S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
P.O. BOX 20207
NASHVILLE, TENNESSEE 37202

March 25, 2008

Opinion No. 08-66

Superior Parental Rights in Dependency and Neglect Proceedings

QUESTIONS

1. Does the subject parent in a dependency and neglect proceeding initiated by a non-parent lose the presumption of superior parental rights at the adjudicatory phase or at the dispositional phase of the proceeding?

2. Once lost, when does the presumption of superior parental rights reattach?

OPINIONS

1. The subject parent in a dependency and neglect proceeding loses the presumption of superior parental rights upon the juvenile court's finding in the adjudicatory phase that the parent's child is dependent and neglected.

2. The presumption may reattach only if the juvenile court's order is invalidated or if the juvenile court subsequently restores custody to the parent.

ANALYSIS

1. The doctrine of "superior parental rights" protects parents against non-parents in child custody disputes. *Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002). In order for a non-parent to invade a parent's right to custody, "there has to be a finding, after notice required by due process, of substantial harm to a child." *In re Adoption of a Female Child*, 896 S.W.2d 546, 548 (Tenn. 1995). Similarly, the Supreme Court has indicated that for a non-parent to gain custody of a child from a parent there must be a finding in "the order initially removing custody from the [parent] . . . that the [parent] was unfit, that the child was a dependent and neglected child, or that a danger of substantial harm threatened the child's welfare." *Blair*, 77 S.W.3d at 143. Thus, an order finding a child dependent and neglected suffices to deprive a parent of "the presumption of superior parental rights." *Id.*

You ask when in a dependency and neglect proceeding initiated by a non-parent the subject parent loses the presumption of superior parental rights--at the adjudicatory phase or at the

dispositional phase? The answer requires greater explication of the two phases. During the adjudicatory phase, the court is required to hear evidence and make findings as to whether the child is a dependent and neglected child. Tenn. Code Ann. § 37-1-129(a). The findings must be made on the basis of clear and convincing evidence. Tenn. R. Juv. P. 28(f)(1)(ii). Only "[if] the court finds from clear and convincing evidence that the child is dependent [and] neglected . . . the court shall proceed immediately or at a postponed hearing to make a proper disposition of the case." Tenn. Code Ann. § 37-1-129(c). In this second, dispositional phase, the court determines, among other things, whether to leave the child with the child's parents or to transfer custody to another entity or individual. Tenn. Code Ann. § 37-1-130.

It is in the adjudicatory phase that the juvenile court makes the finding of dependency and neglect that the Supreme Court requires in order to remove from the parent the presumption of superior parental rights. Accordingly, the subject parent loses the presumption of superior parental rights when the adjudicatory phase of a dependency and neglect proceeding concludes with a such finding.

2. You also ask when the presumption of superior parental rights reattaches to a parent after the presumption is removed by a juvenile court's adjudicatory order finding a child to be dependent and neglected. As only a court order can remove the presumption, only a court order can restore it. The most obvious such order would be one from the juvenile court restoring custody to the parent and dismissing the dependency and neglect case. *See* Tenn. Code Ann. § 37-1-104(c) (providing that a juvenile court's jurisdiction over a dependent and neglected child continues until the child reaches age eighteen unless one of several events occurs, among which is dismissal of the case). It is also possible that a reviewing court could invalidate the order.

ROBERT E. COOPER, JR.
Attorney General and Reporter

BARRY TURNER
Deputy Attorney General

DOUGLAS EARL DIMOND
Senior Counsel

Requested by:

Honorable Donna Scott Davenport
Juvenile Court Judge
Juvenile Court of Rutherford County
Judicial Building, Room 301
20 Public Square
Murfreesboro, TN 37130-8004