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Opinion No. 01-035

Proposed Legislation Regarding Infant Abandonment

QUESTION

Do the proposed bills regarding infant abandonment, HB 1476/SB 1265, HB 600/SB 160 and HB 1248/SB 678, provide sufficient safeguards to protect the constitutional rights of all relevant parties?

OPINION

Allowing immunity from prosecution for a parent who "drops off" an infant at a designated place does not implicate any constitutional rights. There are some specific provisions in these proposed bills, however, which raise concerns regarding the adequacy of safeguards to protect the constitutional rights of the relevant parties.

ANALYSIS

These proposed bills, HB 1476/SB 1265, HB 600/SB 160 and HB 1248/SB 618, would allow an infant to be "dropped off" at designated places without subjecting the parent to criminal prosecution. The bills provide for the Department of Children's Services to assume physical custody of the child and consent to necessary care and treatment. The bills differ, however, in their treatment of the legal impact of "dropping off" an infant on the parental rights of the infant's parents. Legislation that allows the voluntary or involuntary termination of parental rights would be subject to a strict scrutiny test and must be narrowly tailored to achieve a compelling interest.

It is well settled that parents, including parents of children born out of wedlock, have a fundamental liberty interest in the care and custody of their children under both the United States and Tennessee Constitutions. *Nale v. Robertson*, 871 S.W.2d 874 (Tenn. 1994). This right, however, is not absolute and the state may interfere with parental rights if there is a compelling state interest. *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). The state's interest in the care and custody of minor children has long been recognized as a compelling interest. *State Department of Human Services v. Ogle*, 617 S.W.2d 652 (Tenn. App. 1980).

When a state statute interferes with parents' fundamental right to the care, custody and control of their children, the state must be able to show not only that the statute is justified by a compelling state interest but also that the statute is narrowly tailored to achieve that interest. *Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993). It is our opinion that the state can show a compelling interest in protecting infants at risk of abandonment. The issue then is whether the legislation is narrowly tailored to achieve that purpose.

To the extent that the proposed legislation would allow a petition to terminate parental rights on the basis of abandonment of an infant at a designated place without an intent to return for the infant, it is our opinion that the bill would be constitutional. Parental rights cannot be terminated without a showing that the parent is unfit or that substantial harm to the child will result if parental rights are not terminated. *Swanson v. Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999). In this proposed legislation, the definition of abandonment for purposes of termination of parental rights based on the "dropping off" of an infant at a designated place without an intent to return for the infant is based on a showing that the parent is unfit. Therefore, this would likely withstand a constitutional challenge.[1]

Moreover, a termination of parental rights proceeding would provide sufficient safeguards to protect the constitutional rights of the parent. The parent would be provided with due process protections as currently provided in state law, including a clear and convincing evidence standard and the right to counsel.

It is not clear whether the proposed legislation intends to allow the "drop off" of an infant at a designated place without an intent to return for the infant to constitute a voluntary surrender of parental rights in lieu of formal surrender requirements provided in Tenn. Code Ann. §36-1-111. Assuming this is the intent, this raises a concern as to whether this would be able to withstand a constitutional challenge. Under current law, surrenders of parental rights are required to be made in a judge's chambers except in limited circumstances. Tenn. Code Ann. § 36-1-111(b). As the judge is required to ensure that a surrender is given voluntarily and the parent informed of his or her rights, there is a presumption that the judge's decision was correct and a heavy burden placed on an individual later seeking to set aside a surrender. *See Killion v. Tennessee Department of Human Services*, 845 S.W.2d 212, 214 (Tenn. 1992); *Griggs v. Rogers*, 990 WL 4639 (Tenn. App. 1990). The proposed legislation does not appear to give the same level of safeguards.

Tennessee law is not clear as to the due process protections required before a parent voluntarily surrenders his or her parental rights. In general, a court will consider three factors in a due process analysis: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of the interest

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[1]Under current law, parental rights may be terminated based on abandonment due to a willful failure to visit or support the child for a period of four consecutive months. Tenn. Code Ann. § 36-1-102(1)(A).

through the procedures used; and (3) the government's interest in avoiding the administrative burden that a different procedure might create. *Lassiter v. Department of Social Services of Durham County, North Carolina*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981). In considering these factors as applied to the proposed legislation, this office has concerns whether this proposed legislation, if intended to allow the "drop off" of an infant to constitute a voluntary surrender in lieu of current statutory surrender requirements, would be able to withstand a constitutional challenge.

Finally, you have raised a concern regarding the rights of birth fathers. The proposed bills differ in the requirements to provide identifying information regarding the parent abandoning the infant and/or the other parent. The failure to require identifying information so as to allow notification to the other parent raises a practical obstacle to the successful integration of an abandoned infant into a stable and permanent home through adoption at a later date.

The Tennessee Supreme Court has recognized that there is a difference in maternal and paternal roles as to newborn infants. *Nale v. Robertson*, *supra* at 679. In order to be entitled to constitutional protections, a biological father must take action to assume responsibility for his child. *Id.* at 679-80. As the Court recognized in *Nale*, a biological father makes a reasonable effort to establish a relationship with his child by registering as a putative father. This ensures the biological father will receive notice prior to a proceeding for adoption of the child or to terminate parental rights. Tenn. Code Ann. § 36-2-209. In order to allow an abandoned infant to be subsequently adopted, there must be a means to search the putative father registry to notify the other parent prior to a proceeding for adoption or termination of parental rights. Thus, unless information concerning the identity of the other parent is gathered at the time an infant is abandoned, the prospects for a successful future adoption of the child may be fatally compromised.

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