

DOES THE OUTCOME OF *IN RE* CARRINGTON H. CHANGE TENNESSEE TPR LAW?

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PROCEDURE OF THE CASE

- Trial court

- Petition to TPR filed by State against Mother and Father; trial only as to Mother
- No corresponding adoption petition
- Court-appointed counsel for Mother

- Appealed to Tennessee Court of Appeals

- Court-appointed counsel handled the appeal

- Mother applied to Tennessee Supreme Court

- *Pro se* application
- Appointment of new counsel after application accepted

CITATIONS

- ◉ Tennessee Court of Appeals opinion: 2014 Tenn. App. LEXIS 674 (Tenn. Ct. App. 2014)
- ◉ Tennessee Supreme Court opinion: 483 S.W.3d 507

COUNSEL FOR PARENTS IN TPR ACTIONS:

○ Court-appointed

- TN: Right to counsel
- Indigent status
- Tenn. Sup. Ct. R. 13
- TCA § 37-1-126(a)(2)(B)(ii)
- Tenn. R. Juv. P. 39(e)(2)

○ Privately hired

- U.S. Supreme Court does not require right to appointed counsel in TPR cases, only if state requires (which TN does)

GUARDIANS *AD LITEM*

- Court-appointed
 - TCA § 37-1-149(a)
 - Tenn. R. Juv. P. 39(d)
- Follow the rules of Tenn. Sup. Ct. R. 40A

BURDENS OF PROOF

- For the State or the prosecuting party
 - Clear and convincing evidence
 - Both prongs must be met: Ground(s) plus Best Interest of the Child
 - The facts that go to best interest factors must be proven by preponderance of the evidence
- For the defendant parent
 - Show how the State cannot meet its high burden
 - Show how the State cannot prove both prongs

THE HOLDINGS OF *IN RE CARRINGTON H.*

- The Tennessee Supreme Court held that the standard for court-appointed counsel is not one of “effective assistance.”
- There is no separate cause of action by parent against court-appointed counsel for ineffective assistance of counsel.
 - Why? Parents have constitutional right to fundamentally fair procedures, but this doesn’t mean we adopt additional procedures by which to attack the judgment of TPR based on ineffective assistance.
- The Court of Appeals must address all grounds and findings by trial court, even if not raised by the parent on appeal.
 - Why? To prevent unnecessary remands

The Court of Appeals must address all grounds and findings by trial court, even if not raised by the parent on appeal.

And yet, only one ground is needed to TPR.
In re Saliace P., 2016 Tenn. App. LEXIS 37 (Tenn. Ct. App. Jan. 26, 2016).

WHAT DOES *IN RE CARRINGTON H.* CHANGE?

- For the State or the prosecuting party
 - Since the Court of Appeals must rule on all findings of trial court, the State should defend all grounds and findings in its brief, even if not appealed by parent.
- For the defendant parent
 - The Court of Appeals must rule on all findings of trial court, even if the parent does not raise an issue in the brief.

POLICY CONSIDERATIONS

- ◉ Permanency of child
- ◉ Rights of indigent parent subject to TPR
- ◉ A parent's superior right, in general
- ◉ Rules of professional conduct already exist
- ◉ State's duty to protect minors and to prevent serious harm
- ◉ Speedy resolution
 - Expedited timelines

REVIEW OF TPR STATUTORY GROUNDS

- Tenn. Code Ann. § 36-1-113(g)
 - 14 grounds

REVIEW OF TPR STATUTORY BEST INTEREST FACTORS

- Tenn. Code Ann. § 36-1-113(i)
 - 9 best interest factors
 - Plus any other relevant factor

HYPOS:

- You are appointed the attorney of a parent whose parental rights are sought to be terminated by the State. You attempt to contact your client by every method possible. Your client does not call you back. You are not permitted by the court to withdraw as counsel. Your client finally calls you the day before trial to ask where to park for the trial and what courtroom to be in. What do you do? What rules apply here? How do you represent your client?

- ◉ Same situation, but not only does your client not call you back, you don't hear from your client even before trial. You show up at trial with no client. What do you do? What rules govern this situation? How do *In re Carrington H. holdings* apply?

HOW ABOUT THIS ONE?

- You are appointed as a parent's attorney in a TPR alleging severe abuse and persistence of conditions. The D/N petition has not been finalized. The judge enters a termination based upon both grounds; however, the judge fails to include any analysis regarding his findings and instead only recites a summary of the testimony. Do you only make a single argument regarding failure to include findings of fact, or do you raise every possible argument in order to protect your client including arguments which could be considered frivolous such as attacking the GAL's competence.

- You are appointed as a parent's attorney in a TPR. You and your client have previously discussed appealing if the court finds for termination. Your client becomes so distraught during the trial, your client yells at the judge, your client is held in contempt, and is taken away right before the judge finds your client is mentally incompetent and the termination is granted. Your client disappears and you cannot find them. Do you follow your client's previous instructions to appeal, or do you ask to withdraw. (By the way, the new rules require your client's signature on the notice of appeal before you can file it.)

A REVIEW OF THE PROFESSIONAL RULES OF CONDUCT

- The Tennessee Supreme Court emphasized in *In re Carrington H.* that the professional rules of conduct govern court-appointed counsel in TPR cases, as they do all counsel.
- See, e.g. Tenn. Sup. Ct. R. Prof. Conduct 8, 1.1, 1.3

THANK YOU

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