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Opinion No. 02-027

Constitutionality of Tenn. Code Ann. § 36-1-142

QUESTION

Does any provision of Tenn. Code Ann. § 36-1-142, regarding infant abandonment, violate the state or federal constitutions?

OPINION

This statute is constitutionally defensible against a facial challenge.

ANALYSIS

Under the provisions of Tenn. Code Ann. § 36-1-142, an infant aged 72 hours or younger may be "voluntarily delivered" by the infant's mother to designated facilities without subjecting the parent to criminal prosecution. This statute provides for the Department of Children's Services to assume the care, custody and control of such infant and to petition the appropriate court for legal custody of such child. Tenn. Code Ann. § 36-1-142(b). The Department of Children's Services is also required by this statute to publish notice once a week for four consecutive weeks in a newspaper or other publication of general circulation in the county where the voluntary delivery occurred and in any other county for which there are facts known to the Department that reasonably indicate the infant's mother or father may be so located. Tenn. Code Ann. § 36-1-142(e)(1). The mother has 30 days after notice is complete to revoke such voluntary delivery. Tenn. Code Ann. § 36-1-142(d). Similarly, a father has 30 days after notice is complete to claim paternity. Tenn. Code Ann. § 36-1-142(e)(3). The mother's failure to seek contact with the infant through the Department or to revoke the voluntary delivery after 90 days shall be a basis for termination of parental rights. Tenn. Code Ann. § 36-1-142(c). The father's failure to contact the Department or register with the putative father registry within 30 days of the last publication shall bar him from pursuing a paternity action. Tenn. Code Ann. § 36-1-142(e)(3).

As this office previously opined, allowing immunity from prosecution for a mother who "voluntarily delivers" an infant to a designated facility does not implicate any constitutional rights. Op. Tenn. Atty. Gen.

01-035 (March 12, 2001). Likewise, terminating the parental rights of the mother based on this voluntary delivery and the failure to seek contact with the infant through the Department or to revoke the voluntary delivery within 90 days would likely withstand a constitutional challenge. *Id.* Moreover, as this statute provides for the filing of a petition to terminate the mother's parental rights on the basis of her voluntary abandonment rather than the abandonment acting as an automatic legal surrender of her rights, there is no constitutional concern regarding any lack of due process protections associated with the failure to comply with the formal surrender requirements provided in Tenn. Code Ann. § 36-1-111.

Finally, this statute is capable of a constitutional construction regarding the rights of the infant's father. Under the provisions of this statute, a father of an infant left at a designated facility is precluded from bringing or maintaining any action to establish paternity of the infant if the putative father fails to contact the Department or register with the putative father registry within 30 days of the last publication of notice. Tenn. Code Ann. § 36-1-142(e)(3). A putative father who fails to claim paternity shall not be entitled to notice of any subsequent adoption of the infant. *Id.* This is consistent with the holding of the Tennessee Supreme Court that a biological father must take action to assume responsibility for his child in order to be entitled to constitutional protections. *Nale v. Robertson*, 871 S.W.2d 674, 679-80 (Tenn. 1994). On the other hand, this statute does not provide for the termination of parental rights if the putative father registers with the putative father registry or is the legal father of the infant as defined in Tenn. Code Ann. § 36-1-102(28). [1]Thus, this statute appears to be constitutionally defensible against a facial challenge.

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[1]In order to terminate the parental rights of a legal father or a putative father registered with the putative father registry, there would have to be grounds warranting termination under Tenn. Code Ann. § 36-1-113. *See also* Tenn. Code Ann. § 36-1-117.

Requested by:

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