

**AN APPEAL FOR CHANGE: ELIMINATING THE SECOND BITE AT THE APPLE IN TENNESSEE JUVENILE CASES**

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I. INTRODUCTION

“Abbey,”<sup>1</sup> is an eight year old girl who has been repeatedly raped by her father. One day, Abbey disclosed to her mother that she had been sexually abused by her father. The mother immediately sought medical and mental health treatment and the assistance of the Tennessee Department of Children’s Services (DCS).

At an adjudicatory hearing<sup>2</sup> in front of a juvenile court judge, DCS provided physical evidence, medical testimony, forensic interview testimony, father’s psychosexual report, mental health testimony, and party testimony to establish the allegations set forth in the Petition alleging dependency and neglect. During the hearing, the father conceded that the child appeared to have been raped, but he denied the child’s allegations that he was the culprit. The father presented the testimony of friends and family to attest to his good character. After a full hearing, the juvenile court found clear and convincing evidence that the allegations in the petition were true and entered an order awarding custody to the mother and supervised visitation for the father.

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<sup>1</sup> While the name and the situation are both fictional, the authors have, through their extensive experience in juvenile courts, seen similar facts and circumstances occur all too often.

<sup>2</sup> Most “trials” in juvenile courts are referred to as “adjudicatory hearings.”

The father filed a timely appeal to the circuit court, wherein the matter was retried in its entirety, as if the juvenile proceedings never happened.<sup>3</sup> At the beginning of the circuit court trial, the father sought a dismissal based on DCS's failure to comply with the circuit court's formal rules governing the proceedings (i.e. no witness list presented to the opposing party within ten days of trial). Based upon this technicality, the proceedings were limited to testimony by the parties. This procedural decision left a DCS caseworker and the mother to testify that the father abused the child while the father testified that he did not. Although the medical and mental health reports were part of the juvenile court record, the circuit court<sup>4</sup> would not allow them to be entered into evidence without the authors of those reports to authenticate them; however, since the authors were excluded as witnesses, the reports were not allowed in as evidence.<sup>5</sup> Ultimately, the circuit court concluded that the testimony presented on that day could not establish clear and convincing evidence of dependency and neglect and the court, therefore, reinstated the father's custody as it existed prior to the petition being filed.

The parties could not reasonably appeal to the Court of Appeals because the only appealable record was the one created in circuit court, which, admittedly, was without sufficient evidence to warrant an alternate decision. As a result of the father's second bite at the apple and the unnecessary formality of the appellate venue, Abbey was returned to the custody of her abusive father, without regard to the prior findings of the juvenile court.

Decisions from juvenile courts should not be disregarded. They were designed over a century ago with a purpose that has endured over time: keep the focus on rehabilitating children and families, not on formality.<sup>6</sup> From the inception of Tennessee's juvenile court system to the present, juvenile proceedings have evolved to ensure that the goals of the court are met while ensuring due process to the litigants the court is designed to serve. Changes that have occurred over the years include: (1) notice of the right to legal counsel;<sup>7</sup> (2) free appointment of legal

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<sup>3</sup> TENN. CODE ANN. § 37-1-159(a) (West 2010).

<sup>4</sup> Although Tennessee Code Annotated section 37-1-159(a) provides the circuit court with appellate jurisdiction over this type of action, many counties allow the judge of the Chancery Court to preside by interchange, pursuant to Tennessee Code Annotated section 17-2-202 (a)(2).

<sup>5</sup> The excluded witnesses already authenticated the reports through testimony during the, now irrelevant, juvenile court proceeding.

<sup>6</sup> Korine L. Larsen, *With Liberty and Juvenile Justice For all: Extending the Right to a Jury Trial to the Juvenile Courts*, 20 WM. MITCHELL L. REV. 835, 839 (1994).

<sup>7</sup> TENN. CODE ANN. § 37-1-126(b) (West 2012). Although the right to counsel was acknowledged in case law for many years, in 2008 the code was modified to include

counsel for qualifying parties;<sup>8</sup> (3) juvenile proceedings presided over by a judge with a law license;<sup>9</sup> and (4) full adjudicatory hearings governed by the rules of procedure and evidence.<sup>10</sup>

Admittedly, a *de novo* appellate trial to the circuit court may have been appropriate prior to these improvements to procedural safeguards. However, with the implementation of the additional safeguards, thus assuring due process, the lack of deference afforded to juvenile court decisions serves no legitimate purpose other than to provide a retrial, or second bite at the apple, often resulting in delay and increased risk to the vulnerable youth of this state.

This article will, in Section II, detail the evolution of the juvenile court, emphasizing the purpose and specialty nature of the juvenile court and the history of the appellate process and standard of review. In Section III, this article will detail the basis for changing the juvenile appellate structure and standard of review. Lastly, Section IV of this article proposes a new appellate standard that will both serve to reinforce the public policy that spawned the creation of the specialized juvenile courts and, more importantly, to facilitate the best interests of the children of Tennessee.

## II. EVOLUTION OF THE JUVENILE COURT

### A. *The Juvenile Court and its Purpose*

Like it did for many states across the country, the twentieth century brought an evolution in the Tennessee judicial system. Courts began to recognize the need for distinctive goals and procedures in

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the right to counsel for both children and adults. TENN. CODE ANN. §37-1-126(a) (West 2012).

<sup>8</sup> TENN. CODE ANN. §37-1-126(a)(3) (West 2012); see NYASHA N. JUSTICE & LESLIE BARRETT KINCAID, *A RE-ASSESSMENT OF TENNESSEE'S JUDICIAL PROCESS IN FOSTER CARE CASES* 70-71 (2005). (Physical copies of the report are maintained by the Administrative Office of Courts).

<sup>9</sup> TENN. CODE ANN. § 17-1-106(a) (West 2013) (stating that a judge must be "authorized to practice law in the courts of this state").

<sup>10</sup> TENN. R. JUV. P. 28.; see *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) (holding that the "fair preponderance of the evidence" standard denied parents due process and that due process required that the case be proven by clear and convincing evidence); *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 31-32 (1981) (holding that parents faced with the prospect of losing their parental rights are entitled to the due process protections guaranteed by the Tennessee Constitution, article I, section 8 and the Due Process Clause of the Fourteenth Amendment which, at a minimum required representation when the particular facts warranted such); *Stanley v. Illinois*, 405 U.S. 645, 649 (1972) (stating that because of the interests at stake in a termination of parental rights case, fundamental fairness required that parents be afforded a hearing on adequate notice).

matters addressing the confinement and care of children.<sup>11</sup> Along with specific processes intended to further the goal of rehabilitation and protection, specific judges were recognized to do the work of the juvenile court as well.<sup>12</sup> Finally, the juvenile courts firmly established the nature of cases and controversies for their venue.<sup>13</sup>

In 1899, Cook County, Illinois established the first juvenile court in the country.<sup>14</sup> Like its successors, the court provided a framework that viewed child offenders<sup>15</sup> “as child victims[,] less accountable for their condition and more entitled to rehabilitation than [in need of] punishment.”<sup>16</sup> Unlike some of the other early juvenile courts, however, Tennessee provided for the treatment of both “delinquent” and “dependent” children.<sup>17</sup> The former definition applied to children accused of criminal-like conduct<sup>18</sup> and the latter applied to children lacking appropriate parental care.<sup>19</sup>

While procedures varied across the country, all juvenile courts were premised upon the doctrine of *parens patriae*,<sup>20</sup> establishing the role of the court as consistent with that of a parent, providing both care and discipline. As a quasi-parent, juvenile courts were, and still are today, required to consider the best interests of the children for whom the courts were created to serve, whether in meting out sanctions for unlawful conduct or in prescribing custody to provide for the welfare of children without appropriate guardianship.<sup>21</sup>

Although over a century has passed since Tennessee created the juvenile courts, the purpose of the court remains relatively unchanged: to “provide for the care, protection, and wholesome moral, mental and physical development of children;”<sup>22</sup> to “...remove from children committing delinquent acts the taint of criminality and the consequences

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<sup>11</sup> 1911 Tenn. Pub. Acts 111.

<sup>12</sup> *Id.* at 113.

<sup>13</sup> *Id.* at 111.

<sup>14</sup> Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1191 (1970).

<sup>15</sup> Children who commit crimes are not deemed criminals, but are generally described as “offenders” or “delinquents.”

<sup>16</sup> Marvin Ventrell, *Evolution of the Dependency Component of the Juvenile Court: A Centennial Celebration of the Juvenile Court 1899-1999*, 49 JUV. & FAM. CT. J. 4, 4 (1998).

<sup>17</sup> 1911 Tenn. Pub. Acts 111-12.

<sup>18</sup> *Id.* Crimes committed by juveniles are considered civil offenses since the purpose of adjudications is to provide treatment and rehabilitation, not punishment.

<sup>19</sup> *Id.*

<sup>20</sup> *In re Hamilton*, 657 S.W.2d 425, 429 (Tenn. Ct. App. 1983) (The state as *parens patriae* has a special duty to protect minors).

<sup>21</sup> *Commonwealth v. Fisher*, 213 Pa. 48, 49-50 (1905).

<sup>22</sup> TENN. CODE ANN. §37-1-101(a)(1) (West 2009).

of criminal behavior and substitute therefor a program of treatment, training and rehabilitation;”<sup>23</sup> and to “[p]rovide a simple judicial procedure through which this part [Chapter 37] is executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.”<sup>24</sup>

If the purpose of the juvenile court seems broad and relatively stagnant since the court’s creation, the role of the juvenile court judge seems nearly herculean in both dimension and evolution. Unlike the purpose of the court itself, the role of its arbiter, the juvenile judge, has changed substantially over the second half of the twentieth century. One of the first juvenile judges, Julian Mack, aptly described the early role of the juvenile court judge:

The child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude. The ordinary trappings of the court-room are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.<sup>25</sup>

The early conception of the Juvenile Court proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise institutions of the State provided guidance and help to save him from a downward career.<sup>26</sup>

The image of the compassionate judge and the procedural leeway afforded these presumed benevolent courts were considerably eroded after Judge McGhee of the Gila County Superior Court in Arizona, serving as the juvenile judge, committed a fourteen-year-old boy to a state-operated reform school.<sup>27</sup> What was the crime that caused

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<sup>23</sup> TENN. CODE ANN. § 37-1-101(a)(2) (West 2009).

<sup>24</sup> TENN. CODE ANN. § 37-1-101(a)(4) (West 2009).

<sup>25</sup> Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909).

<sup>26</sup> *In re Gault*, 387 U.S. 1, 26 (1967) (citing Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 120 (1909)).

<sup>27</sup> *Id.* at 7.

Gerald Gault to be committed until his twenty-first birthday? Although the child denied it, he was found by Judge McGhee to have made a lewd phone call—a prank call to his neighbor.<sup>28</sup>

The United States Supreme Court, citing numerous errors and comparing the process afforded by Judge McGhee to a “kangaroo court,”<sup>29</sup> found that the lack of formal court processes denied Gault his constitutionally guaranteed right to due process.<sup>30</sup> The Court found that Gault had been denied timely notice of the hearing, at which he was committed to a reform school; denied notification of the right to counsel and appointment of counsel; denied the right to confront and cross-examine witnesses (the victim) against him; denied the privilege against self-incrimination; denied the right to appeal; and denied a record from which an appropriate appeal could be made.<sup>31</sup>

Modern juvenile judges are expected to maintain the altruistic tone of the early years of the court. At the same time however, absent extraordinary circumstances, they must carefully safeguard the rights of children and parents, as delineated by *Gault*, as well as establish the right of parents to be free from the custodial interference of the state.<sup>32</sup> Juvenile judges are called upon to serve the traditional roles of fact-finder and applier of the law, but also to administer probation departments,<sup>33</sup> school programs,<sup>34</sup> and administrative boards.<sup>35</sup> Judges often advocate for benefits and services necessary to rehabilitate children. Finally, in perhaps their most arduous role, juvenile judges

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<sup>28</sup> *Id.* at 7-8 (The caller alleged that Mr. Gault, made statements such as, “Are your cherries ripe today?” and “Do you have big bombers?”).

<sup>29</sup> *Id.* at 28.

<sup>30</sup> *Id.* at 58-59; U.S. CONST. amend. XIV.

<sup>31</sup> *Gault*, 387 U.S. 1 at 13-59.

<sup>32</sup> *Hawk v. Hawk*, 855 S.W. 2d 573, 577 (Tenn. 1993) (due to the right to privacy that parents enjoy, absent substantial harm or risk thereof, there is no compelling justification to interfere with this fundamental right); *In re Knott*, 197 S.W. 1097, 1098 (Tenn. 1917) (although a parent’s right to rear his/her child is protected from state interference, it may be removed where the child’s welfare is materially jeopardized); *State ex. rel. Bethell v. Kilvington*, 45 S.W. 433, 435 (Tenn. 1898) (stating that a parent’s right to the custody of his/her child is fundamental, but not inalienable).

<sup>33</sup> TENN. CODE ANN. § 37-1-105 (West 2011).

<sup>34</sup> TENN. CODE ANN. § 37-1-702 (West 2011).

<sup>35</sup> Adoption and Safe Families Act of 1997 (P.L. 105–89) (ASFA) (as codified at 42 U.S.C.A. § 675(5)(C)). The Act requires the juvenile court to, at a minimum, conduct a review hearing within 12 months from the time a child enters foster care to make decisions or recommendations on the permanent home for a child. *See also* Kurtis A. Kemper, *Construction and Application by State Courts of the Federal Adoption and Safe Families Act and Its Implementing State Statutes*, 10 A.L.R. 173 (Westlaw as of Jan. 27, 2014).

must collaborate with and provide leadership to community partners, both governmental and private, that provide the social and protective services for the children and families the court serves.<sup>36</sup>

At the inception of the juvenile courts, the “county judge”<sup>37</sup> or Chairman of the County Courts was vested with exclusive jurisdiction over all cases coming within the Juvenile Court Act of 1911.<sup>38</sup> The Judges of the circuit, chancery, and all other inferior courts, must be elected by the qualified voters of the district or circuit to which they are to be assigned.<sup>39</sup> Every judge must be thirty years of age, a resident of the State for five years, and a circuit or district resident for one year.<sup>40</sup> The term of service is established as eight years.<sup>41</sup>

By 1982, every county had a general sessions court.<sup>42</sup> The general sessions court, except in counties with a separate juvenile court established by private act,<sup>43</sup> has juvenile court jurisdiction.<sup>44</sup> Only general sessions judges or private act juvenile judges with a law license in Tennessee may order commitment of a juvenile to the Department of Correction, and currently, every general sessions and juvenile judge in Tennessee is a lawyer.<sup>45</sup>

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<sup>36</sup> Edward Leonard, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 JUV. & FAM. CT. J. 2 (1992).

<sup>37</sup> Until a 1978 Tennessee Constitutional Revision, the “county court” met quarterly and consisted of justices of the peace with quasi-judicial powers. One such member of the antiquated “court” was the “county judge” who presided over the quarterly “court”. This group of officials was replaced subsequently by the County Executive (now County Mayor) and the County Commission, ceding all judicial authority in 1978. Shortly thereafter, the Tennessee Supreme Court invalidated a provision that purported to substitute the position of “county executive” in place of “county judge”, holding that the judicial authority of juvenile court cannot lawfully be vested in the county executive; thus, statutory section purporting to vest in county executive “the judicial authority formerly exercised by the county judge, county chairman, or other elected official of county government” is unconstitutional. TENN. CONST. art. 6, § 4; TENN. CODE ANN. § 5-606. *Waters v. State ex rel. Schmutzer*, 583 S.W.2d 756, 760 (Tenn. 1979).

<sup>38</sup> 1911 Tenn. Pub. Acts 113.

<sup>39</sup> TENN. CONST. art. 6, § 4.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> The Juvenile Court Restructure Act of 1982, as amended, is codified in *TENN. CODE ANN.* §§37-1-201 to 214.

<sup>43</sup> Tennessee has 98 juvenile courts with 109 juvenile court judges and 45 Magistrates. Of these 98 courts, 17 are designated “Private Act” juvenile courts while the remaining 81 are general sessions courts with juvenile jurisdiction.

<sup>44</sup> TENN. CODE ANN. § 37-1-203 (West 2009).

<sup>45</sup> See *North v. Russell*, 427 U.S. 328 (1976) (lay judge allowed so long as trial *de novo* before licensed judge followed); see also *Ludwig v. Massachusetts*, 427 U.S.

Juvenile judges across the state preside over a broad category of cases involving children and their families. Juvenile courts have exclusive jurisdiction in proceedings involving minors alleged to be delinquent, unruly, dependent and neglected.<sup>46</sup> Juvenile Courts also have concurrent jurisdiction with circuit, chancery and probate courts in some areas.<sup>47</sup>

### *B. History of the Juvenile Appellate Standard*

The current appellate process for juvenile matters has been in place, in some form, since 1953.<sup>48</sup> From 1911 to 1953, prior to the juvenile appellate process being codified, Tennessee courts acknowledged the statutory silence on the juvenile appellate process, but recognized the limited jurisdiction of juvenile courts, thus deeming them inferior to circuit courts. Given the general jurisdiction of the circuit courts, a right to seek review of the decision of the juvenile court was obtainable via writ of certiorari.<sup>49</sup> Therefore, despite the absence of a statutory juvenile appellate remedy for the first four decades after the juvenile court's creation, the Code allowed circuit courts to carry discretionary juvenile appellate review upon petition of writ of certiorari.<sup>50</sup>

To understand why change is necessary, it is important to understand the evolutionary process that resulted in the appellate standard's current posture. Leading up to the Legislature's codification of the appellate process in 1953, the Tennessee Supreme Court addressed the issue in four notable cases that spanned forty years. In 1905, prior to the creation of juvenile courts, *Staples v. Brown* grappled with the broader issue of the breadth of the circuit court's appellate

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618 (1976) (Justice Stevens' dissent points to serious flaws in a system relying on trial de novo in order to justify lay judges.)

<sup>46</sup> TENN. CODE ANN. § 37-1-103.

<sup>47</sup> TENN. CODE ANN. § 37-1-104.

<sup>48</sup> 1953 Tenn. Pub. Acts 107. The 1953 rule was that juvenile court decisions were to be appealed to the circuit court within two days. This rule was amended in 1955 to say that appeals were to the circuit court, but no time frame was provided. 1955 Tenn. Pub. Acts 687. The rule was again changed in 1957 to say that juvenile appeals were to be filed in the circuit court within five days and that the matter was to be tried de novo with witnesses. 1957 Tenn. Pub. Acts 1077.

<sup>49</sup> BLACK'S LAW DICTIONARY 221 (7<sup>th</sup> ed. 1999). Black's defines "certiorari" as "[a]n extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review... [I]n the United States, it [certiorari] became a general appellate remedy."

<sup>50</sup> TENN. CODE (SHANNON'S ED.) §§ 4853, 4854, 6063, and 6072.

jurisdiction as it related to inferior courts.<sup>51</sup> In 1918, *State v. Bockman* evaluated the inferiority of the juvenile court to the circuit court and, as a result, the Tennessee Supreme Court held that the circuit court had initial appellate review of juvenile decisions.<sup>52</sup> In 1940, *In re Scalf's Adoption* addressed not only the juvenile court's inferior jurisdiction, but also why a *de novo* appeal to the circuit court was appropriate and better served the due process of families.<sup>53</sup> Finally, in 1953, *Doster v. State* reiterated the importance of the *de novo* appellate standard of review despite the anomalous result of granting two jury trials to a single alleged perpetrator.<sup>54</sup>

The remainder of this section will discuss, in detail, the aforementioned four cases that preceded the codification of the appellate standard for juvenile matters. The case analysis will be followed by a discussion of the statutory changes addressing juvenile appeals, and finally, an examination of the current state of juvenile appeals.

#### 1. *Staples v. Brown*

The *Staples* case is a Tennessee Supreme Court case from 1905 wherein the Plaintiff and Defendant both sought to be elected as the city attorney of Harriman, Tennessee.<sup>55</sup> When the official ballots were calculated, Defendant won the election by one vote (172 to 171).<sup>56</sup> Plaintiff contested the election, alleging that he received 173 votes, while Defendant only received 168 votes.<sup>57</sup> The Harriman City Council heard the case and decided it “would abide by the count made by the officers holding the election, and dismissed the contest.”<sup>58</sup> Next, the Plaintiff appealed to the circuit court.<sup>59</sup> The circuit court dismissed Plaintiff's appeal on the basis that the statute vesting original jurisdiction to hear the contest in the city council, did not provide for an appeal from its judgment.<sup>60</sup> Plaintiff refiled his appeal via a petition for certiorari to the circuit court, seeking a retrial on the merits of his case.<sup>61</sup>

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<sup>51</sup> *Staples v. Brown*, 85 S.W. 254 (Tenn. 1905).

<sup>52</sup> *State v. Bockman*, 201 S.W. 741 (Tenn. 1918).

<sup>53</sup> *In re Scalf's Adoption*, 144 S.W.2d 772 (Tenn. 1940).

<sup>54</sup> *Doster v. State*, 260 S.W.2d 279 (Tenn. 1953).

<sup>55</sup> *Staples v. Brown*, 85 S.W. 254, 254 (Tenn. 1905).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 255.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

Plaintiff's petition was dismissed on the ground that the judgment of the council was final and not entitled to appellate review.<sup>62</sup>

On appeal to the Supreme Court, the circuit court's finding was reversed and the Court held that the circuit court had both appellate and original jurisdiction over city council decisions, as it was an inferior body.<sup>63</sup> The Court, quoting the Tennessee Code, stated that circuit courts were vested with "appellate jurisdiction of all suits and actions of whatsoever nature or description, instituted before any inferior jurisdiction, whether brought before them by appeal, certiorari, or in any other manner prescribed by law."<sup>64</sup> In its holding, the *Staples* Court found that circuit courts were vested with the discretion to exercise appellate jurisdiction, via writ of certiorari, in cases where the law provided no appeal or as a substitute for appeal, and that these appellate matters were to be reviewed upon the merits.<sup>65</sup>

In instances where the right to appeal a particular cause was not statutorily provided, *Staples* and Shannon's Code, created a common law right to appellate review for parties who received adverse decisions from jurisdictions inferior to circuit courts. Although the context of *Staples* is not directly related to juvenile law, the Tennessee Supreme Court later expanded the *Staples* ruling to juvenile cases.

## 2. *State v. Bockman*

*Bockman* is a Tennessee Supreme Court case decided in 1918 involving a minor who was adjudicated delinquent by the Overton County Juvenile Court.<sup>66</sup> The Petitioner appealed the juvenile court's finding directly to the Tennessee Supreme Court.<sup>67</sup> Upon review, the Petitioner justified his direct appeal to the Tennessee Supreme Court by arguing that the importance of the juvenile court negated any necessity to allocate it as inferior to the circuit court.<sup>68</sup> Although the Court agreed with the Petitioner that the juvenile court performed very important work, the Court concluded that the juvenile court was inferior to the circuit court.<sup>69</sup> In support of that conclusion, the Court noted that the juvenile court's jurisdiction was limited, while circuit jurisdiction was

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 256 (citing Tennessee Code § 6063 & 6072).

<sup>65</sup> *Id.* at 256.

<sup>66</sup> *State v. Bockman*, 201 S.W. 741, 742 (Tenn. 1918).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 742.

general.<sup>70</sup> In fact, the Court noted that circuit jurisdiction was “wider than that of any other court known to [the] judicial system.”<sup>71</sup>

Although the Court’s finding that juvenile courts were inferior to circuit courts seemingly triggered the *Staples* ruling, the Court continued its analysis by evaluating the appellate jurisdiction of the Tennessee Supreme Court and the Court of Appeals.<sup>72</sup> The Court determined that statutes governing the jurisdiction of both appellate courts limited their jurisdiction to correcting errors from inferior courts of law and equity.<sup>73</sup> As the Court could not find that the juvenile court was either a court of law or equity, neither the Court of Appeals nor the Tennessee Supreme Court had jurisdiction to review juvenile court decisions.<sup>74</sup>

Relying upon the *Staples* decision, the Court ultimately determined that the circuit court had discretionary appellate review, via writ of certiorari, over juvenile matters.<sup>75</sup> Therefore, the Court held that the Petitioner’s appeal had been filed in error with the Tennessee Supreme Court and the matter was dismissed for the Petitioner to re-file his appeal in circuit court.<sup>76</sup>

*Bockman’s* determination that juvenile courts were inferior to the circuit court placed the question of appellate review of juvenile decisions squarely within the *Staples* decision.<sup>77</sup> The *Bockman* decision had enunciated two primary holdings: (1) despite the absence of a law providing for an appellate remedy from juvenile court decisions, an appellate remedy existed via writ of certiorari to the circuit court; and (2) neither the Court of Appeals nor the Tennessee Supreme Court had direct appellate review of juvenile court decisions.

### 3. *In re Scalf’s Adoption*

*In re Scalf’s Adoption* is a Tennessee Supreme Court case from 1940 wherein the Petitioner filed for custody of two minor children who he desired to adopt.<sup>78</sup> Child Services had custody of the children and contested the petition, alleging that the Petitioner was not suitable for

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 743.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> See generally *State v. Bockman*, 201 S.W. 741, 742 (Tenn. 1918).

<sup>78</sup> *In re Scalf’s*, 144 S.W.2d at 772.

custody.<sup>79</sup> The Petitioner succeeded in obtaining an order directing Child Services to turn over the children.<sup>80</sup> Child Services sought and was awarded a stay of the juvenile court's custody order pending their appeal to circuit court.<sup>81</sup> The circuit court declined to review the case, indicating that appellate jurisdiction was vested in the Court of Appeals.<sup>82</sup> Child Services then filed a petition for writ of certiorari to the circuit court.<sup>83</sup> The writ petition was dismissed by the circuit court.<sup>84</sup> Child Services appealed the dismissal to the Tennessee Supreme Court.<sup>85</sup>

In analyzing this case, the Court recalled its conclusion in *Bockman*, wherein no right of appeal from the judgment of the juvenile court was given, thus leaving review in circuit court upon petition for certiorari.<sup>86</sup> However, in this instance, there was an additional statute at issue. A juvenile court was created for Knox County by a specific chapter of the Private Acts of 1913 ("Knox County Act"). Although the jurisdiction was largely the same as that provided for in the general acts, the Knox County Act included a specific appellate provision stating that "an appeal may be taken from the final order of the court to the Circuit Court."<sup>87</sup>

The Knox County Act was amended in 1925 to change the name of the court to the Juvenile and Domestic Relations Court.<sup>88</sup> This amendment granted the newly named juvenile court original and concurrent jurisdiction with the circuit and chancery court to hear divorces, including the related determinations regarding custody and support.<sup>89</sup> The Petitioner argued that since the Knox County Juvenile and Domestic Relations Court was afforded concurrent jurisdiction with circuit and chancery courts, the amendment also afforded the Knox County Juvenile and Domestic Relations Court the same appellate review afforded to circuit and chancery decisions.<sup>90</sup> The Court disagreed stating that, after review, it found no provision in the Act of 1925 that illustrated legislative intent that appeals in ordinary juvenile cases were to be taken to the Court of Appeals rather than to the circuit

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 773.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* (citing *Brockman*, 201 S.W. at 741).

<sup>87</sup> *Id.* (quoting 1913 Tenn. Priv. Acts 896).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 773-74.

court.<sup>91</sup> Instead, the Court gave the following lengthy explanation for why it believed that a *de novo* appellate review by the circuit court better served the parties:

Such cases involving custody of delinquent and dependent children are quite generally informally heard, the parties not being represented by counsel. To require the preservation of a bill of exceptions, motion for a new trial, and other steps necessary in the removal of a case from a court of law to the Court of Appeals, would deprive the provision for appeal contained in these statutes of most of its usefulness. Parties involved, without professional advice, would be utterly incapable of perfecting such an appeal. The appeal contemplated by the Acts of 1913 and the amendment thereto was an appeal similar to that taken from a magistrate's court to the circuit court, with the hearing *de novo* in the circuit court. The Act of 1923 further provided that such appeals should be heard by the circuit judge either in term time or in vacation with a view of hastening disposition of the matter. Did such appeals go to the Court of Appeals, necessarily a hearing there would be delayed, at least, until the next term time of that court.<sup>92</sup>

The Court next addressed the Petitioner's argument that the Court of Appeals Act extended the Court of Appeals jurisdiction to "all civil cases, except those involving constitutional questions."<sup>93</sup> The Court refused to find that the legislature intended such a broad interpretation of the standard because that would extend the Court of Appeals appellate review to justices of the peace.<sup>94</sup> Instead, the Court concluded that the legislature intended for the Court of Appeals' appellate review to be limited to appeals from courts of law and equity.<sup>95</sup> Therefore, the Court reversed the dismissal by the circuit court and remanded the case to the circuit court for a *de novo* hearing.<sup>96</sup>

The *Scalf* decision was important because it was the first case to articulate the rationale for juvenile court appeals being heard on a *de*

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<sup>91</sup> *Id.* at 774.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* (citing 1925 Tenn. Pub. Acts 236).

<sup>94</sup> *Id.* Justices of the peace served as the precursor to today's general sessions courts. These courts have limited jurisdiction, but unlike the juvenile court, they are not courts of record – making any appeal other than a *de novo* trial futile.

<sup>95</sup> *Scalf*, 144 S.W.2d at 774.

<sup>96</sup> *Id.*

*novo* basis – not just a *de novo* review,<sup>97</sup> but a new trial. In summary, the *Scalf* Court’s reasoning for its decision was supported by the following findings: (1) juvenile proceedings were informal and generally executed without legal counsel; (2) navigating the formal procedural requirements to perfect an appeal to the Court of Appeals without counsel would be difficult, if not impossible; and (3) juvenile courts were similar to magistrate courts where the parties were in need of a hasty determination and the delay imposed by the Court of Appeals process would be harmful.<sup>98</sup> This same reasoning, although now a misconception, has persisted since 1940.

#### 4. *Doster v. State*

*Doster* is a 1953 Tennessee Supreme Court case in which a minor was adjudicated delinquent by the Juvenile Court of Weakley County following a jury trial and committed to a reform school.<sup>99</sup> *Doster* appealed the juvenile court’s commitment order to the circuit court via writ of certiorari, demanding a *de novo* trial, that is, a trial by a jury in the same manner as if the proceedings in the juvenile court had never taken place.<sup>100</sup> The circuit court rejected *Doster*’s argument and instead insisted that the court was under an obligation to confine its review to the juvenile court record.<sup>101</sup> After reviewing the record, “the circuit court dismissed *Doster*’s petition for certiorari.”<sup>102</sup> *Doster* appealed the circuit court’s finding to the Court of Appeals where the Court affirmed the circuit court’s ruling.<sup>103</sup> *Doster* then appealed the matter to the Tennessee Supreme Court.<sup>104</sup>

Upon review, the Court reiterated its finding from *Bockman* that, with no specific right to appeal in the juvenile statute, *Doster* was required to appeal to the circuit court via writ of certiorari.<sup>105</sup> Having appropriately followed the *Bockman* rule, the question then turned to whether *Doster*’s case should have been heard *de novo*.<sup>106</sup> Although the Court had previously issued an opinion indicating that circuit courts

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<sup>97</sup> A *de novo* review is the appellate standard of review by which most civil appeals are weighed. Under this “review” standard, an appellate court reviews the evidence presented before the trial court to reach an independent conclusion.

<sup>98</sup> *Scalf*, 144 S.W.2d at 794.

<sup>99</sup> *Doster*, 260 S.W.2d at 279.

<sup>100</sup> *Id.* at 280.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 279.

<sup>106</sup> *Id.* at 280.

were to hear juvenile cases on their merits (without using the phrase “*de novo*”),<sup>107</sup> the Court ruled that the holding in *Scalf* specifically reiterated that holding and provided a clear explanation of the propriety of a *de novo* appellate trial.<sup>108</sup>

Although the Court noted the thoughtful opinion the Court of Appeals delivered earlier in the case, it ultimately reversed both the Court of Appeals and circuit court’s rulings. The Court found that the *Jones* and *Scalf* rulings properly required a *de novo* appellate review by the circuit court, even if such would require the case to be tried on its merits as if it originated in the circuit court.<sup>109</sup> Holding that the doctrine of *res judicata* was no bar to the appellate process, the Court reconciled the doctrine and the *de novo* appeal as follows:

It is logically said in the opinion of the Court of Appeals that the above stated proceedings in these Juvenile Court cases would bring about the anomalous result of granting to either party desiring it two jury trials rather than one, since either party is entitled in these Juvenile Court proceedings to a trial by jury in the Juvenile Court, Code Section 10275. This does seem to be an anomaly, but it is not without precedent or legislative approval, as illustrated by the fact that Code Section 9033 provides that on appeal ‘all jury cases in the county court shall be tried *de novo* in the circuit court.’<sup>110</sup>

Although, the juvenile appellate review standard was codified shortly after the *Doster* opinion was released, this opinion fully solidified the *de novo* standard of review which continues to apply to today’s juvenile appellate process.

##### 5. *Evolution of the Codification of the Juvenile Appellate Process*

In 1953, the appellate standard for juvenile matters was first codified in Public Act House Bill 198, allowing two days to perfect the appeal.<sup>111</sup> Although House Bill 198 does not specifically articulate that these appellate matters were to be tried *de novo*, it alluded to a *de novo*

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<sup>107</sup> *Jones v. State ex rel.*, 201 S.W. 760, 760 (Tenn. 1918).

<sup>108</sup> *Doster*, 260 S.W.2d at 280; *Scalf*, 144 S.W.2d at 774.

<sup>109</sup> *Doster*, 260 S.W.2d. at 280-81.

<sup>110</sup> *Id.* at 281.

<sup>111</sup> 1953 Tenn. Pub. Acts 107.

review by indicating the matter was to be tried in the same manner as prescribed by law.<sup>112</sup>

In 1955, the issue of appeal was presented in Public Act House Bill 505. The relevant portion of the Bill was presented by Congressman Walter I. Forrester for approval wherein he advocated a similar position as that of the Court in *Scalf* and *Doster*, that the informality of juvenile proceedings would fall short of the formality needed to perfect an appeal before the Court of Appeals.<sup>113</sup> At the hearing, Mr. Forrester testified that,

[o]ur amendment is to ... direct the appeal to the circuit court of the county which we think is a good amendment for this reason that in appealing to the court of appeals, you should have a technical record, as it is a technical review of the case. And we believe that a lot of these appeals could fall short of the court of appeals if not tried out in the circuit court.<sup>114</sup>

Ultimately, House Bill 505 was codified to delineate that juvenile appeals were to be perfected before the circuit court.<sup>115</sup> Although the bill required appeals to be “simple,” no time frame was established for perfecting an appeal.<sup>116</sup>

In 1957, the appellate standard of review was yet again amended.<sup>117</sup> Although today’s timeframe is ten days, the 1957 version of the statute is much like the process under which appeals operate today in that it required juvenile appeals to be perfected before the circuit court within five days of the juvenile court’s disposition.<sup>118</sup> House Bill 848 specifically required a juvenile case on appeal to be reviewed *de novo* and further mandated that the circuit court was to hear testimony.

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<sup>112</sup> *Id.*

<sup>113</sup> *To Provide Disposition of Delinquent, Dependent, Neglected and Abandoned Children, and Repeal of Sections 10269, H. R. 505, 79th Gen. Assembly, Reg. Sess. (Tenn. 1955)* (from audio transcript of Congressman Walter I. Forrester recorded Mar. 3, 1955).

<sup>114</sup> *Id.* In his testimony, Mr. Forrester advocated specifically that the phrase “court of appeals” be replaced with the phrase “circuit court;” however, the public acts have never provided for an appeal of dependency and neglect or delinquency cases from juvenile court to the court of appeals. The authors believe that Mr. Forrester was speaking to the individual Private Acts wherein the juvenile appellate review in some counties was to the court of appeals. See 1945 Tenn. Priv. Acts 1511.

<sup>115</sup> 1955 Tenn. Pub. Acts 687.

<sup>116</sup> *Id.*

<sup>117</sup> 1957 Tenn. Pub. Acts 1076.

<sup>118</sup> *Id.*

### 6. *Appellate Standard in Other Juvenile Matters*

In 1994, the legislature modified the juvenile appellate standard by eliminating the *de novo* trial to circuit court for termination of parental rights cases.<sup>119</sup> The legislature's 1994 amendment entitled parties in termination of parental rights cases to directly appeal to the Court of Appeals with a presumption of correctness on issues of fact being extended to the juvenile court proceedings.<sup>120</sup> The first direct appeal made utilizing this statute was in *In re S.M., Jr.*, where the Court of Appeals thoroughly analyzed the propriety of the statutory change.<sup>121</sup>

*In re S.M., Jr.* is a 1996 Court of Appeals case wherein both a mother and father appealed the juvenile court's decision to terminate their parental rights to their son.<sup>122</sup> This case involved two mildly retarded parents and a moderately retarded son suffering from multiple health issues.<sup>123</sup> Immediately upon the child's birth, the Department of Human Services began providing intensive intervention services that continued for the first five or six years of the child's life.<sup>124</sup> After the Department discontinued its services, the family began deteriorating quickly and evidence suggested that the child's father began sexually molesting him.<sup>125</sup> The mother refused to believe the allegations and took no steps to protect the child from the father.<sup>126</sup> As a result, the Department of Children's Services (DCS) intervened and took custody of the child.<sup>127</sup>

After significant efforts to reunify the family, DCS filed a petition to terminate the mother and father's parental rights.<sup>128</sup> Following a full hearing, the juvenile court entered an order terminating both parents' rights to the child and awarded permanent guardianship to DCS.<sup>129</sup> In its order terminating the mother's parental rights, the juvenile court justified its holding with the following: (1) mother's lack of progress in counseling; (2) mother's continuing relationship with

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<sup>119</sup> TENN. CODE ANN § 37-1-159(a) (West 1994).

<sup>120</sup> *In re S.M., Jr.*, No. 01-A-01-9506-JV-00233, 1996 WL 140410, at \*3 (Tenn. Ct. App. Mar. 29, 1996).

<sup>121</sup> *See generally In re S.M., Jr.*, 1996 WL 140410, at \*4 (Tenn. Ct. App. Mar. 29, 1996).

<sup>122</sup> *Id.* at \*1.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at \*2.

<sup>129</sup> *Id.*

father; (3) the poor quality of visitation; (4) mother's inability to meet the child's special needs; and (5) mother's poor housekeeping and inability to provide a stable home environment.<sup>130</sup> In its order terminating the father's rights, the Court found that the father lacked parental responsibility and was unable to provide for his son's special needs.<sup>131</sup>

In their appeal, the parents asserted that they were deprived of their vested right to a *de novo* trial in circuit court following the juvenile proceeding and that the juvenile proceeding was constitutionally deficient.<sup>132</sup> The Court began its analysis with the parents' first argument.<sup>133</sup> The Court noted that prior to 1994, Tennessee Code Annotated section 37-1-159(a) directed parties that were dissatisfied with a juvenile court's decision in a termination of parental rights case to appeal to the circuit court, wherein the case would be reviewed *de novo* with witness testimony.<sup>134</sup> However, the Court determined that the amended law was the standard under which the parties were bound in this very apropos analysis:

The General Assembly changed the adjudicatory procedure for termination of parental rights cases in 1994 by amending Tenn. Code Ann. § 37-1-159(a) to eliminate the *de novo* trial in circuit court. *While this amendment accomplished the desired effect of hastening final decisions in termination of parental rights cases, it also accentuated the importance of the juvenile court proceedings. The juvenile court trial was no longer the warm-up for a circuit court trial. Instead, it became the parties' only opportunity to present evidence on the termination of parental rights issue. Appellate courts base their decisions on lower court's record, and thus the juvenile court record became the evidentiary foundation for all later judicial consideration of the case.*<sup>135</sup>

In determining its applicability to the parties, the Court found that the amendment discussed above was enacted eight months before

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at \*3.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* (emphasis added).

DCS filed its petition to terminate the parents' rights and ten months before the trial began in the juvenile court.<sup>136</sup> The Court reasoned that:

[a]pplying the amended version of Tenn. Code Ann. § 37-1-159(a) to this case did not curtail the parents' appellate rights nor did it come at such an advanced stage of the proceeding that it undermined their substantive rights. The parents had ample notice of the procedural changes and of the increased importance of the juvenile proceeding. Since the amendment left intact the parents' right to appeal to this court, it did not unconstitutionally hinder their ability to present their case in the juvenile court or their ability to seek appellate review of the juvenile court's decision.<sup>137</sup>

The Court quickly addressed and discarded the three remaining Constitutional arguments the parents presented: (1) their right to a jury trial; (2) their right to a trial presided over by a judge who is a licensed lawyer; and (3) their right to obtain the broad pre-trial discovery that would have been available to them in circuit court.<sup>138</sup> In addressing the parents' right to a jury trial, the Court found that termination of parental rights actions are civil in nature and statutory in origin wherein no jury trial is afforded to the parties in either the juvenile or circuit court.<sup>139</sup> Given that no right to a jury existed prior to the enactment of the amendment, there was no right to be affected by the 1994 amendment.<sup>140</sup> In addressing the parents' right to a law-trained judge, the Court discarded the argument. The Court found that a discussion on the merits would be inappropriately theoretical and academic in nature, because the parents' proceeding was, in fact, presided over by a judge who was licensed to practice law.<sup>141</sup> In addressing the parents' right to discover relevant information, the Court disagreed with the assertions of the parents regarding their narrow interpretation of the discovery rule in juvenile court versus the broad interpretation of the rule in circuit court.<sup>142</sup> The Court ruled that there was no material difference between juvenile procedure rules and civil procedure rules related to discovery; and even if there had been, these parties did not experience it because

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<sup>136</sup> *Id.* at \*5.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at \*5-6.

<sup>140</sup> *Id.* at \*6.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at \*7.

they conceded that the juvenile court ruled that it was proceeding under civil procedure rule governing discovery.<sup>143</sup>

Lastly, the parents complained that the juvenile court proceedings lacked sufficient due process protections.<sup>144</sup> In its discussion on this issue, the Court found that because of the interests at stake in a termination case, fundamental fairness required that the juvenile court afford the parents a hearing and adequate notice thereof,<sup>145</sup> representation,<sup>146</sup> and that the proof be established by clear and convincing evidence.<sup>147</sup> The Court was satisfied that all of these due process protections were employed during the juvenile proceeding and that the parents received a fair hearing; thus, the constitutional challenges relating to the hearing in juvenile court were found to be without merit.<sup>148</sup>

The Court of Appeals affirmed the juvenile court's ruling and held that the juvenile proceedings complied with all state and federal constitutional requirements. The Court also held that the juvenile court correctly determined that the child's physical safety and psychological maturation were best served by terminating the parental rights of both the mother and father.<sup>149</sup>

*In re S.M., Jr.* is important to this discussion because it acknowledges the value of the juvenile court proceeding and determined that, in termination proceedings, there was sufficient formality to permit the matter to be directly appealed to the Court of Appeals.<sup>150</sup> As there is little, if any, difference in how all other juvenile court adjudications occur, this article is advocating that the same appellate standard awarded to termination of parental rights proceedings be extended to all juvenile matters.

The three areas of law where the juvenile court wields concurrent jurisdiction with the circuit and chancery court are the following: to terminate parental rights, to legitimate children born out of wedlock, and to determine custody of children born out of

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* (citing *Stanley v. Illinois*, 405 U.S. 645, 649 (1972)).

<sup>146</sup> *Id.* (citing *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31-32 (1981)) and *TENN. R. JUV. P. 39(e)(2)*).

<sup>147</sup> *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982)) and *TENN. R. JUV. P. 39(e)(5)*).

<sup>148</sup> *Id.* at \*8.

<sup>149</sup> *Id.* at \*10.

<sup>150</sup> *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993). These courts have both held that, next to liberty interests, termination of parental rights cases deserve the most scrutiny.

wedlock.<sup>151</sup> Although the 1994 amendment conspicuously applied to termination cases because of the specific removal of those proceedings from the language, the amendment actually applied to all three types of proceedings.<sup>152</sup> The 1994 amendment modified Tennessee Code Annotated section 37-1-159 to add subsection (g) which stated “[a]ppeals in all other civil matters heard by the juvenile court shall be governed by the Tennessee Rules of Appellate Procedure.”<sup>153</sup> The 1994 amendment afforded the same direct appeal to the Court of Appeals for non-dependency and neglect custody and legitimation proceedings as it did for termination of parental rights cases.

### 7. *Juvenile Appellate Standard Today*

Tennessee Code Annotated § 37-1-159 (a) presently states: The juvenile court shall be a court of record; and any appeal from any final order or judgment in a delinquency proceeding... may be made to the criminal court or court having criminal jurisdiction that shall hear the testimony of witnesses and try the case *de novo*; and any appeal from any final order of judgment in an unruly child proceeding or dependent and neglect proceeding, ... may be made to the circuit court that shall hear the testimony of witnesses and try the case *de novo*. The appeal shall be perfected within ten (10) days, excluding nonjudicial days, following the juvenile court’s disposition.<sup>154</sup>

The current appellate standard has two major substantive components: (1) the appeal must be made to the circuit court (or criminal court, if appropriate) and (2) the standard of review is *de novo* with witness testimony.<sup>155</sup> In Tennessee, the circuit court is a court of record, like the juvenile court.<sup>156</sup> However, unlike the circuit court, the juvenile court is a court of limited jurisdiction while the circuit court has both broad general jurisdiction and specific appellate jurisdiction over certain cases decided by inferior courts.<sup>157</sup> The term “*de novo*” has been thoroughly defined by the appellate courts in the context of juvenile

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<sup>151</sup> TENN. CODE ANN. § 37-1-104 (West 2009).

<sup>152</sup> *In re D.H.Y.*, 226 S.W.3d 327, 331 (Tenn. 2007).

<sup>153</sup> TENN. CODE ANN. § 37-1-159(g) (West 1994).

<sup>154</sup> TENN. CODE ANN. § 37-1-159(a) (West 2009).

<sup>155</sup> *Id.*

<sup>156</sup> TENN. CODE ANN. § 16-11-102 (West 2013).

<sup>157</sup> TENN. CODE ANN. § 37-1-103 (West 2013); TENN. CODE ANN. § 16-11-102 (West 2013).

appeals.<sup>158</sup> In one notable decision, the Court of Appeals explained that a *de novo* trial is “a new trial on the entire case – that is on both questions of fact and issues of law – conducted as if there had been no trial in the first instance.”<sup>159</sup> Although Tennessee Code Annotated section 37-1-159 requires that the entire juvenile record, including the juvenile court’s findings, be forwarded to the circuit court when a matter is appealed, the circuit court is not limited to that record on review.<sup>160</sup> On the contrary, the circuit court must hear witnesses and be presented proof again and render an independent decision based on the evidence received in the circuit court proceeding.<sup>161</sup>

The current standard has been largely unchanged in over seventy years. When the appellate standard was codified, venue and procedure may have been appropriate because juvenile courts did not, and likely could not, afford the same due process protections to litigants as the circuit court; however, those disparities no longer exist. Moreover, the current appellate process is fraught with problems.

### III. OBSTACLES CREATED BY THE CURRENT STANDARD OF REVIEW

The obstacles created by the current juvenile appellate standard are abundant. This section will discuss five areas that demonstrate how the current appellate standard is sufficiently problematic to warrant modification. The current standard: (A) fails to facilitate the best interests of children; (B) is confusing; (C) lacks precedential weight necessary to guide juvenile judges and practitioners; (D) lacks transparency within the juvenile and circuit court (when exercising appellate jurisdiction), and; (E) diminishes juvenile court proceedings.

#### A. *The Current Appellate Standard Does Not Facilitate the Best Interests of Children*

As illustrated below in the analysis of *Green v. Green*, the current appellate standard does not facilitate the best interests of children. In fact, the *Green* court specifically found that, once appealed to the circuit court, the juvenile proceedings were of no

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<sup>158</sup> In re Isaiah L., 340 S.W.3d 692, 707 (Tenn. Ct. App. 2010); Cornelius v. Dep’t. Children Servs., 314 S.W.3d 902, 906 (Tenn. Ct. App. 2009); State v. Hood, 221 S.W.3d 531, 541 (Tenn. Ct. App. 2007); and DCS v. T.M.B.K., 197 S.W.3d 282, 289 (Tenn. Ct. App. 2006).

<sup>159</sup> In re Isaiah L., 340 S.W.3d 692, 707 (Tenn. Ct. App. 2011).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

consequence. The remainder of this section will analyze *Green* and the complications arising from the juvenile appellate standard it illuminates.

### 1. *Green v. Green*

*Green* is a 2009 Tennessee Court of Appeals case in which a father filed a petition for custody of his three minor children, alleging that they were dependent and neglected in the mother's care because the mother was married to a convicted sex offender.<sup>162</sup> Following a trial, the juvenile court found probable cause that the mother had allowed the step-father to have unsupervised access to the children and, as a consequence, found her to be unfit to properly care for the children.<sup>163</sup> At the trial's conclusion on November 30, 2005, the juvenile court granted the father's petition for custody and established visitation for the mother with an order precluding contact with the step-father.<sup>164</sup> The mother appealed the juvenile court's decision to the circuit court.<sup>165</sup>

The circuit court conducted a *de novo* trial on the father's original petition and concluded the matter nearly fourteen months after the entry of the juvenile court's order.<sup>166</sup> In its order reversing the juvenile court's decision, the circuit court noted that the juvenile court correctly found that the children were dependent and neglected based on their exposure to mother's registered sex offending husband but that the mother subsequently filed for divorce from the offending husband, thus removing the risk of harm warranting the finding and removal.<sup>167</sup>

The circuit court remanded the matter to the juvenile court for enforcement wherein the mother's custody was reinstated as it existed prior to the father's petition.<sup>168</sup> Based on the circuit court's finding, the juvenile court ruled that, although it had continuing concerns about the mother protecting the children from her former husband (as they had a child together), the court had no authority to place restrictions,

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<sup>162</sup> *Green v. Green*, M2007-01263-COA-R3-CV, 2009 WL 348289, at \*1-2 (Tenn. Ct. App. Feb. 11, 2009)(noting that the record is silent on the specifics, but gleans that shortly after the father filed his petition on Mar. 3, 2005, he was awarded temporary legal custody and then the mother was permitted visitation per a later ruling on Apr. 7, 2005).

<sup>163</sup> *Id.* at \*2.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at \*3. At the time the circuit court entered its ruling, the Court of Appeals did not believe that the mother had actually procured her divorce, only had it filed. The Court of Appeals believes the divorce became final during the remand to the juvenile court (approximately two years after the father initially filed his petition).

<sup>168</sup> *Id.* at\* 3.

conditions, or terms on the mother's custody.<sup>169</sup> The father appealed the circuit court ruling to the Court of Appeals.<sup>170</sup>

On appeal, the facts were undisputed; when the juvenile court heard the matter, the mother was married and residing with a registered sex offender and took no precautions to protect her children from their step-father.<sup>171</sup> When the circuit court heard the matter, the mother was no longer living with the offender and was in the process of obtaining a divorce.<sup>172</sup> The father's argument was based on his contention that once the circuit court acknowledged that the children had been dependent and neglected at one time, then jurisdiction under Tennessee Code Annotated section 37-1-103(a)(1) attached and remained with the juvenile court to determine the disposition.<sup>173</sup>

In its analysis, the Court acknowledged the juvenile court's exclusive jurisdiction to determine allegations that a child is dependent and neglected.<sup>174</sup> After reviewing the statutory framework, the Court determined that juvenile courts are essentially required to follow a two-step process: (1) the court is to hold a hearing and decide whether the petitioning party has proven by clear and convincing evidence that a child is dependent and neglected under the statute<sup>175</sup> and, (2) if the court determines that the child is not dependent and neglected, then the petition must be dismissed and the court has no jurisdiction to determine custody.<sup>176</sup> If, however, the court finds that the petitioning party has proven by clear and convincing evidence that the child is dependent and neglected, the juvenile court is to make a custody decision "best suited to the protection and physical, mental and moral welfare of the child."<sup>177</sup> The Court further indicated that, in recognition of the nature of juvenile proceedings, the legislature provided for the juvenile court to have continuing jurisdiction until one of several enumerated events occur.<sup>178</sup> The Court, however, determined that the juvenile court lost any

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at \*4.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at \*5.

<sup>175</sup> *Id.* at \*5 (citing *In re E.P.*, W2004-02821-COA-R3-CV, 2005 WL 3343807, at \*3-4 (Tenn. Ct. App. Dec. 9, 2005)).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at \*5. (citing TENN. CODE ANN. § 37-1-130(a) (West 2009)).

<sup>178</sup> *Id.* (citing *In re D.Y.H.*, 226 S.W.3d 327, 330 (Tenn. 2007), wherein the Tennessee Supreme Court stated that "once jurisdiction is acquired [by a juvenile court] in a dependency and neglect proceeding, the jurisdiction continues over the child until one of the following four events: (1) the petition is dismissed, (2) the case is transferred, (3) an adoption petition is filed, or (4) the child reaches 18.").

continuing jurisdiction it may have had under these facts because the petitioning party failed to prove dependency and neglect on appeal.<sup>179</sup>

The Court then discussed the juvenile and circuit court's role in dependency and neglect cases.<sup>180</sup> In its analysis, the Court articulated the purpose of juvenile courts:

These [juvenile] courts were established for the protection of our children, and are expressly authorized to remove delinquent or dependent children from unfavorable surroundings and adjudicate their proper custody, and separate them from their parents when such actions appears to be for the best interest of the child.<sup>181</sup>

The primary purpose in a dependency and neglect proceeding is to provide for the care and protection of children.<sup>182</sup>

Furthering the purpose of the juvenile courts, the legislative allocation of exclusive jurisdiction meant that, once jurisdiction was asserted, no other court may take any action affecting the child's custody without first obtaining the juvenile court's approval for a transfer.<sup>183</sup> However, notwithstanding the purpose and specialty jurisdiction prescribed by statute, the Court noted the following regarding the appellate process for juvenile appeals:

The appeal from juvenile court to circuit court in a dependency and neglect case is not the same as this court's review of trial court decisions, as set out in the Tennessee Rules of Appellate Procedure. That is because, by statute, the circuit court is to hear the testimony of witnesses and try the case *de novo*. This directive, to hear the case *de novo*, is important to the resolution of the issues in this appeal. While the record of the juvenile court proceedings is required to be

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<sup>179</sup> *Id.* at \*6 (citing *Toms v. Toms*, 98 S.W.3d 140, 143-44 (Tenn. 2003) and *In re E.P.*, W2004-02821-COA-R3-CV, 2005 WL 3343807, at \*3-4 (Tenn. Ct. App. Dec. 9, 2005)).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* (citing *State ex rel. v. West*, 201 SW 743, 745 (Tenn. 1918)).

<sup>182</sup> *Id.* (citing *Dep't of Children's Servs. v. T.M.B.K.*, 197 S.W.3d 282, 289 (Tenn. Ct. App. 2006)).

<sup>183</sup> *Id.* (citing *Tenn. Dep't of Human Servs. v. Gouvista*, 735 S.W.2d 452, 455-57 (Tenn. Ct. App. 1987); *In re McCloud*, 01-A-01-9212-CV00504, 1993 WL 194041, at \*6 (Tenn. Ct. App. Jun. 9, 1993)).

provided to the circuit court on appeal, the circuit court is not limited to that record. On the contrary, the circuit court in a dependency and neglect case proceeding may not rely solely on the record made before the juvenile court, but under Tenn. Code Ann. § 37-1-159(c) must try the case *de novo* by hearing witnesses again and by rendering an independent decision based on the evidence received in the circuit court proceeding.... Consequently, the circuit court is not “reviewing” the juvenile court’s decision; instead, it is conducting a new proceeding as though the petition were originally filed in circuit court.<sup>184</sup>

With this historical framework established, the Court analyzed the father’s argument that the juvenile court maintained its dispositional authority because the juvenile court found clear and convincing evidence of dependency and neglect.<sup>185</sup> The Court found that since the circuit court ultimately concluded that there was no dependency and neglect at the time of its *de novo* hearing, despite its acknowledgment of the correctness of the juvenile court’s finding, the juvenile court findings “were of no effect whatsoever.”<sup>186</sup> The Court held that the circuit court’s dismissal of the father’s petition was the terminating event that stripped the juvenile court of its jurisdiction.<sup>187</sup> Therefore, on February 11, 2009 (nearly four years after father’s initial petition), the Court affirmed the circuit court’s ruling dismissing the father’s petition, finding that clear and convincing evidence, proving that the children were dependent and neglected, did not exist at the time of the circuit court hearing.<sup>188</sup>

## 2. *Why the Green Case Illustrates the Obstacles Created by the Appellate Standard*

The *Green* case rendered juvenile trials completely meaningless. Instead of the trial court being limited to the timeframe of the petition, as is the case in most all other legal proceedings, juvenile matters appealed to the circuit court are now treated as if they were filed on the date of the circuit court trial, with the parent receiving the complete

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<sup>184</sup> *Id.* at \*8.

<sup>185</sup> *Id.* at \*8-9.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at \*11.

benefit of the passage of time to correct genuine issues of dependency and neglect. In this case, the father received his negative finding from the circuit court in February 2007 and, although it appears the matter was argued during the Court's February 2008 session, the Court of Appeals issued its opinion in this case in February 2009.<sup>189</sup>

Had the mother been required to appeal the juvenile court's November 2005 decision to the Court of Appeals, as this article advocates the appellate standard should be, the juvenile court's factual findings would have received a presumption of correctness. The Court of Appeals would have likely affirmed the finding of dependency and neglect. Following the same protracted timeline as was present in this case, the minor children would have received finality approximately two years earlier in 2007. The Court of Appeals would have remanded the matter back to the juvenile court for the court and likely DCS's continued monitoring. With the juvenile court having continuing jurisdiction, the mother would have maintained her right to petition the juvenile court for a return of custody.

### 3. *Current Appellate Standard Delays Permanency*

In 1998, the Tennessee Court Improvement Program for juvenile dependency cases was assessed.<sup>190</sup> The evaluation notes that one of the systematic barriers to permanency is the "fragmented and politically vulnerable structure of the Tennessee court system."<sup>191</sup> The author noted that "despite the fact that juvenile courts are "courts of record," appeals from dependency proceedings (other than terminations) are heard de novo in circuit court, which ultimately delays permanency for children."<sup>192</sup>

As the report noted, and was illustrated earlier in this section with the *Green* analysis, failing to allow the juvenile court's "court of record" status and due process protections to elevate it to that of its peer courts of record, unfortunately, prevents parties from being able to directly pursue their appeal with the Court of Appeals. The Court of Appeals relies on the trial court's technical record<sup>193</sup> on appeal and

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<sup>189</sup> *Id.* at \*1-3.

<sup>190</sup> Susan L. Brooks, *Reflections on the Tennessee Court Improvement Program for Juvenile Dependency Cases*, 65 TENN. L. REV. 1031 (1998).

<sup>191</sup> *Id.* at 1042-43.

<sup>192</sup> *Id.* at n. 80 (citing Cindy Wood MacLean, TENNESSEE SUPREME COURT IMPROVEMENT PROGRAM FOR JUVENILE DEPENDENCY CASES: THE PROGRAM REPORT FOR THE YEAR FEBRUARY 22, 1997 - FEBRUARY 21, 1998, at 5 (May 1998) (unpublished manuscript, on file with the Tennessee Supreme Court)).

<sup>193</sup> TENN. R. APP. P. 13.

affords trial courts a presumption of correctness on issues of fact.<sup>194</sup> If juvenile court decisions were directly appealable to the Court of Appeals, parties would only be required to create one technical record for the purposes of appeal rather than having to undergo the time and expense of creating a second record with the circuit court before enjoying the privilege of having their issues heard by the Court of Appeals.

*B. Multiple Appellate Venues Cause Confusion and Delay*

As discussed, *supra*, the appellate venue for decisions made by juvenile courts varies, depending on the nature of action that resulted in the decision.<sup>195</sup> Perhaps if decisions affecting families were easily contained in categories without overlapping edges, such a system could be withstood without significant confusion. Unfortunately, cases filed in most family courts, especially Tennessee Juvenile Courts, consist of multiple allegations, which could result in appeals perfected in both the circuit court and the court of appeals, if made exclusive of other allegations. Not only is the confusion avoidable, but the delay that ensues is contrary to the very reformation efforts that caused every state to create separate juvenile court systems.

A recent case decided by the court of appeals perfectly illustrates the confusion caused by allowing two courts to have appellate jurisdiction over juvenile matters. The facts are both simple and routine fodder for juvenile court practice. Brittany, a child born out of wedlock, was an “out of control” teenager whose father sought custody in the juvenile court. Not only did Brittany’s father ask the juvenile court to modify custody to abrogate mother’s primary role, but he plead, in the alternative, that Brittany was a dependent and neglected child.<sup>196</sup> After a full trial, the juvenile judge awarded custody of Brittany to her father, but only upon its determination that the change in custody was in Brittany’s best interest. The circuit court also held that Brittany was not a dependent and neglected child.<sup>197</sup>

Since the order from which Brittany’s mother appealed arose from a trial that was based, in part, on an allegation of dependency and neglect, Brittany’s mother filed an appeal with the circuit court, seeking a *de novo* trial.<sup>198</sup> Her father, relying upon the juvenile court’s dismissal

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<sup>194</sup> TENN. R. APP. P. 24.

<sup>195</sup> TENN. CODE ANN. § 37-1-159(a) (West 2013).

<sup>196</sup> *In Re Brittany P.D.*, M2012-00614-COA-R3-JV, 2013 WL 178457 (Apr. 22, 2013).

<sup>197</sup> *Id.* at \*3.

<sup>198</sup> *Id.* at \*1.

of all allegations of dependency and neglect, filed a Motion to Dismiss the pending circuit court appeal. Since the father was awarded custody as a result of the juvenile court's jurisdiction to determine custody matters for children born out of wedlock, with subsequent appeals to the court of appeals, the circuit court granted her father's Motion to Dismiss, finding it lacked appellate jurisdiction and subsequently transferring the matter to the Court of Appeals.

Contrary to the circuit court's opinion regarding its lack of jurisdiction, the Court of Appeals ruled that, in spite of the juvenile court's dismissal of all dependency and neglect allegations, the fact that the father alleged dependency and neglect and the juvenile court held a hearing on those allegations, continuing jurisdiction attached to the juvenile court.<sup>199</sup> Once continuing jurisdiction attached, all orders arising therefrom were appealable to the circuit court, not the Court of Appeals.<sup>200</sup>

This case illustrates the legitimate confusion experienced by litigants and attorneys alike, not to mention the inefficiency created for both appellate venues; however, what is not measurable is the impact that a delay has on the child whose custody hangs in the balance. What is time to a child? Everything.

In a time when child welfare agencies struggle to walk the tight rope of protecting the constitutional rights of parents and protecting children, some guidance from the appellate courts could vastly improve outcomes for both children and parents.

### *C. Circuit Court Appeals Result in Sparse Case Law*

Retired Illinois circuit court judge John Payne addressed the issue of expedited juvenile appeals:

Having a complete and thorough body of case law guides everyone at the trial court level: prosecutors, defense attorneys and judges. Case law helps ensure consistency and fairness from case to case and from circuit to circuit. Expediting appeals in all cases involving young people – including delinquency matters – is not only good for young people, it's good for trial court practitioners, too.<sup>201</sup>

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<sup>199</sup> *Id.* at \*2.

<sup>200</sup> *Id.* at \*3.

<sup>201</sup> Models for Change, *Expedited Appeals of Juvenile Cases To Improve Fairness of System in Illinois*, available at <http://www.modelsforchange.net/newsroom/526> (quoting retired Illinois circuit court judge, John Payne, in discussing the benefit of

The appellate process serves three essential functions: correction of legal error in the initial proceedings, the opportunity for “law-making” to develop and refine the law, and to promote uniformity in the law’s application. In the criminal context particularly, the third function is critical to ensure uniform treatment and consistent practices.<sup>202</sup>

While one could arguably assert that *de novo* appeals to the circuit court allow for the correction of legal error, albeit through a new trial, the development of the law is nonexistent. The orders of the circuit court remain in the confidential juvenile files and are not shared outside of the parties to the litigation, thereby providing no guidance to the bar, other community stakeholders or other circuit courts. No uniformity in treatment or practices exists. An appellate process that only fulfills one out of three essential functions should not be maintained merely for the sake of the avoidance of change.

In fiscal year 2011-2012, 268 cases from Juvenile Courts were appealed to Circuit Court<sup>203</sup> and 60 cases<sup>204</sup> were appealed to the Court of Appeals.<sup>205</sup> There were no appeals to the Tennessee Court of Criminal Appeals arising from delinquent findings,<sup>206</sup> although 61,146

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expedited juvenile appeals in Illinois that have resulted in fewer cases becoming moot—thus developing a more robust pool of precedent from which all litigants benefit).

<sup>202</sup>Megan Annitto, *Juvenile Justice on Appeal*, 66 U. MIAMI L. REV. 671, 679 (2012); Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 316 (2009); Randall T. Shepard, *Changing the Constitutional Jurisdiction of the Indiana Supreme Court: Letting a Court of Last Resort Act Like One*, 63 IND. L. J. 669, 669 (1988) (As former Chief Justice of the Indiana Supreme Court, Judge Shepard writes, “the law-giving function is pivotal”).

<sup>203</sup> ANNUAL REPORT OF THE TENNESSEE JUDICIARY FISCAL YEAR 2011-2012 17, 119, *available at* [http://www.tncourts.gov/sites/default/files/docs/annual\\_report\\_tn\\_judiciary\\_fy\\_2011-12\\_2-27-13\\_0.pdf](http://www.tncourts.gov/sites/default/files/docs/annual_report_tn_judiciary_fy_2011-12_2-27-13_0.pdf).

<sup>204</sup> This figure does not include direct appeals from Juvenile Court to the Court of Appeals for Termination of Parental Rights cases.

<sup>205</sup> ANNUAL REPORT OF THE TENNESSEE JUDICIARY FISCAL YEAR 2011-2012 13, *available at* [http://www.tncourts.gov/sites/default/files/docs/annual\\_report\\_tn\\_judiciary\\_fy\\_2011-12\\_2-27-13\\_0.pdf](http://www.tncourts.gov/sites/default/files/docs/annual_report_tn_judiciary_fy_2011-12_2-27-13_0.pdf) (The method by which the Court of Appeals maintains its data does not differentiate between direct appeals from Juvenile Court to the Court of Appeals in non-termination cases (paternity and custody appeals) versus second-level appeals that originated in Juvenile Court, were subsequent retried in the Circuit Court, with a subsequent appeal to the Court of Appeals.).

<sup>206</sup> ANNUAL REPORT OF THE TENNESSEE JUDICIARY FISCAL YEAR 2011-2012 14, *available at* [http://www.tncourts.gov/sites/default/files/docs/annual\\_report\\_tn\\_judiciary\\_fy\\_2011-12\\_2-27-13\\_0.pdf](http://www.tncourts.gov/sites/default/files/docs/annual_report_tn_judiciary_fy_2011-12_2-27-13_0.pdf).

delinquent offenses were filed against children in the juvenile courts across the state.<sup>207</sup> In 2012, 14,922 dependency and neglect petitions were filed with juvenile courts across the state.<sup>208</sup> Moreover, 4,347 children were committed to the Department of Children's Services, in both civil and delinquent juvenile orders.<sup>209</sup> Not only does this data reveal the infrequency of juvenile appeals, it illustrates that only 60 cases across the state of Tennessee are produced on an annual basis, from which the laws impacting juveniles and families can be clarified and perfected.

#### D. Circuit Court Appeals Preclude Transparency

A constant criticism of child protective service agencies, particularly the Tennessee DCS, is a perceived lack of accountability and transparency.<sup>210</sup> One method by which transparency can be improved is to create an appellate structure that allows for the review of appearances of the agency and other parties before the appellate court. Every appeal filed in the court of appeals results in a detailed finding of fact and law that is generated by the court. These findings or opinions are available for review by the public. Allowing the public to review

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<sup>207</sup> STATE OF TENNESSEE ANNUAL JUVENILE COURT STATISTICAL REPORT 10 (2012), available at

[http://www.tsc.state.tn.us/sites/default/files/docs/2012\\_annual\\_report.pdf](http://www.tsc.state.tn.us/sites/default/files/docs/2012_annual_report.pdf).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 56.

<sup>210</sup> Tony Gonzalaz, *DCS hit with Stinging Audit*, THE TENNESSEAN, Jan. 27, 2014, available at

<http://archive.tennessean.com/article/20140127/NEWS21/301270060/DCS-hit-stinging-audit-lawmakers-want-agency-tight-leash-> (criticizing that DCS failed to thoroughly investigate allegations of child abuse resulting in child deaths that were going unreported); The Associated Press, *Tennessee's Children's Head Resigns over Handling of Child Death Cases*, FOX NEWS, Feb. 5, 2013, available at <http://www.foxnews.com/us/2013/02/05/tennessee-commissioner-children-services-resigns-over-handling-child-death/> (reporting on the resignation of DCS's Commissioner amid scrutiny over how both she and the agency were handling child deaths where DCS had failed to adequately investigate allegations of harm); Erik Schelzig, *Tennessee Fights Transparency for Child Welfare Agency*, THE DAILY NEWS, Jan. 8, 2013, available at

<https://www.memphisdailynews.com/news/2013/jan/8/tennessee-fights-transparency-for-child-welfare-agency/> (criticizing DCS for its failure to be transparent about our state's most vulnerable citizens, its children); The Associated Press, *Tennessee DCS Scrutinized for Lack of Transparency*, WRCBTV.COM, 2012, available at <http://wrcb.membercenter.worldnow.com/story/20240335/dcs-scrutinized-for-lack-of-transparency> (addressing DCS's lack of transparency notwithstanding increased scrutiny over the agency's failure to adequately report child deaths).

the findings of the appellate court would increase not only the transparency of the agency, but the juvenile court process that is often perceived as shrouded in mystery. This is because forcing the agency and other parties to improve their processes under the transparency of the appeal, attorneys and juvenile judges alike would risk embarrassment if they were ill prepared or unknowledgeable in the law.

While the modification of the appellate venue would not address, in its entirety, the concerns raised by the media, allowing the development of the public record would provide at least a starting point from which legislators, citizens and public media representatives could question the performance of the DCS lawyers appointed to serve all parties as well as juvenile judges who are charged with the responsibility of maintaining their legal expertise in an ever-changing area of the law.

*E. The Current Standard Diminishes the Value of the Juvenile Court*

*1. Circuit Court Appeals Undermine the Established Purpose of Juvenile Courts*

As discussed in Section II(A), the purpose of juvenile courts, from its inception, has been to provide for the care, protection and development of children; to remove the taint of criminality from minors who commit delinquent acts and to provide a simple judicial procedure that allows for fair hearings and constitutional protections.<sup>211</sup> However, juvenile court proceedings are rendered meaningless if any party appeals under TCA § 37-1-159(a). Although the juvenile court's limited jurisdiction results in it being characterized as "inferior," its specialty nature is the very quality that is most worthy of preservation, not disposal. By limiting the juvenile court's jurisdiction to juvenile related issues, mostly dependency and delinquency, the legislature created a boutique environment wherein the court can narrow its focus, almost exclusively, to child welfare and rehabilitation. Juvenile courts are steeped in the nuances of child testimony, broken families, child victims, child perpetrators, educational concerns, parental rights, children rights, foster parents rights, and governmental responsibilities on a daily basis.

As the *In re S.M., Jr.* Court noted, allowing direct appeals to the Court of Appeals for juvenile decisions requires parties to take the juvenile proceedings seriously and not just a

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<sup>211</sup> TENN. CODE ANN. § 37-1-101(a)(1) (West 2009).

“warm-up trial” for circuit court.<sup>212</sup> Juvenile courts mix the formalities necessary to provide due process safeguards, yet sufficient informality and familiarity to ensure that form does not supersede substance. Allowing the juvenile proceedings the dignity of a presumption of correctness on appeal, as the Court of Appeals is accustomed to doing, preserves the specialty nature of the court, and with it, the purpose underlying the court’s design.

## 2. *The Application of the Appellate Standard No Longer Satisfies the Legislature’s Original Intent*

As demonstrated in the history section of this article, when the appellate standard was first implemented by the Tennessee Supreme Court, it was intended to guarantee that parties received the benefit of a more formal process, presumably ensuring due process safeguards, before confining parties to a technical record on appeal.<sup>213</sup> Although it appears those concerns were valid years ago, juvenile courts have evolved over time and now incorporate the necessary formalities into their proceedings. One by one, these important formalities have been absorbed into juvenile procedures: (1) entitlement to legal counsel,<sup>214</sup> (2) free appointment of legal counsel for qualifying parties,<sup>215</sup> (3) juvenile proceedings overseen by a judge with a law license,<sup>216</sup> and (4) full adjudicatory hearings governed by the rules of procedure and evidence.<sup>217</sup>

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<sup>212</sup> *In re S.M., Jr.*, No. 01-A-01-9506-JV-00233, 1996 WL 140410, at \*3 (Tenn. Ct. App. Mar. 29, 1996)..

<sup>213</sup> *Doster* 260 S.W.2d at 280; *Scalf*, 144 S.W.2d at 774; To Provide Disposition of Delinquent, Dependent, Neglected and Abandoned Children, and Repeal of Sections 10269, H. R. 505, 79th Gen. Ass. (Tenn. 1955) (from audio transcript of Congressman Walter I. Forrester recorded Mar. 3, 1955).

<sup>214</sup> TENN. CODE ANN. § 37-1-126(b) (West 2009). Although the right to counsel was acknowledged in case law for many years, in 2008 the code was modified to include the right to counsel for both children and adults. TENN. CODE ANN. §37-1-126 (a) (West 2008).

<sup>215</sup> Nyasha N. Justice and Leslie Barrett Kincaid, *A RE-ASSESSMENT OF TENNESSEE’S JUDICIAL PROCESS IN FOSTER CARE CASES* 81 (2005). (Physical copies of the report are maintained by the Administrative Office of Courts).

<sup>216</sup> TENN. CODE ANN. § 17-1-106 (West 2013). (The statute says a judge “must be...authorized to practice law in the courts of this state.”).

<sup>217</sup> TENN. R. JUV. P. 28; *see Stanley v. Illinois*, 405 U.S. 645, 649 (1972) (Because of the interests at stake in a termination of parental rights case, fundamental fairness required that parents be afforded a hearing on adequate notice.); *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) and *Lassiter v. Dep’t of Social Servs.*, 452 U.S. 18, 27 (1981) (Parents faced with the prospect of losing their parental rights are entitled to the due process protections guaranteed by TENN. CONST. art. I, § 8 and the Due

With these formalities in place, the concerns previously articulated by the Legislature and Tennessee Supreme Court no longer exist. Termination of parental rights cases have been appealable to the Court of Appeals for nearly twenty years and it makes sense to extend that standard to all juvenile matters.

#### IV. PROPOSED STANDARD

##### A. *The 2008 House/Senate Bill*

In 2008, Representatives Sherry Jones and Tom DuBois, co-sponsored House Bill 2909 and Senator Joe M. Haynes sponsored Senate Bill 3111, both seeking to amend TCA § 37-2-259(a) to require all juvenile appeals to be made pursuant to the Tennessee rules of appellate procedure.<sup>218</sup> Both bills were treated favorably in the House and Senate until the Executive Director of the Fiscal Review Committee, in cooperation with the Tennessee Attorney General's Office, attached a fiscal note amounting to an estimated \$405,200.<sup>219</sup> The House Bill was removed from consideration prior to a vote.<sup>220</sup>

Around the same approximate time, Senator Haynes sponsored an amendment to Senate Bill 3111 and Representative Lois M. DeBerry sponsored an amendment to House Bill 2909, both seeking that TCA § 37-1-159(a) be modified to require the proceedings already covered in the statute to be filed in circuit court, but heard *de novo* on the juvenile court's record with a presumption of correctness on issues of fact.<sup>221</sup> As a result of the Fiscal Note attached to the Bills, it appears the Amendments died along with the parent bills.<sup>222</sup>

##### B. *Proposed Amendment*

The author's proposed amendment largely resembles the original 2008 Bills discussed above. The proposed amendment would omit the language of TCA § 37-1-159 and provide the following in its place:

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Process Clause of the Fourteenth Amendment which, at a minimum required representation when the particular facts warranted such).

<sup>218</sup> H.B. 2909, 105th Gen. Assem. (Tenn. 2008); S.B. 3111, 105th Gen. Assem. (Tenn. 2008).

<sup>219</sup> Fiscal Note attached to H.B. 2909 and S.B. 3111 by the Executive Director of the Fiscal Review Committee.

<sup>220</sup> Bill History for H.B. 2909 and S.B. 3111.

<sup>221</sup> Amendment no. 1 to H.B. 2909 and Amendment no. 1 to S.B. 3111.

<sup>222</sup> Bill History for H.B. 2909 and S.B. 3111.

Any appeal from juvenile court must be made pursuant to and governed by the Tennessee Rules of Appellate Procedure, wherein delinquency matters shall be filed with the Tennessee Court of Criminal Appeals and all other matters shall be filed with the Tennessee Court of Appeals. In all juvenile appeals, the appellate court shall, consistent with its rules, expedite the appeal by entering such scheduling orders as are necessary to ensure that the case is not delayed, giving juvenile appeals priority over all other matters.

By adopting this proposal, Tennessee would join the other 45 states that have already implemented rules and statutes requiring juvenile appeals to be heard by their equivalent Court of Appeals or state Supreme Courts.<sup>223</sup>

Although the 2008 amendments seemingly failed due to the Fiscal Note attached by the Executive Director of the Fiscal Review Committee, the authors believe the Note failed to account for (a) the cost savings that will likely be experienced through expedited appellate reviews; (b) the utilization of regional counsel from DCS to cover the estimated thirty additional appellate cases; and (c) the human and financial resources that will be saved by unburdening DCS counsel and caseworkers from re-litigating matters at the circuit level.<sup>224</sup> Unburdening DCS counsel would also make them a possible resource to field the additional Court of Appeals cases.

## V. CONCLUSION

Trials *de novo* have been used in Tennessee primarily as a means of establishing a record from which a subsequent appeal may be taken to the court of appeals and as a method of substituting for the lack of due process afforded in an inferior court presided over by a lay judge. Neither purpose is applicable in today's juvenile court system. All Tennessee Juvenile Courts are courts of record, capable of producing the same record as a trial court in this state and, perhaps more

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<sup>223</sup> Research assistants compiled a fifty state survey of the juvenile appeal standard across the country. Results revealed that Tennessee is one of five states that require juvenile appeals to be heard by a secondary trial court on a *de novo* basis. Maine's juvenile appellate review calls for the matter to be filed in its court of general jurisdiction, but appellate matters are reviewed on the record with a presumption of correctness on findings of fact. ME. REV. STAT. TIT. 15 § 3402.

<sup>224</sup> Fiscal Note attached to 2008 HB 2909 and SB 3111 by the Executive Director of the Fiscal Review Committee.

importantly, all juvenile judges are law-trained and are, by nature of their specialized jurisdiction, best suited to fully and finally determine issues that arise under their exclusive jurisdiction.

Abolishing a parent's second bite at the apple will not only serve the best interests of children and preclude anomalous and unacceptable results like that depicted in *Green*, but will help address the lack of uniformity, predictability, and transparency of the juvenile court system and DCS. The abrogation of the *de novo* appeal has successfully been implemented in termination of parental rights cases and, after two decades of direct appeals from the juvenile courts to the court of appeals, the law has been clarified. Practitioners and courts alike have a uniform model of decisions and more importantly, both the purpose and role of the juvenile court have been bolstered by the deference afforded its decisions. Children like "Abbey" should be protected, and juvenile court decisions should be the only bite at the apple litigants have to create a record for appeal.

