i)(1)(O).

25. *Tenn. Code Ann.* § 36-1-113(i)(1)(S).

26. *Tenn. Code Ann.* § 36-1-113(i)(1)(I).

27. *Tenn. Code Ann.* § 36-1-113(i)(1)(I).

28. Young children will form attachments with responsive caregivers even if those caregivers are not their parents. "Foster Care for Young Children: Why It Must Be Developmentally Informed," *J Am Acad Child Adolesc Psychiatry*, PMC 2012 Aug. 19 Dr. Charles H. Zeanah, M.D., MS. Carole Shaffer, J.D., and Dr. Mary Dozier, Ph.D.

29. *Tenn. Code Ann.* § 36-1-113(g)(9)(iv) and *Tenn. Code Ann.* § 36-1-113(i)(1)(M).