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

August 13, 2008

Opinion No. 08-132

Constitutionality Of *De Facto* Custodian Legislation

QUESTIONS

1. Would House Bill 2883/Senate Bill 3047 ("House Bill 2883") of the 105th General Assembly unconstitutionally infringe upon parents' privacy rights as recognized under Article I, § 8 of the Tennessee Constitution and under the United States Constitution?

2. If the bill as currently drafted would unconstitutionally infringe upon parental privacy rights, would changing the language "adversely harm" in Section 1(c)(2) of the bill to "substantially harm" and changing the language "adverse harm" in Section 1(c)(3) to "substantial harm" make the bill constitutional?

OPINIONS

1. Yes. Certain provisions of House Bill 2883 as currently drafted unconstitutionally infringe on a parent's rights under the Tennessee and United States Constitutions.

2. Yes. Substituting the language "substantial harm" for "adverse harm" would render the statute constitutional.

ANALYSIS

1. You have asked whether proposed legislation that establishes a *de facto* custodianship status under Tennessee law unconstitutionally infringes upon a parent's constitutional rights to the care, custody, and control of his or her child. House Bill 2883, Section 1(a), provides that an individual may be declared the *de facto* custodian of a child when there is clear and convincing evidence that the individual had been the primary caretaker and financial supporter of a child under three years old for more than six months or of a child three years or older for more than one year. This bill would not apply to situations where a parent is on active duty in the military. Section 1(b) provides that if both the requirements of Section 1(a) and any of the circumstances in Section 1(c) are proven by clear and convincing evidence, there

is a rebuttable presumption that it is in the best interest of the child to remain in the custody of the *de facto* custodian. The circumstances under Section 1(c) are that (1) the parent has willfully abandoned a child younger than three years old for more than six months or has willfully abandoned a child three years old or older for a year or more; (2) the parent has engaged in conduct that may adversely harm the child; (3) the child may suffer harm if removed from the custody of the *de facto* custodian; or (4) there is a prior court order awarding custody to a party other than the parent. The legislation goes on to lay out eleven best interest factors for a court to consider in determining custody of the child. Finally, Section 1(e) provides that the court may award custody to one or both parents, the *de facto* custodian, or any combination of those persons; if custody is awarded to the *de facto* custodian, that individual has legal custody for all purposes under Tennessee law.

Any constitutional analysis of this bill must begin with the general legal principles governing parental rights. Both the United States and Tennessee constitutions protect a parent's right to the care, custody and control of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 650, (1972); *Tennessee Baptist Children's Homes, Inc. v. Swanson*, 2 S.W.3d 180, 187 (Tenn. 1999).[1] However, these rights are not absolute and a court may intervene when there is a threat of substantial harm to a child. *Hawk v. Hawk*, 855 S.W.2d 573, 581 (Tenn. 1993). Therefore, generally in a custody dispute between a parent and non-parent, a court will not grant custody to a non-parent absent proof by clear and convincing evidence that the child will be exposed to substantial harm if custody is awarded to the parent. *Ray v. Ray*, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001). However, once custody has been transferred from a parent to another individual through a valid custody order, the parent's superior parental rights no longer apply and courts should modify custody orders according to whether there has been a material change in circumstances. *Blair v. Badenhope*, 77 S.W.3d 137, 148 (Tenn. 2002).

As currently written, House Bill 2883 provides that if there is clear and convincing evidence that an individual has cared for and financially provided for a child for a certain amount of time depending on the child's age, that individual may seek *de facto* custodian status from a court. That an individual other than the parent has cared for the child financially and otherwise is insufficient by itself to allow a court to interfere with a parent's constitutional rights. However, the additional circumstances required by Section 1(c), if also proven by clear and convincing evidence, may provide the needed protections to render the statute constitutional.[2]

---

[1] The Tennessee Constitution has generally been interpreted to provide greater constitutional protection to parents than the federal constitution. *Compare, e.g, Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993) (requiring a finding of a "substantial danger of harm" before awarding grandparent visitation) *with Troxel v. Granville*, 530 U.S. 57, 73 (2000) (explicitly refusing to address whether all nonparental visitation statutes must require a finding of harm). Accordingly, this opinion will primarily rely on cases under the Tennessee Constitution.

[2] Section 1(b) provides that "[i]f the court determines by clear and convincing evidence that the individual is a *de facto* custodian and any one of the circumstances in subsection (c) are met," a rebuttable presumption is established. In order to render the statute constitutional, a court must apply the clear and convincing standard to both finding an individual to be a *de facto* custodian and to finding the circumstances under Section 1(c). Courts should read statutes so as to render them constitutional, and therefore, should read the language of Section 1(b) to apply the clear and convincing evidentiary standard to each of the required findings. *In Re Petition of Burson*, 909 S.W.2d 768, 775 (Tenn. 1995).

The first such circumstance, willful abandonment, is already defined by Title 36 as a parent's willful failure to visit or financially support his or her child for a period of four months.[3] Tenn. Code Ann. § 36-1-102 (1)(A)(i). Abandonment as defined in Tenn. Code Ann. § 36-1-102 is sufficient to terminate a parent's rights to his or her child. Tenn. Code Ann. § 36-1-113 (g)(1). Therefore, we believe that willful abandonment as used in House Bill 2883 is also sufficient to interfere with parental rights by establishing a *de facto* custodianship in another individual.

The second and third circumstances, parental conduct that may "adversely harm" the child or that the "child may suffer adverse harm if removed" from the custodian, are each insufficient as currently written to overcome a parent's constitutional rights. Tennessee courts have routinely held that in order to constitutionally interfere with a parent's rights, there must be a threat of substantial harm to the child. *See, e.g., Swanson*, 2 S.W.3d at 187; *Hawk*, 855 S.W.2d at 581. A showing of "adverse harm" is insufficient to meet the threshold of substantial harm. *Ray*, 83 S.W.3d at 732 ("[T]he use of the modifier 'substantial' indicates two things. First, it connotes a real hazard or danger that is not minor, trivial, or insignificant. Second, it indicates that the harm must be more than a theoretical possibility. While the harm need not be inevitable, it must be sufficiently probable to prompt a reasonable person to believe that the harm will occur more likely than not."). Therefore, awarding *de facto* custodianship under either of these circumstances would unconstitutionally interfere with a parent's constitutional rights.

The final circumstance is that a prior court order has awarded custody to a party other than the parents. The Tennessee Supreme Court determined in *Blair v. Badenhope*, 77 S.W.3d at 148, that if a valid court order has transferred custody to a party other than a parent, a modification of custody should be governed by the test used in modification proceedings between parents – whether there has been a material change in circumstances. Because the Supreme Court has applied a lower constitutional threshold once custody has already been validly removed from a parent, we believe a court would likely find House Bill 2883 Section 1(c)(4) constitutional.

In sum, as currently written, we believe that a court would likely read the clear convincing evidence standard to apply to the required findings under both Sections 1(a) and (c). We also believe that the circumstances presented under House Bill 2883 Sections 1(c)(1) and (4) are sufficient under prior Tennessee precedent to permit a court to constitutionally interfere with parental rights, but that the circumstances under (c)(2) and (3) would be insufficient.

[3] We note that House Bill 2883 uses a six-month or one-year time period for abandonment, depending on the age of the child, as opposed to the four months required by Tenn. Code Ann. § 36-1-102 (1)(A)(i).

2. Amending the language of section (c)(2) from "adversely harm" to "substantially harm" and the language of section (c)(3) from "adverse harm" to "substantial harm" would make the bill constitutional. *See Hawk*, 855 S.W.2d at 581; *Ray*, 83 S.W.3d at 732.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

ELIZABETH C. DRIVER
Senior Counsel

Requested by:

The Honorable Sherry Jones
State Representative
26 Legislative Plaza
Nashville, TN 37243-0159