



Adoption Advance Sheet

By Dawn Coppock

Better Best Interest:

Comparative Review of Tennessee's Old and New Best Interest Factors

Blue is previous (pre April 22, 2021) Green is current

Effective April 22, 2021, the legislature created new factors for courts to consider when determining whether termination of parental rights is in the best interest of a child. HB 200/SB 205. Public Chapter number pending. To clarify for those who don't regularly practice in this area of law, a court does not reach the best interest inquiry until a person, other than the parent, has custody of the child and files an action to terminate the parent's rights and has already proven parental unfitness in the form of as least one particular ground for termination of parental rights.

The "new" factors, effective April 22, 2021, incorporate a child's sense of time and need for stability into the entirety of the analysis by an overarching presumption that "prompt and permanent placement in a safe environment" is in the best interest of the child. The new factors will be substituted for the prior best interest factors found at T.C.A. § 36-1-113 (i).

When considering the factors set forth in subdivision (i)(1), the prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest. § 36-1-113 (i)(2).

The subject areas considered by the new and expanded factors are largely the same as those previously considered. Greater emphasis on the needs of children has been added in each subject area as noted below. Courts no longer need to make findings for each enumerated factor, but are directed to identify the factors that are applicable to the case at bar and to make specific findings of fact regarding only the applicable factors.

Safety

Safety of the parent's home is still a fundamental concern. Consideration of the child's prior trauma is new.

6. Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward other children in the family or household;

7. Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(R) Whether the physical environment of the parent's home is healthy and safe for the child;

(N) Whether the parent, or other person residing with or frequenting the home of the parent, has shown brutality or physical, sexual, emotional, or psychological abuse or neglect toward the child or any other child or adult;

(G) Whether the parent, parent's home, or others in the parent's household trigger or exacerbate the child's experience of trauma or posttraumatic symptoms;

(F) Whether the child is fearful of living in the parent's home;

The Child's Relationships

Existing Relationship with Parent

The prior assessment of whether the relationship was meaningful did not specify meaningful to whom, nor was it specified that the meaning should be positive. The new formulation speaks directly to child's need for "a secure and healthy parental attachment." While the parent may not have formed a secure, healthy parental attachment at the time of trial, there should be, at least the reasonable expectation that the parent can create that attachment.

Previously, regular visits weighed in favor of a parent, regardless of the child's experience of the visits. Use of visits to cultivate a positive relationship with the child is the new metric.

3. Whether the parent or guardian has maintained regular visitation or other contact with the child;

4. Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;

(D) Whether the parent and child have a secure and healthy parental attachment, and if not, whether there is a reasonable expectation that the parent can create such attachment;

(E) Whether the parent has maintained regular visitation or other contact with the child and used the visitation or other contact to cultivate a positive relationship with the child;

Existing attachment to others and stability

Longview is expressly considered for the first time in the new factor "the child's critical need for stability and continuity throughout the child's minority." The previous factor regarding the effect of change of caretakers on the child appears in the new factors without modification.

The new factors require that the court determine whether the child has formed a healthy parental attachment with someone else. This, combined with whether the child has a healthy parental attachment with the parent, is the heart of many best interest cases.

The impact of termination of parental rights on other relationships and information about the child's heritage is also expressly added as a factor. While relationships beyond the primary caregiver, in both the birth and custodial families, and difference in the heritage information available, were previously an undercurrent in some cases, an expressed factor should facilitate more direct examination when this factor is in play.

5. The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

(A) The effect a termination of parental rights will have on the child's critical need for stability and continuity of placement throughout the child's minority;

(B) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological, and medical condition;

(H) Whether the child has created a healthy parental attachment with another person or persons in the absence of the parent;

(I) Whether the child has emotionally significant relationships with persons other than parents and caregivers, including biological or foster siblings, and the likely impact of various available outcomes on these relationships and the child's access to information about the child's heritage;

Meeting the Child's Basic and Specific Needs

The prior factors don't consider the quality of the home the parent offers beyond the most basic physical safety. The ability to keep a child safe from physical harm versus the ability to understand and consistently offer what the child needs to thrive are a very different standards. Maintaining clean drug screens or moving away from a partner who abused the child reflect removal of basic safety concerns. The ability to consistently keep a roof over a child's head and get them to school and medical appointments are part of meeting the child's needs. Here, the bar has risen considerably because it is in a child's best interest to live where their basic and specific needs are consistently met.

(P) Whether the parent has demonstrated an understanding of the basic and specific needs required for the child to thrive;

(C) Whether the parent has demonstrated continuity and stability in meeting the child's basic material, educational, housing, and safety needs;

(Q) Whether the parent has demonstrated the ability and commitment to creating and maintaining a home that meets the child's basic and specific needs and in which the child can thrive;

Parental Capacity

The factor regarding the parent's mental or emotional status is substantively unchanged.

8. Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child;

(T) Whether the mental or emotional fitness of the parent would be detrimental to the child or prevent the parent from consistently and effectively providing safe and stable care and supervision of the child.

Efforts, Adjustment

In state agency cases, the Tennessee Department of Children's Services is to provide reasonable efforts to help parents make lasting adjustments to the problematic circumstances. This is unchanged. But there is a new factor applicable to all parents considering their efforts to avail themselves to available social service programs.

The factor regarding whether the parent has made lasting adjustments again raises the bar beyond just basic safety, this time to "safe and beneficial".

Whether the parent has successfully parented a child before is another new factor that could come into play more than one way. Most commonly, if a parent has successfully parented a child before some problem arose, they are more likely to be able to resume an acceptable level of care when the problem is resolved.

1. Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;

2. Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;

(J) Whether the parent has demonstrated such a lasting adjustment of circumstances, conduct, or conditions to make it safe and beneficial for the child to be in the home of the parent, including consideration of whether there is criminal activity in the home or by the parent, or the use of alcohol, controlled substances, or controlled substance analogues which may render the parent unable to consistently care for the child in a safe and stable manner;

(K) Whether the parent has taken advantage of available programs, services, or community resources to assist in making a lasting adjustment of circumstances, conduct, or conditions;

(L) Whether the department has made reasonable efforts to assist the parent in making a lasting adjustment in cases where the child is in the custody of the department;

(O) Whether the parent has ever provided safe and stable care for the child or any other child;

Urgency

Considering the parent's sense of urgency is an entirely new factor. This value is echoed in the presumption that prompt permanence fosters a child's best interest. Historically, there are few parental consequences of enjoying a little break before attempting to cure the parental shortcoming that caused the child to be removed. However, momentum to regain custody typically diminishes with time, at least until a termination of parental rights action is filed. But, the consequences of parental delay is tremendous for the child. If the child is placed with a quality caregiver, the child will, and for his or her mental health should, over time, form a secure parental attachment with the caregiver. Permitting the child to reside away from the parent long enough for another parental attachment to form and then to disrupt that attachment, is emotionally harmful to the child. Parental urgency not only demonstrates the strength of commitment necessary to successfully raise a child to adulthood, it is also a critical element to keep separation between parent and child short. Short separations reduce the risk of emotional harm to the child.

(M) Whether the parent has demonstrated a sense of urgency in establishing paternity of the child, seeking custody of the child, or addressing the circumstance, conduct, or conditions that made an award of custody unsafe and not in the child's best interest;

Financial support

The best interest factor related to the parent's financial support of the child is modified to remove the reference to the Tennessee child support guidelines and substitute the low standard "more than token." The reference to the consistency of payments, an indicator of parental commitment, is retained.

9. Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to T.C.A. § 36-5-101.

(S) Whether the parent has consistently provided more than token financial support for the child;

Termination of parental rights and adoption law require consideration of the interests of all members of the triad, biological parents, prospective adoptive parents and most importantly, the child. Those interests often compete. The constitutionally protected status of birth parents is widely known. But children also enjoy constitutionally protected rights. T.C.A. § 36-1-101(d). Specifically, that their best interest be protected above the rights of adults when such rights are in competition. The new best interest factors strengthen protections for children at the court's first opportunity, after the parent has been found to be unfit.

Prepared by: Dawn Coppock – April 26, 2021