

Raising Your Children and Appeals Right: The Importance of Appeals in Parental Termination Proceedings

Bethany Gale Blitchington*

I. INTRODUCTION

“Bang, bang, bang.” This was the sound one mother woke to on a Saturday morning.¹ It was the police.² Her three-year-old son had decided to be a “big boy” and walk one of the family dogs in the park across the street.³ The mother scolded the little boy and explained how he could not leave the house by himself.⁴ The police left, and the mother thought everything was fine.⁵ Monday morning, the police returned with an agent from the state’s child welfare services and took the little boy from his mother’s custody.⁶ The state proceeded to initiate termination of her parental rights.⁷

Luckily, on appeal, this case had a much happier outcome, and the little boy returned to his family.⁸ This happy ending rarely happens. In 2014, at least 60,000 parent-child relationships were terminated in the United States.⁹ For the parents who decide to appeal these terminations, normal rules of appellate procedure prevent an appellate court from reviewing a trial court’s finding unless the finding was raised on appeal.¹⁰ However, if these parents

* Bethany Gale Blitchington is a third-year law student at Southern Illinois University, expecting her Juris Doctor in May of 2019. She would like to thank her faculty advisor, Professor Angela Upchurch, for her continued guidance throughout the writing process. She would also like to thank her loving family and friends for their continuing support and encouragement.

¹ Dustin Dwyer, *When the Government Steps in to Separate Parents from Their Children - Permanently*, ST. OF OPPORTUNITY (Jan. 27, 2016), <http://stateofopportunity.michiganradio.org/post/when-government-steps-separate-parents-children-permanently>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See Dustin Dwyer, *She Lost Her Parental Rights. Now, She’s Won Her Appeal, and the Case Could Change Michigan’s Laws*, ST. OF OPPORTUNITY (Apr. 20, 2016), <http://stateofopportunity.michiganradio.org/post/she-lost-her-parental-rights-now-shes-won-her-appeal-and-case-could-change-michigans-laws>.

⁹ *Child Welfare Outcomes 2010–2014*, U.S. CHILDREN’S BUREAU, DEP’T HEALTH & HUM. SERVS. 7 (2015), https://www.acf.hhs.gov/sites/default/files/cb/cwo10_14.pdf.

¹⁰ Several rules of appellate procedure require that each issue being brought before the appellate court be made and argued in the appellate brief. See FED. R. APP. P. 28(a); TENN. R. APP. P. 27(a); IND. R. APP. P. 46(A).

are in Tennessee, the state supreme court mandated in the case of *In re Carrington H.* that appellate courts in the state must review all trial court findings on appeal in termination proceedings to ensure procedural due process.¹¹ The case arose from an attorney's failure to raise one of three grounds for termination on appeal resulted in a parent's termination of her rights at the intermediate appellate level.¹² Thus, to better protect a parent's right to raise his or her child, the Supreme Court of Tennessee saw fit to implement an appellate safeguard.¹³

This note will address the constitutionality of waiving issues from termination cases on appeal and whether Tennessee's use of an appellate safeguard is required under federal procedural due process or is even the best method for protecting parental rights. In Part II, this note addresses how the Supreme Court of the United States has defined parental rights. Then, under Part III, it will outline the basic process for parental termination proceedings and how the court has defined procedural due process in such cases. Part IV will briefly describe Tennessee's treatment of the issue, and Part V will conduct an analysis of Tennessee's appellate safeguard under the Supreme Court's jurisprudence for procedural due process challenges brought under the Fourteenth Amendment. Lastly, while the analysis will suggest that such a safeguard is not constitutionally required, Parts VI through VIII will discuss the positive and negative consequences of Tennessee's appellate safeguard and propose statutory and judicial remedies to further protect parental rights while still promoting the health and safety of children.

II. BACKGROUND: THE SUPREME COURT'S RECOGNITION OF PARENTAL RIGHTS UNDER THE FOURTEENTH AMENDMENT

The notion of parental rights, like many other fundamental rights, has its roots in the common law and was developed by great political philosophers of the day, specifically John Locke and William Blackstone. Under the common law, parental rights were not necessarily a right.¹⁴ Both Locke and Blackstone believed that parenthood creates responsibilities, not rights.¹⁵ Parents have a duty to ensure the welfare of their children, and the law provides each parent with certain privileges to help him in fulfilling his

¹¹ See *In re Carrington H.*, 483 S.W.3d 507, 535 (Tenn. 2016).

¹² *Id.* at 521. The trial court found the following grounds for termination at the trial level: (1) substantial noncompliance with a permanency plan, (2) the existence of persistent conditions that had required removal in the first place, and (3) mental incompetency. *Id.* at 514-15.

¹³ *Id.* at 535.

¹⁴ Jeffrey Shulman, *THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES, AND THE ENFRANCHISEMENT OF THE CHILD* 25 (Yale Univ. Press 2014).

¹⁵ *Id.* at 30.

duties to the child.¹⁶ This parental duty was often seen as a civil liberty.¹⁷ The notion of civil liberties, along with other common law ideas, created the doctrine of family autonomy,¹⁸ which plays an essential role in the Supreme Court of the United States' analysis of family law under the Fourteenth Amendment.

At the turn of the twentieth century, the Supreme Court started to grapple with how to define parental rights in light of the recently ratified Fourteenth Amendment. The Fourteenth Amendment states in pertinent part, "No State shall... deprive any person of life, liberty, or property, without due process of law."¹⁹ The Court first recognized a fundamental right in parenting in the case *Meyer v. Nebraska*.²⁰ While the Court did not provide much analysis, it interpreted the term "liberty" in the Fourteenth Amendment to include "the right of the individual... to marry, establish a home and bring up children."²¹

The Court expanded on this idea a few years later in *Pierce v. Society of Sisters*.²² In its analysis, the Court declared (1) parents have the right, along with a "high duty," to prepare their children and direct their education and (2) a child is not "the mere creature of the State."²³ The Court relied on that precedent in *Prince v. Massachusetts*.²⁴ The main holding was that the duty to care for a child belongs first with the parents;²⁵ however, the state has a right to act as *parens patriae*²⁶ and violate family autonomy when necessary to protect the child's welfare.²⁷ To this day, *Prince* is often cited to support the balancing of rights between the parent and child: "[t]he right to raise one's

¹⁶ *Id.*

¹⁷ *Id.* at 33 (citing WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 121 (Oxford: Clarendon Press, 1765) (defining civil liberties as natural liberties that have been restrained by laws and government to ensure the public welfare)).

¹⁸ Margaret Brinig, FAMILY, LAW, AND COMMUNITY: SUPPORTING THE COVENANT 122 (The Univ. of Chicago Press, 2010) (defining family autonomy as not allowing government intervention into family affairs).

¹⁹ U.S. CONST. amend. XIV, § 1.

²⁰ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

²¹ *Id.* at 399.

²² *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (involving a challenge to an Oregon law that required children be sent to public schools on the grounds that it violated the Fourteenth Amendment.).

²³ *Id.* at 535.

²⁴ *Prince v. Massachusetts*, 321 U.S. 158 (1944) (involving a Fourteenth Amendment challenge alleging that a Massachusetts law banning children from selling periodicals on street corners was an unconstitutional infringement on due process.).

²⁵ *Id.* at 166 (1944) (citing *Pierce*, 268 U.S. at 534-35).

²⁶ *Parens patriae* is a Latin phrase meaning "parent of his or her country. It is a doctrine used by the state to exercise a protective authority over its citizens unable to care for themselves. *Parens patriae*, BLACK'S LAW DICTIONARY (10th ed. 2014).

²⁷ *Prince*, 321 U.S. at 166-67.

children as one sees fit is a fundamental liberty but it may be constitutionally limited to protect the health, safety and welfare of [his or her] children.”²⁸

III. BACKGROUND: FEDERAL TREATMENT OF PARENTAL RIGHTS IN FOURTEENTH AMENDMENT CHALLENGES AND TERMINATION PROCEEDINGS

Under the due process clause of the Fourteenth Amendment, challenges can be raised on two grounds: substantive or procedural.²⁹ First, substantive due process addresses whether the government has infringed upon an individual’s fundamental liberty and whether the government can provide some type of justification for its intrusion.³⁰ This is where a bulk of Fourteenth Amendment challenges fall regarding parental rights. On the other hand, procedural due process claims focus on what type of interest (life, liberty, or property) is at stake and what type of procedural requirements are necessary to fulfill due process in that instance.³¹ Procedural due process, at a minimum, requires a person have notice and an opportunity to be heard before deprivation of a life, liberty, or property interest can occur.³² This facet of due process is where this note’s analysis will be spent.

In the context of liberty interests, the Supreme Court has declared a change in an individual’s legal status is the equivalent of a loss of liberty.³³ For example, the Court found a state law moving a prisoner to a mental facility without at least providing a hearing was in violation of procedural due process because of the change in the prisoner’s current liberty status.³⁴ When considering parental rights in termination proceedings, the Court has held parents facing the “forced dissolution of their parental rights” need procedural protections sufficient to provide them with “fundamentally fair procedures.”³⁵

Parental termination proceedings are governed by a variety of laws, including both federal and state law.³⁶ Such proceedings usually take place after the child has already been removed from the parent’s custody and can

²⁸ Randy Frances Kandel, *FAMILY LAW: ESSENTIAL TERMS AND CONCEPTS* 258 (Richard A. Epstein et al. eds., 2000).

²⁹ See U.S. CONST. amend. XIV, § 1; CALVIN MASSEY, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* 455 (Erwin Chemerinsky et al. eds., 5th ed. 2016).

³⁰ CALVIN MASSEY, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* 497 (Erwin Chemerinsky et al. eds., 5th ed. 2016).

³¹ *Id.* at 456.

³² *Id.* (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (Frankfurter, J., concurring)).

³³ *Id.* at 462.

³⁴ See *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980).

³⁵ *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982).

³⁶ John Thomas Halloran, *Families First: Reframing Parental Rights as Familial Rights in Termination of Parental Rights Proceedings*, 18 U.C. DAVIS J. JUV. L. & POL’Y 51, 55 (2014).

result in the severance of a parent's legal relationship with his or her child.³⁷ Even though these proceedings are different throughout the country, they typically require two findings be made: (1) the parent is unfit to care for the child and (2) termination of the parent-child relationship is in the child's best interest.³⁸ The criteria for parental unfitness is normally based on the voluntary actions or inactions of parents,³⁹ while the child's best interest standard reflects the importance of considering the law and circumstances surrounding the case given the needs of each child affected by the possible outcome of the proceeding.⁴⁰

The American Bar Association Center on Children and the Law (A.B.A.) produced guidelines to assist states in creating an appropriate framework for parental termination proceedings.⁴¹ According to the A.B.A., after a child has been removed from parental custody, and before termination is sought, the state's primary goal should be "to help the parent correct the abusive or neglectful behavior" and make the home a safe environment for the child.⁴² This requires a state prove it made reasonable attempts at reunification or that such attempts were not possible.⁴³ When a parent fails to make the home a safe environment and it becomes clear that a permanent home should be sought for the child, the state should then seek termination.⁴⁴ The state needs to consider two main questions when seeking termination: (1) whether the child can be returned to a safe home environment in the near future and (2) whether adoption is a "realistic and appropriate goal" for the child.⁴⁵ These questions are normally reflected in a state's two-step determination of the grounds for termination and the child's best interest.⁴⁶

A.B.A. guidelines also assert a state's statute detailing the termination process should include grounds for termination focusing on the proof necessary to make it clear a child cannot be returned to a safe environment.⁴⁷ Ideally, these grounds should question: (1) whether the parent has tried to

³⁷ See MARK HARDIN & ROBERT LANCOUR, EARLY TERMINATION OF PARENTAL RIGHTS: DEVELOPING APPROPRIATE STATUTORY GROUNDS 4-5 (Am. Bar Ass'n. 1996).

³⁸ RANDY FRANCES KANDEL, FAMILY LAW: ESSENTIAL TERMS AND CONCEPTS 336 (Richard A. Epstein et al. eds., 2000).

³⁹ Halloran, *supra* note 36, at 63 (explaining that "[c]riteria for parental unfitness" is also referred to as "grounds for termination" and that the terms are often used interchangeably).

⁴⁰ *Id.* at 67.

⁴¹ See generally HARDIN & LANCOUR, *SUPRA* NOTE 37.

⁴² HARDIN & LANCOUR, *SUPRA* NOTE 37, AT 5.

⁴³ See 42 U.S.C. § 671(a)(15)(B)-(D) (2012) (stating in order for a state to receive federal assistance for its department of children's services, the state must make reasonable efforts to reunify a parent with his or her child before terminating the parental relationship, except when the parent has submitted the child to "aggravated circumstances" or committed homicide or felony assault that resulted in bodily harm or when the state previously terminated the parent's rights to another child).

⁴⁴ HARDIN & LANCOUR, *supra* note 37, at 42.

⁴⁵ *Id.* at 9.

⁴⁶ *Id.*

⁴⁷ *Id.* at 10.

provide a stable environment for the child, (2) whether the parent has the capacity to care for the child, (3) whether there is a “long-standing pattern of abandonment or extreme parental disinterest”, and (4) whether the child would be subjected to further neglect and possible emotional or psychological trauma if reunited with the parent.⁴⁸

In addition to requiring at least one ground for termination be proven, a state’s statute should also require a determination of whether termination is in the child’s best interests under the A.B.A. guidelines.⁴⁹ At a bare minimum, this determination should include an inquiry into whether (1) termination is necessary to secure a permanent placement for the child, (2) the child will have to linger without a replacement after termination, and (3) adoption is a financial possibility for the potential adoptive family.⁵⁰

Once a parental termination proceeding is sought, the potential deprivation of an individual’s status as a legal parent awakens the procedural due process requirement. Under procedural due process challenges, once a liberty interest has been identified, a court must then consider what processes and procedures are necessary before deprivation of that interest can occur.⁵¹ A critical case in providing the framework for such analysis in parental termination proceedings was *Santosky v. Kramer*.⁵²

In *Santosky*, the state of New York allowed for a child to be declared “permanently neglected” and parental rights terminated if the state could establish by a preponderance of the evidence the state had tried to strengthen the parent-child relationship but the parents failed to do so.⁵³ The Santoskys, whose parental rights were terminated under New York’s law, challenged the “fair preponderance of the evidence” standard’s constitutionality.⁵⁴ First, the Supreme Court of the United States found a liberty interest existed for parents to care for and manage the upbringing of their children.⁵⁵ This liberty interest does not vanish solely because parents make poor choices or temporarily lose custody of their children.⁵⁶ Parents faced with the permanent dissolution of their rights have a “critical need” for procedural safeguards.⁵⁷ Having emphasized the importance of parental rights, the Court went on to apply a

⁴⁸ *Id.* at 11.

⁴⁹ *Id.* at 20.

⁵⁰ *Id.* at 20-23.

⁵¹ MASSEY, *supra* note 30, at 464-65.

⁵² *Santosky v. Kramer*, 455 U.S. 745 (1982).

⁵³ *Id.* at 748.

⁵⁴ *Id.* at 750.

⁵⁵ *Id.* at 753.

⁵⁶ *Id.*

⁵⁷ *Id.*

balancing test from *Mathews v. Eldridge*⁵⁸ and compared the Santoskys' rights with the state's interest in using the "preponderance" evidentiary standard.⁵⁹

Under the *Mathews* test, the Court first examined the parents' private interests in light of the evidentiary standard.⁶⁰ Normally, a "fair preponderance of the evidence" standard reflects "society's 'minimal concern with the outcome'" and the notion that "the litigants [involved] should 'share the risk of error in roughly equal fashion.'"⁶¹ The "clear and convincing evidence" standard applies "when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than the mere loss of money,'" such as "'a significant deprivation of liberty.'"⁶² Because of the importance and significance of parental rights compared to property rights, the Court concluded a parent's private interest "weighs heavily against use of the preponderance standard" in parental termination proceedings.⁶³

The Court then considered whether the "fair preponderance of the evidence" standard "fairly allocate[d] the risk of erroneous factfinding between [the] two parties."⁶⁴ The Court identified factors present in termination proceedings that increase the possibility of erroneous findings, such as the inconsistent standards and a court's discretion to ignore facts that might be beneficial to the parents, and concluded the State had an unfair advantage over parents in the ability to establish a case and to repeatedly bring termination proceedings.⁶⁵ According to the Court, these factors, when coupled with the "fair preponderance of the evidence standard," created a significant probability of erroneous deprivation, and such risk would be alleviated by a higher standard of proof.⁶⁶

⁵⁸ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (determining the appropriate test to be applied in procedural due process challenges consists of balancing these three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail).

⁵⁹ *Santosky*, 455 U.S. at 754.

⁶⁰ *Id.* at 754-55 (defining standards of proof as tools used to guide the factfinder in making a determination that vary depending on the weight of private and public interests and society's view of how the risk should be allocated between the parties involved).

⁶¹ *Id.* at 755-56 (quoting *Addington v. Texas*, 441 U.S. 418, 423-24 (1979)).

⁶² *Id.* at 756 (quoting *Addington v. Texas*, 441 U.S. 418, 424 (1979)).

⁶³ *Id.* at 759.

⁶⁴ *Id.* at 761.

⁶⁵ *Id.* at 762-64 (explaining: (1) the state's resources to establish a case against natural parents exceedingly surpass the parents'; and (2) if the parents win the termination proceeding, there is no "double jeopardy" bar preventing the state from bringing another action).

⁶⁶ *Id.* at 763-64.

Finally, the Court considered how the state's interests would be affected by a heightened evidentiary standard.⁶⁷ The state interests at stake were (1) preserving and fostering the child's welfare under the *parens patriae* doctrine and (2) fiscal and administrative interests in the costs of parental termination proceedings.⁶⁸ First, the state's *parens patriae* interest would actually be better served through preservation of a healthy parent-child relationship, rather than its severance.⁶⁹ Also, the Court found a higher evidentiary standard would reduce the risk of error without creating substantial financial or administrative burdens on the state.⁷⁰ Ultimately, in order to ensure procedural due process, the Court declared every state must employ a "clear and convincing" evidentiary standard in parental termination proceedings.⁷¹

Another central case in defining the required procedural due process in parental termination proceedings is *Lassiter v. Department of Social Services*.⁷² In *Lassiter*, a mother retained counsel for a criminal proceeding but failed to mention a pending termination proceeding to the attorney, did not try to retain other counsel for that proceeding, and did not request appointed counsel or claim indigence.⁷³ She raised the argument that, because she was indigent, the trial court violated the Fourteenth Amendment's Due Process Clause by not requiring the state to provide counsel.⁷⁴ In its opinion, the Supreme Court did not elaborate on the *Mathews* test to the same extent it would do so a year later in *Santosky*,⁷⁵ but it provided several important principles to frame the procedural due process discussion.

First, the Court noted the importance of a parent's interest in the accurate and just determination of a termination proceeding against him or her.⁷⁶ Then, the Court explained that, because of its *parens patriae* interest in the well-being of a child, the state shares this same interest with the parent.⁷⁷ However, this shared interest differs from the parent's because the state desires to conduct an economically efficient termination proceeding.⁷⁸ This pecuniary interest, the Court explained, generally is not enough to outweigh the parental interests involved, but in some instances, the state might have a stronger interest in the use of informal procedures.⁷⁹ Lastly, the

⁶⁷ See *id.* at 766.

⁶⁸ *Santosky*, 455 U.S. at 766.

⁶⁹ *Id.* at 766-67.

⁷⁰ *Id.* at 767.

⁷¹ *Id.* at 769.

⁷² *Lassiter v. Dep't. of Soc. Servs.*, 452 U.S. 18, 27 (1981).

⁷³ *Id.* at 21-22.

⁷⁴ *Id.* at 24.

⁷⁵ See *id.* at 27-31.

⁷⁶ *Lassiter*, 452 U.S. at 27.

⁷⁷ *Id.*

⁷⁸ *Id.* at 28.

⁷⁹ *Id.* at 31.

Court determined the risk of erroneous deprivation would be substantial given the potential complexity of a termination proceedings and the parent's inability to understand some of these issues without legal counsel.⁸⁰

The Court in *Lassiter* ultimately sided with the state and upheld the trial court's termination.⁸¹ However, the important principles derived from *Lassiter*, coupled with the application of those and other principles in *Santosky*, will be central to resolving the issue of whether the Court would find a constitutional mandate for appellate courts to review all trial court findings in parental termination cases, regardless of whether the parent raises them on appeal.

IV. TENNESSEE'S PARENTAL TERMINATION PROCEEDINGS AND IN RE CARRINGTON H.

Under Tennessee state law, termination of parental rights must be based on a finding (1) that at least one ground for termination exists and (2) that termination of those rights is in the child's best interests.⁸² First, finding grounds for termination requires a court to analyze whether a parent has willfully failed to support the child, willfully failed to visit the child, exhibited a wanton disregard for the child's welfare, failed to substantially comply with his or her permanency plan, failed to establish a suitable home, or displayed persistent conditions that would make it unsafe for the child to return.⁸³ Other grounds taken into consideration are whether the parent is mentally incompetent, has substance abuse issues that lead to neglectful behavior, or has been previously convicted of "severe child sexual abuse," sexual trafficking, or other serious criminal offenses.⁸⁴

Next, determining whether termination is in the child's best interest requires the court to consider several factors.⁸⁵ Some of these include whether the parent has made an effort to provide a safe environment for the child, whether the parent has maintained regular visitation with the child, whether the parent has cooperated with the social services agencies, whether the parent will have a negative impact on the child's medical, emotional, or psychological condition, and whether the parent has paid child support.⁸⁶

⁸⁰ *Id.*

⁸¹ *Id.* at 33. The Court also stated it was within the prerogative of the trial court to weigh the *Mathews v. Eldrige* factors and make procedural due process determinations because of the fact-intensive nature of the test. *Id.* at 32-33.

⁸² TENN. CODE ANN. § 36-1-113(c) (2017).

⁸³ See TENN. CODE ANN. §§ 36-1-102, 36-1-113(g)(1)-(14) (2017). See generally *In re Mya V.*, No. M2016-02401-COA-R3-PT, 2017 WL 3209181 (Tenn. Ct. App. July 28, 2017).

⁸⁴ TENN. CODE ANN. §§ 36-1-113(g)(5)-(8), (10)-(13) (2017).

⁸⁵ See TENN. CODE ANN. § 36-1-113(i)(1)-(9) (2017).

⁸⁶ See *id.* (The full factors to consider in the best interest determination are:

These factors are not exhaustive, and the court may, at its own discretion, consider other factors related to the child's best interests.⁸⁷ In a trial court's analysis of a child's best interests, the determination should occur "separate from and subsequent to" any analysis of the grounds for termination.⁸⁸

Decided in 2016, *In re Carrington H.* added a new wrinkle to parental termination proceedings on appeal.⁸⁹ The case involved a mother challenging the termination of her parental rights on the grounds that her counsel was inefficient for failing to raise one of the Juvenile Court's findings on appeal.⁹⁰ At trial, the Juvenile Court determined termination was appropriate on three grounds and in the child's best interest.⁹¹ Out of these findings, the mother's attorney failed to appeal the finding of mental

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- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
 - (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
 - (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
 - (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
 - (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
 - (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
 - (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol, controlled substances or controlled substance analogues as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
 - (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
 - (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.)

⁸⁷ TENN. CODE ANN. § 36-1-113(i) (2017).

⁸⁸ *In re Carrington H.*, 483 S.W.3d 507, 523 (Tenn. 2016) (quoting *In re Angela E.*, 303 S.W.3d 240, 254 (Tenn. 2010)).

⁸⁹ *See Carrington H.*, 483 S.W.3d 507 (Tenn. 2016).

⁹⁰ *Carrington H.*, 483 S.W.3d at 520-21.

⁹¹ *Id.* at 520. (The trial court's holding states in full:

- (1) Mother had failed to substantially comply with the requirements of the permanency plan; (2) Carrington had been removed from Mother's home by court order for more than six months, and the conditions that led to Carrington's removal still persisted, and there was little likelihood that these conditions would be remedied at an early date so that Carrington could safely return to Mother in the near future, and the continuation of the parent-child relationship greatly diminished Carrington's chances of early integration into a safe, stable, and permanent home; (3) Mother was incompetent to adequately provide for the further care of and responsibility for Carrington in the near future; and (4) termination of Mother's parental rights was in Carrington's best interest.)

incompetency that would interfere with her ability to provide and care for Carrington, the child.⁹²

The court of appeals refused to review any of the mother's challenges to the trial court's findings because the attorney's failure to raise incompetency as an issue on appeal made the court's decision to terminate final.⁹³ This was sufficient rationale for the appellate court to affirm the Juvenile Court's judgment.⁹⁴ However, on appeal, the Supreme Court of Tennessee rejected the idea.⁹⁵ To secure constitutional due process, the court mandated "that appellate courts [in Tennessee] must review the trial court's findings as to each ground for termination and as to whether termination is in the child's best interests."⁹⁶

In its decision, the court utilized both federal and state case law to determine what it deemed the appropriate scope of appellate review for parental termination proceedings.⁹⁷ The court relied on both federal Supreme Court and state court cases to support the idea that parental rights are protected by both federal and state constitutions.⁹⁸ The court heavily cited *Santosky v. Kramer* to support its proposition that parents are entitled to fundamentally fair proceedings in parental termination proceedings.⁹⁹ This combination of case law was determinative in the court's decision to mandate all appellate courts review each individual finding in termination proceedings regardless of whether it was raised on appeal.¹⁰⁰

The court also relied on Tennessee Rule of Appellate Procedure 13 in its analysis.¹⁰¹ According to the court, under Tennessee Rule of Appellate Procedure 13(d), appellate courts should "review factual findings de novo on the record [with]... a presumption of correctness unless the evidence [shows] otherwise."¹⁰² All other conclusions of law found by the trial court must be

⁹² *Id.* at 521.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 525-26.

⁹⁶ *Id.* at 535.

⁹⁷ *See id.* at 523-24.

⁹⁸ *Carrington H.*, 483 S.W.3d at 521-22 (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010); *In re Adoption of Female Child*, 896 S.W.2d 546, 547-48 (Tenn. 1995); *Hawk v. Hawk*, 855 S.W.2d 573, 578-79 (Tenn. 1993)).

⁹⁹ *Carrington H.*, 483 S.W.3d at 522 (citing *Santosky v. Kramer*, 455 U.S. 745, 754 (1982)).

¹⁰⁰ *See Carrington H.*, 483 S.W.3d at 521-22.

¹⁰¹ *See Carrington H.*, 483 S.W.3d at 524-25.

¹⁰² *Id.* at 524. TENN. R. APP. P. 13(d) provides in full:

Unless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. Findings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict.

reviewed “de novo with no presumption of correctness.”¹⁰³ The court found Tennessee Rule of Appellate Procedure 13 required appellate courts review all findings in termination proceedings, regardless of whether they are raised on appeal.¹⁰⁴

V. WOULD MANDATORY REVIEW BE REQUIRED UNDER THE CONSTITUTION? APPLYING SANTOSKY TO CARRINGTON

In considering whether waiver of findings not raised on appeal from termination proceedings is constitutionally required, the Supreme Court would conduct a procedural due process analysis similar to the one applied in *Santosky v. Kramer*.¹⁰⁵

A. The private interests affected are substantial.

The Court would first look to see what private interests are affected by the disputed practice.¹⁰⁶ In this case, like *Santosky*, the private interest is that of the parent to raise his or her child.¹⁰⁷ The Court has deemed this right, time and time again, as a fundamental liberty interest worthy of constitutional protection.¹⁰⁸ Because of this fundamental liberty interest, parents have a strong, compelling interest in the accurate and just results of a termination proceeding.¹⁰⁹ Similar to its decision *Lassiter*, absent any diminishing factors, the Court would find the private interest of the parent to weigh heavily against the waiver of non-raised issues from parental termination proceedings.¹¹⁰

¹⁰³ *Carrington H.*, 483 S.W.3d at 524 (citing *In re Angela E.*, 303 S.W.3d 240, 246 (Tenn. 2010)).

¹⁰⁴ *See Carrington H.*, 483 S.W.3d at 524 (explaining how lower levels of Tennessee’s appellate system employed Rule of Appellate Procedure 13 to review issues not raised by parents on appeal from termination cases because of the serious consequences involved); *See also* TENN. R. APP. P. 13(b):

Review generally will extend only to those issues presented for review. The appellate court shall also consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review, and may in its discretion consider other issues in order, among other reasons: (1) to prevent needless litigation, (2) to prevent injury to the interests of the public, and (3) to prevent prejudice to the judicial process.

¹⁰⁵ *See Santosky v. Kramer*, 455 U.S. 745 (1982).

¹⁰⁶ *Santosky*, 455 U.S. at 758-59.

¹⁰⁷ *Id.*

¹⁰⁸ *Carrington H.*, 483 S.W.3d 507, 521 (Tenn. 2016) (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000), *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), *In re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 1995), *In re Adoption of Female Child*, 896 S.W.2d 546, 547-48 (Tenn. 1995), *Hawk v. Hawk*, 855 S.W.2d 573, 578-79 (Tenn. 1993)) (showing the multiple recognitions of a fundamental liberty interest in parental rights at both state and federal levels).

¹⁰⁹ *Lassiter v. Dep’t. of Soc. Servs.*, 452 U.S. 18, 27 (1981).

¹¹⁰ *See id.* at 31-33.

B. There is a high probability of erroneous deprivation.

The Court would then look at the procedure used, its risk of mistakes, and the value of any additional procedural safeguards.¹¹¹ Here, the disputed practice is the waiver of findings from parental termination cases if they are not raised on appeal. Erroneous deprivation occurs when an individual is wrongfully deprived of a fundamental interest under the Fourteenth Amendment.¹¹² For example, the possibility of erroneous deprivation is high when an individual without legal representation is confronted with complex legal principles during trial.¹¹³ Another example of erroneous deprivation occurs in instances where a child should not be removed from his parent's custody but, because of a computer glitch, the attorney's appellate brief lacked a finding of the trial court, meaning that finding was not properly raised on appeal. If that occurs, then, under current procedures, most appellate courts would find the termination final and not review the case.

This grave consequence is magnified when a state's termination statute is similar to Tennessee's.¹¹⁴ When only one ground for termination coupled with a best interest determination is necessary for a successful termination, the failure to raise either a single ground for termination or the trial court's best interest analysis will result in automatic termination. This occurred at the intermediate appellate level in *Carrington*.¹¹⁵ Mother's attorney raised the issues of her substantial non-compliance with a permanency plan and the existence of persistent dangerous conditions yet failed to raise the issue of her mental incompetency on appeal, and because the state statute requires only one ground be found for termination to occur, the court of appeals denied review and declared the termination final.¹¹⁶

This prompted the Tennessee Supreme Court to mandate appellate courts review all findings of the trial court in parental termination cases, regardless of whether the finding is raised on appeal.¹¹⁷ Such an appellate safeguard would ensure that parental rights are not terminated without sufficient proof, adequate determinations, and fair proceedings.¹¹⁸ The safeguard would prevent unnecessary termination of parental relationships based on a mistake, either the parent's, the state's child welfare agency, or the court's.¹¹⁹ Because of the current procedure's consequences and the

¹¹¹ *Santosky*, 455 U.S. at 76.

¹¹² *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹¹³ *Lassiter*, 452 U.S. at 31.

¹¹⁴ *See* TENN. CODE ANN. § 36-1-113(c) (2017).

¹¹⁵ *In re Carrington H.*, 483 S.W.3d 507, 521 (Tenn. 2016).

¹¹⁶ *Id.* at 521.

¹¹⁷ *Carrington H.*, 483 S.W.3d at 525.

¹¹⁸ *Id.*

¹¹⁹ *See* Dustin Dwyer, *She Lost Her Parental Rights. Now, She's Won Her Appeal, and the Case Could Change Michigan's Laws*, ST. OF OPPORTUNITY (Apr. 20, 2016), <http://stateofopportunity->

added value of appellate safeguards, the Court would lean towards disfavoring waivers on appeal from termination proceedings.

C. However, the government interests involved in termination proceedings would outweigh the private interests and risk of erroneous deprivation.

Finally, the Court would look at the possible effects on the state's interests by requiring appellate review of all findings from termination cases, regardless of whether they were raised on appeal.¹²⁰ This is where the requirement of an appellate safeguard would fail.

There are multiple state interests involved in termination cases. First, the state has an interest in keeping its judicial system and administrative agencies running efficiently.¹²¹ The implication of an appellate safeguard would increase the amount of time and resources the state's appellate court system would have to incur in determining these cases. A safeguard could also incentivize attorneys to raise frivolous or deficient appeals and clog the appellate court system.¹²² The state's agency providing child welfare services would also experience difficulties in operating effectively. Time and money normally spent on other important tasks will now be spent on more appellate litigation than ever before. However, the Court has ruled the state's pecuniary interest, by itself, will not be enough to outweigh a parent's interest in termination proceedings.¹²³

The state also shares an interest with parents in the accurate and just findings in termination proceedings.¹²⁴ This shared interest supports the state's substantial *parens patriae* interest in protecting and promoting the welfare of a child.¹²⁵ However, in some instances, a swift termination best fulfills the state's *parens patriae* responsibilities.¹²⁶

Parens patriae allows the state to interfere with the parental right to raise one's child when the child's health and safety might be at risk.¹²⁷ Some of the principal purposes of a parental termination statute are to protect a

.michiganradio.org/post/she-lost-her-parental-rights-now-shes-won-her-appeal-and-case-could-change-michigans-laws (providing an example of a state's appellate process preventing the unnecessary termination of a parent-child relationship).

¹²⁰ See generally *Santosky v Kramer*, 455 U.S. 745, 766 (1982).

¹²¹ See *Santosky*, 455 U.S. at 767.

¹²² See *In re Mya V.*, No. M2016-02401-COA-R3-PT, 2017 WL 3209181 at *2-3 (Tenn. Ct. App. July 28, 2017) (involving an appellate brief that received harsh criticism from the court of appeals in its opinion because of the brief's inadequacy).

¹²³ *Lassiter v. Dep't. of Soc. Servs.*, 452 U.S. 18, 28 (1981).

¹²⁴ *Id.* at 27.

¹²⁵ See *Santosky*, 455 U.S. at 766.

¹²⁶ *Lassiter*, 452 U.S. at 31 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 788 (1973) ("[D]ue process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed[.]").

¹²⁷ See *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944).

child and prevent him or her from lingering with uncertainty in the foster care system through use of quick and efficient termination procedures. Thus, the state has a substantial interest in securing a safe, stable, and permanent home for the child, which is promoted through the accurate and swift determination of parental termination cases.

For example, in *Carrington*, there were several indications that Carrington's mother was not providing a safe environment for her children, including "a history of mental instability" and "unsafe housing" conditions.¹²⁸ The state attempted to help the mother rectify this behavior through a permanency plan, but she failed to achieve full compliance with the plan.¹²⁹ Thus, the state had a *parens patriae* interest in removing Carrington from his mother's custody to prevent possible harm and secure a permanent home for Carrington. However, Carrington's removal was prolonged because of the Tennessee Supreme Court's decision to further review the case.

Carrington's contact with the Department of Children's Services (D.C.S.) began in December 2005 when he was barely a year old.¹³⁰ After numerous attempts to help the mother provide a stable home, D.C.S. finally filed a petition to terminate parental rights in October 2013.¹³¹ The Juvenile Court terminated the mother's rights in February 2014,¹³² and had the issue not been appealed, Carrington's stay in the foster system would be eight years, almost his entire life. The appellate court promptly denied review of the case for failure to raise a ground for termination in October 2014.¹³³ However, the supreme court's decision to review and decide the case prolonged the termination for another year.¹³⁴

Carrington's contact with D.C.S. and stay in foster care lasted more than ten years, until the court's decision in 2016.¹³⁵ Even then, the court did not overturn the termination found at trial.¹³⁶ The state arguably failed in its *parens patriae* duty to secure a permanent and safe environment for Carrington, and the court's mandated appellate review has the potential to continue undermining this important state interest. Thus, the Supreme Court would likely find the state's *parens patriae* and pecuniary interests in requiring an appellate safeguard would outweigh the individual interests at stake.

¹²⁸ *In re Carrington H.*, 483 S.W.3d 507, 513 (Tenn. 2016).

¹²⁹ *Id.* at 513-15.

¹³⁰ *Id.* at 511.

¹³¹ *Id.* at 514.

¹³² *Id.* at 520.

¹³³ *Id.* at 521.

¹³⁴ *See generally Carrington H.*, 483 S.W.3d 507.

¹³⁵ *See Carrington H.*, 483 S.W.3d at 511.

¹³⁶ *Carrington H.*, 483 S.W.3d at 511.

D. Mandatory review would not be constitutionally required under Santosky.

While there are fundamental liberty interests at stake and a risk of deprivation from failing to raise a finding on appeal, the requirement of an appellate safeguard is unlikely to be mandated under the Court's procedural due process analysis because of the potential for huge governmental burdens, particularly to states' *parens patriae* interests. However, the federal Constitution acts as a floor, not a ceiling, when it comes to securing personal liberties,¹³⁷ and states are free to be more protective of individual liberties than the federal government.¹³⁸ Tennessee has opted to do this in appeals from parental termination proceedings.

VI. POSITIVE CONSEQUENCES OF HAVING *CARRINGTON*-LIKE APPELLATE SAFEGUARDS

The court in *Carrington* best explains the positives of an appellate safeguard for parental termination proceedings. It believed that requiring appellate review on all grounds would ensure the state terminate parental rights only with "sufficient proof, proper findings, and fundamentally fair proceedings."¹³⁹ The review protects fundamental liberty rights by requiring a higher standard of procedural due process.

Most importantly, the use of an appellate safeguard in certain cases might prevent unnecessarily terminating a parent-child relationship. For example, trial courts can mistakenly terminate parental relationships, as was the case in *People v. Teresa R.*¹⁴⁰ In this case, a mother's two children were deemed to have been neglected, but only by the children's fathers.¹⁴¹ The trial court relied on the proceedings against the fathers to find by clear and convincing evidence the mother's parental rights should be terminated.¹⁴² The appellate court reversed, preserving the mother's rights to her children.¹⁴³ Without the state's appellate procedures, the mother would have

¹³⁷ See generally U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This supports the idea that a state may grant more liberties than the federal government, so long as it is not prohibited in doing so.)

¹³⁸ *Mills v. Rogers*, 457 U.S. 291, 300 (1982) (citing *Greenholtz v. Nebraska Prison Inmates*, 442 U.S. 1, 7, 12 (1979); *Oregon v. Hass*, 420 U.S. 714, 719 (1975)).

¹³⁹ *In re Carrington H.*, 483 S.W.3d 507, 525 (Tenn. 2016).

¹⁴⁰ *People v. Teresa R.* (*In re Cheyenne S.*), 815 N.E.2d 1186 (Ill. App. Ct. 2004).

¹⁴¹ *Id.* at 1192.

¹⁴² *Id.* at 1087-88.

¹⁴³ *Id.* at 1191-92 (explaining that the trial court (1) could not rely on the neglect finding against the child's father as a basis for termination of the mother's rights and (2) improperly mandated the mother file an order of protection against the father against her will without having found the mother had also neglected the children and relied on that order to terminate her rights).

lost her children forever, solely on the basis that both of the children's fathers had neglected them.

VII. NEGATIVE CONSEQUENCES OF HAVING *CARRINGTON*-LIKE APPELLATE SAFEGUARDS

When the court created the appellate safeguard in *Carrington*, there was no intention for the safeguard to produce frivolous appeals or prolong termination proceedings.¹⁴⁴ In fact, the court expected the safeguard to promote concluding "parental termination litigation as rapidly as possible 'consistent with fairness.'"¹⁴⁵ However, since the decision released in 2016, the Tennessee Court of Appeals has already been confronted with the problem of abusive appeals.

The court of appeals decided *In re Mya V.* in 2017, less than two years after *Carrington*.¹⁴⁶ Both the mother's and father's rights were terminated on numerous grounds at the trial level, and the mother sought an appeal.¹⁴⁷ In her appellate brief, the mother's argument section was less than one hundred fifty words and made no reference to relevant case law other than *Carrington*.¹⁴⁸ It also failed to mention the trial court's grounds for termination or the factors used in the best-interest analysis.¹⁴⁹ In its opinion, the court of appeals noted that its required analysis, coupled with the appellant's failure to follow normal appellate procedural, did not promote "the important goal of concluding parental termination litigation as rapidly as possible" in a fair manner.¹⁵⁰ It is clear that cases like *Mya* abuse the judiciary, result in a waste of scarce resources, and needlessly prolong a child's stay in the foster system.

The appellate safeguard also has the potential to unnecessarily prolong the termination proceedings. The State has a substantial interest in ensuring the health and safety of children, especially when their parents are unfit or pose a threat to the child.¹⁵¹ When a parent is not fit to care for his or her child, the ultimate goal changes from returning to the child to the parent's care to integrating the child into a safe and stable home, even if that home is

¹⁴⁴ *Carrington H.*, 483 S.W.3d at 525.

¹⁴⁵ *Id.* (quoting *Lassiter v. Dep't of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 32 (1981), *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003)).

¹⁴⁶ *In re Mya V.*, No. M2016-02401-COA-R3-PT, 2017 WL 3209181 (Tenn. Ct. App. July 28, 2017); *In re Carrington H.*, 483 S.W.3d 507 (Tenn. 2016).

¹⁴⁷ *Mya V.*, No. M2016-02401-COA-R3-PT, 2017 WL 3209181, at *2.

¹⁴⁸ *Id.* at *3.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* (quoting *In re Carrington H.*, 483 S.W.3d 507, 525 (Tenn. 2016)).

¹⁵¹ See RANDY FRANCES KANDEL, *FAMILY LAW: ESSENTIAL TERMS AND CONCEPTS* 258 (Richard A. Epstein et al. eds., 2000).

not the parent's.¹⁵² Sometimes, a parent's unfitness is evident. For example, when a parent subjects their child to abuse, termination is overwhelmingly appropriate in such circumstances.¹⁵³ Termination may also be appropriate when a parent continuously fails to visit his or her child. For example, a father who was notified prior to the birth of his child that he was the father and subsequently failed to visit the child during the first year shows a pattern warranting termination.¹⁵⁴ Especially under the circumstances mentioned above, an appellate safeguard that requires an appellate court to review all trial court findings regardless of whether they were raised on appeal has the potential to prolong a child's stay in the foster care system and increase the number of unnecessary appeals.

Lastly, an appellate safeguard has the potential to disrupt families and create emotional heartbreak for almost all involved. Imagine a little boy named Alex, whose parents lost custody of him before his first birthday. Their parental rights were terminated a year later, and the parents' appealed the finding to the state appellate court and then the state supreme court. The state appellate courts reviewed every finding of the trial court on appeal, and eventually, about four years later, Alex was returned to his biological parents. During the four-year appellate process, Alex lived with a foster family, who planned on pursuing adoption once the termination was final. Alex knew no other family than his foster parents. Such a traumatic life event is likely to cause short-term distress to a child and, in some cases, can result in long-term problems.¹⁵⁵

VIII. SOLUTIONS TO PROTECTING PARENTAL RIGHTS ON APPEAL

The negative consequences of an appellate safeguard far outweigh any positives that might occur. That is not to say that parental rights are any less important; they are. Parental rights are fundamental liberty interests and receive constitutional protections.¹⁵⁶ However, the state may limit these

¹⁵² See MARK HARDIN & ROBERT LANCOUR, EARLY TERMINATION OF PARENTAL RIGHTS: DEVELOPING APPROPRIATE STATUTORY GROUNDS 5 (Am. Bar Ass'n 1996).

¹⁵³ See *In re Chance D.*, No. E2016-00101-COA-R3-PT, 2016 WL 6997795 (Tenn. Ct. App. Nov. 30, 2016) (affirming the termination of a mother's parental rights when there was proof she had abused her child); see also *In re J.M.N.*, 134 S.W.3d 58, 68 (Mo. Ct. App. 2004) (explaining that it is proper to consider prior abuse of a child if that abuse is indicative of future behavior).

¹⁵⁴ See *In re Mariah H.*, No. E2016-02091-COA-R3-PT, 2017 WL 2829820, *6-8 (Tenn. Ct. App. June 30, 2017).

¹⁵⁵ See 2008 American Psychological Association Presidential Task Force on Posttraumatic Stress Disorder and Trauma in Children and Adolescents, *Children and Trauma: Update for Mental Health Professionals*, AM. PSYCHOL. ASS'N, <https://www.apa.org/pi/families/resources/update.pdf> (last visited Nov. 11, 2017).

¹⁵⁶ *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

rights in things affecting a child's health and well-being.¹⁵⁷ So, what possible protections can a state use to sufficiently protect a child's welfare and secure fundamental parental rights?

One possible solution is to amend parental termination statutes to require more than one ground for termination to be permissible. It seems that part of the problem in *Carrington* resulted from a state law that required the state's child welfare agency to find only one ground for termination by clear and convincing evidence.¹⁵⁸ Because the mother in *Carrington* failed to raise one of the grounds found by the trial court, her appeal became moot in the eyes of the appellate court.¹⁵⁹ Had the statute required the state to prove at least two grounds by clear and convincing evidence at the trial level, the mother's appeal would have been reviewed by the court of appeals because she raised two out of the three findings.¹⁶⁰ The amended statute would require the court to find two out of the three grounds were unsupported for the court to reverse, and the issue of the one ground not raised would become irrelevant.

However, requiring two grounds for termination is not the most viable solution. A majority of state laws require only one ground for termination be found.¹⁶¹ Other states grant broad discretion to the trial judge by providing a list of factors to consider in making determinations.¹⁶² This single-ground requirement is imposed largely because requiring more than one ground for termination would potentially lengthen the amount of time a child lingers in uncertainty. Therefore, requiring more than one ground for termination contradicts a state's *parens patriae* interest by hindering the state in swiftly providing a safe environment for the child.

The most viable solution to Tennessee's appellate safeguard is to require an attorney to have an honest, good faith intention in filing an appeal before a court triggers the appellate safeguard and embarks on a review of all findings. The appropriate test for whether an attorney had good faith in filing should take into account the reasons or motives behind the deficient appellate brief. Additionally, the analysis should consider timing factors and the party's intentions. Ideally, the appellate court would take notice of the deficient brief and return it to the filing attorney, along with an order requesting an affidavit explaining why there was a good faith mistake and any other evidence the attorney has available within two weeks of receiving

¹⁵⁷ Prince v. Massachusetts, 321 U.S. 158, 167 (1944).

¹⁵⁸ TENN. CODE ANN. § 36-1-113(c)(1) (2017).

¹⁵⁹ See *In re Carrington H.*, 483 S.W.3d 507, 521 (Tenn. 2016).

¹⁶⁰ Compare TENN. CODE ANN. § 36-1-113(c)(1) (2017) with *Carrington H.*, 483 S.W.3d at 521.

¹⁶¹ See ARIZ. REV. STAT. ANN. § 8-863(B) (2017); COLO. REV. STAT. § 19-3-604 (2017); DEL. CODE ANN. tit. 13, § 1103(a) (2017); GA. CODE ANN. § 15-11-310 (2017); KY. REV. STAT. ANN. § 625.090(2) (LexisNexis 2017).

¹⁶² See ALA. CODE § 12-15-319 (2017); HAW. REV. STAT. ANN. § 571-61(b)(1) (LexisNexis 2017); MISS. CODE ANN. § 93-15-121 (2017).

notice. Other evidence could include an attorney's billing statements or client contract.

In offering proof, the attorney should have to plead both: (1) there were exigent circumstances affecting his or her ability to submit an adequate appellate brief on time and (2) there were no bad motives or intentions in filing the appeal. Timing factors could include considerations of whether the attorney was hired the day before the deadline to file an appeal or whether the parent decided to appeal the day before the filing was due. Factors showing intention or motivation should include: whether the party filed the appeal to frivolously delay the final termination; whether the attorney was not diligent in filing the appeal; whether the attorney frequently procrastinates; and other similar factors the court sees fit. This type of analysis is not completely unprecedented. The factors appropriate to determining whether an appellate brief is filed in good faith are strikingly similar to the process for sanctioning lawyers under the Federal Rule of Civil Procedures.¹⁶³

One of the main problems with the *Carrington* safeguard is the potential for abuse and prolonged litigation by attorneys stretching the rule's boundaries.¹⁶⁴ This sort of abuse is evident in *Mya V.*¹⁶⁵ The mother's attorney made no mistake in this appeal:

A party seeking to terminate parental rights must prove both the existence of one of the statutory grounds for termination and that termination is in the child's best interest. *T.C.A. § 36-1-113(c)*. Both the grounds for termination and the best interest determinations must be supported and established by clear and convincing evidence. *T.C.A. § 36-1-113(c) (1)*. The trial court's ruling that the evidence sufficiently supports termination of parental rights is a conclusion of law, which appellate courts review *de novo* with no presumption of correctness. *In re Carrington H.*, 483 S.W.3d 507, 523-24 (Tenn. 2016).

In this case, it is [Mother's] position that the Department of Children's Services failed to establish by clear and convincing evidence that there are grounds to terminate her parental rights, and that the termination is in the child's best interest. [Mother] is simply requesting the *de novo* appellate review of the record and Juvenile Court findings to which she is entitled.¹⁶⁶

¹⁶³ See FED. R. CIV. P. 11. When an attorney signs and presents something before a federal court, he or she is "certifies that to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" the filing is not being made for an improper purpose, including to cause unnecessary delay; the claims made are supported by existing law or an argument for modifying the law; the facts have or will have evidentiary support; and any denials of facts have factual support or are reasonably based on lack of information.

¹⁶⁴ See *In re Mya V.*, No. M2016-02401-COA-R3-PT, 2017 WL 3209181, at *3 (Tenn. Ct. App. July 28, 2017).

¹⁶⁵ See generally *Mya V.*, No. M2016-02401-COA-R3-PT, 2017 WL 3209181.

¹⁶⁶ *Mya V.*, No. M2016-02401-COA-R3-PT, 2017 WL 3209181, at *3.

This appeal was a blatant manipulation of the *Carrington* rule. The appeal provides neither a substantial argument for the court to decipher nor any case law, other than *Carrington*, for the court to reference. Under a good faith analysis, the appeal from *Mya V.* would not be permitted unless the attorney handling the mother's appeal could establish the appeal was not filed with an improper motive and there were timing constraints or other practical issues affecting his ability to submit a proper brief. *Mya V.* would likely not meet the good faith qualifications.

While this type of analysis might cause a delay, the two weeks it would take for the attorney to submit a properly-pled appellate brief and affidavit with supporting evidence is much less than the time it could possibly take for the reviewing court to trudge through the record on appeal. The two-week delay would also promote judicial efficiency because the reviewing court could devote its time and energy to other cases pending before the court while the attorney corrects his or her appeal. Ultimately, this two-week period would promote judicial efficiency without contradicting the state's *parens patriae* interest, and thus, requiring a showing of good faith prior to embarking on appellate review is a viable option to balance the parents' and the state's interests.

IX. CONCLUSION

In conclusion, requiring an appellate court to review all findings from parental termination proceedings regardless of whether they are raised is neither mandated by the federal constitution nor the best method for protecting parental rights. The federal framework, arising from *Santosky v. Kramer*, of procedural due process claims in termination cases would not find a constitutional violation in waiving issues not raised on appeal. The government interests involved are far too great. Not only would requiring such review increase the possibility of frivolous appeals and prolonged litigation, it could cause substantial harm to the child involved and prevent efficient placement with an adoptive family.

There are other means a state could employ if it wishes to offer more protection to parents in termination proceedings. Although not the best solution, a state could require more than one ground for termination be established before termination of parental rights is permissible. The state could also employ an appellate safeguard like the one produced in *Carrington* but limit its application to only those instances where the attorney had an honest, good-faith intention when filing a deficient brief. Regardless of the route it takes, each state has an imperative duty in protecting a parent's rights in termination proceedings, but it should not provide such protection at the expense of a child's well-being.

