IN THE SUPREME COURT OF TENNESSEE

STATE OF TENNESSEE,	**)**	
Appellee,	**)**	
	)	
	)	
	)	**LOUDON COUNTY**
	)	**Case No.: 10611 A & B**
v.	**)**	
	)	**CCA: E2012-01189-CCA-R3-CD**
	)	**[Consolidated Appeals]**
	)	
JACQUELINE P. CRANK	**)**	
Appellant	**)**	

BRIEF FOR AMICUS CURIAE CHILDREN'S HEALTHCARE IS A LEGAL DUTY, TENNESSEE MEDICAL ASSOCIATION, TENNESSEE CHAPTER AMERICAN ACADEMY OF PEDIATRICS, PREVENT CHILD ABUSE TENNESSEE, PENNSYLVANIA CHAPTER AMERICAN ACADEMY OF PEDIATRICS, PREVENT CHILD ABUSE PENNSYLVANIA, CENTER FOR CHILDREN'S JUSTICE, MASSACHUSETTS CITIZENS FOR CHILDREN, FIRST STAR, VICTOR I. VIETH, AND DONALD DUQUETTE

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SUMMARY OF ARGUMENT

The spiritual treatment exemption in Tennessee's child maltreatment laws is a black hole of indiscernible boundaries into which children fall and die. The Court of Criminal Appeals' attempt to dance around this hole without looking at it was legally and morally clumsy. The result is that this treacherous hole remains, certain to claim the lives of more Tennessee children if the State's courts declare themselves impotent to order removal of this patently unconstitutional erasure of crucial legal protection for an arbitrarily defined group of children.

This case is as good an opportunity as this Court will likely ever have to end this violation of children's constitutional rights, to withdraw the legislature's vague permission for parents to pray over sick and injured children instead of (rather than in addition to) getting them medical care they desperately need. This Court has an obligation to the children of Tennessee, who are unable to file lawsuits themselves to challenge this violation of their rights, to act now to invalidate the spiritual treatment exemption and make the law's direction to parents clear and non-discriminatory. Regardless of their ideological disposition, adults in whom the state has entrusted the legal custody of dependent children should be legally required to get medical attention for those children when the children are sick or injured.

ARGUMENT

Whatever merits there might be in other contexts to the prudential rules the Criminal Court of Appeals invoked to evade the constitutional problems with Tennessee's child maltreatment law, it is inappropriate to apply them in this case. This is a case in which the unconstitutional provision poisons the entire statute. It is also a case in which the unconstitutional provision harms persons who are not parties to the litigation – namely, the crime

victims – and who also are incapable of acting in their own behalf to challenge the harmful unconstitutional statutory provision in judicial or legislative fora, because they are non-autonomous. Prudence in this circumstance requires judicial action rather than inaction.

Tennessee's maltreatment laws confer an extremely important benefit on the State's children – that is, legal protection against harmful, even life-threatening, acts or omissions by the persons in whom the State has reposed their legal custody. By enacting the spiritual treatment provision of Code § 39-15-402(c), Tennessee withdrew this important benefit from a particular group of children, even though those children need this legal protection even more than do other children. The spiritual treatment exemption thus clearly denies these children equal protection of the State's laws, and thereby violates their rights under the Fourteenth Amendment to the United States Constitution. Any interpretation of a state religious freedom statute as empowering parents to preclude their children from receiving essential medical care would be just as unconstitutional.

I. APPLICATION OF THE MURRAY RULE IS INAPPROPRIATE IN THIS CASE.

The Court of Criminal Appeals declined to consider the constitutionality of a criminal child neglect law that contains a vague spiritual treatment exemption, citing the severability and prudential abstention directions this Court gave in *State v. Murray*, 480 S.W.2d 355 (1972). But two aspects of the present case make it unlike *Murray*. First, *Murray* presented no due process claim of the type asserted here – that is, that a statute's exception to criminal liability is so imprecisely drafted as to render the boundaries of the underlying offense uncertain. Second, the exception to criminal liability at issue in *Murray* did not harm anyone, let alone third parties incapable of protecting their own interests.

The criminal law Mr. Murray violated protected creditors. The exception to that law did so as well; it said that if you make the creditor whole before trial, the state will not prosecute you for violating the law's prohibition against disposing of or concealing collateral. The rules were clear to creditors and debtors in advance, they could act accordingly, and no helpless third parties were endangered thereby. There was therefore no compelling reason for this Court to assess the constitutionality of the statute's exception to criminal liability.

In the present case, in contrast, the exception obscures the underlying criminal prohibition. It thereby endangers children like Jessica Crank even if a court ultimately concludes the exception does not apply to their situation. See American Academy of Pediatrics, *Policy Statement: Conflicts Between Religious or Spiritual Beliefs and Pediatric Care: Informed Refusal, Exemptions, and Public Funding*, 132 PEDIATRICS 962, 964 (2013) ("These exemptions … may create confusion that results in harm to children; parents may be unclear about their duty to provide medical treatment, child protective services agencies may falsely believe that they cannot intervene until after a child suffers serious injury or dies, and prosecutors and courts may be uncertain whether parents are subject to criminal liability if their child dies of medical neglect.").

The Court of Criminal Appeals held that it did not need to reach constitutional issues because the religious defense was severable from the rest of the criminal neglect statute at Tennessee Code 39-15-402. The question of severability surely does not obviate the need to consider whether a parent is entitled to the defense and whether the defense is constitutional. It is inappropriate for a court to tell a defendant who claims that a statutory exception to a criminal law applied, "In your case we will just pretend that exception never existed and prosecute you accordingly, and we will also leave that exception on the books even if it does mislead people

like you." That throws the rule of law out the window and gives the legislature license to entrap citizens with vague exceptions immune from constitutional review.

In addition, the spiritual treatment exemption directly endangers all the children whose parents a court *would* deem free to neglect them under the law. As Mrs. Crank argues and the State admits, the legislature intended for parents to be exempt from liability for criminal neglect of a child when they withhold medical care and rely on a certain kind of prayer instead. See Brief in Support of Rule 11 Application to Appeal filed on Behalf of Jacqueline P. Crank, page 30, and Brief of the State of Tennessee on Appeal as of Right from the Judgment of the Loudon County Criminal Court, page 16. The State has argued that Mrs. Crank was not entitled to the defense because her prayers were not the kind described by the legislature. See State's Brief, *supra*, page 17, footnote 10.

The children of Tennessee urgently need this Court to review the spiritual treatment exemption in equal protection terms and on that basis to eliminate it. How else are they to have their constitutional rights enforced, if not in a case where the State's violation of their rights has caused one of them to suffer and die? Constitutional avoidance is merely a prudential rule, so it is irrational to apply it when the consequence of doing so is profoundly imprudent, as is true when an unconstitutional statutory provision profoundly harms children. Moreover, invalidating the exception only on parent-focused due process vagueness or Establishment Clause grounds would not give the necessary protection to Tennessee's children, who are the intended beneficiaries of child protection laws, because doing that would effectively invite the legislature to reenact the exemption with different language, thus perpetuating the true problem with the exemption—namely, arbitrary discrimination among children in providing a vital legal protection.

II. THE SPIRITUAL TREATMENT PROVISION VIOLATES THE EQUAL PROTECTION RIGHTS OF CHILDREN.

Through its parentage laws, Tennessee confers legal parent status on individuals, most commonly a child's birth parents. Tennessee then confers on legal parents various legal protections, powers, and privileges that enable parents to enjoy a family life largely insulated from outside interference. Further, Tennessee gives many forms of financial and practical assistance to parents, effectively taxing childless citizens to pay for that assistance. In return, Tennessee requires that parents bear certain legal obligations. Cf. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life."); *In re R.C.P.*, 2004 WL 1567122, *6 (Tenn.Ct.App.) ("Parents have a duty to provide, and children have a corresponding right to be provided with, a safe environment, free from abuse and neglect."). Anyone who does not wish to accept those legal obligations is free to decline the opportunity to have custody of a child.

Among the obligations parents implicitly agree to take on when they enjoy custody of a child is an obligation to bring a child to a medical facility for care when the child is sick or injured. Though imposing only a slight practical burden on parents, this legal requirement is an immense benefit for children, whose very lives could depend on its fulfillment. Recognizing the great importance for children of this parental duty, Tennessee embodied it not only in its civil maltreatment laws but also in its criminal code. The potential harm to children from medical neglect is so severe and irreparable that the State concluded it should treat dereliction of this parental duty in more serious cases as a crime warranting incarceration of the parents. Viewed

from another perspective, the State rightly concluded that the power to prevent a very sick child from receiving medical care should not be among the powers that it confers on parents.

In 1994, however, Tennessee withdrew this crucial protection from some children, and it correspondingly conferred on some parents the extraordinary power to cut off a child's access to necessary medical services. Tennessee did not enact an exemption from providing medical care after discovering that some children actually do not need medical care when they become seriously ill or injured. Indeed, children whose parents are religiously opposed to doing anything other than praying when a child becomes sick are in *greater* need of attention from medical professionals than are other children. Tennessee also did not withdraw this legal protection from some children after concluding that they are capable of and entitled to decide for themselves whether they will ever get medical attention. Nor did Tennessee withdraw this legal protection from some children on the assumption that they have countervailing interests weightier than their health and survival. The State's singling out of these children actually had nothing to do with their interests. The State took this vital legal protection away from some children simply because the Christian Science church did not want children to have this legal protection. It is difficult to imagine a more illegitimate reason for denying a powerless group of persons the equal protection of the law.

Some Tennessee government officials who supported enactment of Code section 39-15-402(c) in 1994 might have supposed parents who oppose medical care for religious reasons have a constitutional right to deprive children in their custody of the important legal protection the State extends to all other children. Although they might have recognized that ordinarily a state may not deny one group of persons the criminal law's protection just because some other group of persons wants them to be denied that protection, for religious or other reasons, they might

have believed things are different with child welfare laws. They might have uncritically accepted claims by Christian Science lobbyists that parents have a constitutional right to do to their children what the state regards as harm if the parents have a religious reason for doing so. See Alan Rogers, THE CHILD CASES: HOW AMERICA'S RELIGIOUS EXEMPTION LAWS HARM CHILDREN (2014) (describing the political history of spiritual treatment exemptions).

Such a belief, however, would be flatly false. There is no federal constitutional doctrinal support for a view that religiously-motivated parents are entitled to cause their children what the state views as harm. To the contrary, the United States Supreme Court and lower federal courts have repeatedly reaffirmed the *parens patriae* power and obligation of the state to impose legal restrictions on parental decision making and conduct in order to protect and promote children's safety, health, and proper development, even in the face of parental religious objection. The Supreme Court has been quite clear about this:

> Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944).

See also *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972) ("To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation...if it appears that parental decisions will jeopardize the health or safety of the child."); *Jehovah's Witnesses v. King County Hospital*, 390 U.S. 598 (1968) (affirming lower court decision ordering blood transfusions for a child needing surgery, over the free exercise objection of Jehovah's Witness parents); *Prince*, 321 U.S. at 170 (1944) (upholding a state law prohibiting parents from involving children in

distribution of leaflets on the streets after dark, against a claim that this law interfered with parents' free exercise of religion, and stating: "Parents may be free to become martyrs themselves. But it does not follow that they are free. . . to make martyrs of their children. . . ."); *Pierce v. Society of Siste*rs, 268 U.S. 510, 534-35 (1925) ("No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils."); *Spiering v. Heineman*, 448 F.Supp.2d 1129 (D. Neb. 2006) (rejecting parents' free exercise claim for exemption from newborn metabolic screening law); *Boone v. Boozman*, 217 F.Supp.2d 938 (E.D. Ark. 2002) (rejecting a parent's free exercise objection to a child immunization law); *McCarthy v. Boozman*, 212 F.Supp.2d 945 (W.D. Ark. 2002) (same).

State courts likewise have repeatedly upheld the state's *parens patriae* power to protect and promote children's health regardless of parental religious objection. See, e.g., *Commonwealth v. Nixon*, 761 A.2d 1151 (Pa. 2000) (rejecting free exercise and "mature minor" defenses to parents' manslaughter conviction based on medical neglect); *Brown v. Stone*, 378 So.2d 218 (Miss. 1979) (rejecting a parent's free exercise claim to exemption from the state child immunization law); *Davis v. State*, 451 A.2d 107 (Md. 1982) (same); *Anderson v. Georgia*, 65 S.E.2d 848 (Ga. 1951) (same); *Wright v. DeWitt Sch. Dist.*, 385 S.W.2d 644 (Ark. 1965) (same); *Cude v. State*, 377 S.W.2d 816 (Ark. 1964) (same); *Mosier v. Barren County Bd. of Health*, 215 S.W.2d 967 (Ky. 1948) (same); *Sadlock v. Board of Education*, 58 A.2d 218 (N.J. 1948) (same); *Douglas County v. Anaya*, 694 N.W.2d 601 (Neb. 2005), *cert. denied* 546 U.S. 826 (2005) (rejecting parents' free exercise objection to newborn metabolic screening law).

Consistent with that clear position of the courts on the state's power and obligation, the Tennessee Courts' Rules of Juvenile Procedure authorize trial courts to order protective custody, physical examination, and medical treatment of a minor, despite parental refusal of consent and

regardless of the reason for that refusal, whenever the court concludes that "the child's welfare or safety so requires." *Tenn. Courts Rules of Juv. Proc., Rule 38: Protective Orders - Judicial Consent for Treatment.* Courts in all other states also have such authority. See, e.g., *In re S.H.*, Slip Copy, 2013 WL 5519847 (Ohio App. 9 Dist.,2013) (*appeal denied*, 3 N.E.3d 1217 (2014) (ordering appointment of a guardian to make medical decisions for a child whose parents refused consent to chemotherapy, based simply on a finding that this would be in the child's best interests, stating: "Parental rights, even if based upon firm belief and honest convictions can be limited in order to protect the `best interests' of the child."); *In re Guardianship of L.S. and H.S.*, 87 P.3d 521, 526 (Nev. 2004) (awarding to a hospital temporary guardianship of a child whose parents were religiously opposed to medical care, stating: "Other jurisdictions have uniformly held that when medical treatment is available and necessary to save a minor's life, the state may intervene."). In practice, such authority is, sadly, often ineffective. In the present case, for example, a court ultimately ordered medical treatment of Jessica Crank, but not until four and a half months after physicians recommended it, too late. But the authorization manifests universal recognition of the state's power to protect children.

Indeed, for a court to hold otherwise – that is, to declare that some people (in this context, parents) have a constitutional right to deprive some other people (here, children) of the equal protection of the law and thereby endanger their lives – would be unprecedented and alarming. Even when the legal system blatantly denied equal protection of the law to wives – for example, in connection with property ownership and bodily integrity, it did not go so far as to aver that husbands were constitutionally entitled to this. And now, of course, such discrimination among women based on family relationship is anathema.

Some other states' courts have recognized the inherent conflict between children's equal protection right and parental demands for religious exemptions from child welfare laws, and they have recognized that the former precludes state capitulation to the latter. For example, in *Brown v. Stone*, 378 So.2d 218 (Miss. 1979), the Mississippi Supreme Court invalidated the religious exemption in that state's compulsory immunization laws because it denied some children the equal protection of the law. "A child," wrote the court, "is indeed himself an individual, although under certain disabilities until majority, with rights in his own person which must be respected and may be enforced." No child should "be denied the protection against crippling and death that immunization provides because of [parents'] religious belief." Id. at 222. See also James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Law as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. Rev. 1321 (1996); Ann MacLean Massie, *The Religion Clauses and Parental Healthcare Decisionmaking for Children: Suggestions for a New Approach*, 21 Hastings Const. L.Q. 725, 771-72 (1994).

Consistent with the precept that one group cannot have a constitutional right to harm members of another group, the U.S. Supreme Court has ascribed to parents a constitutional right to deviate from generally-applicable child welfare laws only when parents' preference poses no threat to the health or safety of the child and so should be a matter of indifference to the state. *See Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972) (holding that Amish parents are constitutionally entitled to an exemption from compulsory schooling laws for their children after eighth grade, but only after concluding: "This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred."); *Pierce*, 268 U.S. at 534-35 (invalidating a

state law requiring all children to attend public school, after applying rational basis review and finding no reason to believe attendance at a private school was in any way detrimental to children); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (invalidating a state law prohibiting instruction of children in German after applying rational basis review and finding the law did nothing to serve children's welfare or educational interests). This Court cannot find harmless, however, a parent's desire to be excused from her duty of physical care or to be endowed by the state with the legal power to preclude a sick child from receiving medical care. These cannot be and never have been a matter of indifference for the state in this country.

None of the foregoing suggests that it is wrong for parents to pray for a sick child or to encourage a sick child to find strength in faith. But the Establishment Clause precludes the state from assuming that prayer will suffice to heal a sick child. See *County of Allegheny v. ACLU*, 492 U.S. 573, 593 - 94 (1989) ("The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief"). And the Equal Protection Clause precludes the state from gratuitously exempting a group of parents from a legal duty of care owed to children solely out of deference to the parents' religious beliefs. The Equal Protection Clause creates a strong presumption that the state must give the same legal protection to the fundamental interests of all children. See *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (holding that a state's denial of education to children of undocumented immigrants violated the children's right of equal protection, decrying the state's imposing "a lifetime of hardship on a discrete class of children not accountable for their disabling status").

A state would need an exceedingly strong and legitimate reason for doing otherwise, for singling out a particular group of children and giving them less protection from abuse and neglect than other children. See *Plyer*, 457 U.S. at 221-23 (applying heightened scrutiny to a law

denying some children access to a state's public schools, because of the importance of education to children's lives); *Weber v. Aetna Cas. & Sur. Co.,* 406 U.S. 164, 172 (1972) (holding that a workers' compensation law discriminating against illegitimate children in statutory entitlement to dependent benefits was a violation of the Equal Protection Clause, stating that "when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny"). The religious beliefs of other persons cannot be a legitimate, let alone compelling reason, for denying such an important benefit to a group of vulnerable people, regardless of the relationship between members of the two groups. *Plyer*, 457 U.S.. at 220 (quoting *Weber*, 406 U.S. at 175) ("`imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing'").

The religious beliefs of guardians are not considered a legitimate and compelling reason to deprive never-competent adults of needed medical treatment. Instead, such deprivation would constitute a serious breach of the legal duty of care guardians owe their wards. Likewise, parents' religious beliefs are not a legitimate, let alone compelling, reason for denying necessary medical care to children. The state may not make children suffer for the beliefs, choices, or characteristics of their parents. See *Plyer*, 457 U.S. at 220 (condemning a law's denial of public education to children on the basis of parents' unlawful immigration because it "imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control" and because "the children who are plaintiffs in these cases 'can affect neither their parents' conduct nor their own status.'" (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977))); *Weber*, 406 U.S. at 175 ("no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent.").

Recognizing these truths, an Ohio court struck down the religious exemption in that state's child medical neglect laws, explaining:

> "[I]f the real purpose of [the neglect law] is to protect children from parental defalcation, then the prayer exception creates a group of children who will never be so protected, through no fault or choice of their own. . . . Why. . . should children not be afforded special protection by our laws, each child on an equal basis with every other child, where the denial of that protection may injure or cripple the child for life or even result in that child's premature death? This special protection should be guaranteed to all such children until they have their own opportunity to make life's important religious decisions for themselves upon attainment of the age of reason. After all, given the opportunity when grown up, a child may someday choose to reject the most sincerely held of his parents' religious beliefs, just as the parents on trial here have apparently grown to reject some beliefs of their parents. Equal protection should not be denied to innocent babies, whether under the label of 'religious freedom' or otherwise. . . .
>
> "For the reasons stated above, this court must hold that the second sentence of R.C. 2919.22(A) is clearly violative of the Constitution of the United States and must therefore be declared to be of no force or effect within this jurisdiction." *State v. Miskimens*, 490 N.E.2d 931, 935-36 (Ohio Ct. Com. Pl. 1984).

This Court should do the same with Tennessee Code section 39-15-402(c) in this case.

III. TENNESSEE'S RELIGIOUS FREEDOM ACT IS OF NO AVAIL TO APPELLANT

Perhaps recognizing the implausibility of doing so, Appellant does not argue against her conviction directly on the basis of a supposed federal constitutional free exercise right.

Defendant does appeal, though, to Tennessee's Preservation of Religious Freedom statute, in the hope that it might give her protection the United States Constitution does not. The applicability to this case of that statute, passed years after the conduct for which Appellant was prosecuted, is in dispute. One problem with deeming it applicable that Appellant disregards is the prejudice it would cause children such as Jessica Crank, if it were interpreted as excusing their parents' neglect. If applying the statute would increase *ex post* the protection afforded parents, it would to that extent decrease *ex post* the law's protection of children. To give the Preservation of Religious Freedom Act retroactive application, effectively changing now what the law was before 2009, and thereby retroactively aggrandizing parental power and correspondingly exacerbating the denial of equal protection to children, would thus "produce an unjust result" of the sort that counts strongly against retrospective application of a new law. See *Saylors v. Riggsbee*, 544 S.W.2d 609, 610 (Tenn. 1976). Looked at another way, for this Court to decide that a *substantive* rule of conduct enacted in 2009 applies retroactively to conduct in 2001 and effectively amends the substantive law *ex post* would throw all of the civil and criminal laws on the books today into doubt, because the Court would be telling citizens of Tennessee that any law now ostensibly protecting them can later be retroactively changed in unpredictable ways.

In any event, even if the Court were to deem the 2009 Act applicable to parental conduct in 2001, the state legislature cannot override the equal protection rights of children through a broad-based religious freedom statute any more than it can through a specific religious exemption to the medical neglect law. The Preservation of Religious Freedom Act would be unconstitutional-as-applied were a court to make it a basis for denying protection of the laws to a particular group of children solely because of their parents' religious beliefs.

Moreover, the Act does not purport to be an absolute prohibition on burdening religion; it simply requires that the state show its actions are necessary to serve a compelling state interest and use least restrictive means, which the State clearly can do with respect to its medical neglect laws. Courts have uniformly treated children's welfare as a compelling state interest. See, e.g., *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'"); *Lehr v. Robertson*, 463 U.S. 248, 257 (1983) ("the Court has emphasized the paramount interest in the welfare of children"); *Lassiter v. Dept. of Soc. Servs*., 452 U.S. 18, 27 (1981) ("the state has an urgent interest in the welfare of the child"); *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (*supra*); *Adoption of Daniele G.,* 105 Cal. Rptr. 2d 341, 348 (Cal. Ct. App. 2001) ("the welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect"); *Walker v. Superior Court*, 763 P.2d 852, 869 (Cal. 1988) (characterizing as "an interest of unparalleled significance: the protection of the very lives of California's children"); *In re Sheneal W. Jr.*, 728 A.2d 544, 551-52 (Conn. Super. Ct. 1999) ("it is beyond debate that the state has a compelling interest in protecting children."); *G.B. v. Dearborn Cnty. Div. of Family & Children*, 754 N.E.2d 1027, 1032 (Ind. Ct. App. 2001) ("the state has a compelling interest in protecting the welfare of children."); *In re K.M.*, 653 N.W.2d 602, 609 (Iowa 2002); *Commonwealth v. Nixon*, 761 A.2d. at 1156 (*supra*).

In addition, laws requiring parents to secure medical care for seriously sick or injured children, backed by the threat of criminal prosecution, are necessary to protect children's fundamental wellbeing. Such laws are less restrictive of family privacy than would be having state employees constantly investigating the welfare of children and attempting to secure care for them. Moreover, the state can adequately protect children of religious objectors, if at all, only by

making the legal command exception-less; even a clearer and more circumscribed religious exception would be constitutionally insufficient. See AAP Policy Statement, at 132 Pediatrics at 964 ("Although the exemptions could be revised to make it explicit that seeking medical care is required when a child is seriously ill, … parents and spiritual healers who are members of groups that refuse all medical treatment may not be able to differentiate moderate from severe illnesses and, therefore, fail to seek medical attention in a timely manner.").

Jessica Crank's death makes evident the necessity of imposing on *all* parents without special dispensation a clear legal duty to secure medical care for a child when necessary to prevent substantial harm. Cf. *Walker v. Superior Court*, 763 P.2d 852, 871 (Cal. 1988) (upholding charges of involuntary manslaughter and felony child endangerment over mother's free exercise objection, after finding that "an adequately effective and less restrictive alternative is not available to further the state's compelling interest in assuring the provision of medical care to gravely ill children whose parents refuse such treatment on religious grounds," because "civil dependency proceedings [are] profoundly intrusive" and because "child dependency proceedings advance the governmental interest only when the state learns of a child's illness in time to take protective measures, which quite likely will be the exception rather than the rule.").

IV. THE PROPER REMEDY IS TO STRIKE THE SPIRITUAL TREATMENT PROVISION FROM THE STATE CODE.

Given that any religious exemption to Tennessee's child neglect law violates the rights of certain children, the only proper remedy in this case is to strike the religious exemption from the Tennessee statutes. Extending it to encompass a broader category of parents, and thereby to violate the constitutional rights of a greater number of children, would clearly be improper and contrary to the state's vital role as protector of children and of other citizens who cannot protect

themselves. Without doubt, the legislative preference following invalidation of the exemption would be to strike the exemption, rather than have it extended so far as to enable any parents to eviscerate the legal duty of care simply by claiming to have prayed as their child suffered and died. Cf. *Boone v. Boozman*, 217 F.Supp.2d at 952 ("this Court is disinclined to re-write the immunization statute to fashion a broader exemption that the General Assembly may not have contemplated or intended. Rather, under Arkansas law, the proper remedy is for this Court to `sever' the religious exemption from the remainder of the statute."); *Davis v. State*, 451 A.2d 107, 114 (Md. 1982) (stating that one of the most important "established principles of construction… is the presumption, even in the absence of an express clause or declaration, that a legislative body generally intends its enactments to be severed if possible," and that "when the dominant purpose of a statute may largely be carried out notwithstanding the invalid provision, courts will ordinarily sever the statute and enforce the valid portion"); *Brown v. Stone*, 378 So.2d at 223 ("We have no difficulty here in deciding that the [child immunization] statute is 'complete in itself' without the provision for religious exemption and that it serves a compelling state interest in the protection of school children.").

Amici take no position on what the implications should be for Appellant's conviction if this Court invalidates the religious exemption, but note that other courts in similar circumstances have taken the approach of invalidating an unconstitutional religious exemption only prospectively, so as to avoid due process problems with current criminal defendants. See, e.g., *State v. Miskimens*, 490 N.E.2d at 936 ("this court must hold that the second sentence of R.C. 2919.22(A) [the religious exemption] is clearly violative of the Constitution of the United States and must therefore be declared to be of no force or effect within this jurisdiction. However, because such holding would operate to the severe detriment of these defendants who are

defending against a charge based on past acts committed before this holding, the court must limit its holding to one of prospective application only, commencing with the date of this judgment.").

CONCLUSION

The Tennessee Supreme Court should rule § 39-15-402(c) unconstitutional as a violation of the Fourteenth Amendment equal protection rights of children.

Respectfully submitted this 8th day of August, 2014.

APPENDIX A: DESCRIPTION OF AMICI CURIAE

Children's Healthcare Is a Legal Duty (CHILD) is a tax-exempt educational organization with approximately 430 members in 48 states and three foreign countries. CHILD's mission is to stop child abuse and neglect related to cultural tradition, religious beliefs, and harmful secular belief systems. CHILD provides information to public officials, scholars, and others; supports research, publishes a newsletter, files *amicus curiae* briefs, and does a limited amount of lobbying. Its officers and honorary members have won many awards for their child advocacy work, including the National Association of Counsel for Children's Child Advocacy Service Award, the American Academy of Pediatrics President's Certificate for Outstanding Service, and commendation from Oregon Governor John Kitzhaber.

The **Tennessee Medical Association** is a professional organization of 8,000 members who are doctors dedicated to protecting the health interests of patients and enhancing the effectiveness of physicians throughout the state by defining and promoting:

Quality, safe and effective medical care;
Public policy to protect the sanctity of the physician-patient relationship, improve access to and the affordability of quality medical services;
Ethics and competence in medical education and practice; and
Open communication between the medical profession and the public, fostering a better understanding of the capacities of medical practice.

The TMA has an interest in this case because one of our core principles is to improve access to quality medical care for all Tennesseans, including of course, children and other minors. This case is about removing a barrier to access to medical care for minors.

The **Tennessee Chapter of the American Academy of Pediatrics (TNAAP)** is a statewide professional membership and child advocacy organization comprised of approximately 1,000 pediatricians and pediatric sub-specialists in Tennessee dedicated to the health, safety, and

well-being of infants, children, adolescents and young adults. For over 50 years, TNAAP has been a respected advocate for children, providing an effective forum to address pediatric health care issues in Tennessee. Since 1988 the American Academy of Pediatrics has had a policy of opposing religious exemptions from laws requiring health care for children.

Prevent Child Abuse Tennessee has worked to prevent child abuse and neglect of Tennessee children for 25 years through public education and direct services. We are a chapter of Prevent Child Abuse America, which, along with its predecessor, the National Committee for the Prevention of Child Abuse, has called for repeal of religious exemptions from child abuse and neglect laws since 1990. Prevent Child Abuse Tennessee joins its parent organization in advocating that laws protect all children from abuse and neglect.

The **Pennsylvania Chapter, American Academy of Pediatrics** (PA AAP), is comprised of 2,200 pediatrician members and has been dedicated to the health and well-being of all children for over 30 years. Since 1999, the PA AAP has led the way in educating the medical community across the state on recognizing and reporting suspected child abuse. In 2008, the PA AAP became the only chapter of AAP to also house the state chapter of Prevent Child Abuse America, **Prevent Child Abuse Pennsylvania**, with the mission of preventing all forms of child abuse. As such, we support the policy statements of both national organizations which call for repeal of religious exemption laws. We also support efforts to educate state officials, health care professionals, and the public about parents' legal obligations to obtain necessary medical care for their children.

The **Center for Children's Justice** is a statewide non-profit widely recognized and respected as Pennsylvania's trusted voice for at-risk and abused children. For more than a decade, we have been at the forefront of every major child protection policy and practice reform

in Pennsylvania. In 2003 we spearheaded a public education and awareness campaign to help secure two amendments of the state's constitution in order to permit victimized children testimony options beyond face-to-face. Most recently we mobilized a statewide call to action urging the PA General Assembly and Governor to appoint an independent Task Force on Child Protection. Eventually created, this Task Force's recommendations have led to enactment of nearly two dozen new laws including a significant rewrite of the state's definition of child abuse. Throughout this reform effort, we consistently advocated for eliminating the statutory language that provides an exclusion from child abuse when a parent denies "needed medical or surgical care" to a child due to the parent's religious beliefs. While not eliminated, the exclusion was modified so that it does not apply when a child dies as a result of this withheld medical or surgical care.

Massachusetts Citizens for Children, "MassKids," is the oldest, private statewide child advocacy organization in the country. Throughout its 55-year history, MassKids has tackled the tough and complex issues affecting children and youth. From its work in the 70s to establish the state's child abuse reporting law, its program in the 80s to prevent HIV among homeless and runaway youth, to its more recent work to reduce child poverty, prevent infant death and disability from Shaken Baby Syndrome and prevent child sexual abuse, MassKids has been a recognized national leader and effective advocate for children and families. Since 1984, MassKids has served as the Massachusetts Chapter of Prevent Child Abuse America.

In 1990, MassKids organized the Coalition to Repeal Religious Exemption Laws which succeeded in removing from Massachusetts law all religious exemptions from providing necessary medical care to seriously ill children. Massachusetts became the third state in the country to do so. MassKids issued a comprehensive report on the issue entitled "Death by

Religious Exemption: An Advocacy Report on the Need to Repeal Religious Exemptions to Necessary Medical Care for Children" in 1992 and "Jeopardizing Children's Lives: A Policy Report on the Need for the U.S. Department of Health and Human Services to Require Repeal of Religious Exemptions to Medical Care for Children" in 1994.

First Star was founded in 1999 as a national 501(c)(3) public charity dedicated to improving life for child victims of abuse and neglect. First Star improves the lives of America's abused and neglected children by strengthening their rights, illuminating systemic failures and igniting necessary reforms. We pursue our mission through research, public engagement, policy advocacy, education and litigation. First Star believes that children have a right to equal protection of the law and that the state should not deprive one group of children of protections it extends to others.

Victor I. Vieth, J.D., has trained thousands of child protection professionals from all over the world on topics ranging from child abuse investigations, prosecutions to prevention activities. Mr. Vieth has been instrumental in implementing 22 state and international interview training programs and dozens of undergraduate and graduate programs on child maltreatment. Mr. Vieth serves as the executive director emeritus at the National Child Protection Training Center (NCPTC). His interest in this case, which is outside of the confines of his relationship with NCPTC, is to advocate for child abuse and neglect prevention and justice for children, which necessarily requires that they have equal protection of the law.

Donald N. Duquette, Clinical Professor of Law at the University of Michigan Law School, founded the University's Child Advocacy Law Clinic in 1976. It is the oldest clinical law program specializing in child welfare law in the United States. He has written many books and articles on child welfare law and practice. He is also director of the National Quality

Improvement Center for Child Representation in the Child Welfare System, a multi-year, $6 million project supported by the U.S. Children's Bureau. His interest in this case stems from a long career studying, teaching and advocating for the rights and protection of children.

ADDENDUM

Subject: Westlaw Results : 2004 WL 1567122

FOR EDUCATIONAL USE ONLY

Not Reported in S.W.3d, 2004 WL 1567122 (Tenn.Ct.App.)

(Cite as: 2004 WL 1567122 (Tenn.Ct.App.))

C
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

In re R.C.P.

No. M2003-01143-COA-R3-PT.

June 11, 2004 Session.

July 13, 2004.

Appeal from the Juvenile Court for Coffee County, No. 313-02J; Timothy R. Brock, Judge.

Christina B. Jackson, Murfreesboro, Tennessee, for the appellant, M.A.F.

Paul G. Summers, Attorney General and Reporter, and Douglas Earl Dimond, Assistant Attorney General, for the appellee, Tennessee Department of Children's Services.

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which PATRICIA J. COTTRELL, J., joined. WILLIAM B. CAIN, J., filed a separate concurring opinion.

OPINION

WILLIAM C. KOCH, JR., P.J., M.S.

*1 This appeal involves the termination of a mother's parental rights with regard to her ten-year-old daughter. The Department of Children's Services obtained custody of the child after discovering that she had been sexually abused by her mother's boyfriend. Approximately three

months later, the Department and the child's guardian ad litem filed separate petitions in the Juvenile Court for Coffee County to terminate the mother's parental rights based on abandonment under Tenn.Code Ann. s 36-1-113(g)(1) (Supp.2003) and severe child abuse under Tenn.Code Ann. s 36-1-113(g)(4). Following a bench trial, the juvenile court determined that the Department and guardian ad litem had failed to present clear and convincing evidence of abandonment but concluded that the mother had committed severe child abuse by knowingly failing to protect her daughter from her boyfriend. The mother has perfected this appeal. We have determined that the record contains clear and convincing evidence supporting the juvenile court's conclusion that the mother knowingly failed to protect her child from her boyfriend's sexual abuse and that terminating the mother's parental rights is in the child's best interests.

I.

M.A.F. gave birth to her daughter, R.C.P., on December 26, 1993. She was barely eighteen years old and was married to L.B.P. M.A.F.'s relationship with L.B.P., which was apparently abusive, ended in 1999 when L.B.P. died. M.A.F. and her daughter moved to McMinnville to live with M.A.F.'s parents. She obtained a two-year college degree and found a job as a laboratory technician at an area hospital.

Sometime in 1999, M.A.F. renewed her acquaintance with B.J. whom she had met casually several years earlier through a mutual friend. B.J. operated an automobile repair garage and hunting supply store in Manchester. In April 2000, after dating B.J. for approximately one year, M.A.F. and R.C.P. moved into his residence which was part of his garage and hunting supply store. This decision soon proved to be a hellish mistake. Both M.A.F. and R.C.P. paid the price for the next two years.

Within weeks after M.A.F. and R.C.P. moved in with B.J., he proved himself to be a violent, physical abuser and sexual predator. It also became apparent that he was a binge drinker and that he was becoming increasingly addicted to methamphetamine. He severely beat M.A.F. on a regular basis. On these occasions, M.A.F. would tell R.C .P. to leave the room, but B.J. forced the little girl to remain in the room to watch him beat her mother.

B.J. never physically abused R.C.P., but he did far worse while M .A.F. was at work. On at least four occasions, B.J. had oral sex with R.C.P. and also tried to have sexual intercourse with her. He videotaped at least one of these episodes and on another occasion used an Internet camera to broadcast his activities to his brother and his brother's girlfriend. He also forced R.C.P. to dress up in her mother's clothes and strip for him and forced her to watch pornographic videos with him, including a video he had made of her mother. B.J.'s sexual predations were not limited to R.C.P. He also had oral sex with E.C., one of R.C.P.'s female playmates. Neither R .C.P. nor E.C. told M.A.F. what B.J. had done to them.

*2 B.J. also involved M.A.F. in his sexual depravity. She obtained pornographic videos for him. Many of these videos described the actors as "barely legal." On one occasion, she agreed to have sex with another man while B.J. videotaped them.

On two other occasions, B.J. arranged for M.A.F. to have oral sex with C.J.O., an 11-year-old boy who lived nearby. B.J. videotaped the first episode, and during the second episode, M.A.F. engaged in sexual acts with B.J. and C.J.O.
simultaneously.

In late 2001 and early 2002, B.J. began to use methamphetamine more and more. He gave the drug to M.A.F. before their two sexual episodes with C.J.O. Eventually, he began manufacturing the drug in his garage. It was at this point that M.A.F. tried to break free from B.J. In March 2002, she used her tax refund to rent a house in Monteagle, and she and R.C.P. moved out of B.J.'s garage in Manchester. Two weeks later, M.A.F. and R.C.P. returned to B.J. after he told her that he was suffering from an adverse reaction to chemotherapy for colon cancer.

By this time, M.A.F.'s parents and several of her co-workers had become aware of the physical abuse she was receiving from B.J., and they urged her to leave him. M.A.F. agreed that she should end the relationship but insisted that she needed to do it in her own way to avoid repercussions from B.J. In May 2002, M.A.F. was hospitalized for several days following a savage beating with a hammer. Again, a hospital social worker and others urged her to escape from the abusive situation.

On June 24, 2002, E.C. and C.J.O. informed local authorities of the sexual abuse committed by B.J. Representatives of the Coffee County Sheriff's Department and the Department of Children's Services interviewed the children the following day. During these interviews, C.J.O. told the authorities that B.J. had forced M.A.F. to have sex with him and that B.J. had also forced him to have sexual contact with E.C. Armed with this information, the authorities obtained a search warrant for B.J.'s garage and living quarters. When they executed the search warrant, they found R.C.P. and B.J. at home. M.A.F. was at work. B.J. was taken into custody but later released.

The Coffee County Juvenile Court placed R.C.P. in the custody of the Department, and on June 26, 2002, the Department placed her in the first of two foster homes. R.C.P. was placed in her second foster home on July 2, 2002, where she has remained ever since. On the same day, the juvenile court appointed Frank Van Cleave, an attorney practicing in Tullahoma, to serve as R.C.P.'s guardian ad litem.

When questioned at the sheriff's office on the afternoon her daughter was taken into custody, M.A.F. expressed surprise when she learned what B.J. had done to R.C.P. She insisted that R.C.P. had never complained to her about B.J. and that she would never have believed that B.J. would physically or sexually abuse her daughter. Following additional interviews with R.C.P., the authorities charged B.J. with five counts of child rape and M.A.F. with two counts of child rape. B.J. disappeared shortly thereafter. M.A.F. moved back to McMinnville to be closer to her parents and soon discovered she was pregnant. She also changed her employment to another hospital.

*3 On July 18, 2002, the Department prepared an initial permanency plan for R.C.P. The alternative goals for the plan were either to return R.C.P. to M.A.F. or to place her for adoption.

The plan noted that M.A.F. had telephoned the Department frequently about R.C .P. and that M.A.F. had adequate housing and reliable transportation. It also imposed several obligations on M.A.F., including:
(1) participating in counseling to enable her to "become knowledgeable about child sex abuse" and "to help her accept her paramour's role in the sexual molestation of her child," (2) participating in education "to become knowledgeable about the extreme and sometimes harmful behaviors displayed by victims of sex abuse," (3) enrolling in and completing a sex offender treatment program "if the ... allegations against her are founded," (4) participating in counseling designed for victims of domestic violence, (5) obtaining a mental status evaluation, and (6) furnishing her home and assuring that it is free from safety and health hazards. The Department also informed M.A.F. that it expected her to complete these tasks by January 2003.

Thereafter, M.A.F.'s parents sought permission to intervene to obtain custody of R.C.P. On August 15, 2002, the juvenile court conducted a hearing on their request as well as the Department's petition for temporary custody. The court denied the grandparents' motion to intervene but granted them supervised visitation with their granddaughter. The court also determined that R.C.P. was dependent and neglected and placed her in the temporary custody of the Department. In its September 23, 2002 order embodying its decision, the court stated that "[M.A.F.] ... did agree to a finding of severe abuse pursuant to T.C.A. s 37-1-102 in that [B.J.] ... did sexually abuse ... [R.C.P.]; and [M.A.F.] ... does not make any admissions of guilt."

On August 26, 2002, the juvenile court terminated M.A.F.'s supervised visitation with R.C.P. after a case worker decided that M .A.F. had not adequately corrected what she believed to be R.C.P.'s sexually suggestive behavior during a visitation. The court vacated this order one month later and determined that R.C.P.'s visitation would be supervised by the guardian ad litem rather than by the Department.

On September 3, 2002, the child's guardian ad litem filed a petition seeking to terminate M.A.F.'s parental rights because R.C.P. had been "subject to severe child abuse" or alternatively because M.A.F. was "an unfit parent, and that substantial harm will result to her child if the parental rights are not terminated." FN1 On September 24, 2002, the Department followed suit by filing its petition to terminate M.A.F.'s parental rights on the grounds of abandonment and severe child abuse.FN2

FN1. The contract between the Department and foster parents prohibits the foster parents from retaining counsel in anticipation of future adoption proceedings before the parental rights of a foster child's biological parents have been terminated. However, there is some evidence in this record that R.C.P.'s foster mother had a conversation with the child's guardian ad litem about hiring an attorney to help with the case and with future adoption proceedings.

FN2. The Department filed its petition three months before the deadline it had given M.A.F. to accomplish her remedial tasks in the permanency plan. The timing of the Department's petition calls into question the wisdom of the Department's original decision to consider reuniting M.A.F. and R.C.P.

Making reasonable efforts to reunite parents and children is not statutorily required in cases like this one. For the most part, imposing remedial tasks on a parent who has engaged in conduct violating Tenn.Code Ann. S 36-1-113(g)(4) only delays matters and raises false hopes that reunification will occur.

M.A.F. was deposed on November 5, 2002. She insisted that she had never seen B.J. physically or sexually abuse either R.C.P. or E.C. and that she never suspected that B.J. would engage in inappropriate sexual conduct with R.C.P. She described the physical and psychological abuse she had received from B.J. between April 2000 and June 2002 and conceded that she had made a mistake by not leaving him. She also admitted renting pornographic videos at B.J.'s request and that B.J. had made a videotape of her having sex with another adult. However, she declined to answer questions regarding her sexual activities with C.J.O. or her use of methamphetamines.

*4 B.J. was later apprehended and placed in custody. Only then did M.A.F.decide to assist the authorities in making their case against him. On January 8, 2003, she prepared a written confession admitting that B.J. had instigated her having oral sex with C.J.O. on two occasions and that B.J. had supplied her with methamphetamine on both occasions. She also confirmed that B.J. had videotaped one of these episodes.

Both R.C.P. and M.A.F. began individual counseling after R.C.P. was placed in foster care. Their therapists were working toward joint counseling, and M.A.F.'s counselor was encouraging her to apologize and to take responsibility for what had happened. During a visitation on January 30, 2003, M.A.F. tearfully told R.C.P.that she could not "apologize enough for what has happened." She also told her daughter that she did not know what had been going on at the time but that she believed her daughter's accounts of what B.J. had done to her. Both M.A.F. and R.C.P. discussed how B.J. had lied to them and had used them. M.A.F. also told her daughter that she had declined the Department's suggestion that she surrender her parental rights.

On February 27 and 28, 2003, the juvenile court conducted a hearing on both petitions to terminate M.A.F.'s parental rights. The guardian ad litem and the Department presented evidence, including the deposition given by M.A.F. and her confession, regarding the sordid events occurring while M.A.F. and R.C.P. had lived with B.J. R.C.P.'s case manager testified (1) that M.A.F. now had a clean, safe home, (2) that M.A.F. had completed every one of her obligations under the permanency plan, (3) that she had regularly visited R.C.P., (4) that M.A.F. and R.C.P. clearly love each other, and (5) that currently "there is nothing inappropriate that the mother does." In addition, M.A.F.'s therapist testified that she had a "high commitment level" to her therapy and counseling and that she was "beginning to absorb the significance" of what had happened. She recommended that M.A.F. "undergo a psychosexual evaluation to see if there is [sic] truly sexual predator issues for her, or is it that she is truly a victim, which at this point, everything that I'm seeing is that she is a victim and not a sexual predator."

The juvenile court made its decision shortly after the close of proof on February 28, 2003. It determined that the Department had failed to prove that M.A.F. had abandoned R.C.P. either by failing to visit her or by failing to support her. However, the court also determined that M.A.F.

had committed severe child abuse in two ways. First, the court found that M.A.F. had committed severe child abuse on C.J.O. while he was a "temporary resident in her home." Second, the court concluded that M.A.F. had committed severe child abuse by "knowing and allowing the abuse by ... [B.J.] to exist ." FN3 On March 6, 2003, the court filed written findings of fact, and on April 2, 2003, filed its "final" order terminating M.A.F.'s parental rights but reserving the issue of "placement and guardianship" for a later hearing.

FN3. The juvenile court expanded on this finding as follows:

I further find that ... [M.A.F.] knew of ... [B.J.'s] proclivities for sexual abuse of children. She witnesses [sic] these tendencies, and she participated with him in the sexual abuse of a child.

Further, ... [M.A.F.] allowed to exist and helped to create an environment which can only be described as conducive to sexual deviancy and the exploitation of minors as sexual victims. She knew of ... [B.J.'s] sexual interest in children, and she clearly had a sexual interest in children. She, in fact, participated in a criminal act with a minor child. She effectively allowed ... [R.C.P.] to sleep in the same bedroom with her and ... [B.J.] while many sexual escapades took place.

I further find by clear and convincing evidence that the totality of the circumstances in this case is such that it is inconceivable to the Court that ... [M.A.F.] was not reasonably certain that ... [B.J.] would commit acts of sexual abuse toward ... [R.C.P.], so I therefore find that grounds for termination exist pursuant to applicable law.

*5 Shortly after filing its written findings of fact, the trial court permitted M.A.F.'s trial counsel to withdraw from the case and appointed another lawyer to represent her on appeal. The Department prepared a revised permanency plan with adoption and placement with relatives as the alternative goals. This plan, which was ratified by the juvenile court in mid-April 2003, confirmed that R.C.P.'s foster parents desired to adopt her. On October 13, 2003, the juvenile court entered an order denying the custody petition of R.C.P.'s grandparents and directing that she remain in the Department's custody.

M.A.F. perfected this appeal, taking issue with the juvenile court's conclusion that she committed severe child abuse. The Department has not appealed from the juvenile court's dismissal of its abandonment claims. It has properly declined to defend the juvenile court's finding that M.A.F. violated Tenn.Code Ann. S 36-1-113(g)(4) with regard to C.J.O.FN4 However, the Department has requested this court to find that M.A.F. committed severe child abuse on R.C.P. under Tenn.Code Ann. s 37-1-102(b)(21)(A)-(C) (Supp .2003).

FN4. Where the abused child was someone other than "the child who is the subject of the petition or ... any sibling or half-sibling of such child," Tenn.Code Ann. s 36-1-113(g)(4) requires proof that the abused child was either temporarily or permanently residing in the perpetrator's home. The Department has correctly pointed out that the record contains no evidence that C.J.O. ever resided with B.J. or M.A.F.

II.

THE STANDARDS FOR REVIEWING TERMINATION ORDERS

A biological parent's right FN5 to the care and custody of his or her child is among the oldest of the judicially recognized liberty interests protected by the Due Process Clauses of the federal and state constitutions. FN6 Troxel v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054, 2060 (2000); Hawk v. Hawk, 855 S.W .2d 573, 577-79 (Tenn.1993); Ray v. Ray, 83 S.W.3d at 731. While this right is fundamental and superior to the claims of other persons and the government, it is not absolute. It continues without interruption only as long as a parent has not relinquished it, abandoned it, or engaged in conduct requiring its limitation or termination. Blair v. Badenhope, 77 S.W.3d 137, 141 (Tenn.2002); Stokes v. Arnold, 27 S.W.3d 516, 520 (Tenn.Ct.App.2000); O'Daniel v. Messier, 905 S.W.2d 182, 186 (Tenn.Ct.App.1995).

FN5. This right exists notwithstanding the marital status of the child's biological parents where a biological parent has established or is attempting to establish a relationship with the child. Lehr v. Robertson, 463 U.S. 248, 261-62, 103 S.Ct. 2985, 2993-94 (1983); Jones v. Garrett, 92 S.W.3d 835, 840 (Tenn.2002); Ray v. Ray, 83 S.W.3d 726, 732 (Tenn.Ct.App.2001). The right also extends to adoptive parents. Simmons v. Simmons, 900 S.W.2d 682, 684 (Tenn.1995).

FN6. U.S. Const. amend. XIV, s 1; Tenn. Const. art. I, s 8.

Termination proceedings in Tennessee are governed by statute. Parties who have standing to seek the termination of a biological parent's parental rights must prove two things. First, they must prove the existence of at least one of the statutory grounds for termination.FN7 Tenn.Code Ann. s 36-1-113(c)(1); In re D.L.B., 118 S.W.3d 360, 367 (Tenn.2003); Jones v. Garrett, 92 S.W.3d at 838.

Second, they must prove that terminating the parent's parental rights is in the child's best interests.FN8 Tenn.Code Ann. s 36-1-113(c)(2); In re A.W., 114 S.W.3d 541, 545 (Tenn.Ct.App. 2003); In re C.W.W., 37 S.W.3d 467, 475-76 (Tenn.Ct.App.2000); In re M.W.A., Jr., 980 S.W.2d 620, 622 (Tenn .Ct.App.1998).

FN7. The statutory grounds for terminating parental rights are found in Tenn.Code Ann. s 36-1-113(g).

FN8. The factors to be considered in a "best interests" analysis are found in Tenn.Code Ann. s 36-1-113(i).

No civil action carries with it graver consequences than a petition to sever family ties irretrievably and forever. Tenn.Code Ann. s 36-1-113(l)(1); M.L.B. v. S.L.J., 519 U.S. 102, 119, 117 S.Ct. 555, 565 (1996); In re Knott, 138 Tenn. 349, 355, 197 S.W. 1097, 1098 (1917); In re D.D.K., No. M2003-01016-COA-R3-PT, 2003 WL 23093929, at *8 (Tenn.Ct.App. Dec. 30, 2003) (No Tenn. R.App. P. 11 application filed). Because the stakes are so profoundly high, Tenn.Code Ann. s 36-1-113(c)(1) requires persons seeking to terminate a biological parent's

parental rights to prove the statutory grounds for termination by clear and convincing evidence. This heightened burden of proof minimizes the risk of erroneous decisions. In re C.W.W., 37 S.W.3d at 474; In re M.W.A., Jr., 980 S.W.2d at 622. Evidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable, State v. Demarr, No.
M2002-02603-COA-R3-JV, 2003 WL 21946726, at *9 (Tenn.Ct.App. Aug. 13, 2003) (No Tenn. R.App. P. 11 application filed), and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence. In re Valentine, 79 S.W.3d 539, 546 (Tenn.2002); In re C.D.B., 37 S.W.3d 925, 927 (Tenn.Ct.App.2000). It produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established. In re A.D.A., 84 S.W.3d 592, 596 (Tenn.Ct.App.2002); Ray v. Ray, 83 S.W.3d at 733; In re C.W.W., 37 S.W.3d at 474.

*6 Because of the gravity of their consequences, proceedings to terminate parental rights require individualized decision making. In re Swanson, 2 S.W.3d 180, 188 (Tenn.1999). Accordingly, Tenn.Code Ann. s 36-1-113(k) explicitly requires courts terminating parental rights to "enter an order which makes specific findings of fact and conclusions of law" whether they have been requested to do so or not. In re Adoption of Muir, No. M2002-02963-COA-R3-CV, 2003 WL 22794524, at *3 (Tenn.Ct.App. Nov. 25, 2003) (No Tenn. R.App. P. 11 application filed). These specific findings of fact and conclusions of law facilitate appellate review and promote just and speedy resolution of appeals. When a lower court has failed to comply with Tenn.Code Ann. s 36-1-113(k), the appellate courts must remand the case with directions to prepare the required findings of fact and conclusions of law. In re D.L.B., 118 S.W.3d at 367; In re K.N.R., No.
M2003-01301-COA-R3-PT, 2003 WL 22999427, at *5 (Tenn.Ct.App. Dec. 23, 2003) (No Tenn. R.App. P. 11 application filed).

Because of the heightened burden of proof required by Tenn.Code Ann. s 36-1-113(c)(1), we must adapt Tenn. R.App. P. 13(d)'s customary standard of review for cases of this sort. First, we must review the trial court's specific findings of fact de novo in accordance with Tenn. R.App. P. 13(d). Thus, each of the trial court's specific factual findings will be presumed to be correct unless the evidence preponderates otherwise. Second, we must determine whether the facts, either as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements required to terminate a biological parent's parental rights. Jones v. Garrett, 92 S.W.3d at 838; In re Valentine, 79 S.W.3d at 547-49; In re Adoption of Muir, 2003 WL 22794524, at *2; In re Z.J.S., No. M2002-02235-COA-R3-JV, 2003 WL 21266854, at *10 (Tenn. Ct.App. June 3, 2003) (No Tenn. R.App. P. 11 application filed); Ray v. Ray, 83 S.W.3d at 733; In re L.S.W., No. M2000-01935-COA-R3-JV, 2001 WL 1013079, at *5 (Tenn.Ct.App. Sept. 6, 2001), perm. app. denied (Tenn. Dec. 27, 2001).FN9

FN9. These decisions draw a distinction between specific facts and the combined weight of these facts. Tenn. R.App. P. 13(d) requires us to defer to the trial court's specific findings of fact as long as they are supported by a preponderance of the evidence. However, we are the ones who must then determine whether the combined weight of these facts provides clear and convincing evidence supporting the trial court's ultimate factual conclusion. The Tennessee Supreme Court

used this approach in In re Valentine when it recognized the difference between the conclusion that a biological parent had not complied substantially with her obligations in a permanency plan and the facts relied upon by the trial court to support this conclusion. In re Valentine, 79 S.W.3d at 547-49; see also Jones v. Garrett, 92 S.W.3d at 838-39.

III.

TERMINATIONS BASED ON A KNOWING FAILURE TO PROTECT UNDER TENN. CODE ANN. 37-1-102(B)(21)

M.A.F.'s primary challenge to the juvenile court's termination of her parental rights focuses on the court's conclusion that her failure to protect R.C.P. from B.J. was "knowing" for the purpose of Tenn.Code Ann. s 37-1-102(b)(21). She insists that her conduct was not "knowing" because she had no actual knowledge of B.J.'s conduct. While we have concluded that the juvenile court employed the wrong standard in this case, we have determined that the record contains clear and convincing evidence that M.A.F. knowingly failed to protect R.C.P.

A.

Parents have a duty to provide, and children have a corresponding right to be provided with, a safe environment, free from abuse and neglect. M.F.G. v. Dep't of Children & Families, 723 So.2d 290, 292 (Fla.Dist.Ct.App.1998); C.L.S. v. C.L.S., 722 S.W.2d 116, 121 (Mo.Ct.App.1986); In re S.D.S., 648 S.W.2d 351, 353 (Tex.Ct.App.1983); West Va. Dep't of Health & Human Res. ex rel. Wright v. Doris S., 475 S.E.2d 865, 879 (W.Va.1996). Accordingly, Tenn.Code Ann. s 36-1-113(g)(4) empowers the courts to terminate the parental rights of parents who have committed "severe child abuse" upon their own child or on any other child residing temporarily or permanently in their home. Parents who have not themselves severely abused their own child may still be found to have committed severe child abuse if they knowingly exposed the child to, or knowingly failed to protect the child from, conduct constituting severe child abuse. Tenn.Code Ann. s 37-1-102(b)(21)(A)-(C).FN10

FN10. Tenn.Code Ann. s 37-1-102(b)(21) defines "severe child abuse" as follows:

(A) The knowing exposure of a child to or the knowing failure to protect a child from abuse or neglect that is likely to cause great bodily harm or death and the knowing use of force on a child that is likely to cause great bodily harm or death;

(B) Specific brutality, abuse or neglect towards a child which in the opinion of qualified experts has caused or will reasonably be expected to produce severe psychosis, severe neurotic disorder, severe depression, severe developmental delay or retardation, or severe impairment of the child's ability to function adequately in the child's environment, and the knowing failure to protect a child from such conduct; or

(C) The commission of any act towards the child prohibited by ss 39-13-502-39-13-504, 39-13-522, 39-15-302, and 39-17-1005 or the knowing failure to protect the child from the commission of any such act towards the child; or

(D) Knowingly allowing a child to be present within a structure where the act of creating methamphetamine, as that substance is identified in s 39-17-408(d)(2), is occurring.

*7 The terms "knowing" and "knowingly" are not defined in Tenn.Code Ann. s 37-1-102 or in any other statute pertaining to proceedings to terminate parental rights or other civil proceedings involving juveniles. While the terms are defined in Tenn.Code Ann. s 39-11-106(a)(20) (2003),FN11 the application of these definitions is expressly limited to Title 39 which deals exclusively with criminal offenses. Accordingly, we have determined that the juvenile court erred by basing its decision on the definition of "knowing" in Tenn.Code Ann. s 39-11-106(a)(20).
While the rights at stake in a proceeding to terminate parental rights have constitutional significance, they are protected, not by importing criminal standards of mens rea into the proceeding, but rather by applying a heightened burden of proof.

FN11. The definitions of "knowing" and "knowingly" in Tenn.Code Ann. s 39-11-106(a)(20) are modified versions of the definitions in the American Law Institute's Model Penal Code s 2.02(2)(b) (1962).

The words "knowing" and "knowingly" do not have fixed or uniform meanings. Their meanings in particular cases vary depending on the context in which they are used or the character of the conduct at issue. Still v. Comm'r of the Dep't of Employment & Training, 657 N.E.2d 1288, 1293 n. 7 (Mass.App.Ct.1995), aff'd, 672 N.E.2d 105 (Mass.1996); State v. Contreras, 253 A .2d 612, 620 (R.I.1969).
Because the parties have not supplied us with definitions of these terms, statutory or otherwise, we will employ the basic rules of statutory construction to ascertain their meaning. Accordingly, we will give these words their natural and ordinary meaning, Frazier v. East Tenn. Baptist Hosp., Inc., 55 S.W.3d 925, 928 (Tenn.2001), and we will construe them in the context of the entire statute
and the statute's general purpose. State v. Flemming, 19 S.W.3d 195, 197 (Tenn.2000). We will also construe the words in a manner consistent with the rules of grammar and common usage.

The word "knowing," when used as an adjective, connotes a state of awareness. In re D.P., 96 S.W.3d 333, 336 (Tex.Ct.App.2001). Thus, it requires some inquiry into the actor's state of mind. A person's conduct is "knowing," and a person acts or fails to act "knowingly," when he or she has actual knowledge of the relevant facts and circumstances or when he or she is either in deliberate ignorance of or in reckless disregard of the information that has been presented to him or her.
Persons act "knowingly" when they have specific reason to know the relevant facts and circumstances but deliberately ignore them. FN12

FN12. Knowing conduct differs from negligent conduct primarily because negligent conduct does not require a state of awareness. Mode Penal Code s 2.02(2)(b) cmt. 4. Conduct is "knowing" if the evidence indicates that the actor deliberately closed his or her eyes to avoid knowing what was taking place.

For the purpose of determining whether a parent's conduct runs afoul of Tenn.Code Ann. s 37-1-102(b)(21), parents who are present when a child is abused but who fail to intervene to protect the child have knowingly exposed the child to or have failed to protect the child from abuse. However, the "knowing" requirement in Tenn.Code Ann. s 37-1-102(b)(21) is not limited to parents who are present when severe abuse actually occurs. A parent's failure to protect a child will also be considered "knowing" if the parent had been presented with sufficient facts from which he or she could have and should have recognized that severe child abuse had occurred or that it was highly probable that severe child abuse would occur. West Va. Dep't of Health & Human Res. ex rel. Wright v. Doris S., 475 S.E.2d at 878-879 . Thus, this appeal requires us to determine whether this record contains clear and convincing evidence that M.A.F. had specific reason to know but deliberately or recklessly ignored that B.J. either had severely abused R.C.P. or that it was highly probable that B.J. would severely abuse R.C.P.

B.

*8 Neither the Department nor the guardian ad litem proved that M.A.F. was present when B.J. sexually abused her daughter or that she had actual knowledge that this abuse was occurring. However, the record contains evidence that proves clearly and convincingly that M .A.F. deliberately and recklessly disregarded the information she had regarding B.J.'s prurient interest in sex that made it likely that he would sexually abuse R.C.P.

M.A.F. knew that B.J. had a prurient interest in sex. She knew that he searched for and downloaded pornographic materials from the Internet. She knew that he watched pornographic videos because she obtained them for him. She had also personally participated in group sex that he arranged, and she allowed him to videotape her having sex with other partners.

In addition, M.A.F. knew that B.J. was a pedophile. Many of the pornographic videos she obtained for him characterized their actors as "barely legal." At B.J.'s instigation, M.A.F. herself engaged in oral sex with an eleven-year-old boy and permitted the boy to attempt to have sexual intercourse with her. On one occasion, she, B.J., and the boy had group sex. She also knew that B.J.'s sexual appetite was not limited to young boys. She was aware that B.J. had dressed R.C.P. in women's clothes and that he had taken a picture of R.C.P. wearing only a pair of M.A.F.'s thong underwear. On at least one other occasion, M.A.F. was sufficiently concerned about B.J.'s sexual proclivities to instruct E.C., who was eleven or twelve years old at the time, not to sit on his lap.

Reasonable persons possessing the information that M.A.F. possessed could only have concluded that B.J. was a pedophile. She deluded herself into assuming that B.J. had no sexual interest in R.C.P. despite his obvious sexual proclivities toward young children. In spite of her knowledge, M.A.F. routinely left R.C.P. with B.J. alone and unsupervised for many hours while

she was away at work. By deliberately and recklessly ignoring that B.J. was an active pedophile and by routinely leaving R.C.P. in B.J.'s sole custody and control, M.A.F. committed severe child abuse as defined in Tenn.Code Ann. s 37-1-102(b)(21)(C) because she knowingly failed to protect R.C.P. from being raped by B.J.FN13

FN13. We have concluded that the Department and the guardian ad litem did not clearly and convincingly prove a violation of Tenn.Code Ann. S 37-1-102(b)(21)(A) because of the absence of proof that B.J.'s conduct caused or could cause "great bodily harm or death." The Department asserts in its appellate brief that the evidence would also have supported finding a violation of Tenn.Code Ann. s 37-1-102(b)(21)(B). We disagree. The record does not contain the opinions of qualified experts that B.J.'s conduct, no matter how despicable, has or will produce severe psychosis, neurotic disorder, depression, developmental delay or retardation, or impairment of R.C .P.'s ability to function adequately in her environment.

IV.

M.A.F.'S _DURESS_ DEFENSE

As a final matter, M.A.F. asserts that the juvenile court erred by failing to conclude that her failure to protect her daughter from B.J. should be excused because her ability to protect her daughter was undermined by B.J.'s physical and psychological abuse. We have determined that M.A.F. has failed to carry her burden of proving that her ability to protect her daughter was overridden by the treatment she was receiving from B.J.

Duress is a defense to prosecution in a criminal case. Tenn.Code Ann. s 39-11-504(a) (2003). It need not be raised as an affirmative defense in a criminal proceeding, and thus, a criminal defendant is entitled to an acquittal whenever the evidence raises a reasonable doubt regarding the existence of duress. State v. Culp, 900 S.W .2d 707, 710 (Tenn.Crim.App.1994). However, proceedings to terminate parental rights under Tenn.Code Ann. s 36-1-113 are not criminal proceedings. Therefore, a defense based on duress in the context of a termination proceeding must be analyzed using civil, as opposed to criminal, procedural standards.

*9 Duress is also an affirmative defense in civil proceedings. Tenn. R. Civ. P. 8.03. It consists of unlawful restraint, intimidation, or compulsion that is so severe that it overcomes the mind or will of ordinary persons. Johnson v. Ford, 147 Tenn. 63, 86, 245 S.W. 531, 538 (1922); Dockery v. Estate of Massey, 958 S.W.2d 346, 348 (Tenn.Ct.App.1997). Parties seeking to rely on the defense in a civil proceeding must specifically plead it and then must introduce evidence supporting it. Ass'n of Owners of Regency Park Condos. v. Thomasson, 878 S.W.2d 560, 566 (Tenn.Ct.App.1994) (a party asserting an affirmative defense has the burden of proving it).

The lawyer who originally represented M.A.F. did not specifically plead duress. Ignoring this oversight would be of little practical benefit to M.A.F. in this case because she failed to produce evidence sufficient to make out the defense.

While M.A.F.'s therapist testified favorably for her at trial, the therapist was never asked to testify about the effects that B.J.'s physical and psychological abuse had on M.A.F.'s ability protect her child from B .J. The therapist never stated or implied that M.A.F.'s ability to understand, process, or act upon information was impaired because of the way that B.J. was treating her. Thus, the record contains no probative evidentiary basis for us to conclude that M.A.F. was unable to protect her child from B.J. because of the abuse she was receiving from him.

V.

The record contains clear and convincing evidence that M.A.F. violated Tenn.Code Ann. s 36-1-113(g)(4) by knowingly failing to protect her daughter from B.J.'s severe child abuse and that terminating M.A.F.'s parental rights is in R.C.P.'s best interests. Accordingly, we affirm the judgment and remand the case to the juvenile court for whatever further proceedings may be required. We tax the costs of this appeal to the Tennessee Department of Children's Services.

WILLIAM B. CAIN, J., concurs.

WILLIAM B. CAIN, J., concurring.

I concur in the judgment that clear and convincing evidence establishes abundant grounds for the termination of the parental rights of the mother in this case and further establishes that it is in the best interests of the child to terminate her parental rights.

I continue, however, to adhere to my view that a preponderance of the evidence standard on the one hand and a clear and convincing evidence standard on the other are completely incompatible with each other both at the trial level and at the appellate level. My views are exhaustively set forth in Estate of Acuff v. O'Linger, 56 S.W.3d 527 (Tenn.Ct.App.2001) perm.app.denied (Oct. 1, 2001) and in In re Z.J.S. and M.J.P., No. M2002-02235-COA-R3-JV, 2003 WL 21266854 (Tenn.Ct.App.
June 3, 2003) (Cain, Judge, concurring) and in State v. R.S. and K.S., No. M2002-00919-COA-R3-CV, 2003 WL 22098035 (Tenn.Ct.App.Sept.11,2003) (Cain, Judge, concurring), along with In re: K.N.R., et al., No. M2003-01301-COA-R3-PT (Tenn.Ct.App.2004); see also Colorado v. New Mexico, 467 U.S. 310, 104 S.Ct. 2433, 81 L.Ed.2d 247 (1984); Taylor v. Commissioner of Mental Health, 481 At.2d 139, 153-54 (Me.1984); Riley Hill General Contractor, Inc. v. Tandy Corp., 737 P.2d 595, 604 (Or.1987); Beeler v. American Trust Co., 147 P.2d 583 (Ca.1944), (Traynor, Justice, dissenting).

*10 In any event, the evidence in this case is overwhelming and the clear and convincing evidence standard set forth in Estate of Acuff v. O'Linger is clearly met. I concur in the judgment.

Tenn.Ct.App.,2004.

In re R.C.P.

Not Reported in S.W.3d, 2004 WL 1567122 (Tenn.Ct.App.)

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CERTIFICATE OF SERVICE

I hereby certify that I have delivered a true and exact copy of the foregoing Amicus Curiae Brief on to John H. Bledsoe, Senior Counsel, Criminal Justice Division, P.O. Box 20207, Nashville, Tennessee 37202 and to Gregory P. Isaacs, Gregory P. Isaacs Law Firm, 618 S. Gay Street, Suite 300, P.O. Box 2448, Knoxville, Tennessee 37901, by depositing same in the U.S. mail with sufficient postage affixed thereto.

This 8 day of August, 2014.

_____
A. Wayne Henry