

FAMILY LAW II - JUVENILE LAW

I. Jurisdiction

A. Exclusive original jurisdiction of the juvenile court includes proceedings in which a child is alleged to be delinquent, unruly, or dependent and neglected. (Tenn. Code Ann. § 37-1-103(a)(1))

B. Even if the dependent and neglected allegations relate to a divorce or post-divorce proceeding, if the petition alleges dependency and neglect, either expressly or in substance, the exclusive original jurisdiction of the juvenile court is implicated. (See Holley v. Holley, 420 S.W.3d 756 (Tenn. Ct. App. 2013))

- Note the recent appellate decisions of Minyard v. Lucas, No. E2017-02261-COA-R3-CV, 2018 WL 5778967, (Tenn. Ct. App. July 17, 2018) and Cox v. Lucas, No. E2017-02264-COA-R3-CV, 2018 WL 5778969, (Tenn. Ct. App. July 17, 2018), wherein the Tennessee Court of Appeals recently ruled that allegations contained in a parent's post-divorce custody pleading implicated the exclusive jurisdiction of the juvenile court because the substance of the allegations amounted to a child being unruly or dependent and neglected and therefore, any action taken by the chancery court is void for lack of subject matter jurisdiction. A Rule 11 application for permission to appeal to the Tennessee Supreme Court has been filed in both cases. Cert. has been granted in both cases. Argument is scheduled for 5/7/19. See 2018 WL 5778967, Tenn.Ct.App., Nov. 02, 2018, appeal granted (Feb 22, 2019). 2018 WL 5778969, Tenn.Ct.App., Nov. 02, 2018, appeal granted (Feb 22, 2019) Order attached. In addition, SB0719-HB854 is working its way through the 111th General Assembly. The legislation would negate the COA ruling. It is scheduled on the House Floor on 3/18/19. It has yet to be calendared in the Senate Judiciary Committee.

C. Generally, the juvenile court's jurisdiction over a child ends when the child reaches the age of eighteen. (Tenn. Code Ann. § 37-1-103(e) & 37-1-102(b)(5))

D. The juvenile court has concurrent jurisdiction with the probate court of proceedings to:

1. Treat or commit a developmentally disabled or mentally ill child;
2. Determine the custody or appoint a guardian of the person of a child; and
3. Give judicial consent to the marriage of a child if consent is required by law.
4. (Tenn. Code Ann. § 37-1-104(a))

E. The juvenile court has concurrent jurisdiction with the general sessions court for the offenses of contributing to the delinquency or unruly conduct of a minor as defined in §

37-1-156 and contributing to the dependency of a minor as defined in § 37-1-157. (Tenn. Code Ann. § 37-1-104(b))

F. The juvenile, circuit and chancery courts have concurrent jurisdiction to terminate parental or guardian rights pursuant to the provisions of title 36, chapter 1, part 1. (Tenn. Code Ann. § 37-1-104(c))

G. The juvenile court has concurrent jurisdiction and statewide jurisdiction with other courts having the jurisdiction to order support for minor children and shall have statewide jurisdiction over the parties involved in the case. (Tenn. Code Ann. § 37-1-104(d))

H. Notwithstanding any law to the contrary, the juvenile court has concurrent jurisdiction with the circuit and chancery court of proceedings to establish the paternity of children born out of lawful wedlock and to determine any custody, visitation, support, education or other issues regarding the care and control of children born out of wedlock. (Tenn. Code Ann. § 37-1-104(f)). Subsection (e) provides concurrent jurisdiction with circuit and chancery courts for cases arising under the 1980 Hague Convention on the Civil Aspects of International Child Abduction. This may have been intentionally omitted.

II. Delinquency

A. Definition

1. A delinquent child is statutorily defined as a child who has committed a delinquent act and is in need of treatment or rehabilitation. (Tenn. Code Ann. § 37-1-102(b)(11))

2. Delinquent acts are statutorily defined as an act designated as a crime under the law, including local ordinances of this state, or of another state if the act occurred in that state, or under federal law, and the crime is not a status offense, or certain traffic offenses. A status offense is an offense only applicable to a child that if committed by an adult would not result in charges being filed, such as curfew violation or possession of tobacco. (Tenn. Code Ann. § 37-1-102(b)(10))

B. Right to Counsel

1. A child is entitled to legal counsel at all stages of any delinquency proceeding. (Tenn. Code Ann. § 37-1-126(a)(1))

C. Venue

1. Venue for delinquency proceedings is the county in which the child resides. (Tenn. Code Ann. § 37-1-111(a)) but constitutionally, it must be brought in the county where the delinquent act occurred.

2. In addition, the proceeding may be commenced in the county in which the acts constituting the alleged delinquent act occurred. (Tenn. Code Ann. § 37-1-111(b))

D. Detention or Shelter Care

1. A child taken into custody shall not be detained or placed in shelter care prior to the hearing on the delinquency petition unless there is probable cause to believe that the child:

- a) Has committed the delinquent act with which the child is charged.
- b) Is a neglected, dependent or abused child, and in either case the child's detention or shelter care is required because the child is subject to an immediate threat to the child's health or safety to the extent that delay for a hearing would be likely to result in severe or irreparable harm, or the child may abscond or be removed from the jurisdiction of the court, and in either case, there is no less drastic alternative to removal of the child from the custody of the child's parent, guardian, legal custodian or the person who physically possess or controls the child available that would reasonably and adequately protect the child's health or safety or prevent the child's removal from the jurisdiction of the court pending a hearing. (Tenn. Code Ann. § 37-1-114(a)(1) & Tenn. Code Ann. § 37-1-117(a))

2. A child shall not be detained in any secure facility or secure portion of any facility unless:

- a) There is probable cause to believe the child has committed a delinquent offense constitution:
 - (1) A crime against a person resulting in the serious injury or death of the victim or involving the likelihood of serious injury or death to such victim; or
 - (2) The unlawful possession of a handgun or carrying of a weapon, as prohibited by title 39, chapter 17, part 13;
- b) There is probable cause to believe the child has committed any other delinquent offense involving the likelihood of serious physical injury or death, or an offense constituting a felony, violation of probation or violation of aftercare, and the child:
 - (1) Is currently on probation;
 - (2) Is currently awaiting court action on a previous alleged delinquent offense;
 - (3) Is alleged to be an escape or absconder from a juvenile facility, institution or other court-ordered placement;

(4) Has, within the previous twelve (12) months, willfully failed to appear at any juvenile court hearing, engaged in violent conduct resulting in serious injury to another person or involving the likelihood of serious injury or death, or been adjudicated delinquent by virtue of an offense constitution a felony if committed by an adult.

c) There is probable cause to believe the child has committed a delinquent offense, and special circumstances indicate the child should be detained.

d) The child is alleged to be an escapee from a secure juvenile facility or institution.

e) The child is wanted in another jurisdiction for an offense that, if committed by an adult, would be a felony in that jurisdiction.

f) There is probable cause to believe the child is an unruly child who has violated a valid court order or who is a runaway from another jurisdiction.

g) In addition to any of the conditions listed above, there is no less restrictive alternative that will reduce the risk of flight or of serious physical harm to the child or others, including placement of the child with a parent, guardian, legal custodian or relative, or the setting of bail.

(Tenn. Code Ann. § 37-1-114(a), (c))

E. Probable Cause Determination and Detention Hearing

1. If a child is taken into custody without an order and:

(a) The child is alleged to be delinquent and held in secure detention, a probable cause determination that an offense has been committed by the child shall be made by a magistrate or judge within 48 hours of the child being taken into custody; or

(b) The child is alleged to be delinquent and detained under the special circumstances exception pursuant to T.C.A. § 37-1-114(c)(3), a probable cause determination that an offense has been committed by the child and a finding of special circumstances shall be made by a magistrate within 24 hours, excluding nonjudicial days, but no later than 48 hours of the child being taken into custody.

In either case, if the magistrate or judge does not make the required findings, the child shall be immediately released to the child's parent, guardian or other custodian. Probable cause determinations shall be based on a written affidavit, which may be sworn to in person or by audio-visual electronic means.

(T.R.J.P. 301(b)(1))

2. If a child alleged to be delinquent is taken into custody pursuant to an order of attachment or if a probable cause determination is made, the child shall not remain in detention longer than 72 hours, excluding nonjudicial days, but in no event more than 84 hours, unless a detention hearing is held. For a child so detained, a petition setting forth the allegations against the child and the basis for asserting the court's jurisdiction shall be filed prior to the child's detention hearing. (T.R.J.P. 301(b)(2) & Tenn. Code Ann. § 37-1-117(a))

3. Evidence admitted at the detention hearing shall be in accordance with the Rules of Evidence, except such evidence may include reliable hearsay. (T.R.J.P. 301(b)(2))

F. Adjudicatory Hearing

1. The adjudicatory hearing is the proceeding at which the court determines whether the evidence supports a finding that a child is delinquent and whether the child is in need of treatment and rehabilitation. (TRJP 210(a) & Tenn. Code Ann. § 37-1-129(b)(1), (3))

2. The court shall consider only evidence which has been formally admitted at the adjudicatory hearing in accordance with the Tennessee Rules of Evidence. (TRJP 210(d))

3. If the court finds that the delinquent offense has not been proved beyond a reasonable doubt, it shall dismiss the petition and order the child discharged from any detention or other restriction. (TRJP 210(e) & Tenn. Code Ann. § 37-1-129(b)(1))

4. If the court finds beyond a reasonable doubt that the child committed the acts by reason of which the child is alleged to be delinquent, it shall enter an order finding the child guilty and proceed to a hearing to determine whether the child is in need of treatment or rehabilitation and make findings thereon. (TRJP 210(e)(2) & Tenn. Code Ann. § 37-1-129(b)(3))

a) If the court finds that the child does not need treatment or rehabilitation, then no further proceedings are held and the child is discharged from any detention or restriction. In such event, the child is not adjudicated as delinquent. (TRJP 210(e)(2)(A) & Tenn. Code Ann. § 37-1-129(b)(3))

b) If the court finds that the child does need treatment or rehabilitation, then the court shall enter an order finding the child to be delinquent and proceed to a dispositional hearing immediately or schedule it at a later date. (TRJP 210(e)(2)(B) & Tenn. Code Ann. § 37-1-129(b)(3))

G. Dispositional Hearing

1. Dispositional hearings shall be held within fifteen (15) days of the adjudicatory hearing if the child is in detention or otherwise has been placed out of the home by court order and ninety (90) days of the adjudicatory hearing in all other cases unless good cause shown. (TRJP 211(a))

2. For a child found to be delinquent, the court may make any of the following orders of disposition best suited to the child's treatment, rehabilitation and welfare:

- a) Make any order authorized for the disposition of a dependent and neglected child pursuant to Tenn. Code Ann. § 37-1-1-30;
- b) Place the child on probation;
- c) Place the child in an institution, camp or other facility for delinquent children operated under the direction of the court or other public authority;
- d) Commit the child to the department of children's services, which commitment shall not exceed past the child's nineteenth birthday;
- e) Assess a fine not to exceed fifty dollars for each offense;
- f) Order the child to perform community service; and
- g) Order the child to make restitution.

(1) (Tenn. Code Ann. § 37-1-131)

3. Note that Tenn. Code Ann. § 37-1-131 will incur certain changes based upon the passage of the Juvenile Justice Reform Act of 2018. Based upon the Act, the amended version of Tenn. Code Ann. § 37-1-131 shall become effective on July 1, 2019. Pursuant to the Act, the court may make any of the following orders of disposition best suited to the child's treatment, rehabilitation, and welfare:

- a) Subject to conditions and limitations as the court prescribes, transfer temporary legal custody or grant guardianship to any relative or other individual with a relationship with the child who is found by the court to be qualified and if the transfer is in the child's best interest;
- b) Place the child on probation;
- c) The child to participate in programming at a non-residential facility for delinquent children operated under the direction of the court or other public authority;
- d) Commit the child to the department of children's services, which commitment shall not exceed past the child's nineteenth birthday;
- e) Order the child to perform community service; and
- f) Order the child to make restitution.

H. Transfer

1. After a petition has been filed alleging delinquency based on conduct that is designated a crime or public offense under the laws, including local ordinances, of this state, the court, before hearing the petition on the merits, may transfer the child to the sheriff of the county to be held according to law and to be dealt with as an adult in the criminal court of competent jurisdiction. The disposition of the child shall be as if the child were an adult if:

a) The child was:

(1) Less than fourteen (14) years of age at the time of the alleged conduct and charged with first degree murder or second degree murder or attempted first or second degree murder;

(2) Fourteen (14) years of age or more but less than seventeen (17) years of age at the time of the alleged conduct and charged with the offense of first degree murder, second degree murder, rape, aggravated rape, rape of a child, aggravated rape of a child, aggravated robbery, especially aggravated robbery, aggravated burglary, especially aggravated burglary, kidnapping, aggravated kidnapping, especially aggravated kidnapping, commission of an act of terrorism, carjacking, or an attempt to commit any such offenses;

(3) Sixteen (16) years of age or more at the time of the alleged conduct and charged with the offense of robbery or attempt to commit robbery; or

(4) Seventeen (17) years of age or more at the time of the alleged conduct.

(Tenn. Code Ann. § 37-1-134(a)(1)(A))

b) A hearing on whether the transfer should be made is held in conformity with Tenn. Code Ann. § §§ 37-1-124, 37-1-126 and 37-1-127. (Tenn. Code Ann. § 37-1-134(a)(2))

c) Reasonable notice in writing of the time, place and purpose of the hearing is given to the child and the child's parents, guardian or other custodian at least fourteen (14) days prior to the hearing. (Tenn. Code Ann. § 37-1-134(a)(3))

d) The court finds that there is probable cause to believe that:

(1) The child committed the delinquent act as alleged;

(2) The child is not committable to an institution for the developmentally disabled or mentally ill; and

(3) The interests of the community require that the child be put under legal restraint or discipline.

e) In making the determination, the court shall consider, among other matters:

- (1) The extent and nature of the child's prior delinquency records;
 - (2) The nature of past treatment efforts and the nature of the child's response thereto;
 - (3) Whether the offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
 - (4) Whether the offense was committed in an aggressive and premeditated manner;
 - (5) The possible rehabilitation of the child by use of procedures, services and facilities currently available to the court in this state; and
 - (6) Whether the child's conduct would be a criminal gang offense, as defined in § 40-35-121 , if committed by an adult.
- f) The district attorney general shall not seek, nor shall any child transferred under this section receive, a sentence of death for the offense for which the child was transferred. (Tenn. Code Ann. § 37-1-134(a)(1)(B))
- g) The transfer terminates jurisdiction of the juvenile court with respect to any and all delinquent acts with which the child may then or thereafter be charged, and the child shall thereafter be dealt with as an adult as to all pending and subsequent criminal charges; provided, that if a child transferred pursuant to this section is acquitted in criminal court on the charge or charges resulting in such transfer, or if such charge or charges are dismissed in such court, this subsection (c) shall not apply and the juvenile court shall retain jurisdiction over such child. (Tenn. Code Ann. § 37-1-134(c))

I. Appeal

1. The juvenile court shall be a court of record; and any appeal from any final order or judgment in a delinquency, except a proceeding to transfer, 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. (Tenn. Code Ann. § 37-1-159(a))

III. Dependency and Neglect

A. Definition

1. A dependent and neglected child is statutorily defined pursuant to Tenn. Code Ann. § 37-1-102(b)(13) as a child:
 - a) Who is without a parent, guardian or legal custodian;

- b) Whose parent, guardian or person with whom the child lives, by reason of cruelty, mental incapacity, immorality or depravity is unfit to properly care for such child;
- c) Who is under unlawful or improper care, supervision, custody or restraint by any person, corporation, agency, association, institution, society or other organization or who is unlawfully kept out of school;
- d) Whose parent, guardian or custodian neglects or refuses to provide necessary medical, surgical, institutional or hospital care for such child;
- e) Who, because of lack of proper supervision, is found in any place the existence of which is in violation of law;
- f) Who is in such condition of want or suffering or is under such improper guardianship or control as to injure or endanger the morals or health of such child or others;
- g) Who is suffering from abuse or neglect;
- h) Who has been in the care and control of one (1) or more agency or person not related to such child by blood or marriage for a continuous period of six (6) months or longer in the absence of a power of attorney or court order, and such person or agency has not initiated judicial proceedings seeking either legal custody or adoption of the child;
- i) Who is or has been allowed, encouraged or permitted to engage in prostitution or obscene or pornographic photographing, filming, posing, or similar activity and whose parent, guardian or other custodian neglects or refuses to protect such child from further such activity; or
- j) Who has willfully been left in the sole financial care and sole physical care of a related caregiver for not less than eighteen (18) consecutive months by the child's parent, parents or legal custodian to the related caregiver, and the child will suffer substantial harm if removed from the continuous care of such relative.

(1) Solely for purposes of this subsection, the following shall apply:

(a) A related caregiver shall include the child's biological, step or legal grandparent, great grandparent, sibling, aunt, uncle or any other person who is legally or biologically related to the child; and

(b) A child willfully left with a related caregiver as defined above because of the parent's military service shall not be subject to action pursuant to Tenn. Code Ann. § 37-1-183.

B. Venue

1. A proceeding for dependency and neglect may be commenced in the county in which the child resides. In addition, the proceeding may be brought in the county where the child is present when it is commenced. (Tenn. Code Ann. § 37-1-111(a),(c))

C. Who May File

1. A petition alleging dependency and neglect may be made by any person, including a law enforcement officer, who has knowledge of the facts or is informed and believes that they are true. (Tenn. Code Ann. § 37-1-119)

D. Right to Counsel and Guardian ad Litem

1. A parent is entitled to representation by legal counsel at all stages of any dependency or neglect proceeding. If the person is indigent, the court shall provide counsel to the indigent person. (Tenn. Code Ann. § 37-1-126(a)(2), (a)(3))

2. A child is entitled to being represented by a guardian ad litem in proceedings alleging the child to be dependent and neglected or abused. The Court will appoint a guardian ad litem for the child who is alleged to be dependent and neglected or abused. (Tenn. Code Ann. § 37-1-126(a)(1) & Tenn. Code Ann. § 37-1-149)

E. Probable Cause Hearing

1. A child taken into custody shall not be detained or placed in shelter care prior to the hearing on the petition unless there is probable cause to believe that the child is a neglected, dependent or abused child and in either case the child's detention or shelter care is required because the child is subject to an immediate threat to the child's health or safety to the extent that delay for a hearing would be likely to result in severe or irreparable harm, or the child may abscond or be removed from the jurisdiction of the court, and in either case, there is no less drastic alternative to removal of the child from the custody of the child's parent, guardian, legal custodian or the person who physically possesses or controls the child available that would reasonably and adequately protect the child's health or safety or prevent the child's removal from the jurisdiction of the court pending a hearing. (Tenn. Code Ann. § 37-1-114(a)(2))

2. When the court finds, based upon a sworn petition or sworn testimony containing specific factual allegations, that there is probable cause to believe that the conditions warranting removal of the child exist and the child is in need of the immediate protection of the court, the court may order that the child be removed from the custody of the child's parent, guardian, legal custodian, or the person who physically possesses or controls the child and be placed in the custody of a suitable person or agency pending further investigation and hearing for a period not to exceed three days, excluding weekends and legal holidays. If the child is not

returned within such three day period, a preliminary hearing must be conducted. (Tenn. Code Ann. § 37-1-117(b)(1))

3. If a child is taken into custody without a court order pursuant to T.C.A. § 37-1-113(a)(3), a written protective custody order for the removal of legal custody, containing the probable cause determination required by T.C.A. § 37-1-114(a)(2), shall issue from a magistrate or judge within 48 hours of the taking of physical custody. The probable cause determination shall be based on a written affidavit, which may be sworn to in person or by audio-visual electronic means. If the court denies the protective custody order, the child shall be returned to the parent, guardian, or legal custodian. If the protective custody order is issued, a preliminary hearing shall be held within 72 hours, excluding non-judicial days, of the child being taken into custody. (T.R.J.P. 302(a))

F. Preliminary Hearing

1. This hearing is also commonly referred to as the 72 hour hearing.

2. The preliminary hearing may be waived by an express and knowing waiver by the parties to the action including the parents, guardian, or legal custodian and the child or guardian ad litem for the child. Any such waiver may be revoked at any time. (TRJP 302(d)(6) & Tenn. Code Ann. § 37-1-117(b)(3))

3. Reliable hearsay may be considered by the court at the preliminary hearing. (TRJP 302(d)(3))

4. The court, in making a decision on whether the child's continued removal from the home is warranted, shall:

a) Determine whether probable cause exists that the child is a dependent and neglected child; and

b) If probable cause is found, determine whether the child is subject to an immediate threat to the child's health or safety, or whether the child may be removed from the jurisdiction of the court; and

c) Determine whether any less drastic alternative is available to the removal of the child from the custody of the parent, guardian or legal custodian.

(TRJP 302(d)(4))

5. If the court finds that the child's continued removal from the home is not warranted, the court shall return the child to the person from whose custody was removed. If the court determines that the child's removal is required, then the court may order that the child be placed in the custody of a suitable person or agency. (TRJP 302(d)(5))

G. Adjudicatory Hearing

1. The adjudicatory hearing is the proceeding at which the court determines whether the evidence supports an ultimate finding that a child is dependent and neglected. (TRJP 307(a) & Tenn. Code Ann. § 37-1-129(b)(1))
2. The standard of proof for finding a child dependent and neglected is by clear and convincing evidence. (TRJP 307(e))
3. Procedural matters in a dependency and neglect case are governed by the Tennessee Rules of Juvenile Practice and Procedure. (TRJP 101(b))
4. All cases in which a child has been placed out of the home by court order shall be heard within thirty (30) days. All other cases shall be heard within thirty (30) days of the date of filing of the petition if reasonable under the circumstances, but no later than ninety (90) days from the date the child is placed outside the home or the date the petition is filed unless good cause is shown. (TRJP 307(b))
5. The court will consider only evidence that is formally admitted, and evidence shall be admitted in compliance with the Tennessee Rules of Evidence. (TRJP 307(d))
6. At the conclusion of the adjudicatory hearing, the court shall enter an order in compliance with the following provisions:
 - a) If the court finds that the allegations have not been proved by clear and convincing evidence, it shall dismiss the petition.
 - b) If the court finds that the allegations have been proved by clear and convincing evidence, it shall adjudicate the child dependent and neglected. The court will then conduct a dispositional hearing immediately or schedule it to be heard at a later date.
 - c) If the court finds that the child is dependent and neglected, the court shall additionally make a finding whether the parents or either of them or another person who had custody of the child committed severe child abuse. (TRJP 307(e) & Tenn. Code Ann. § 37-1-129(b))

H. Dispositional Hearing

1. A dispositional hearing shall be separate and distinct from the adjudicatory hearing. However, it may be held immediately following the adjudicatory hearing or at a later date. (TRJP 308(b))
2. A dispositional hearing shall be held within fifteen (15) days of the adjudicatory hearing if the child is placed out of the home by court order and within ninety (90) days of the adjudicatory hearing in all other cases, unless good cause is shown. (TRJP 308(a))

3. The standard of proof at the dispositional hearing is preponderance of the evidence. (TRJP 308(e))

4. At the dispositional hearing, the court will make orders of disposition that are best suited to the protection and physical, mental and moral welfare of the child such as:

a) Permitting the child to remain with the child's parents, guardian or other custodian, subject to conditions as the court prescribes including supervision as directed by the court;

b) Transfer temporary legal custody to or grant guardianship to the department of children's services, another person deemed qualified to care for the child, or an agency licensed to receive and provide care for the child.

(Tenn. Code Ann. § 37-1-130(a))

I. Appeal

1. At the conclusion of the dispositional hearing, the court shall advise the parties of the right to appeal the dispositional order. (TRJP 308(c))

2. Any appeal from any final order or judgment in a dependent and neglect proceeding, may be made to the circuit court that shall hear testimony of witnesses and try the case de novo. (Tenn. Code Ann. § 37-1-159(a) & TRJP 118)

3. An appeal must be filed within ten (10) days of the entry of the final order. (Tenn. Code Ann. § 37-1-159(a) & TRJP 118)