Tennessee Judicial Academy

Juvenile Court Judges

Juvenile Justice System Philosophy

- TCA 37-1-101
- Our "Preamble"

37-1-101(a)(1):

- "Provide for the care, protection, and wholesome moral, mental and physical development of children coming within its provisions."
- Emphasis in juvenile court is *rehabilitative* and *protective* – not punishment oriented
- Focus is on what the child IS, rather than what the child HAS DONE

37-1-101(a)(2):

- "Consistent with the protection of the public interest, remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior and to substitute therefor a program of treatment, training, and rehabilitation."
- "I guess some mistakes you keep on paying for." Robert Redford as Roy Hobbs in *The Natural*
- Emphasis is that children should not be considered criminals – children should be *treated, trained, and rehabilitated*
- Exception: "consistent with the protection of the public interest"

37-1-101(a)(3):

- "Achieve the foregoing in a family environment whenever possible, separating the child from such child's parents only when necessary for such child's welfare or in the interest of public safety."
- Emphasis is on the family and the importance of keeping the child at home whenever possible.
- Children usually do better in a family environment; children almost always want to be with their family; society advances when families are strengthened.
- Separation of a child from the family is a massive intrusion by the state into a family's affairs – tread surely, but lightly.

37-1-101(a)(4):

- "Provide a simple judicial procedure through which this part is executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced."
- "Simple judicial procedure" – proceedings in juvenile court are often more informal than in other courts – BUT
- Special emphasis of this provision is on the parties' "constitutional and other legal rights"
- Do you see any *tension* between these two objectives?
- Ask yourself as judge: At the end of the day, was this proceeding fair to all parties?

37-1-101(b):

- "It is the intention of the general assembly in the passage of this part to promulgate laws relative to children that are to be uniform in application throughout the state." (emphasis added)
- Clear intent is for Tennessee children to be treated the same regardless of which county handles the case
- Although the Rules of Juvenile Procedure allow for local rules and encourage development of local processes, the substantive effect should be as consistent as possible

New Rules of Juvenile Procedure

- Complete rewrite of Juvenile Rules currently underway
- Anticipated completion date: to be submitted to General Assembly January 2016
- Will make several substantive changes in delinquency practice - please stand by

Nomenclature

- Crime – delinquent offense or delinquent act
- Charging instrument, warrant – petition
- Arrest - attachment
- Incarceration – detention
- Defendant - child
- Arraigned – undergoes intake
- Pleads guilty or not guilty – admits or denies (new rules add no contest and best interests pleas)
- Trial – adjudication
- Sentencing hearing – disposition hearing

Definition of Delinquency

- Delinquent Act: TCA 37-1-102(b)(9) – an act designated a crime, but not a status offense or a traffic offense (with exceptions – DUI, felony traffic offenses)
- Delinquent child: TCA 37-1-102(b)(10) – a child who has committed a delinquent act AND "is in need of treatment and rehabilitation"
- Two step process: guilty of delinquent act and in need of treatment and rehabilitation
- 37-1-129(b) – acts that constitute felony or that reflect recidivistic delinquency are sufficient to sustain finding of treatment and rehabilitation

Definition of Child

- TCA 37-1-102(b)(4)
- A person under the age of 18
- A person under the age of 19 for limited purposes
  - To enforce a non-custodial order of disposition entered prior to the child's 18th birthday
  - To complete commitment to DCS (for a delinquency offense)
  - To consider delinquency matters involving acts occurring prior to age 18

Commencement of Case

- TCA 37-1-108
  - Transfer from adult court (37-1-109)
  - Traffic offenses (37-1-146)
  - Transfer from another state (37-1-142, 144)
  - Filing of a petition

Intake

- Rules 8 and 12
- Intake officer – "designated intake court officer" – usually done by Youth Services Officer (see TCA 37-1-106)
- Receipt of "complaint" and preliminary inquiry
  - "complaint" – Rule 2(4) – "Informal oral or written statement requesting the court to exercise jurisdiction"

Preliminary Inquiry

- Rule 8(c) – designated court officer to determine whether the facts alleged establish that the matter is within the jurisdiction of the court and whether the best interests of the child or of the public require further court action
- Advisory Commission Comments to Rule 8 discuss "legal sufficiency of the evidence" and "jurisdiction" and recommend consultation with the district attorney (see also Rule 12(a)(1)(II) – to divert cases with "insufficient evidence")
- Probable Cause?
- Rule 12 – purpose and duties

Preliminary Inquiry: Duties

- Rule 12 - Intake officer to
  - Advise of rights
  - Request court to appoint attorney, if child requests
- Intake officer to divert cases from formal court action if appropriate
- Pursue informal adjustment, if appropriate (TCA 37-1-110, and Rule 14)
- File petition "only when necessary" for the welfare of the child or protection of the public

Informal Adjustment

- Rule 14 and TCA 37-1-110
- Rule states "subject to court approval" (new rules will change this)
- Limited to "counsel and advice" – must be voluntary
- Wide discretion given to court officer
- Limited to 3 months, unless court extends (up to 6 months)
- May be terminated by court officer or child, and case recommences against child
- Note: Traffic diversions are under TCA 37-1-146 – "nonjudicially"
- If successful, petition is dismissed
- Note: no procedure for expunction (TCA 37-1-153(f))

Petition

- "A verified written statement by which the formal process of the juvenile court is begun." Rule 2(13)
- Includes all charging instruments used to initiate delinquency proceedings
- Note: non-traffic offense citations – are definitely used and would probably fall under definition

Petition: Who May File?

- TCA 37-1-119 – by any person "with knowledge of the facts"
- Rule 8(a) expands universe of potential filers to include any "person or agency"
- Usually law enforcement

Petition: Contents

- TCA 37-1-120 and Rule 9
- Due Process Concerns
  - "plain and concise language"
  - "with particularity the factual and other allegations"
- *State v. Rogers*, 235 S.W.3d 92, 95 (Tenn. 2007): "The child is afforded a number of constitutional and statutory rights and procedures in delinquency proceedings. These include the right to due process...."

Key Juvenile Court Personnel

- Youth Services Officer (the "YSO") – TCA 37-1-106 and Rule 2(21)
- Probation Officer – TCA 37-1-105 and Rule 2(14)
- Probation Officers can be "county" officers or employees of DCS
- Clerk – an elected official, often combined with Clerk of General Sessions and/or Circuit Court (especially in small counties)
- Court Liaison – DCS employee assigned to the court to facilitate contact between DCS and the court (a good one is "priceless")

Nature of the Delinquency Proceeding

- TCA 37-1-133
- A finding of delinquency is not a "conviction of crime"
- The delinquency proceeding is "civil" in nature
- *State v. Womack*, 591 S.W.2d 437, 442 (Tenn. Ct. App. 1979) – "Until a juvenile has been 'transferred' to the criminal court, the proceeding against him is civil in nature...."
- Limit to "civil" treatment: Due Process

Nature of the Proceeding, cont.

- *Arwood v. State,* 49 S.W.2d 943, 946 (Tenn. Ct. App. 1970):
- "... our answer is simply that where due process comes into conflict with procedures in the juvenile courts – however laudable the purpose behind the adoption of the procedures – due process must prevail."

Rights of Child

- In the beginning, there was *In re: Gault*, 387 U.S. 1 (1967)
- Unremarkable facts:
  - Gerald, age 15, accused of making lewd telephone calls
  - Gerald was on probation for theft (he accompanied another juvenile when a lady's purse was stolen)
- Remarkable procedure:
  - No written accusation from complaining witness
  - Taken into custody and detained
  - Parents not notified of detention
  - Several days later, parents learned from probation officer that hearing would be next day
  - Probation officer filed petition on hearing day, no service on Gerald or his parents

Rights, cont.

- Initial hearing conducted in chambers
- Complaining witness not present
- No sworn testimony, no record of proceedings
- Gerald not represented by counsel
- Judge questioned Gerald directly
- Judge took matter under advisement and sent Gerald back to detention
- Gerald released from detention one or two days later
- Parents received a note on plain paper informing of further proceedings
- At second hearing, complaining witness not present
- Gerald denied making call, confirmed by probation officer

Rights, cont.

- Gerald not represented by counsel
- Judge never spoke to the complaining witness
- Probation officer filed a "referral report" which was never disclosed to Gerald or his parents
- Judge found Gerald to be a juvenile delinquent
- Sentenced to "State Industrial School" until age 21 (effective 6 year sentence)
- No appeal allowed
- An adult found guilty of this offense would face a fine of $5-$50 and two months incarceration

Rights, cont.

- Supreme Court blasted the lower courts
- Court held that juveniles are entitled to due process, including:
  - Right to proper notice of proceeding
  - Right to counsel, including if indigent
  - Privilege against self-incrimination
  - Right of confrontation, including right to sworn testimony and cross examination

Rights, cont.

- Basic Rights at hearing: TCA 37-1-127
- Represent virtual codification of *Gault* decision
  - Right to introduce evidence
  - Right to testify
  - Right of confrontation
  - Privilege against self-incrimination
  - Right to constitutional scrutiny of confession
  - Right to benefit of exclusionary rule
  - Right to benefit of corroboration of confessions
  - Right to be informed of sex offender registration requirements

Rights, cont.

- Confessions -
  - *Miranda* analysis under TCA 37-1-127 (knowing and voluntary)
  - Reasonable time requirement under TCA 37-1-115
- Tennessee courts recognize *Miranda* in juvenile court:
  - *R.D.S. v. State*, 245 S.W.3d 356, 363 (Tenn. 2008)
- Exclusionary rule – TCA 37-1-127(d); Rule 28(c)
- Search Warrants? Proper procedure? Tennessee Rule Criminal Procedure 1(c) – not applicable in Juvenile Court

Rights, cont.

- Right to counsel
- Juvenile has right "at all stages of any delinquency proceeding" – TCA 37-1-126(a)
- Includes indigent juveniles – TCA 37-1-126(a)(3); Tenn. Sup. Ct. R. 13, Sec. 1 (d)(2)(A)
- Court must determine if unrepresented juveniles are aware of right – TCA 37-1-126(a)(3)
- Indigency is to be determined by reference to TCA 37-1-126(b) and may include consideration of parents' finances
- Juvenile must be represented by counsel at transfer hearing – Rule 24(b)(2)(ii) (confirmed in new rules)
- Counsel is to continue representation through appeals or until relieved by court – Tenn. Sup. Ct. R. 13, Sec. 1 (e)(5)

Rights, cont.

- Court must appoint if no parent present or parent's interests conflict – TCA 37-1-126(a)(4)
- Child cannot choose appointed counsel, court must use public defender unless there is a reason not to – Tenn. Sup. Ct. R. 13, Sec. 1 (e)(4) and (f)(1)
- Don't forget the administrative fee – TCA 37-1-126(c)(1)
- Court may assess parents part or all of cost of counsel – TCA 37-1-150(h)(1)
- Counsel takeaway: When in doubt (or not), get the child a lawyer (a court never got into too much trouble by appointing lawyers to represent kids)

Rights, cont.

- Standard of Proof: Beyond a Reasonable Doubt – TCA 37-1-129(b); Rule 28(d)
- Presumption of Innocence
- Evidence Admissible: In Adjudicatory Hearing, Rules of Evidence apply – Rule 28(c)
- Evidence Admissible: in Dispositional Hearing, Evidence formally admitted (under the Rules of Evidence), the juvenile court record, and reliable hearsay – Rule 32(f); TCA 37-1-129(d)

Rights, cont.

- No right to jury trial – TCA 37-1-124(a); Rule 27(c)
- Right to Attorney Judge – *State ex. Rel. Anglin v. Mitchell, 596* S.W.2d 779, 791 (Tenn. 1980); TCA 37-1-181 (mental health cases); TCA 37-1-107 (magistrate); TCA 37-1-203 (only Sessions judge-attorneys may order commitment to DCS); TCA 37-1-159(d) (criminal court must conduct acceptance hearing if juvenile judge who ordered transfer is non-lawyer)
- Double Jeopardy – applicable to juvenile proceedings – *Breed v. Jones*, 421 U.S. 519, 531 (1975); Rule 27(b); Rule 28(d)(1)

Rights, cont.

- Mental State – Rule 29
- No current Tennessee case law on insanity defense in juvenile court (but remember the trend?)
- At time of hearing – Rule 29(a)
  - Court may stay proceedings for evaluation
  - If incompetent, adjudication must be continued
- At time of offense – Rule 29(b)
  - Notice of intent to use defense must be given
  - Court may allow defense or have child examined

Rights, cont.

- *Ake v. Oklahoma*, 470 U.S. 68 (1985) – due process requires the state to provide an indigent defendant with access to a mental health professional to assist in the preparation, evaluation, and presentation of his or her defense when the defendant's mental condition at the time of the offense is likely to be a significant factor in the case
- Applicable to Tennessee in *State v. Barnett*, 909 S.W.2d 423, 428 (Tenn. 1995)
- No Tennessee case (found) applies *Ake* to juvenile court (but, remember the trend?)

Rights, cont.

- School Setting
- Vehicles, containers, packages, lockers or other enclosures may be searched "when individual circumstances in a school dictate" – TCA 49-6-4204(a)
- Students or visitors
- "Individual circumstances" – TCA 49-6-4204(b)
- Persons may be searched due to results of locker search or "information received from a teacher, staff member, student or other person" – TCA 49-6-4205(a)
- Person search must be "reasonable" – statute describes reasonableness – TCA 49-6-4205 (b)

Rights, cont.

- Schools may use dogs for search, but not of persons – TCA 49-6-4208
- Drug tests of students ok if "reasonable indications" are present – TCA 49-6-4213(a)(1)
- Drug test must be "reasonable" – statute lists 5 factors which must be present – TCA 49-6-4213(a)(1)
- Students participating in voluntary extracurricular school activities are subject to random testing – TCA 49-6-4213(a)(2)

Waiver of Rights

- Must be in compliance with Rule 30
- Knowing and voluntary
- Consultation with "knowledgeable adult who has no interest adverse to the child" is required for waivers in Adjudication – Rule 30(d)
- Who is this "knowledgeable adult?" Comments to Rule 30 state that "parents are not automatically disqualified from fulfilling this function."
- Stress appointment of attorney

Guardian ad Litem

- Court may appoint under Rule 37(a)
- Court must appoint under Rule 37(a) if no parent appears or interests conflict
- Be aware that AOC does not reimburse GALs in delinquency matters – Tenn. Sup. St. R. 13, 40

Detention

- Pre-hearing detention – TCA 37-1-114
- Statute lists eligible offenses – TCA 37-1-114(c)
- Probable cause
- Finding of no "less drastic alternative" – TCA 37-1-114(a)(2); TCA 37-1-114(c)(7)
- Special circumstances cases under TCA 37-1-114(c)(3)
  - Require judicial action within 24 hours
- New rules will require judicial action (ex parte) within 48 hours (findings required under TCA 37-1-114)
- Detention hearing within 3 days – TCA 37-1-117(b)(1); Rule 6
  - Nonjudicial days excluded – defined at TCA 37-1-102(b)(19) – Saturdays, Sundays and legal holidays (Title 15 for legal holidays)

Detention, cont.

- Petition required to be filed "promptly" – TCA 37-1-117(b)(1); Rule 5(c)(8)
  - What is "promptly?" D/N petitions required to be filed within two days of child removal – TCA 37-1-128(b)(2)
  - *Gerstein v. Pugh*, 420 U.S. 103, 124 (1974) (judicial determination of probable cause in warrantless arrest must be made "either before or promptly after arrest")
  - *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991) ("A jurisdiction that chooses to offer combined [probable cause and arraignment] proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest.")
  - *Cox v. Turley*, 506 F.2d 1347, 1353 (6th Cir. 1974) ("... prompt determination of probable cause – a constitutional mandate that protects juveniles as well as adults.")

Detention, cont.

- Detention Hearing – Rule 15
- Court required to inform of purpose of hearing and of rights – Rule 15(a)
- Findings required for continued detention:
  - Probable cause to believe child committed offense
  - Best interest of child and public that child be detained
  - Child's detention warranted under TCA 37-1-114
  - Immediate welfare of child and/or protection of public requires continued detention
- Evidence considered may include reliable hearsay – Rule 15(b)
- If child is released, case is not over

Detention, cont.

- When child first taken into custody by law enforcement, must be released to parent or "within reasonable time" taken to juvenile court or to a detention facility – Rule 5(b), (c)(1)
- When child first brought to detention facility, court must be notified, intake officer must inform child of rights and notify parents – Rule 5(c)(5)
- Intake officer must conduct preliminary investigation – Rule 5(c)(7)

Detention, cont.

- Place of detention – TCA 37-1-116
- General idea is that juveniles may be detained only in licensed detention facilities
- Detention in an adult jail is a general no-no – requirements are onerous – TCA 37-1-116(e), (h)
- In the event of a transfer, jails are ok – TCA 37-1-116(c)
- Rights during detention – Rule 7 (to be deleted in new rules)

Pretrial Diversion

- Rule 23
- Requires court approval
- May include "terms and conditions" – would include sanctions (more than just "counsel and advice" under informal adjustment)
- May last 6 months; can be extended by court an additional 6 months
- Charges may be reinstated – failure to complete, filing of new charges
- Child entitled to notice and hearing
- Note: notice must be filed before end of term

Pretrial Diversion, cont.

- Upon completion of the agreement, charges are dismissed
- Main difference between informal adjustment and pretrial diversion: "counsel and advice" vs. "terms and conditions"
- Another difference: 3 months vs. 6 months

Post Trial Diversion

- It ain't in the rules or statutes, but courts do them all the time (except Stewart County Juvenile Court)
- New rules address the matter and expressly allow for post trial
- With post trial, child pleads guilty; with pre trial, no plea
- Best practice (until new rules kick in): stick to pre trial (and do not take a guilty plea)

Adjudicatory Hearing

- TCA 37-1-129; Rule 28
- This is the trial – conduct it like one
- Court requirements at commencement
  - Lawyers?
  - All parties present? Age of child? Notices given?
  - Explain purpose of hearing, consequences, rights
- Rules of Evidence apply fully
- Note: juvenile files attract stuff like dogs to a gut wagon – DO NOT consider anything not properly admitted
- Proof beyond a reasonable doubt
- If guilty, then find (or not) "in need of treatment and rehabilitation" – already completed rehab? SHAM WOW guy.

Adjudicatory Hearing, cont.

- Time Limits: 30 days if in detention; 30-90 days otherwise – Rule 17
- If guilty and in need of treatment and rehabilitation, move on to disposition – now or later
- Other statutes:
  - TCA 37-1-124 (conduct of hearing) – informal but orderly, no jury, DA represents the state, minutes to be kept
  - TCA 37-1-126 (right to counsel)
  - TCA 37-1-127 (basic rights – due process)
- Other Rule: Rule 27 (Trial by the Court) -- mostly whether open to public: "to all persons who are properly concerned" and two phases to proceeding – adjudication and disposition

Adjudicatory Hearing, cont.

- If postpone either "treatment and rehabilitation" phase or disposition, court may make interim orders – TCA 37-1-129(f); Rule 28(d)(2); Rule 32(b)
- If found not guilty, case is dismissed, court loses jurisdiction – you're done
- Real world – child is given chance to reach agreement with DA prior to trial

Adjudicatory Hearing, cont.

- Time limits: Rule 17
- If child is detained, adjudication within 30 days
- If child is not detained, adjudication within 30 – 90 days
- Continuances granted "for good cause shown"
- If continued, must be to a date certain

Guilty Pleas

- Rule 21
- Court's Role:
  - Inform child of nature of charge
  - Possible dispositional consequences (and agreement if applicable)
  - Inform of Rights
  - Determine voluntariness of plea
  - Determine factual basis of plea
  - Inform that court may ask questions; perjury
- No provision for no contest plea (new rules address this)

Dispositional Hearing

- TCA 37-1-129; Rule 32
- Devise plan to meet the needs of the child and to achieve objectives of state
- May be held immediately after adjudication or later
  - Why later? Receipt of reports, medical/psychological assessments, additional witnesses, time for parties to discuss alternatives, complete rehab or obtain proof of completion
- Predisposition report – court may order
- Time Limits: 15 days from adjudication if in detention; 90 days otherwise – Rule 18
- Standard of proof: preponderance of evidence
- Evidence considered: formally admitted; court record; reliable hearsay (with opportunity to rebut)

Dispositional Alternatives

- TCA 37-1-131 – like a "buffet" of choices
- Any order authorized for d/n
  - Remain with parents "subject to conditions and limitations"
  - Transfer custody to individual, or DCS
- Placing child on probation – county or DCS – "under conditions and limitations the court prescribes"
- Facility operated under direction of court or by local authority
- Commit to DCS custody
- $50 fine
- Commit to county dcs

Dispositional Alternatives, cont.

- Community Service Work
  - Statutory immunity for groups using juveniles
  - ER visit
- Restitution – under (b)

- Opportunity for courts to BE CREATIVE:
  - Henry County Boxing program
  - Montgomery County CPR classes
  - Reality-type programs
  - Cop ride-a-longs
  - Find out what other judges/courts are doing

Dispositional Alternatives, cont.

- Do not be afraid to fail: "The maxim 'Nothing avails but perfection' may be spelt shorter: paralysis." *Winston Churchill*
- Graduated scheme – first, perhaps no probation, or "parental probation"; second, county probation; third, DCS probation; fourth, custody
- Common sanctions used by Stewart County Juvenile Court:
  - Probation (graduated scheme)
  - Community service
  - Apology
  - Essays
  - Restitution
  - A & D assessment, Drug education, random drug screens

Dispositional Alternatives, cont.

- Funeral home visits
- Police ride-a-long
- Reality-type programs
- Restriction of driving privileges (remember the Drug Free Youth Act – TCA 55-10-701 – certain convictions must be reported)
- Driving education – consequences of stupid driving
- CPR classes
- Medical examinations
- Counseling with court staff
- Call ins
- Regular meetings
- Interaction with former addicts, inmates, parents of victims

Dispositional Alternatives, cont.

- Curfew
- Ankle monitor
- House arrest
- Speaking to younger groups
- Tour of jail
- Participation in "Shop with a Cop"
- Restraining orders (sometimes called "no contact" orders)
- Nursing home visit

Dispositional Alternatives, cont.

- Participation of parents
  - TCA 37-1-103(f) – court may require parent to participate in counseling or treatment program
  - TCA 37-1-174(a) – court may require parent to participate in treatment and rehabilitation, seek resources to treat the child, community service with child, and provide supervision of child – court required to find "did not take responsible steps" to control child

Dispositional Alternatives, cont.

- Court may not spank – Op. Tn. Atty. Gen. 95-040
- Court may not banish child – Op. Tn. Atty. Gen. 99-007
- Function of juvenile court at disposition:
  - Dispassionate jurist vs. inquisitive jurist

Traffic

- A different animal – traffic offenders are a separate class – not delinquents - TCA 37-137-1-146
- Definition of "delinquent act" excludes most traffic offenses – TCA 37-1-102(b)(9)
- Disposition may be handled "nonjudicially" – with supervision of judge – diversion by another name?
- Dispositional alternatives include all alternatives for a delinquent child plus 4 additional alternatives
- Jurisdiction may be waived to adult traffic court
- Remember the Drug Free Youth Act – TCA 55-10-701

Discovery

- Rule 25
- "access to information which would be available in criminal court...."
- New rules keep basic idea, to encourage informal discovery, then resort to Rules of Criminal Procedure

Transfer

- TCA 37-1-134; Rule 24
- Children eligible: (1) any delinquent offense – child 16 or older; (2) certain delinquent offenses – child younger than 16
- No death penalty
- Process begins with petition filed by DA (although statute and rule are a bit awkwardly worded - new rules will fix)
- Four conditions must be satisfied prior to transfer:
  - Age and qualifying offense
  - Transfer hearing held
  - At least 3 day's notice given

Transfer, cont.

- Reasonable grounds to believe:
  - Child committed delinquent act
  - Child not committable to institution
  - Interests of community require child be transferred
- Child must be represented by attorney
- State represented by DA
- Rules of evidence apply as in General Sessions preliminary hearing
- "Reasonable grounds" equals probable cause

Transfer, cont.

- Child presumed to be not committable – Rule 24(b)(4)
- Best practice: Have the child examined
- Interests of the community (the crux of the matter)
  - Statutory factors – nonexclusive
- Statements made at transfer hearing not admissible later

Transfer, cont.

- Effect of transfer: Juvenile court jurisdiction terminates, unless dismissal or acquitted in circuit/criminal court
- If transfer is denied, case is put back on the "adjudication track"
- Judge may have to recuse in subsequent adjudicatory hearing if objection raised
- No appeal of transfer decision (unless non-lawyer judge presided over transfer hearing)

Appeals

- TCA 37-1-159; Rule 36
- Final order or judgment – rule states "entry of the order of final disposition"
- 10 day period – excluding nonjudicial days
- Criminal court or "court having criminal jurisdiction"
- De Novo hearing – "anew"
- Court duties:
  - Inform right to appeal during dispositional hearing; time limits; right to lawyer
- Rehearings in matters tried before magistrate – 5 judicial days to request hearing before judge – TCA 37-1-107(e)

Probation Revocation

- Rule 35
- Petition to be filed
- Proceeding conducted same as delinquency adjudication
- Child entitled to full rights
- Standard of proof – preponderance of evidence
- Upon finding of violation, court may extend or any other disposition available in the original proceeding

Modification and Vacation of Orders

- TCA 37-1-139;Rule 34
- Modification: Clerical mistakes – upon motion of party or court's own initiative
- Modification: Changed Circumstances – best interests analysis
- Vacation: fraud or mistake
- Vacation: no jurisdiction
- Vacation: newly discovered evidence
- Petition required (except for clerical mistakes – motion sufficient)

Unruly

- Same general procedure as delinquency matters
- Definition of Unruly child: TCA 37-1-102(b)(25)
  - Truant
  - Disobedient of reasonable and lawful commends of parent or guardian
  - Commits an offense applicable only to minor
  - Runaway
- Right to attorney: only if in danger of being removed from home – TCA 37-1-126(a)

Unruly, cont.

- Basic rights – 37-1-127 – language suggests some rights apply only to delinquency matters
  - Fully applicable to unruly matters:
    - (a) – right to introduce evidence, cross exam, be heard
    - (d) – illegally obtained evidence – exclusionary rule
  - Contains language limiting to delinquency matters:
    - (b) – self incrimination
      (e) – confessions
      (f) – juvenile sex offender warnings
  - Could go either way:
    - (c) - confession

Unruly, cont.

- Standard of Proof: Clear and Convincing
- Evidence Admissible: Adjudication – only evidence properly admitted; Disposition – evidence admitted, court record, reliable hearsay
- GAL – court can appoint, but AOC will not pay
- Detention – TCA 37-1-114(b) – 24 hours is limit unless probable cause of violation of Valid Court Order
- VCO – Appendix to rules

Unruly, cont.

- Dispositional Alternatives: TCA 37-1-132
- Appeals – same as delinquency matter – TCA 37-1-159
- Probation Revocation – same as delinquency matter
- Modification and Vacation of Orders – same as delinquency matter

Andy's Ramblings:

- Know where you are procedurally
- Before making a decision, know the law or take time to figure it out
- Keep up to date
- It's okay to ask other judges their opinion – this can be a lonely job
- If a case is taken under advisement, don't put it off (I give myself a public "deadline")

Andy's Ramblings, cont.

- Make the best decision you can, then MOVE ON
- Court appearances are not usual for most folks
- Contempt – use it sparingly – take a time out to cool off (you'd be surprised how the judge's exit affects people and changes their attitude)
- Don't lose your temper – use your temper
- On slow days, visit other courts, service-provider facilities
- Maintain good relations with surrounding judges – for interchange, ideas
- "Just get me to the church on time." – *My Fair Lady*
  - be ready to do a wedding

Andy's Ramblings, cont.

- "It's good to be king." – *Mel Brooks*
- "Nearly all men can stand adversity, but if you want to test a man's character, give him power." – *Abraham Lincoln*

Andy's Ramblings, cont.

- "The history of American freedom is, in no small measure, the history of procedure." – *Mr. Justice Frankfurter (as quoted in In re: Gault)*
- "Blessed are they who maintain justice, who constantly do what is right." – *Psalm 106:3*

Andy's Ramblings, cont.

"Destiny guides our fortunes more favorably than we could have expected. Look there, Sancho Panza, my friend, and see those 30 or so wild giants, with whom I intend to do battle and kill each and all of them, so with their stolen booty we can begin to enrich ourselves. This is noble, righteous warfare, for it is wonderfully useful to God to have such an evil race wiped from the face of the earth."

"What giants?" asked Sancho Panza.

"The ones you can see over there," answered his master, "with the huge arms, some of which are very nearly two leagues long."

"Now look, your grace," said Sancho, "what you see over there aren't giants, but windmills, and what seems to be arms are just their sails, that go around in the wind and turn the millstone."

"Obviously," replied Don Quijote, "you don't know much about adventures."

Don Quijote de la Mancha, by Miguel de Cervantes

TENNESSEE JUDICIAL ACADEMY
JUVENILE COURT JUDGES

THE DELINQUENCY PROCESS

Andy Brigham, Stewart County Juvenile Court

1.1 Delinquency Process - In General

The new juvenile court judge must understand that there is a wide variance among the several juvenile courts in Tennessee in handling delinquency - as well as other - matters. The Juvenile Rules encourage this so long as such procedures do not conflict with relevant statutory and case law. Many differences arise from the inherent distinctions between courts in large urban areas and those in smaller rural areas. Other differences come from the differing philosophies held by the presiding juvenile judges. Still more differences are of an historical character: "We've always done it that way."

1.1.1 Delinquency Process -- New Rules of Juvenile Procedure

Judges and practitioners should be aware that the Tennessee Supreme Court has instructed the Court Improvement Program, administered by the Administrative Office of the Courts, to revise the current Rules of Juvenile Procedure. This work is extensive and is ongoing and is expected to be presented to the General Assembly during the 2016 legislative session.

1.2 - Overview and Semantics of Process

A delinquency matter generally follows the same procedural path as does any other criminal matter. The nomenclature is a bit different: A defendant ("juvenile") is charged with a crime ("delinquent offense" or "delinquent act"), pursuant to an arrest warrant or criminal summons ("petition"), perhaps is jailed prior to court proceedings ("detained"), is arraigned ("undergoes intake and is informed of rights"), perhaps pleads guilty ("admits"), faces trial ("adjudicatory hearing"), is found guilty and in need of treatment and rehabilitation ("found delinquent") or not guilty ("not found delinquent" or "petition is dismissed"), and undergoes a sentencing hearing ("dispositional hearing"). Although the language is specific to juvenile court, the core steps along the way, however, are substantively the same as the adult criminal process. A charge is lodged, the juvenile is afforded rights and protections, both substantively and procedurally, a proceeding determining guilt is held, and the matter is dismissed or a sentence is imposed.

During the delinquency process, the juvenile is afforded many opportunities to reach a settlement regarding the charges. Informal adjustment or even dismissal may be obtained during intake. All juvenile courts with which the author is familiar allow the juvenile to negotiate a possible settlement with the district attorney prior to the

adjudicatory hearing. Further, the court itself has broad powers in regard to informal adjustments and pretrial and, under proposed rules, judicial diversion.

In the author's experience, very few delinquent charges result in an adjudicatory hearing. A significant percentage of cases are filtered out at intake, mostly through informal adjustment. Almost all (but not all) remaining charges are settled during discussions with the district attorney. Such settlements usually include agreement regarding disposition or at least most disposition issues. Of course, the court's approval regarding disposition must be obtained. Almost all (but not all) traffic offenses are settled by juvenile court staff through informal adjustments. Also, the author's anecdotal experience is that law enforcement is often more disposed to handle a matter informally and avoid formal charges when a juvenile is involved, although the opposite result sometimes obtains when the officers feel the juvenile needs to be "straightened out" by the court system.

1.3 Definition of Delinquency

A child is a "delinquent child" when the child is adjudicated guilty of an offense which would be classified as a crime if the child were an adult, and the child is in need of treatment and rehabilitation.[1] The definition of "delinquent act" is provided in statute, as follows:

> 'Delinquent act' means an act designated 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 under subdivision (b)(23)(A)(iii) and the crime is not a traffic offense as defined in the traffic code of the state other than failing to stop when involved in an accident pursuant to [Tenn. Code Ann. §] 55-10-101, driving while under the influence of an intoxicant or drug, vehicular homicide or any other traffic offense classified as a felony.[2]

The definition of "delinquent child" is also provided in statute, as: "...a child who has committed a delinquent act and is in need of treatment and rehabilitation."[3] In similar fashion, a later provision of Title 37 provides that "'Adjudication of delinquency' means that a juvenile court has found beyond a reasonable doubt that a child has committed a delinquent act, as defined in [Tenn. Code Ann. §] 37-1-102, that is an act designated a crime under the law...."[4]

Predicated on the recited statutory authorities, *supra*, it is clear that a child is a delinquent child if that child commits an offense which would be classified as a crime if

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[1] *See gen., State v. Jackson*, 60 S.W.3d 738, 743 (Tenn. 2001) (court ruled that a violation of probation could not be considered a "delinquent act" because the Tennessee Criminal Code does not classify such as a crime).
[2] Tenn. Code Ann. § 37-1-102(b)(9).
[3] Tenn. Code Ann. § 37-1-102(b)(10).
[4] Tenn. Code Ann. § 37-5-103(2).

the child were an adult. Conduct does not constitute a crime unless it is so defined by statute, municipal ordinance, or rule authorized and adopted under a statute.[5] As a general caveat, the enactment of the Tennessee Criminal Code supersedes common law offenses.[6]

1.4 - Commencement and Intake

Proceedings may be begun in juvenile court in one of four ways, according to statute:

> (1) By transfer of a case from another court as provided in [Tenn. Code Ann. §] 37-1-109 [When a matter is begun in adult criminal court in error because the defendant is a juvenile];
>
> (2) As provided in 37-1-146 in a proceeding charging the violation of a traffic offense;
>
> (3) By the court accepting jurisdiction as provided in 37-1-141 or accepting supervision of a child as provided in 37-1-143; or
>
> (4) In other cases by the filing of a petition as provided in this part....[7]

The Rules of Juvenile Procedure also discuss commencement of cases and provide generally for the receipt by the court of a complaint, a preliminary investigation by the intake officer, and the decision by the intake officer to dismiss, informally adjust, or accept the filing of a petition.[8] This Rule specifically allows cases to commence by means of a juvenile summons (in delinquency and unruly matters), petition, or a traffic citation.[9]

Juvenile court practitioners should understand the importance of the intake process. During intake, the court officer gathers information and conducts a preliminary inquiry to determine what action, if any, the court should undertake. The intake officer is authorized to informally adjust or even dismiss a matter without the filing of a petition.

The term "complaint" is defined in the Rule of Juvenile Procedure as "an informal oral or written statement requesting the court to exercise its jurisdiction."[10]

The practitioner should note that matters begun through transfer of a matter from adult criminal court pursuant to Tenn. Code Ann.§ 37-1-109 [i.e., when the juvenile defendant is in criminal court in error] may not include the filing of a petition. This

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[5] Tenn. Code Ann. § 39-11-102(a); *Goff v. State*, 209 S.W.2d 13, 15 (Tenn. 1948).
[6] Tenn. Code Ann. § 39-11-102, Adv. Comm. Cmts.
[7] Tenn. Code Ann.§ 37-1-108. *See also*, Tenn. Code Ann.§ 40-2-104 ("A prosecution is commenced, within the meaning of this chapter, by ... the issuing of a juvenile petition alleging a delinquent act.").
[8] Tn. R. Juv. P. 8.
[9] Tn. R. Juv. P. 8.
[10] Tn. R. Juv. P. 2.

statute provides that the "accusatory pleading" from the adult court may serve in lieu of a petition unless the juvenile court directs the filing of a petition.[11]

[It is the author's opinion that the statutory references in subsection (3) above should read Tenn. Code Ann.§§ 37-1-142 & 37-1-144 rather than Tenn. Code Ann.§§ 37-1-141 & 37-1-143. This appears to be either a typographical or statutory language error.]

It the author's experience that most of the cases begun in juvenile court are commenced either by a traffic citation or the filing of a petition. Some jurisdictions begin proceedings with a warrant – that is, a charging instrument signed by a judicial officer directing the arrest (or attachment) of the child. More specifically, most delinquency cases in the author's court are begun by law enforcement personnel, either through a traffic citation or a petition in the case of delinquency matters more serious than a traffic offense.

The practitioner should be aware of the wide differences among the several juvenile courts in Tennessee regarding commencing the process. Differences arise from the size of the county which the particular court serves, and from different philosophies and interpretations held by the various juvenile judges.

1.5 Petition in General

As mentioned *supra*, and with the possible exception of traffic citations, most matters in juvenile court are begun by the filing of a petition. "Petition" is defined as "a verified written statement by which the formal process of the juvenile court is begun."[12] The Rules confirm that the petition must be verified.[13] A matter is said to be "verified" when made in the presence of a authorized officer, such as a notary public, or under oath but not in the presence of such an officer, whereby one swears to the truth of the statement.[14]

It is the author's opinion that a sworn affidavit attached to the petition would satisfy the "verification" requirement. The petitions used in the courts with which the author is familiar contain an affidavit pursuant to which the petitioner swears that the statements contained in the petition are true to the best of his knowledge, information and belief.

The petition is filed after the intake officer (or the person performing intake duties) has performed his or her investigatory duties as outlined in Rules 5, 8, 12 and 13 of the Rules of Juvenile Procedure.

1.6 - Who May File

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[11] Tenn. Code Ann.§ 37-1-109(c).
[12] Tn. R. Juv. P. 2(13).
[13] Tn. R. Juv. P. 9.
[14] BLACK'S LAW DICTIONARY (Verification), 1698 (9th Ed. 2009).

A petition may be filed by "any person, including a law enforcement officer, who has knowledge of the facts alleged or is informed and believes that they are true."[15] The Rules expand the universe of potential petitioners from "any person" to include a "person or agency."[16] Although not seriously open to question, this Rule confirms that entities such as the Department of Children's Services are allowed to file petitions.

1.7 - Probable Cause and the Juvenile Proceeding

An issue concerning the filing of petitions is whether, as in adult criminal court, an independent member of the judiciary is required to determine whether probable cause exists to support the levying of charges against the juvenile.[17] The applicable juvenile statute and rules do not explicitly require such a finding.[18]

The statute provides only that the petition "shall be verified and may be on information and belief."[19] Similarly, the rule provides that the petition "shall be verified and may be on information and belief."[20] This language does not state that a probable cause determination is to be made by the court official accepting the petitions. Those juvenile proceedings begun by a traffic citation are, by their very nature, issued only by members of the executive branch, the appropriate law enforcement agency, without the involvement of the juvenile court personnel.

The requirement that the petition be "verified" would require that the authenticity, truth and correctness of the document must be confirmed.[21] The intake officer is required to ensure the petition contains certain information and meets other requirements, and the "verification" requirement attaches some due diligence by the court staff in accepting the filing.[22] Most significantly, the rules require the intake officer to conduct a preliminary investigation "to determine whether the facts alleged establish that the matter is within the jurisdiction of the court and whether the best interests of the child or of the public require that further court action be taken."[23]

Perhaps more to the point, the Advisory Commission Comments to the Tennessee Juvenile Rule 8 discuss the function of the intake officer in this regard and suggest, if not quite require, that this person make a determination that closely resembles a probable cause determination. The Comments read as follows:

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[15] Tenn. Code Ann.§ 37-1-119.
[16] Tn. R. Juv. P. 8(a).
[17] *See*, Tn. R. Crim. P. 4(a) (If the affidavit of complaint and any supporting affidavits filed with it establish that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate or clerk shall issue an arrest warrant ....).
[18] *See gen.*, Tenn. Code Ann.§ 37-1-120; Tn. R. Juv. P. 9.
[19] Tenn. Code Ann.§ 37-1-120.
[20] Tn. R. Juv. P. 9.
[21] BLACK'S LAW DICTIONARY (Verification), 1698 (9th Ed. 2009).
[22] *See gen.*, Tenn. Code Ann.§ 37-1-120.
[23] Tn. R. Juv. P. 8(c).

> ...In addition, the designated court officer is required by this rule to conduct an investigation, or 'preliminary inquiry,' in order to obtain information necessary for making intake decisions. In the course of this investigation, the designated court officer should proceed substantially as provided in the comment to Rule 5, regarding detention screening investigations. At the beginning of the interview with the child and the child's family, guardian, or legal custodian, the designated court officer should explain the nature of the complaint; the purpose, procedures, and possible outcomes of the intake process; and that the child has the right to remain silent, to have an attorney, and to have an attorney appointed for the child if the child cannot afford to hire one.
>
> In making decisions whether to dismiss, informally adjust, or file petitions in delinquent cases, it is desirable that, wherever practicable, the designated court officer consult with the district attorney general on questions concerning jurisdiction and *legal sufficiency of evidence*. While the committee recognizes that in many areas of the state, time constraints will not allow the district attorney to become intimately involved in the intake process, it encourages such involvement in regard to these legal questions, for the purpose of assuring that complaints which are not *legally sufficient* are screened out of the intake or court process at the outset. Such involvement represents the trend in juvenile court intake across the nation.[24] (emphasis added)

The use by the Advisory Commission of the language "questions concerning jurisdiction and legal sufficiency" and "complaints which are not legally sufficient are screened out" would strongly suggest that the intake officer is to make a determination which is akin to a probable cause determination. However, at least two problems arise with this conclusion. First, the determination is to be made in consultation with the district attorney general. A true probable cause determination is to be made by a neutral and detached magistrate. No involvement with a member of the executive branch is contemplated.[25] Second, the Commission recognizes that the intake officer may not always be able to consult with the district attorney general, in which case the protocol for the intake officer will, by necessity, differ from county to county. Rather than a true probable cause determination, which is a judicial decision, this suggests that the determination is more of an informal administrative decision, the parameters of which may be inconsistent from county to county.

Further illumination of this point is provided by Tennessee Juvenile Rule 12, concerning Intake in Delinquent and Unruly Case. This rule describes the intake process and states that such "shall be designed to do all of the following:

> (1) To provide for resolution of complaints and petitions at intake by excluding or diverting from the juvenile process at its inception:

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[24] Tn. R. Juv. P. 8, Advisory Comm. Comments.
[25] *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972).

> (i) Those matters over which the juvenile court has no jurisdiction;
>
> (ii) Those matters in which there appears to be *insufficient evidence* to support the petition; ...[26] (emphasis added)

The use of the phrase "insufficient evidence" would strongly suggest that a probable cause determination is to be made during intake for delinquency matters.

The author would suggest that, based on his experience with several different juvenile courts, the determination made during intake is a *de facto* probable cause determination, if not a *de jure* decision. Many times the author has heard the intake personnel state something like "There was nothing to it" or "We didn't feel like this was something that needed to come to court, but we did x, y or z." (an informal adjustment) The author would posit that this is in keeping with the intent of Juvenile Rules of Procedure 5, 8, 12, and 13, along with the informal procedure contemplated by the enabling statute. The author would further suggest that, as a better practice, intake personnel should be instructed in the probable cause concept.

1.8 - Contents of Petition

The petition must contain certain information concerning the juvenile and the allegations which support court involvement. The statute and rule are both similar but the rule contains a more thorough description of what the petition must contain. It states:

> It shall set forth in plain and concise language with particularity the factual and other allegations relied upon in asserting that the respondent is within the juvenile court's jurisdiction, including:
>
> > (1) The name, residence address, and date of birth of the child if known;
> >
> > (2) The names and residence addresses, if known to the petitioner, of the parents, guardian or custodian of the child and of the child's spouse, if any;
> >
> > (3) The approximate date, manner and place of the acts alleged as the basis of the court's jurisdiction;
> >
> > (4) Whether the petition alleges delinquent, unruly, dependent and neglected, or other category of jurisdiction;
> >
> > (5) A statement that it is in the best interest of the child and the public that the proceeding be brought and, if delinquent or unruly

[26] Tn. R. Juv. P. 12(a)(1).

> conduct is alleged, that the child is in need of treatment or rehabilitation; and
>
> (6) A statement whether the child is in custody and if so, the place of detention and the time the child was taken into custody.[27]

It is suggested that due process principles would dictate that the petition must contain sufficient detail to adequately inform the juvenile of the basis of the charge or allegation. In support of this proposition, the court in *State v. Rogers*,[28] stated the following: "The child is afforded a number of constitutional and statutory rights and procedures in delinquency proceedings. These include the right to due process...." Further, the Tennessee Rules of Criminal Procedure, applicable to juvenile court in specific instances (such as juvenile traffic offenses – see, e.g., Tn. R. Juv. Proc. 1(a)), require an affidavit of complaint to "allege the essential facts constituting the offense charged."[29]

1.9 Key Personnel

1.9.1 Youth Services Officer

Each Tennessee county may establish either a full time or part time youth services officer ("YSO"), depending on the county's population, to assist the juvenile court in discharging its functions.[30] It is this position that is the key position in the juvenile court office.

The duties of the YSO are set forth in the statute but the statute makes clear that such listing is not intended to be an exclusive listing of such duties; the clear implication is that the court may delegate other duties to the YSO as the court may desire.[31] The listed duties are:

> (1) Intake duties including receiving and examining complaints and allegations of delinquency and unruly behavior for the purpose of considering the commencement of proceedings;
>
> (2) Counseling;
>
> (3) Record keeping and transmitting information as required by this part or by law to the commission on children and youth or the

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[27] Tn. R. Juv. P. 9; Tenn. Code Ann.§ 37-1-120.
[28] 235 S.W.3d 92, 95 (Tenn. 2007); *see also,* Tenn. Code Ann. 37-1-120 – 124.
[29] Tn. R. Crim. P. 3. *See also, Abu-Ali Abdur'rahman v. Bredesen,* 181 S.W.3d 292, 309 (Tenn. 2005) (citing *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972)) (Procedural due process requires 'fundamentally fair' procedures to be employed whenever a governmental entity acts to deprive a person of a right to or interest in life, liberty or property.).
[30] Tenn. Code Ann.§ 37-1-106.
[31] *See,* Tenn. Code Ann. § 37-1-106(b).

office of the executive secretary of the Tennessee council of juvenile and family court judges;

(4) Make investigations, reports and recommendations to the judge having juvenile jurisdiction;

(5) Make appropriate referrals to other public or private agencies;

(6) Make predisposition studies and submit reports and recommendations to the court as required; and

(7) Perform other functions as directed by the court or by law including, but not limited to, those set out in 37-1-105 [duties of the probation officer].[32]

It is the author's experience that all juvenile courts have at least one YSO. The larger counties may have several, designating them all as YSOs or as Assistant YSOs. Some smaller counties may combine this office – or its functions – with other court personnel, or all administrative functions of the court may be located in this one person. In the author's court and experience, it is the YSO, more so than the Juvenile Court Clerk, that directs the daily activities of the juvenile court office. Much depends on this office. Depending on the specific court, the YSO's daily duties may include record keeping and reporting requirements, compliance with various grants, providing intake duties, initiating and conducting investigations as directed by the court, decisions regarding informal adjustments, supervision and maintenance of the court's files, maintaining court dockets, issuing notices and subpoenas, monitoring probationers, providing counseling and education, both to juveniles and their parents/guardians, recommending referrals to community resources, communicating and working with the juvenile court clerk and various other county groups and organizations concerning the court and juveniles, such as the school system, law enforcement, school resource officers, truancy review boards, district attorneys and public defenders, Guardians ad Litem, private counsel, CASA volunteers, representatives from the Department of Children's Services, representatives from various service providers, members of the foster care review board, officials and representatives from local government, and various church and civic organizations, preparing and updating court minutes, supervising other court personnel, and, of course, attending court and ensuring that the proper files are before the court, and preparing appropriate court orders. The importance of this office to the effective functioning of the court in fulfilling its duties cannot be overstated.

1.9.2 Youth Probation Officer

The juvenile court has the authority to appoint one or more probation officers to assist in the supervision, management and monitoring of juveniles placed on probation.[33] The statute lists the following duties of county probation officers as follows:

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[32] Tenn. Code Ann. § 37-1-106. *See also*, Tn. R. Juv. P. 2(21).

(1) Make investigations, reports and recommendations to the juvenile court;

(2) Receive and examine complaints and charges of delinquency, unruly conduct or dependency and neglect of a child for the purpose of considering the commencement of proceedings under this part;

(3) Supervise and assist a child placed on probation or in such probation officer's protective supervision or care by order of the court or other authority of law;

(4) Make appropriate referrals to other public or private agencies of the community if their assistance appears to be needed or desirable;

(5) Take into custody and detain a child who is under such probation officer's supervision or care as a delinquent, unruly or dependent and neglected child if the probation officer, or other designated officers of the court, have reasonable cause to believe that the child's health or safety is in imminent danger, or that such child may abscond or be removed from the jurisdiction of the court, or when ordered by the court pursuant to this part. Except as provided by this part, a probation officer, or other designated officer of the court, does not have the powers of a law enforcement officer. Such probation officer, or other designated officer of the court, may not conduct accusatory proceedings under this part against a child who is or may be under such officer's care or supervision; and

(6) Perform all other functions designated by this part or by order of the court pursuant thereto.[34]

A probation officer has all the authority of a law enforcement officer with respect to any child committed to that officer's care.[35] The Rules of Juvenile Procedure provide similarly:

'Probation Officer' means a person who performs the duties set forth in Tenn. Code Ann. 37-1-105, particularly those of supervising and assisting children placed on probation or in the person's protective supervision or care by order of the court or other authority of law, whether such person is

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[33] *See*, Tenn. Code Ann. § 37-1-105.
[34] Tenn. Code Ann. § 37-1-105.
[35] Tenn. Code Ann. § 37-1-128(a)(2).

employed by the Department of Correction or so designated by the juvenile court.[36]

The probation officer is mentioned throughout the statute and rules as performing various functions. For example, the probation officer is involved in informal adjustments[37] and in investigations ordered by the court.[38]

It is the author's practice, which is generally consistent with other juvenile courts with which the author is familiar, to approach delinquency matters in a tiered fashion. In addition to other appropriate dispositional orders, the juvenile is first either given a warning (usually minor offenses such as traffic offenses) or placed onto "county" probation – the officer generally referred to in Tenn. Code Ann. § 37-1-105 – and then, if the juvenile reoffends or proves to be unamenable to the court's probation program, the juvenile is placed on "state" probation subject to the probation officer assigned to the court from the Department of Children's Services. In this way, the juvenile is given more than one chance to change his or her behavior before more restrictive measures may be put into place. Obviously, this protocol is not appropriate in every case, such as serious delinquency matters. Also, the practitioner should understand the distinction between "county" probation officers and "state" probation officers.

It is the author's experience that the probation officer is the individual who works most closely with the juvenile ensuring that the court's orders are followed, supervising and monitoring the progress of the juvenile. Often, this individual becomes a mentor and role model for the juvenile. The probation officer may fill a need which the juvenile's family is unable or unwilling to fill. In some cases, the relationship which develops between the juvenile and the probation officer continues long after the formal discharge of the juvenile from court supervision. This is to be praised. The juvenile probation officer knows well the highs and lows, the successes and disappointments, the bitter and the sweet, the heartbreak and frustration - yet the incredible power of working with our state's children. This is a job not for the thin skinned or faint of heart, but for those individuals who are willing to answer the call in the middle of the night, those persons who wake up each day with the intent to help a child, those persons who desire to be on the front line of some of our society's most pressing problems and how such problems affect our children.

1.9.3 Intake Officer

The duties of the person in this position include the acceptance and screening of petitions and complaints as they are presented to the juvenile court to determine what further action may be necessary or desirable with each matter. This officer is responsible for conducting a preliminary inquiry to determine whether the matter is within the jurisdiction of the court and to determine whether the best interests of the child and of the public require further court action. This officer may assist in determining whether

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[36] Tn. R. Juv. P. 2(14).
[37] Tenn. Code Ann. § 37-1-110.
[38] Tenn. Code Ann. § 37-1-128.

continued detention is necessary in the event a juvenile is taken to a detention facility. The officer is to be involved in decisions regarding informal adjustments and the filing of formal petitions.[39] The term "intake" is defined in the Juvenile Procedure Rules as a process consisting of:

> (i) the screening of cases in which children have been taken into custody and have been brought to a detention facility, to determine whether detention is warranted under the law; and
>
> (ii) the screening of complaints received by the juvenile court, to determine whether the court has jurisdiction and what action if any should be taken in regard to the complaint.[40]

It should be noticed that the intake duties include the determination of proper jurisdiction of the court.

The person performing intake duties may be the YSO, probation officer, or some other officer appointed by the court. It is possible that a member of local law enforcement may perform these duties. The Advisory Commission Comments to Juvenile Procedure Rule 5 recommends that this person be the YSO: "The committee urges that youth services officers perform these functions, but realizes that in some counties this will be difficult to achieve on a consistent basis." The Advisory Commission Comments to Juvenile Procedure Rule 2 recognize that the functions of the YSO, probation officer and intake officer may overlap and may be performed by the same person:

> Regarding the terms 'youth services officer,' 'intake officer,' and 'probation officer,' there has been confusion concerning the overlapping functions of these three positions. The committee has attempted, within the parameters of the law to clarify the functions in the above definitions. However, it recognizes that in many cases one person will fulfill multiple functions, whatever the job title.

In Rules 5(c) and 8(c), the Rules of Juvenile Procedure spell out more specific duties to be performed by the intake officer during detention decisions, the initiation of delinquent and unruly matters, and the initiation of dependency and neglect matters.[41]

1.10 Nature of the Delinquency Proceeding

Although dealing with offenses which would be classified as crimes were the offender to be an adult, an adjudication of delinquency is deemed to not be a conviction

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[39] *See gen.*, Tenn. Code Ann. § 37-1-117(a); Tn. R. Juv. P. 2(8)-(9), 5 & 8.
[40] Tn. R. Juv. P. 2(8).
[41] *See also*, Judge Leonard Edwards, Intake Decisions and the Juvenile Court System, Juvenile & Family Justice Today (Spring 2011, Nat'l Council of Juvenile and Family Court Judges).

of a crime and does not confer upon the juvenile the status of infamy or impose any civil disability ordinarily resulting from a criminal conviction.[42] Accordingly, and somewhat paradoxically, the delinquency proceeding is civil in nature.[43]

There is a limit to this principle in delinquency proceedings - a limit known as "due process." The principles of due process operate to inject into the juvenile delinquency process some required procedures applicable to the criminal law regardless of the label applied to the delinquency proceeding. Although discussed more thoroughly in the subsection below, it is helpful to refer quickly to the decision of the United States Supreme Court in *In re: Gault*,[44] in which the court ruled that due process required certain procedures in juvenile delinquency proceedings:

> Further, we are told that one of the important benefits of the special juvenile court procedures is that they avoid classifying the juvenile as a 'criminal.' The juvenile offender is now classed as a 'delinquent.' There is, of course, no reason why this should not continue. It is disconcerting, however, that this term has come to involve only slightly less stigma than the term 'criminal' applied to adults. It is also emphasized that in practically all jurisdictions, statutes provide that an adjudication of the child as a delinquent shall not operate as a civil disability or disqualify him for civil service appointment. There is no reason why the application of due process requirements should interfere with such provisions.[45]

Tracking similarly, the Tennessee Supreme Court in *State, ex rel. Anglin v. Mitchell*,[46] recognized the similarities of result between the adult criminal system and the juvenile delinquency system:

> This is the nature of the juvenile justice system. In its dealings with delinquent children – those who are charged with the commission of criminal offenses – it differs from the criminal courts only as to the

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[42] Tenn. Code Ann. § 37-1-133 (a) & (c). See also, J. L. Mershon, "*Juvenile Justice: The Adjudicatory and Dispositional Process*," pp. 12-18 (Nat'l Council of Juv. And Family Ct. Judges, 1991) ("The juvenile court construction and definition in most states: *Proceedings deemed not criminal.* This is reflected in general juvenile court nomenclature such as a child is not Arrested but is taken in[to] *Protective Custody*; not put in Jail but placed in *Detention*; the act is not referred to as a Crime, but an *Offense*; the procedure is not referred to as a Trial, but a *Hearing*; a Sentence is not imposed but a *Disposition* takes place."). (emphasis in original)

[43] See *State v. Womack*, 591 S.W.2d 437, 442 (Tenn. Ct. App. 1979) ("Until a juvenile has been 'transferred' to the criminal court, the proceeding against him is civil in nature and appellate review and supervision of the cause resides in the civil and not the criminal courts of the state.") (*citing, Juvenile Court of Shelby County v. State*, 201 S.W. 771 (Tenn. 1918)). *See also*, *State v. Johnson*, 574 S.W.2d 739, 740 (Tenn. 1978) ("A finding of delinquency is not equivalent, in legal theory, to conviction of a crime 'and does not impose any civil disability ordinarily resulting from a conviction or operate to disqualify the child in any civil service application or appointment.'").

[44] 387 U.S. 1 (1967).

[45] *In Re: Gault*, 387 U.S. at 22-24.

[46] 596 S.W.2d 779 (Tenn. 1980).

disposition of the offender. In some instances the punishment is lighter; in others it is heavier....

* * *

This Court unanimously declared in *Patrick v. Dickson*, 526 S.W.2d 449 (Tenn. 1975):

> Indeed, the entire juvenile court structure, despite recent renovations and innovations, continues to constitute, in a large measure, a junior criminal court.
>
> This characteristic of these courts was recognized by the Supreme Court of the United States in *Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975), wherein the Court points out that 'there is a gap between the originally benign conception of the system and its realities' and observes that recent cases require 'that [the] courts 'eschew the 'civil' label of convenience which has been attached to juvenile proceedings' and that the juvenile process ... be candidly appraised.'

Later this Court in *State v. Johnson*, 574 S.W.2d 739 (Tenn. 1978), speaking through Justice Harbison, stated:

> [Courts] in recent years have emphasized that in practical effect persons involved in juvenile proceedings may be deprived of their liberty. Increasingly, concepts of the criminal law, and in particular constitutional principles designed to protect the rights of individuals charged with crime, have been deemed to be applicable to proceedings involving juvenile offenders. 574 S.W.2d at 741."[47]

The main concern of the courts in discussing this issue is the authority of the juvenile court to commit a delinquent child to a secure facility (or, more accurately regarding those juvenile courts which do not have available a locally run detention facility, to commit a child to the Department of Children's Services, which may then commit the child to such a facility), or to foster care. The *Anglin* court observed:

> It is this deprivation of liberty that causes us concern. The incarceration of a child deprives him or her of the happy pursuits and unforgettable joys of childhood's all too brief hour. Even worse than that deprivation is the undeniable fact that all too often reform schools do not reform; rehabilitation centers do not rehabilitate; happiness does not seem to flourish in foster homes; and confinement seems to afford an opportunity

[47] *State ex. rel. Anglin v. Mitchell*, 596 S.W.2d at 784.

> to hone criminal technique and learn of new and more effective methods of criminal conduct. All too often these are but prep schools for future and further criminal activity. This is not avoided by confinement in youth centers. The psychological evils attendant upon confinement are not reduced.[48]

Perhaps the most forceful, yet concise expression of the idea that juvenile procedure reaches its limit when in conflict with the power of due process is stated in the case of *Arwood v. State*: "... our answer is simply that where due process comes into conflict with procedures in the juvenile courts – however laudable the purpose behind the adoption of the procedures – due process must prevail."[49]

1.11 Rights of the Child

Due to the nature of the subject matter, being both complex and the subject of extensive appellate court development, the treatment of the topics in this sections is not intended to be exhaustive, but only a brief presentation of the rights enjoyed by juveniles in Tennessee juvenile courts.

1.11.1 - *In re: Gault*

It is said that nature abhors a vacuum, but instead seeks a balance in all things.[50] Due to the constant search for a proper balance, matters tend to move in a cycle. It is the same in the field of juvenile jurisprudence. The juvenile court system was developed in response to the perceived injustice done to children by America's criminal law process. Often harsh results obtained for juveniles in the adult system. Juvenile court focused less on what the child had "done," and instead sought to address what the child "is" and what the child might "become" by placing the child in a system that could be more responsive to the child's needs, developing a treatment and punishment regimen specifically tailored and designed for each child. The unique characteristics of each child and his or her environment would be taken into account by the court system, which would operate free from most procedures in the adult system. The overriding concern was to be the child's best interests. However, by the mid-point of the twentieth century, it was becoming clear that the juvenile court system had gotten off track in at least some parts of the country. The system designed for the child and his or her needs was not fulfilling its mission and was - in its operation - more punitive and less responsive than the adult system it replaced. The cure, it seemed, had replaced the cause.

On many public buildings in the United States are found representations of "lady liberty" holding a law book in one hand while the other holds a torch. This is said to

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[48] 596 S.W.2d at 784, 785.
[49] 463 S.W.2d 943, 946 (Tenn. App. 1970)
[50] THIMS L. LIBB. HUMAN CHEMISTRY, Vol. 1, § Vacuums in nature, 46-47) (LuLu 2007) (attributed to the philosopher Parmenides from his treatise, ON NATURE, written circa 495 BC).

symbolize the idea that true liberty is obtained only when the people live under the rule of law.

In 1967, the United States Supreme Court issued its opinion in the seminal juvenile justice case of *In re: Gault*.[51] The *Gault* opinion is of tremendously significant import in the juvenile justice area having far reaching impact on juvenile delinquency procedures. The decision's impact is still being felt today both judicially and legislatively - expressing its analysis in forceful and, at times, beautiful language. For example, the opinion describes the juvenile court system as a "peculiar system" whose constitutional basis is "debatable," and perhaps refers to the Arizona system as a "kangaroo court," and even mentions the "Star Chamber," all the while discussing the relationship between citizens and the state in the loftiest Constitutional rhetoric. For the juvenile justice practitioner, it is an opinion which inspires and is worth revisiting on occasion. As with many judicial decisions during this era, it arose from a set of facts which would make the modern legal observer wince.

Gerald Gault, age 15, and a friend were taken into custody by Gila County, Arizona, law enforcement authorities based upon a verbal complaint by a neighbor, Mrs. Cook. Mrs. Cook alleged that Gerald and his friend had made lewd or indecent telephone calls to her. Gerald was then on probation for an earlier offense for theft in which he had been in the company of another boy who had stolen a lady's purse.[52]

Gerald was taken to a juvenile detention facility to await court proceedings. His parents, both of whom were at work, were not notified, nor was any notice of his detention or whereabouts left at Gerald's home. His parents eventually learned of his detention and were informed by the superintendent of the facility, Officer Flagg, who also was Gerald's probation officer, that a hearing in Gerald's matter would be held the next day.[53]

Officer Flagg filed a petition with the court on the hearing day, but did not serve Gerald or his parents. Gerald's parents never saw the petition until the habeas corpus proceeding several months later. The petition contained no recitation of facts to support the accusations, stating merely that "said minor is under the age of eighteen years, and is in need of the protection of this Honorable Court; [and that] said minor is a delinquent child."[54]

The juvenile judge conducted the hearing in chambers. The complaining witness, Mrs. Cook, was not present. No one was sworn at the hearing and no transcript or recording thereof was made. The judge asked Gerald several questions regarding the telephone calls. Gerald was not represented by counsel. Gerald later denied admitting to the calls, stating that he only dialed the telephone while the other youth actually did the talking, while the judge and the probation officer recalled that he admitted making "one

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[51] 387 U.S. 1 (1967).
[52] *Id.* at 4.
[53] *Id.* at 5.
[54] *In Re Gault*, 387 U.S. at 5.

of these [lewd] statements." The judge took the matter under advisement and, with no explanation, sent Gerald back to the detention facility.[55]

One or two days later, Gerald was released from detention with no explanation. His mother received a note on plain paper stating that further proceedings would be held three or four days later, on Monday, June 15.[56]

At the second hearing, Gerald again denied speaking to Mrs. Cook, and Officer Flagg agreed that Gerald had never admitted to making the remarks. As in the initial hearing, Mrs. Cook, the complainant, was not present, the judge having informed Gerald's mother that her presence was not required. The judge never spoke to Mrs. Cook during the matter. The probation officer had spoken to Mrs. Cook on one occasion - by telephone on the day of the first hearing. Presumably, the probation officer informed the court of the substance of that conversation. The probation officers filed a "referral report" with the court but the report was not disclosed to Gerald or his parents. Again, Gerald was not represented by counsel at this hearing. At the conclusion of the hearing, the judge found Gerald to be a juvenile delinquent and committed him to the State Industrial School "for the period of his minority [that is, until age 21], unless sooner discharged by due process of law." Gerald faced a sentence of up to six years. No appeal was permitted under Arizona law.[57]

During the subsequent habeas corpus hearing, the juvenile judge testified that Gerald's commitment was based partly upon Gerald being "habitually involved in immoral matters," having recalled that Gerald was the subject of a referral two years earlier regarding a stolen baseball glove. No formal accusation or hearing had occurred regarding this matter.[58] The judge also testified that Gerald had violated an Arizona statute which provides that it is an offense to use vulgar, abusive or obscene language in the presence of a woman or child. The penalty for an adult found to violate this statue is a fine of between $5 and $50, and incarceration of no more than two months.[59]

The matter was appealed to the U.S. Supreme Court after relief was denied by all state courts. The Supreme Court issued a lengthy opinion which focused on the Due Process Clause of the 14th Amendment to the U.S. Constitution, and which built upon two previous decisions. In *Kent v. United States*,[60] the court held that "the basic requirements of due process and fairness" must be satisfied in a juvenile transfer proceeding. Prior to this decision, the court decided *Haley v. Ohio*,[61] in which the court held that the Fourteenth Amendment applied to prohibit the use of a juvenile's coerced confession, Mr. Justice Douglas stating: "Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." Regarding these decisions, the *Gault* court stated: "Accordingly, while these cases relate only to

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[55] *Id.* at 5, 6.
[56] *Id.* at 6.
[57] *Id.* at 6, 7.
[58] *Id.* at 9.
[59] *Id.* at 8, 9.
[60] 383 U.S. 541, 553 (1966).
[61] *Id.* at 601; *citing,* 332 U.S. 596 (1948).

restricted aspects of the subject, they unmistakably indicate that, whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[62]

It would seem the pump was primed for dramatic movement in juvenile practice. The *Gault* court begins its opinion with a discussion of the history of the development of juvenile courts in the United States and the concepts of *parens patriae*[63] and *in loco parentis*.[64] Concluding that such concepts cannot be used to deprive a child of constitutional protections, even in the face of beneficent motives, the *Gault* court stated:

> The Latin phrase [*parens patriae*] proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance. The phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child. But there is no trace of the doctrine in the history of criminal jurisprudence. At common law, children under seven were considered incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial, and in theory to punishment like adult offenders. In these old days, the state was not deemed to have authority to accord them fewer procedural rights than adults.
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> * * *
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> Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is -- to say the least -- debatable. And in practice, as we remarked in the Kent case, *supra*, the results have not been entirely satisfactory. Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. In 1937, Dean Pound wrote : 'The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts ....' The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.[65]

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[62] 387 U.S. at 13.
[63] BLACK'S LAW DICTIONARY, 1221 (9th Ed. 2009) (The State in its capacity as the provider of protection for those unable to care for themselves).
[64] BLACK'S LAW DICTIONARY, 858 (9th Ed. 2009) (In the place of a parent).
[65] *In Re: Gault,* 383 U.S at 16-19.

The court's opinion stresses the importance of procedure in ensuring that an individual receives fair treatment under the law:

> Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise. As Mr. Justice Frankfurter has said: 'The history of American freedom is, in no small measure, the history of procedure.' But in addition, the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. 'Procedure is to law what 'scientific method' is to science.'[66]

The court next notes the disparity of result which obtains in Arizona depending on the age of the offender. The court appears to be struck by how the procedures in place for juveniles in Arizona, or the lack thereof (or the lack of observation by the juvenile court thereof), allow the judicial process to simultaneously disregard the individual's rights under the constitution while enhancing greatly the applicable penalty, all the while being clothed in the fabric of service to the juvenile's greater good:

> Ultimately, however, we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence – and of limited practical meaning – that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with whitewashed walls, regimented routine and institutional hours ...' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide.
>
> In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy

[66] *Id.* at 19-21.

does not justify a kangaroo court. The traditional ideas of Juvenile Court procedure, indeed, contemplated that time would be available and care would be used to establish precisely what the juvenile did and why he did it – was it a prank of adolescence or a brutal act threatening serious consequences to himself or society unless corrected? Under traditional notions, one would assume that in a case like that of Gerald Gault, where the juvenile appears to have a home, a working mother and father, and an older brother, the Juvenile Judge would have made a careful inquiry and judgment as to the possibility that the boy could be disciplined and dealt with at home, despite his previous transgressions. Indeed, so far as appears in the record before us, except for some conversation with Gerald about his school work and his 'wanting to go to … Grand Canyon with his father,' the points to which the judge directed his attention were little different from those that would be involved in determining any charge of violation of a penal statute. The essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case. The summary procedure as well as the long commitment was possible because Gerald was 15 years of age instead of 18.

If Gerald had been over 18, he would not have been subject to Juvenile Court proceedings. For the particular offense immediately involved, the maximum punishment would have been a fine of $5 to $50, or imprisonment in jail for not more than two months. Instead, he was committed to custody for a maximum of six years. If he had been over 18 and had committed an offense to which such a sentence might apply, he would have been entitled to substantial rights under the Constitution of the United States as well as under Arizona's laws and constitution. The United States Constitution would guarantee him rights and protections with respect to arrest, search and seizure, and pretrial interrogation. It would assure him of specific notice of the charges and adequate time to decide his course of action and to prepare his defense. He would be entitled to clear advice that he could be represented by counsel, and, at least if a felony were involved, the State would be required to provide counsel if his parents were unable to afford it. If the court acted on the basis of his confession, careful procedures would be required to assure its voluntariness. If the case went to trial, confrontation and opportunity for cross-examination would be guaranteed. So wide a gulf between the State's treatment of the adult and of the child requires a bridge sturdier than mere verbiage, and reasons more persuasive than cliché can provide. As Wheeler and Cottrell have put it, 'The rhetoric of the juvenile court movement has developed without any necessarily close correspondence to the realities of court and institutional routines.'[67]

[67] *In Re: Gault,* 383 U.S at 27-30.

Turning to the specific deficiencies in the case, the *Gault* court first held that the notice given to Gerald and his parents was not sufficient:

> Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.' ...
>
> Due process of law requires notice of the sort we have described – that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding. It does not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet. Nor, in the circumstances of this case, can it reasonably be said that the requirement of notice was waived.[68]

The court next concerned itself with the issue of right to counsel and held that juveniles subject to custody were to be accorded this "essential" right:

> A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.' Just as in *Kent v. United States*, *supra*, at 561-562, we indicated our agreement with the United States Court of Appeals for the District of Columbia Circuit that the assistance of counsel is essential for purposes of waiver proceedings, so we hold now that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21.
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> * * *
>
> We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.[69]

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[68] *Id.* at 33, 34.
[69] *In Re: Gault,* 383 U.S at 36-37, 41.

The opinion then addressed a juvenile's right of confrontation, cross examination and the privilege against self-incrimination. Regarding Gerald's privilege against self-incrimination, the court first noted that Mrs. Cook, the complainant, was never called to testify in the matter. The court assumed that Gerald confessed either to the probation officer or to the court during his questioning by the judge, the record being unclear as to whom Gerald confessed. The court then noted that "neither Gerald nor his parents were advised that he did not have to testify or make a statement, or that an incriminating statement might result in his commitment as a delinquent."[70] Then the court dove into discussion of the privilege and its importance:

> The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth. The roots of the privilege are, however, far deeper. They tap the basic stream of religious and political principle because the privilege reflects the limits of the individual's attornment to the state and – in a philosophical sense – insists upon the equality of the individual and the state. In other words, the privilege has a broader and deeper thrust than the rule which prevents the use of confessions which are the product of coercion because coercion is thought to carry with it the danger of unreliability. One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.[71]

The court then concluded that the privilege against self-incrimination protects both adults and children, and would bar Gerald's confession in this matter:

> It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children. The language of the Fifth Amendment, applicable to the States by operation of the Fourteenth Amendment, is unequivocal and without exception. And the scope of the privilege is comprehensive.
>
> * * *
>
> And our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty – a command which this Court has broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom.
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> * * *

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[70] *Id.* at 43, 44.
[71] *Id.* at 47.

> We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults.[72]

The court then considered a juvenile's right of confrontation and cross examination. The court noted that the only proof introduced in Gerald's case was his apparent confession: "Apart from the 'admissions,' there was nothing upon which a judgment or finding might be based. There was no sworn testimony."[73] The court held that a finding of delinquency must be based either on a valid confession - which Gerald's was not - or sworn testimony subject to cross-examination:

> Absent a valid confession adequate to support the determination of the Juvenile Court, confrontation and sworn testimony by witnesses available for cross-examination were essential for a finding of 'delinquency' and an order committing Gerald to a state institution for a maximum of six years.
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> * * *
>
> We now hold that, absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements.[74]

In summary, the *Gault* decision granted juveniles: (1) the right to proper notice of the proceedings; (2) the right to counsel, including if indigent; (3) the privilege against self-incrimination; and (4) the right of confrontation, including the right to sworn testimony absent a valid confession, and the right of cross-examination. As importantly, and perhaps more significantly, the decision strongly continued the swing of the pendulum back toward the importance and place of procedure in juvenile proceedings.

1.11.2 - Basic Rights at Hearing

In addition to rights granted by court decision, the juvenile court statute grants juveniles certain basic rights which must be observed at all delinquency hearings:

> (a) A party is entitled to the opportunity to introduce evidence and otherwise be heard in the party's own behalf and to cross-examine adverse witnesses.
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> (b) A child charged with a delinquent act need not be a witness against self-interest or otherwise engage in self-incrimination.

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[72] *In Re: Gault,* 383 U.S at 47, 50 & 55.
[73] *Id.* at 56.
[74] *Id.* at 56, 57.

(c) An extra-judicial statement, if obtained in the course of violation of this part or that would be constitutionally inadmissible in a criminal proceeding shall not be used against the child.

(d) Evidence illegally seized or obtained shall not be received over objection to establish the allegations made against the child.

(e) A confession validly made by a child out of court is insufficient to support an adjudication of delinquency unless it is corroborated in whole or in part by other evidence.[75]

The court in *State ex rel., Anglin v. Mitchell* noted that these statutory rights grant to a juvenile the expectation of "... full evidentiary hearings with the full panoply of constitutional safeguards ...."[76] Likewise, the court in *Colyer v. State*, observed that this section "...expressly bestows upon children *charged with a delinquent act* basic rights which were not uniformly recognized or granted in the juvenile courts of this state prior to the 1970 Act, but were then enjoyed by adults on trial in the criminal courts."[77] (Italics in original). In summary, this statute essentially codifies the *Gault* decision and provides the juvenile with these basic rights:

1. Right to introduce evidence;
2. Right to testify;
3. Right of confrontation;
4. Privilege against self-incrimination;
5. Right to constitutional scrutiny of confessions (*Miranda*);
6. Right to the benefit of the exclusionary rule (search and seizure); and
7. Right to the benefit of corroboration of confessions.

1.11.3 - Confessions

The admissibility of a juvenile's confession will depend both upon compliance with subsection (c) of Tenn. Code Ann. § 37-1-127 (i.e., the confession must not be "constitutionally inadmissible in a criminal proceeding") and satisfaction of the "reasonable time" requirements of Tenn. Code Ann. § 37-1-115.[78]

1.11.3.1 - - Constitutional Admissibility

A complete discussion of the admissibility of a suspect's confession is beyond the scope of this presentation. Accordingly, only a brief treatment is presented herein.

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[75] Tenn. Code Ann. § 37-1-127.
[76] 596 S.W.2d 779, 784 (Tenn. 1980),
[77] 577 S.W.2d 460, 463 (Tenn. 1979).
[78] See *State v. Carroll*, 36 S.W.3d 854, 862 (Tenn. Crim. App. 1999) ("Thus, when police take a child into custody and conduct an interrogation, the admissibility of any resultant statement in a juvenile court proceeding will depend *both* upon satisfaction of the reasonable time requirements to Tenn. Code. Ann. § 37-1-115 and the knowing and voluntary nature of the confession."). (emphasis in original) (*citing State v. Lundy*, 808 S.W.2d 444, 446 (Tenn. 1991)).

Subsection (c) of Tenn. Code Ann. § 37-1-127 (set out above) provides that "an extra judicial statement" (such as a confession) "that would be constitutionally inadmissible in a criminal proceeding shall not be used against the child." The inquiry thus turns to whether the juvenile's confession would be admissible if analyzed according to constitutional principles.

A fundamental precept of criminal law is that a suspect's confession is admissible against the suspect, provided that the confession meets certain requirements, e.g., as whether the confession was voluntary and knowing.[79] As the U.S. Supreme Court stated in *Dickerson v. U.S.*, quoting English common law: "A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt."[80] Continuing the thought, the *Dickerson* court makes the point that the credibility of the confession depends upon whether it is voluntary; if not, it must be rejected: "[B]ut a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape ... that no credit ought to be given to it; and therefore it is rejected."[81]

The repugnance of an involuntary confession was explained by the U.S. Supreme Court in *Rogers v. Richmond*:

> Our decisions under [the Fourteenth] Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system – a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.[82]

To be deemed voluntary, a confession must be analyzed under several constitutional sources, including the due process clause of the Fourteenth Amendment to the U.S Constitution, the "law of the land" clause of Article I, Section 8 of the Tennessee Constitution, and the dual privileges against self-incrimination contained in the Fifth Amendment to the U.S. Constitution and Article I, Section 9 of the Tennessee Constitution. The seminal case of *Miranda v. Arizona*[83] is the touchstone of the analysis of the privilege against self-incrimination under the Fifth Amendment.

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[79] *See, State v. Housler*, 193 S.W.3d 476, 489 (Tenn. 2006).
[80] 530 U.S. 428, 433 (2000).
[81] *Id.*
[82] 365 U.S. 534, 540, 541 (1961).
[83] 384 U.S. 436 (1966).

To briefly summarize *Miranda*'s holdings, the court held that procedural safeguards must be in place and that certain specific warnings must be given a suspect before a confession may be considered voluntary: "The prosecution may not use statements, whether exculpatory or inculpatory, stemming from questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way, unless it demonstrates the use of procedural safeguards effective to secure the 5th Amendment's privilege against self incrimination."[84] These safeguards, now known as "*Miranda* warnings," have been upheld in innumerable decisions:

> [The *Miranda* court laid down] concrete constitutional guidelines for law enforcement agencies and court to follow.... Those guidelines established that the admissibility in evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings. These warnings are: a suspect 'has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.'[85]

Two prerequisites must be present before the requirements of *Miranda* come into play, however: The suspect must be in custody, and he must be subject to interrogation while in custody:

> The warnings are not required under every circumstance in which police officers come into contact with citizens. Rather, because 'the underpinnings of *Miranda* are to dissipate the compulsion inherent in custodial interrogations, to prevent coerced self incrimination, and to prevent relevant defendant ignorance... the requirements of *Miranda* come into play only when the defendant is in custody and is subjected to questioning or its functional equivalent.... Thus, absent either of these prerequisites, the requirements of *Miranda* are not implicated.[86]

The United States Supreme Court has recently issued a decision which may impact police procedure and court analysis of police interrogations of juveniles. In *J.D.B. v North Carolina*,[87] the court held that the age of a juvenile suspect is a factor which must be considered in determining whether the suspect is "in custody," thus triggering *Miranda* warnings prior to interrogation. In ruling that a suspect's age must be taken into account in determining whether a reasonable person would consider themselves free to terminate the encounter, the court held:

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[84] *Id.* at 444.
[85] *Dickerson v. U.S.*, 530 U.S. 428, 435 (2000).
[86] *State v. Summers*, 2008 WL 4613664, 33 TAM 46-28, 2008 Tenn. Crim. App. LEXIS 807, *7 (Tenn. Crim. App. 2008) *(citing, State v. Callahan*, 979 S.W.2d 577, 582 (Tenn. 1998)).
[87] 564 U.S. _____, 131 S.Ct. 2394 (2011).

> Reviewing the question de novo today, we hold that so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. This is not to say that a child's age will be a determinative, or even a significant, factor in every case. (citations omitted) It is, however, a reality that courts cannot simply ignore.[88]

The court remanded the case back to the lower courts to determine whether the juvenile, who was thirteen at the time of his questioning in a closed conference room at his school, and who had been threatened with detention and encouraged to "do the right thing" by his principal, was in custody for *Miranda* purposes.

Tennessee courts have affirmed the application of *Miranda* in the context of juvenile encounters with the police. For instance, *R.D.S. v. State* enunciates:

> In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the United States Supreme Court concluded that in the context of 'custodial interrogation' certain procedural safeguards are necessary to protect against compulsory self-incrimination.... Specifically, the Court held that 'the prosecution may not use statements ... stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.' *Id.* Part of those safeguards include the now familiar *Miranda* warnings informing the suspect that:
>
> > he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[89]

The *R.D.S.* court, citing *Miranda*, elaborated on the "in custody" requirement:

> The Miranda Court defined custody as a situation in which the defendant is placed under formal arrest or is 'otherwise deprived of his freedom of action in any significant way.' (citation omitted) We have expanded this definition to mean 'under the totality of the circumstances, [whether] a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest.' *State v. Anderson*, 937 S.W.2d 851, 852, 855 (Tenn. 1996). To aid in determining whether a reasonable person would consider himself

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[88] 131 S.Ct. at 2406.
[89] 245 S.W.3d 356, 363 (Tenn. 2008).

or herself in custody, we consider a variety of factors, including the following:

> the time and location of the interrogation; the duration and character of the questioning; the officer's tone of voice and general demeanor; the suspect's method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions between the officer and the suspect, including the words spoken by the officer to the suspect, and the suspect's verbal or nonverbal responses; the extent to which the suspect is confronted with the law enforcement officer's suspicions of guilt or evidence of guilt; and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will.

(citation omitted) This test is 'objective from the viewpoint of the suspect, and the unarticulated, subjective view of law enforcement officials that the individual being questioned is or is not a suspect does not bear upon the question.'" (citations omitted).[90]

The *R.D.S.* court also analyzed the "interrogation" aspect of the questioning of a juvenile by a school principal and the School Resource Officer, holding that questions asked by the SRO "constituted interrogation or its functional equivalent." The court stated that "[i]nterrogation includes not only direct questions, but also 'any words or actions of the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect.'"[91]

The Tennessee Court of Criminal Appeals undertook a constitutional analysis of a juvenile's confession in *State v. Carroll*[92] In *Carroll*, the juvenile defendant was charged, along with two other juvenile co-defendants, with robbery and murder. The defendant was found guilty of murder and other charges after being transferred to adult court and challenged the admissibility of his confession both during the transfer hearing and the subsequent criminal trial. The court, after first analyzing the "reasonable time" requirement of Tenn. Code Ann. § 37-1-115 (discussed below), initially noted that the juvenile defendant enjoys the privilege against self-incrimination but may waive this right:

> In contrast to the State's compliance with Tenn. Code. Ann. § 37-1-115, see *Lundy*, 808 S.W.2d at 446, the knowing and voluntary nature of the appellant's confession is relevant both to the use of the appellant's

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[90] *R.D.S. v. State*, 245 S.W.3d at 363, 364.
[91] *Id.* at 363.
[92] 36 S.W.3d 854 (Tenn. Crim. App. 1999).

> confession at the juvenile transfer hearing and to the use of the confession at the appellant's trail. In either context, the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution provide the criminally accused a privilege against self-incrimination. *State v. Callahan*, 979 S.W.2d 577, 581 (Tenn. 1998). An accused may waive this privilege provided the accused is apprised of his or her Miranda rights and knowingly and voluntarily waives those rights. *Id.* (*citing, Miranda v. Arizona*, 384 U.S. 436, 444-445, 479-478, 86 S. Ct. 1602, 1612, 1630, 16 L. Ed.2d 694 (1966)).[93]

The *Carroll* court next noted that a proper determination of whether a juvenile defendant has waived his or her privilege against self-incrimination requires an analysis of the "totality of the circumstances" to determine whether the confession is knowing and voluntary:

> The applicable standard in reviewing the validity of a *Miranda* waiver is the totality-of-the-circumstances test (citations omitted).
>
> In the context of juvenile confessions, the totality-of-the-circumstances test requires consideration of the following factors: (1) the circumstances surrounding the interrogation including the juvenile's age, experience, education, and intelligence; (2) the juvenile's capacity to understand the Miranda warnings and the consequences of the waiver; (3) the juvenile's familiarity with Miranda warnings or the ability to read and write in the language used to give the warnings; (4) any intoxication; (5) any mental disease disorder, or retardation; and (6) the presence of a parent, guardian, or interested adult.[94]

The court was clear in stating that no single factor is conclusive, making the point that the presence of a juvenile's parent during the interrogation is not required:

> With respect to these factors, the court in Callahan observed, 'While courts should exercise special care in scrutinizing purported waivers by juvenile suspects, no single factor...should by itself render a confession unconstitutional absent coercive police activity.' Thus, the admissibility of a juvenile's confession is not dependent upon the presence of his parents at the interrogation." (citation omitted).[95]

In summary of the *Carroll* decision, a juvenile may waive his or her privilege against incrimination, and thus a confession may be used against the juvenile if the juvenile has waived this right in a knowing and voluntary manner. To determine whether a waiver is knowing, voluntary and admissible, the court is to consider the totality of the

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[93] *State v. Carroll*, 36 S.W.3d at 864.
[94] *Id.*
[95] *State v. Carroll*, 36 S.W.3d at 864.

circumstances and consider several enumerated factors, none of which is conclusive, including the presence or absence of a parent during the waiver and confession.

1.11.3.2 - - Reasonable Time Requirement.

The "reasonable time" requirement refers to the language of Tenn. Code Ann.§ § 37-1-115(a), which requires "a person" taking a child into custody "within a reasonable time" to release the child to the parent or guardian, to bring the child before the court, or deliver the child to a detention facility or to a medical facility.

A thorough and instructive discussion of the phrase "within a reasonable time" and its predecessor language is contained in the case of *State v. Lundy*.[96] The *Lundy* case was decided after the decision in the significant case of *State v. Strickland*[97] where the court, in dealing with an earlier version of the statute containing the language that the child must be released to his or her parents or taken before a court "directly and with all reasonable speed," ruled that a juvenile could be detained and questioned only after permission was obtained from juvenile court.[98] The *Strickland* court ruled that the juvenile's confession was inadmissible due to the delay in either releasing the juvenile to his parents or taking him before the court. The juvenile had been detained and questioned by the police for a considerable length of time before he confessed.

In response to the *Strickland* decision, the legislature amended the statute to substitute the phrase "within a reasonable time" for the offending language quoted *supra*. The *Lundy* court ruled that the "reasonable time" requirements of the statute had been met where a juvenile had been taken by the police from school and, within one hour and twelve minutes, had confessed to a murder occurring at the school. Noting that the juvenile's parent had been present during the juvenile's detention and questioning by the police, the court ruled that individual questioning of the juvenile was a reasonable method of investigation under the circumstances and stated that the proper inquiry focused on the totality of the circumstances:

> The proper post-*Strickland* inquiry is whether the reasonable time requirements of the statute have been met and whether, under the totality of the circumstances, the defendant's confession was the result of a knowing and intelligent waiver of his constitutional rights. (*citing. State v. Gordon*, 642 S.W.2d 742, 744 (Tenn. Crim. App. 1982)).[99]

In the case of *State v. Gordon* [100] the juvenile defendant, only a few days shy of his eighteenth birthday, was arrested at 12:51 a.m. and charged with at least two violent crimes, armed robbery and aiding and abetting second degree murder. He was the last of several co-defendants to be questioned by the police, his questioning occurring at 5:00

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[96] 808 S.W.2d 444 (Tenn. 1991).
[97] 532 S.W.2d 912 (Tenn. 1975).
[98] *Id.* at 918.
[99] *State v. Lundy*, 808 S.W.2d at 446.
[100] 642 S.W.2d 742 (Tenn. Crim. App. 1982).

a.m. He was advised of his *Miranda* rights, executed a waiver thereof, and confessed at approximately 6:30 a.m. He was taken before a juvenile judge at 7:00 a.m., and his aunt was notified at 9:30 a.m. Among other issues before the appellate court, the defendant maintained that the police did not comply with the "reasonable time" requirement of the statute (differently enumerated, but identical in language to the present statute). In rejecting this assertion, the court stated:

> In view of the defendant's age, the relatively brief time period involved in his detention and questioning, the unavailability of any parent or legal guardian, and the defendant's own refusal to contact his aunt or grandfather, we find no violations of T.C.A. 37-215 (a). Under the time sequences involved in this case, we find that the defendant was brought before the juvenile judge within the 'reasonable time' period contemplated by the statute.[101]

The court in *State v. Carroll*[102] (discussed *supra*), formulated a concise statement of the law pertaining to the options facing the appropriate authorities when taking a child into custody:

> Viewed in the context of the statute as a whole [Tenn. Code Ann. § 37-1-115], this provision provides that, within a reasonable time of taking a child into custody, the police must either release the child to his parents' custody, bring the child before the court, or place the child in an appropriate detention facility for juveniles, thereby triggering procedural protections relating to the detention of juveniles.[103]

1.11.4 - Right to Counsel

A juvenile has the right to counsel "at all stages of any delinquency proceedings or proceedings alleging unruly conduct that place the child in jeopardy of being removed from the home pursuant to 37-1-132(b)."[104] A juvenile has the right to counsel in a hearing to revoke or terminate his or her home placement status. The court in *Gillard v. Cook*[105] reasoned that a juvenile on home placement status following commitment to the state on delinquency charges occupies the same status as an adult on probation whom subsequently faces a probation revocation hearing.

The juvenile has the right to counsel if indigent and, if he or she appears without counsel, the court "shall" determine whether the juvenile is aware of the right to be appointed counsel if indigent.[106] This right is built upon the sturdy foundation of *Gideon*

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[101] *Id.* at 744, 745.
[102] 36 S.W.3d 854 (Tenn. Crim. App. 1999).
[103] *Id.* at 863.
[104] Tenn. Code Ann. § 37-1-126(a)(1). *See also*, *In re: Gault*, 383 U.S at at 41; *State v. Johnson*, 574 S.W.2d 739, 741 (Tenn. 1978).
[105] 528 S.W.2d 545, 548 (Tenn. 1975).
[106] Tenn. Code Ann. § 37-1-126(a)(3) ("If the person is indigent, the court shall provide counsel for the indigent person."). *See also*, Tn. Sup. Ct. R. 13, §1(d)(2) ("In the following proceedings ... the court or

v. Wainwright,[107] in which the court held that the Sixth Amendment to the U.S. Constitution is applicable to the states through the Fourteenth Amendment, and that an indigent defendant is entitled to counsel.[108]

The statute set forth at Tenn. Code Ann. § 37-1-126(a)(3) requires the court to inquire as to whether an unrepresented juvenile is aware of his or her right to counsel, including if indigent: "If a person appears without counsel, the court shall ascertain whether the person knows of the right to counsel and of the right to be provided with counsel by the court if the person is indigent."

A person requesting appointed counsel must complete an affidavit of indigency on a form provided by the Administrative Office of the Courts.[109] An administrative fee "shall" be assessed to the child if he or she is provided with court appointed counsel.[110]

The author has observed a wide variance regarding the administrative fee among the several juvenile courts with which the author is familiar. Some courts are diligent in assessing the fees while others are not so.

The court's intake officer must inform the juvenile "at the initial interview" of the right to counsel, including if indigent.[111] Likewise, if the juvenile is placed into detention pending a hearing, the intake officer must advise the juvenile "within a reasonable time" of the right to counsel, including if indigent.[112] During the notice concerning an informal adjustment, and during any discussions regarding an informal adjustment, the juvenile court officers must inform the juvenile and his or her parent or guardian of the right to have counsel present during the conference, including if indigent.[113]

For indigent juveniles, the court must appoint the district public defender's office "or other attorneys employed by the state for indigent defense" unless "in the sound discretion" of the judge other counsel should be appointed.[114] Appointments of attorneys other than the public defender must be from a roster of attorneys the court is required to maintain.[115] Indigent defendants are not allowed to select appointed counsel.[116] The

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appointing authority shall advise any party without counsel of the right to be represented throughout the case by counsel and that counsel will be appointed if the party is indigent and ... requests appointment of counsel: (A) Cases in which a juvenile is charged with juvenile delinquency for committing an act which would be a misdemeanor or a felony if committed by an adult.").

[107] 372 U.S. 335, 344-345 (1963).

[108] *See also*, *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

[109] Tn. Sup. Ct. R. 13, §1(e)(1).

[110] Tenn. Code Ann. § 37-1-126(c)(1); Tn. Sup. Ct. R. 13, §1(e)(4)(E).

[111] Tn. R. Juv. P. 12(c).

[112] Tn. R. Juv. P. 5(c)(5).

[113] Tn. R. Juv. P. 12(b)(2) & (c).

[114] Tn. Sup. Ct. R. 13, § 1(e)(4)(A) & (B).

[115] Tn. Sup. Ct. R. 13, § 1(e)(4)(A) & (B).

[116] Tn. Sup. Ct. R. 13, § 1(f)(1); *See also*, *State v. Carruthers*, 35 S.W.3d 516, 546 (Tenn. 2000) (citing, among others, *Wheat v. U.S.*, 486 U.S. 153, 159 (1988)) ("The right of an accused to assistance of counsel, however, does not included the right to appointment of counsel of choice, or to special rapport, confidence,

court must appoint separate counsel "for indigent defendants having interests that cannot be represented properly by the same counsel or when other good cause is shown."[117] The court is required to appoint counsel for juveniles who are not represented by a parent or guardian.[118]

1.11.5 - Standard of Proof

The juvenile defendant is entitled to have his or her guilt proved beyond a reasonable doubt.[119] It would follow that the juvenile is entitled to the presumption of innocence.[120]

1.11.6 - Compulsory Service of Process

A juvenile defendant has the right to have subpoenas issued to require "attendance and testimony of witnesses and production of papers at any hearing ...."[121]

1.11.7 - Jury Trial

There is no right to trial by jury in juvenile court.[122] Further, there is no right to trial by jury when a juvenile matter is appealed to circuit court for trial de novo. In *State v. Burns,*[123] the Tennessee Supreme Court ruled, in a case of first impression construing the Tennessee Constitution, that a juvenile defendant, while being tried in adult court for an offense which would have been a felony if an adult, pursuant to a de novo appeal from juvenile court, was not entitled to a jury trial:

> As evidenced by our current statutory scheme, our legislature has determined that, while they are still within the juvenile court system, our juveniles are to be tried by judges, not juries-even upon de novo appeal. Should the legislature choose in the future to provide the option of a jury trial during some or all of juvenile proceedings, it may, of course, do so. We are not convinced, however, that Tennessee's law of the land clause mandates jury trials in this context.
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> * * *
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> We stress that the system for dealing with juvenile offenders *as juveniles* is separate and distinct from the criminal justice system. On those

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or even a meaningful relationship with appointed counsel.... The essential aim of the Sixth Amendment is to guarantee an effective advocate, not counsel preferred by the defendant.").

[117] Tn. Sup. Ct. R. 13, § 1(e)(4)(C).

[118] Tenn. Code Ann. § 37-1-126(a)(4).

[119] Tenn. Code Ann. § 37-1-129(b); Tn. R. Juv. P. 28(d). *See also, In re: Winship*, 397 U.S. 358, 377-378 (1970) (juvenile entitled to proof beyond a reasonable doubt in the adjudication phase of a delinquency proceeding); *State v. Johnson*, 574 S.W.2d 739, 741 (Tenn. 1978) (*citing, In re: Gault*, 387 U.S. 1 (1967)).

[120] *In re: Winship*, 397 U.S. at 375.

[121] Tenn. Code Ann. § 37-1-118 . *See also, State v. Womack*, 591 S.W.2d 437, 442 (Tenn. App. 1979).

[122] See Tenn. Code Ann. § 37-1-124(a) ("Hearings pursuant to this part shall be conducted by the court without a jury...."); Tn. R. Juv. P. 27(c) ("There shall be no trial by jury of any case in juvenile court.").

[123] 205 S.W.3d 412 (Tenn. 2006).

> occasions when a juvenile is transferred to criminal court to be tried *as an adult*, he or she is afforded the full panoply of constitutional rights accorded to criminal defendants, including jury trials. Defendant in this case is not, however, being tried as an adult. He is being tried within the context of a system that was designed to avoid much of the trauma and stigma of a criminal trial. (emphasis in original).
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> * * *
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> Accordingly, we conclude that Defendant is not entitled under article I, section 8 of the Tennessee Constitution to a jury trial upon his de novo appeal to circuit court following the juvenile court's finding him delinquent by virtue of having committed an offense which would be a felony if committed by an adult.
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> * * *
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> [J]uvenile proceedings are statutory: they did not exist under common law. This provision [Article I, Section 6] of our Constitution is therefore inapposite. Section 9 provides a right to a jury trial 'in all criminal prosecutions.' This provision is likewise inapposite because juvenile proceedings are not 'criminal prosecutions.'[124]

The *Burns* court overruled by implication,[125] if not by expression ("Prior cases holding otherwise are hereby overruled."), the case of *Arwood v. State*[126] and *State v. Johnson*[127]

1.11.8 - Right to Attorney Judge

While not often thought of as a right possessed by a juvenile defendant, the juvenile defendant in a delinquency proceeding in which the juvenile may be deprived of liberty is entitled to have a judge who is licensed to practice law.[128] The court in *State, ex rel., Anglin v. Mitchell*[129] based this decision on Article I, Section 8 of the Tennessee Constitution (the "law of the land" clause, which is the Tennessee equivalent of the U.S. Constitution's due process clause):

> The right to counsel becomes 'as sounding brass, or a tinkling cymbal,' if there is not a concomitant right to a trial before a qualified judge. Extending the guiding hand of counsel is an idle gesture if there is absent the gingerly approach of a genuine judge. There is, perhaps, some warrant for a lay judge in the disposition of small offenses and due process is not offended; however, in juvenile delinquency cases, where loss of liberty for years is involved, there is no place for an untrained judge.

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[124] *State v. Burns*, 205 S.W.3d at 416-418.
[125] *Id.* at 418.
[126] 463 S.W.2d 943 (Tenn. App. 1970).
[127] 574 S.W.2d 739 (Tenn. 1978).
[128] *See, State, ex rel., Anglin v. Mitchell*, 596 S.W.2d 779, 791 (Tenn. 1980).
[129] 596 S.W.2d 779 (Tenn. 1980).

* * *

> Virtually every facet of criminal law is involved in juvenile delinquency hearings. Judges at all levels, and active and knowledgeable practitioners, often dissent and disagree among themselves as they make an honest effort to resolve the complex issues being addressed daily by our criminal courts. We consider it beyond dispute that the dictates of fundamental fairness, the demands of common sense and the developing law of this modern era require that the state supply a law-trained judge in all of our criminal courts of record, which necessarily includes the juvenile criminal court, when conducting adjudicatory hearings in criminal cases. We cannot countenance one law for adult criminal offenders and a wholly different law for juveniles who are charged with an identical offense.
>
> The fact that Tennessee today is served by many non-lawyer juvenile judges who are kindly, considerate and attuned to juvenile problems is of no constitutional consequence. Good intention is not enough. In dealing with these, 'the least among us,' constitutional considerations demand an honest answer to the simple question: 'Why not the best?' This is all Due Process and the Law of the Land require; but they will not settle for less.[130]

In addition to decisional law as recited, *supra*, various statutory sources require a juvenile court judge to be an attorney or otherwise touch upon this issue. Title 37 of the Tennessee Code requires the juvenile judge to be an attorney in cases involving some juveniles suffering from mental illness.[131] Any magistrate appointed pursuant to Tenn. Code Ann. § 37-1-107 must be a licensed attorney ("A magistrate shall be a member of the bar...."). [132] The Juvenile Court Restructure Act provides that, absent special legislation, the state's general sessions courts are to exercise juvenile court jurisdiction and that "only general sessions court judges who are attorneys may order commitment of a delinquent child to the department of children's services."[133]

In the event of a transfer hearing of a child from juvenile court to adult court pursuant to Tenn. Code Ann. § 37-1-134 - where the presiding juvenile judge is a "nonlawyer judge" - the criminal court is required to conduct an acceptance hearing upon motion of the child. The hearing is to determine whether the criminal court will accept jurisdiction of the transferred juvenile.[134]

1.11.9 - Double Jeopardy In General

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[130] *Id.* at 788.
[131] Tenn. Code Ann. § 37-1-181,
[132] Tenn. Code Ann. § 37-1-107(a)(1).
[133] Tenn. Code Ann. § 37-1-203.

[134] Tenn. Code Ann. § 37-1-159(d).

Jeopardy is defined as "the peril in which a prisoner is put when he is regularly charged with a crime before a tribunal properly organized and competent to try him."[135] The court in *Breed v. Jones* pronounced that: "Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution."[136]

To be placed into jeopardy twice for the same offense is a violation of both the United States Constitution - the 5th Amendment, and the Tennessee Constitution - Article I, §10. The Double Jeopardy clause of the 5th Amendment has been made applicable to the states through the due process clause of the 14th Amendment.[137] The Tennessee Supreme Court has explained the reasoning underlying the double jeopardy prohibition:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."[138]

The double jeopardy prohibition operates to protect against being tried twice for the same offense as well as being punished twice for the same offense. The protection operates to spare the accused successive prosecutions for a single offense. In the event of an acquittal, prosecution is barred from a subsequent trial.[139]

1.11.9.1 - - Continuous Episode

A concept common to many double jeopardy cases is that of "continuous episode." If the accused's acts constitute a continuous episode for which the accused is prosecuted for multiple charges, the courts are sensitive to double jeopardy claims. In *State v. Mullins*[140] the court ruled that the accused's convictions for both felony evading arrest and misdemeanor evading arrest violated double jeopardy because the defendant's flight was "one continuous episode" rather than two distinct acts for which the defendant might be prosecuted.

Correspondingly, the court in *State v. Phillips*[141] held that the defendant's two convictions for child endangerment arising out of the same driving episode violated double jeopardy. The court conceded that the defendant endangered the two children in his car by his driving while intoxicated; however, the single episode of driving constituted but one single offense.

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[135] BLACK'S LAW DICTIONARY, 852 (8th Ed. 2004).
[136] 421 U.S. 519, 528 (1975).
[137] *Benton v. Maryland*, 395 U.S. 784, 787 (1969).
[138] *State v. Pennington*, 952 S.W.2d 420, 422 (Tenn. 1997) (*citing*, *Green v. U.S.*, 355 U.S. 184 (1957).
[139] *King v. State*, 391 S.W.2d 637, 640 (Tenn. 1965).
[140] 2005 WL 2045151, 30 TAM 43-28, 2005 Tenn. Crim. App. LEXIS 927 (Tenn. Crim. App. 2005).
[141] 2005 WL 1827838, 30 TAM 39-25, 2005 Tenn. Crim. App. LEXIS 807 (Tenn. Crim. App. 2005).

1.11.9.2 - - Different Sovereigns

Another important principle applicable to double jeopardy analysis is the different sovereigns doctrine. The general rule is that different sovereigns may institute separate prosecutions against the accused for offenses arising out of the same episode without violating double jeopardy. A good discussion of the doctrine is contained in the case of *State v. Shifflett.*[142] In the *Shifflett* case, the defendant was prosecuted by both Tennessee and Pennsylvania for activities surrounding the death of an acquaintance. The court rejected the defendant's double jeopardy claim, stating that the "dual sovereigns doctrine" prevents the double jeopardy prohibition from being implicated. The court stated that each state may prosecute for offenses committed within their jurisdictions. The "crucial question" for the court is whether the second prosecuting entity draws its authority to punish from a "separate and distinct source of power." Because each state (the "different sovereigns" in this case) draws its power to punish from separate and distinct sources of power (the citizens of their respective states), the dual sovereigns doctrine prevents double jeopardy from being violated.

As a distinction to the different sovereigns doctrine, however, is a Tennessee statute which provides that an accused may not be prosecuted for the same offense in municipal court and state court, even if the offense constitutes a violation of state and municipal law.[143]

[Practice Point: The practitioner may be sensitive to this statute in the event a juvenile is prosecuted in both juvenile court and city court for a traffic offense.]

1.11.9.3 - - Juvenile Proceedings

The United States Supreme Court held in *Breed v. Jones* that the prohibition against double jeopardy applies in juvenile court proceedings as well as adult proceedings.[144] The *Breed* court held further that jeopardy attaches in a juvenile proceeding at the beginning of the adjudicatory hearing - "[w]e therefore conclude that respondent was put in jeopardy at the adjudicatory hearing. Jeopardy attached when respondent was 'put to trial before the trier of the facts,' ... that is, when the Juvenile Court, as the trier of the facts, began to hear evidence."[145]

1.11.10 - Mental State - Competence to Stand Trial - General Considerations

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[142] 2008 WL 1813106, 33 TAM 26-23, 2008 Tenn. Crim. App. LEXIS 306 (Tenn. Crim. App. 2008).
[143] Tenn. Code Ann. § 40-3-105(a). *See also*, *Waller v. Florida*, 397 U.S. 387 (1970).
[144] 421 U.S., 519, 531 (1975) ("We deal here, not with the 'formalities of the criminal adjudicative process,' ... but with an analysis of an aspect of the juvenile-court system in terms of the kind of risk to which jeopardy refers. Under our decisions we can find no persuasive distinction in that regard between the proceeding conducted in this case pursuant to Cal. Welf. & Inst'ns Code § 701 and a criminal prosecution, each of which is designed 'to vindicate [the] very vital interest in enforcement of criminal laws.'").
[145] *Breed v. Jones*, 421 U.S. at 531 (*citing*, *Serfass v. United States*, 420 U.S. 377, 388 (1975).

An accused in a criminal proceeding is entitled to a determination after hearing as to whether he or she is competent to stand trial.[146] The United States Supreme Court has held that a conviction of one who is mentally incompetent to stand trial is a violation of due process rights under the 14th Amendment to the United States Constitution.[147]

The standard for determining whether a defendant is competent to stand trial was stated by the United States Supreme Court in *Dusky v. U.S.*: "[w]hether [the accused] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether [the accused] has a rational as well as factual understanding of the proceedings against [the accused]."[148] Tennessee courts have described the test similarly: "The test for determining whether a defendant is competent to stand trial is whether the defendant has 'the capacity to understand the nature and object of the proceedings against him, to consult with counsel and to assist in preparing his defense.'"[149]

1.11.11 – Mental State - Competence at Time of Offense - General Considerations

An accused is entitled to assert as a defense that he or she was mentally incompetent at the time of the offense.[150] The "insanity defense" enunciated in case law[151] has been codified at Tenn. Code Ann. § 39-11-501(a), which provides:

> It is an affirmative defense to prosecution that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or wrongfulness of the defendant's acts.... The defendant has the burden of proving the defense of insanity by clear and convincing evidence.[152]

1.11.12 Mental State - Application to Juvenile Proceedings

The general principles discussed above have been given voice in Rule 29 of the Tennessee Rules of Juvenile Procedure. The Rule provides that if at any time prior to or during the adjudicatory hearing in a delinquent or unruly case, the court has reasonable grounds to believe the juvenile may be incompetent to proceed with the adjudicatory hearing, the court may stay the proceeding pending an evaluation of the juvenile.[153] In the event the child is found to be incompetent, the court may proceed with an involuntary

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[146] *Pate v. Robinson*, 383 U.S. 375, 385 (1966).
[147] *Id,* at 378 (citing *Bishop v. U.S.*, 350 U.S. 961, 961 (1956)). *See also*, *State v. Hilt*, 2009 WL 37614, 34 TAM 9-25, 2009 Tenn. Crim. App. LEXIS 392, *23 (Tenn. Crim. App. 2009) (additionally holding that such a conviction is a violation of Article I, Section 8 of the Tennessee Constitution) (citing *State v. Blackstock,* 19 S.W.3d 200, 205 (Tenn. 2000)).
[148] 362 U.S. 402, 402 (1960).
[149] *State v. Hilt*, 2009 Tenn. Crim. App. LEXIS at *23-*24 (citing *State v. Black*, 815 S.W.2d 166, 173-174 (Tenn. 1991)).
[150] See *State v. Sparks*, 891 S.W.2d 607, 615 (Tenn. 1995) ("Insanity at the time an offense is committed is an absolute defense.") (*citing*, *Graham v. State*, 547 S.W.2d 531 (Tenn. 1971)).
[151] *Graham v. State*, 547 S.W.2d 531 (Tenn. 1971).
[152] Tenn. Code Ann. § 39-11-501(a).
[153] Tn. R. Juv. P. 29(a)(1).

hospitalization of the child, or release the child to the parent or guardian for a voluntary admission to an appropriate facility.[154]

Upon an event a juvenile intends to assert an insanity defense, the Rule 29 requires notice thereof to be given to the court.[155] The court may then cause the child to be examined or permit the defense to be asserted.[156]

The Advisory Commission Comments to Rule 29 point out that case law has not yet addressed the issue of the insanity defense in juvenile proceedings. Consequently, the Comments declare that Rule 29 is not intended to affect substantive law on the subject, but is rather drafted to provide procedures for those cases in which the juvenile intends to assert the defense:

> There are no reported cases in Tennessee addressing the question of whether or under what circumstances an insanity defense is available in juvenile court proceedings.
>
> * * *
>
> This rule is not intended to alter the substantive law respecting the applicability of the insanity defense to juvenile court proceedings in Tennessee or to delineate those circumstances under which such a defense may be available. Rather, it provides procedures for those cases in which 'the child intends to introduce expert testimony relating to mental disease, defect or other condition bearing upon the issue of whether the child had the mental state required for the offense charged.'

1.11.13 - *Ake v. Oklahoma*

The juvenile court judge and practitioner should be aware of the significant assistance provided by the *Ake* decision. Indigent defendants whose mental capacity is likely to be a significant factor in the case may be able to receive financial assistance from the state in the preparation of their defense. In *Ake v. Oklahoma,* the United States Supreme Court ruled that due process requires the state to provide an indigent defendant with access to a mental health professional to assist in the preparation, evaluation, and presentation of his defense when the defendant's mental condition at the time of the offense is likely to be a significant factor in the case. The defendant, charged with first degree murder, was denied a psychiatric evaluation at state expense, even though he had a past history of mental illness and exhibited bizarre behavior at trial. The Supreme Court held that to ensure "meaningful access to justice," the trial court, once the defendant has made a threshold showing that his mental condition at the time of the

[154] Tn. R. Juv. P. 29(a)(3).
[155] Tn. R. Juv. P. 29(b)(1).
[156] Tn. R. Juv. P. 29(b)(2).

offense is likely to be a significant factor at trial, must ensure the defendant has access to one competent psychiatrist to make the necessary evaluation.[157]

The Tennessee Supreme Court adopted the *Ake* principles in *State v. Barnett*.[158] The *Barnett* court went further than the *Ake* decision and ruled that even in noncapital cases, the state must provide the indigent defendant access to a competent, independent psychiatrist to assist in the evaluation, preparation, and presentation of the defense in those cases where the defendant has demonstrated to the court that his sanity at the time of the offense will be a significant factor at trial. The trial court must conduct an ex parte hearing to consider the defendant's request. The defendant must demonstrate a "particularized need" for the expert, which would require the defendant to show that a psychiatrist is necessary to protect his or her right to a fair trial. The defendant is not, however, allowed to choose an expert who will reach conclusions the defendant wishes.

It is the author's experience that *Ake* hearings are infrequent in juvenile court practice, occurring most often in cases involving serious felony offenses.

[Practice Point: The practitioner should consider *Ake* and *State v. Barnett* in the event a transfer hearing is likely. The mental condition of the juvenile is one of the factors listed in Tenn. Code Ann. § 37-1-134 ("The child is not committable to an institution for the developmentally disabled or mentally ill."), and the child's mental condition may be considered by the court in determining whether the child is amenable to rehabilitation ("The possible rehabilitation of the child by use of procedures, services and facilities currently available to the court in this state.").]

1.11.14 - School Setting

The rights of a child are significantly impacted when present at school or on school property, including school buses. Tennessee statutes allow school officials to conduct searches of lockers, vehicles and other property when "individual circumstances in a school dictate." When such circumstances are present, the principal may order a search of students' or visitors' vehicles parked on school property, containers, packages, lockers or other enclosures used by students or visitors for storage, and other areas accessible by students or visitors.[159]

The phrase "individual circumstances" is given elaboration in the statute, including incidents on school property, information received from law enforcement, juvenile or other authorities indicating patterns of drug use or trafficking, assaults or attempted assaults, and "any other actions or incidents" known by the principal which may give rise to a reasonable suspicion that drugs or weapons may be present on school property.[160]

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[157] 470 U.S. 68, 76 (1985).
[158] 909 S.W.2d 423, 428 (Tenn. 1995).
[159] Tenn. Code Ann. § 49-6-4204(a).
[160] Tenn. Code Ann. § 49-6-4204(b).

A student may be physically searched due to the results of a locker search, or because of information received from a student, staff member, teacher, or other person, if such search is "reasonable to the principal." [161] The statute elaborates on the "reasonableness" requirement, requiring five factors to be present prior to the physical search.[162]

A student may be drug tested if the principal has "reasonable indications" that the student has used or may be under the influence of drugs.[163] The need for testing may be brought to the attention of the principal through either of the searches authorized under Tenn. Code Ann. §§ 49-6-4204 or 49-6-4205, or "other reasonable information received from a teacher, staff member or other student." The statute requires that five factors be present before "reasonableness" is present. The statute contains extensive provisions regarding the testing process.

Additional statutes allow the use of metal detectors and dogs or other animals in conducting the search, with the caveat that search animas may not be used to search a student's or visitor's person.[164]

The case of *R.D.S. v. State* [165] is a case of first impression in Tennessee as to whether probable cause or reasonable suspicion should be applied to law enforcement officers conducting a search of a student in a school setting. A school official may conduct a search of a student's person based upon reasonableness (Tenn. Code Ann. § 49-6-4205), while a search by law enforcement must generally be based upon probable cause - a more stringent standard. The court, citing extensively from the U.S. Supreme Court case of *New Jersey v. T.L.O.* [166] ruled that law enforcement officers who are assigned to a school on a regular basis and who have duties beyond that of an ordinary police officer, may conduct a search based upon the lesser standard of reasonable suspicion:

> After balancing the competing interests between R.D.S.'s legitimate expectations of privacy and the State's need for effectively investigating breaches of public order, we hold that the reasonable suspicion standard is the appropriate standard to apply to searches conducted by a law enforcement officer assigned to a school on a regular basis and assigned duties at the school beyond those of a ordinary law enforcement officer such that he or she may be considered a school official as well as a law enforcement officer, whether labeled an 'SRO' or not. However, if a law enforcement officer not associated with the school system

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[161] Tenn. Code Ann. § 49-6-4205(a).
[162] Tenn. Code Ann. § 49-6-4205(b).
[163] Tenn. Code Ann. § 49-6-4213(a)(1).
[164] *See*, Tenn. Code Ann. §§ 49-2-4207 & 49-2-4208.
[165] 245 S.W.3d 356 (Tenn. 2008),
[166] 469 U.S. 325 (1985).

searches a student in a school setting, that officer should be held to the probable cause standard.[167]

1.11.15 - Evidence Admissible

The Tennessee Rules of Evidence apply fully in the adjudicatory hearing.[168] More fully, the Rule provides: "In delinquent and unruly proceedings, no evidence that would be inadmissible in an adult criminal proceeding shall be admitted. In addition, in a delinquent or unruly case, no statement made by a child to the youth services officer or designated intake officer during the preliminary inquiry and evaluation process, or pursuant to informal adjustment under Rule 14, shall be admissible against the child prior to the dispositional hearing. In all other cases, evidence shall be admitted as provided by the Tennessee Rules of Evidence."[169] The Rule also provides that the court "shall consider only evidence which has been formally admitted."[170]

This is in distinct contrast to Rule 32(f) of the Tennessee Rules of Juvenile Procedure, which concerns Dispositional Hearings, and which provides that the court "shall consider only evidence which has been formally admitted, and the juvenile court record of the child.... The rules of evidence shall apply except that reliable hearsay including, but not limited to, certified copies of convictions or documents such as psychiatric or psychological evaluations of the child or the child's parents or custodian or reports prepared by the Department of Children's Services, may be admitted provided that the opposing party is accorded a fair opportunity to rebut any hearsay evidence so admitted."

Clearly, the court may only consider evidence formally admitted during the Adjudicatory while the court may also consider the juvenile court record of the juvenile, as well as "reliable hearsay," during the Dispositional Hearing. The references to the juvenile's "record" and "reliable hearsay" are important because often the court record, and more importantly, the court file, contain many items which have not been formally admitted during a hearing (reports of investigations, medical records and reports, etc.), and evidence admitted during the preliminary hearing or perhaps a detention hearing (which also may include "reliable hearsay").[171]

1.11.16 - Waiver of Rights

A juvenile may waive some or all of his or her rights but the waiver must comply with Rule 30, which requires the waiver to be knowing and voluntary. Special attention should be given to Rule 30(d) which concerns waivers in the adjudicatory hearing. Generally, for any such waiver to be knowing and voluntary, the juvenile must first

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[167] *R.D.S. v. State*, 245 S.W.3d at 369. *See also*, *Hill v. Sharber*, 544 F. Supp. 2d 670 (2008).
[168] Tn. R. Juv. P. 28(c).
[169] Tn. R. Juv. P. 28(c).
[170] Tn. R. Juv. P. 28(c).
[171] *See*, Tn. R. Juv. P. 15(b); Tn. R. Juv. P. 16(a).

consult with "a knowledgeable adult who has no interest adverse to the child." Additional detail is provided for the waiver by the child of his or her right to be represented by an attorney.

1.12 - Guardian ad Litem

In a delinquency proceeding, the court may appoint a guardian ad litem "at any stage of a proceeding" upon application of a party or on its own motion. Further, the court "shall" appoint a guardian ad litem for a child if the child's parent or guardian does not appear with the child, or if the interests of the child and the parent or guardian are in conflict.[172]

The author notes that appointment of a GAL in a delinquency matter is not common. This is due primarily to the fact that under Tennessee Supreme Court Rule 13, the state will not compensate a GAL in a delinquency case.

1.13 - Detention in General

The discussion herein concerns prehearing detention as opposed to post-adjudication detention which the court may order pursuant to dispositional alternatives under Tenn. Code Ann. § 37-1-131.

The judge and practitioner should be aware of the often wide divergence in practice concerning detention among the various juvenile courts in Tennessee. This is due in large measure to the differences in available resources to any specific court. For instance, the author's county is a small rural county with the closest contracted detention facility over 150 miles away. For practical reasons, this means that detention is used sparingly simply because of the logistics involved in transporting the juveniles. Also, detention is expensive and is a charge to the county. The author's county pays in excess of $135.00 per day to detain a juvenile. In contrast, juvenile courts in larger areas often have detention options available within the county; often these facilities are operated by the county. Courts in these jurisdictions, logically, are more apt to choose detention as a prehearing procedure. Further, courts in larger areas are more often faced with more numerous and more serious offenses justifying detention.

The term "detention" is defined as by statute as "confinement in a secure or closed type of facility that is under the direction or supervision of the court or a facility that is designated by the court or other authority as a place of confinement for juveniles."[173] The phrase "Youth Development Center" is defined by statute to be "... a hardware secure facility that houses children who have been adjudicated delinquent and who meet the criteria as established by the department [of children's services] for placement at such facility."[174] As of the time of this writing, the website for the

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[172] Tn. R. Juv. P. 37(a).
[173] Tenn. Code Ann. § 37-1-102(b)(13). *See also, State v. Carroll*, 36 S.W.3d 854, 862 (Tenn. Crim. App. 1999).
[174] Tenn. Code Ann. § 37-5-103(16).

Tennessee Commission on Children and Youth lists seventeen Juvenile Detention Centers in Tennessee, eight Temporary Holding Facilities, and six Youth Development Centers.[175]

1.14 - Grounds for Detention

The statute, Tenn. Code Ann.§ 37-1-114, sets forth the grounds for detention and contains three sections, with separate grounds, depending on the circumstances. First, subsection (a)(1) of this statute provides for the detention of a child charged with a delinquent or unruly act when there is probable cause to believe the child committed the act.[176] In addition to probable cause, subsection (a)(2) provides further that "...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 or legal custodian 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."

Subsection (c) of Tenn. Code Ann.§ 37-1-114 contains six grounds to detain a juvenile "...in any secure facility or secure portion of any facility...." Subsection (c)(1) provides for detention if there is probable cause to believe the child has committed a delinquent offense constituting a crime involving death or serious bodily injury, or the likelihood thereof, or a crime involving the unlawful carrying or possession of a weapon.

Subsection (c)(2) authorizes detention if 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 one of the following circumstances exist: the child is on probation; the child has pending prior delinquent offenses; the child is an escapee; the child has failed to appear for court within the last twelve months, has engaged in violent conduct resulting in serious injury to another, or the likelihood thereof, or has been adjudicated guilty of a delinquent offense qualifying as a felony.

Subsection (c)(3), also known as the "special circumstances" provision, allows detention if there is probable cause to believe the child "... has committed a delinquent offense, and special circumstances in accordance with the provisions of subsection (a) indicate the child should be detained." It should be noted that (c)(3) requires certain judicial action within twenty-four hours of the detention.

Detention is permitted if the child is alleged to be an escapee from a secure juvenile facility under Subsection (c)(4) and is permitted if the child is wanted in another jurisdiction for a felony offense pursuant to Subsection (c)(5). Finally, Subsection (c)(6) allows detention if the child is unruly and has violated a valid court order or is a runaway.

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[175] http://www.tn.gov/tccy/jjshtml .
[176] *See also*, Tn. R. Juv. P. 5(b).

1.15 - Place of Detention

In general terms, upon taking a juvenile into custody, the law enforcement authorities must either release the juvenile into the custody of his or her parents, guardian or other custodian, or bring the child before the court, or deliver the child to a detention or shelter care facility designated by the court, or to a medical care facility.[177] Statute permits counties to contract with public or private agencies or authorities, or other juvenile courts, to place juveniles in detention or shelter care facilities.[178]

The author's county, being small and rural, has no detention facility within the county and, consequently, contracts with several area detention facilities for the placement of juveniles accused of delinquent acts.

A child alleged to be delinquent may be detained only in the following facilities:

1. A licensed foster home or a home approved by the court;

2. A facility by a licensed child care agency;

3. A detention home or center for delinquent children that is under the direction or supervision of the court or other public authority or of a private agency approved by the court; or

4. Subject to subsection (e) [of Tenn. Code Ann. §37-1-116], any other suitable place or facility designated or operated by the court.[179]

A juvenile may be detained "for as short a time as feasible, not to exceed forty-eight (48) hours" in a jail or other facility designed for adult inmates *only* under specific circumstances as outlined in Tenn. Code Ann. §§ 37-1-116(b)(4), (c), (e), and (h).[180] These circumstances are quite onerous. For example: the matter must involve a serious crime against the person, the facility must be approved by the Tennessee Corrections Institute, the county involved must meet certain population density requirements, there are no other facilities willing to contract for the placement of the child, and the court must make certain findings prior to admittance.[181] Statute makes clear that a child transferred to adult court in accordance with the appropriate procedures may be detained in the appropriate facility for persons accused of crimes.[182]

1.16 - Post Detention Procedure/Time Limits for Detention Hearings

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[177] Tenn. Code Ann. § 37-1-115(a); Tn. R. Juv. P. 5(c)(1) & (d)(3).
[178] Tenn. Code Ann. § 37-1-116(f).
[179] Tenn. Code Ann. § 37-1-116(a).
[180] *See also*, Tenn. Rule Juv. Proc. 5(c)(3).
[181] Tenn. Code Ann. § 37-1-116(h).
[182] Tenn. Code Ann. § 37-1-116(c).

Upon a child being detained, the intake officer is tasked with determining whether continued detention is warranted under the circumstances or whether the child should be released to his or her parents or guardian.[183] If the child is not released, a petition must be filed "promptly" but in no event no later than two days from the child coming into custody, not including Saturdays, Sundays, and legal holidays.[184]

The applicable statutes and rules sometimes use the phrase "Saturdays, Sundays, and legal holidays" and other times use the defined term "nonjudicial days." The judge and practitioner should note that these are one and the same.

If the child is accused of being delinquent, a detention hearing must be held within three days (seventy-two hours, as defined by Juvenile Rule 6(a)) after the child is placed into detention. Nonjudicial days are not included in the computation; however, a hearing must be held within eighty-four hours of the child being detained.[185]

The procedures the court is to use in conducting the detention hearing are provided in Juvenile Procedure Rule 15. Rule 15 confirms that the purpose of the detention hearing is to determine whether probable cause exists to believe the child committed the offense charged, and includes a listing of the rights enjoyed by the juvenile during the hearing. Reliable hearsay may be considered by the court during the detention hearing.[186]

At the beginning of the detention hearing, the court must inform the parties of the "nature of the complaint, the purpose of the detention hearing, the possible consequences of the court's disposition in that and/or subsequent proceedings, and their legal rights...."[187] This Rule lists several legal rights the child possesses, including the right to remain silent, the right of confrontation, the right to compulsory service of process, and the right to counsel. The Rule allows the court to consider reliable hearsay.[188]

Pursuant to Rule 15(b) the court is to determine:

> (1) that there is probable cause to believe that the child committed the offense charged;
>
> (2) that it is in the best interest of the child and the public that the child be detained pending a hearing on the petition;
>
> (3) that the child's detention is warranted or required by law as provided in Tenn. Code Ann. 37-1-114; and

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[183] Tenn. Code Ann. § 37-1-117(a).
[184] Tenn. Code Ann. §§ 37-1-115(a)(2) & 37-117(b)(1); Tn. R. Juv. P. 5(c)(8 & (d)(4).
[185] Tenn. Code Ann. § 37-1-117(b)(1).
[186] Tn. R. Juv. P. 15.
[187] Tn. R. Juv. P. 15(a).
[188] Tn. R. Juv. P. 15(b).

(4) that the immediate welfare of the child and/or the protection of the community so requires.

In addition to the findings described above, the court must determine that there is no less drastic alternative to detention, such as releasing the child to a parent or guardian or to a facility designate as an alternative to detention.[189]

Upon making the required determinations, the court is to enter a detention order.[190] If the court does not make all the required determinations, the child is to be "discharged forthwith from detention or, in the discretion of the court, release the child to a parent, guardian, legal custodian, or adult relative, with or without bond, pending further proceedings."[191]

1.17 - Rights During Detention

The juvenile is entitled to certain basic rights while in detention, which rights are spelled out at Tennessee Juvenile Procedural Rule 7. These rights include the right to telephone calls, mail, visiting hours, the juvenile shall not be subjected to intimidation or coercive questioning methods, corporal punishment, and shall not be interviewed by unauthorized persons.

The author would question the authority of Rule 7 to direct or otherwise affect the activities of detention facility personnel.

1.18 - Determination of Delinquency - Informal Adjustment and Pretrial Diversion

Two procedures exist which may avoid the necessity of a hearing. Both procedures are negotiated prior to the scheduled adjudicatory hearing, but only one requires court approval of the specific agreement reached.

1.18.1 - - Informal Adjustment

Before or after a petition is filed, the designated court officer (usually the intake officer) may suspend or defer formal proceedings against a child pursuant to an informal adjustment. Although not defined in either the statute or rules, an informal adjustment is a method used to dispose of certain minor offenses and situations when the matter may be best handled outside the courtroom without the institution or continuation of formal charges. An informal adjustment is a voluntary procedure whereby the child and his or her parents or guardians agree to submit to a specifically tailored program designed to correct the child's behavior or to improve the child's environment or situation. However, the program for the child may consist only of "counsel and advice." Informal adjustment is specifically sanctioned by statute as set forth below:

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[189] Tenn. Code Ann. § 37-1-114(c)(7).
[190] Tn. R. Juv. P. 15(b).
[191] Tn. R. Juv. P. 15(c).

> Before or after a petition is filed, the probation officer or other officer of the court designated by it, subject to its direction, may give counsel and advice to the parties with a view to an informal adjustment if it appears:
>
> (1) The admitted facts bring the case within the jurisdiction of the court;
>
> (2) Counsel and advice without an adjudication would be in the best interest of the public and the child; and
>
> (3) The child and the child's parents, guardian or other custodian consent thereto with knowledge that consent is not obligatory.[192]

In the author's court, informal adjustment is regularly used for a child's first traffic offense unless the facts suggest that court involvement would be beneficial, such as excessive speed, reckless driving, or situations where drugs or alcohol may have been involved.

In addition to being voluntary, a feature of informal adjustments is that they last only for three months, unless extended by the court for a period not to exceed an additional six months.[193] Being voluntary, a child may withdraw from the informal adjustment at any time.[194] In such case, formal court proceedings would again commence or resume against the child.[195] Likewise, the court officer supervising the informal adjustment may terminate the program and elect to allow formal proceedings to commence or resume against the child.[196]

Upon successful completion of the program, or in the discretion of the court officer supervising the informal adjustment for "other sufficient reasons," the matter is dismissed along with any charges which have been filed against the child.[197]

The designated court officer "may consider" certain factors in deciding whether to pursue an informal adjustment:

> (1) Whether the child has had a problem in the home, school or community which indicates that some supervision would be desirable;
>
> (2) Whether the child and the parent, guardian or legal custodian seem able to resolve the matter with the assistance of the

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[192] Tenn. Code Ann. § 37-1-110(a).
[193] Tenn. Code Ann. § 37-1-110(b); Tn. R. Juv. P. 14(d)(3).
[194] Tn. R. Juv. P. 14(c)(2)(iv).
[195] Tn. R. Juv. P. 14(c)(2)(viii).
[196] Tn. R. Juv. P. 14(c)(2)(viii) & 14(d)(2).
[197] Tn. R. Juv. P. 14(d)(1).

designated court officer or other court staff, and without formal juvenile court action;

(3) Whether further observation or evaluation by the designated court officer is needed before a decision can be reached;

(4) The attitude of the child, the parent, guardian, or legal custodian, and/or any other affected persons or agencies;

(5) The age, maturity and mental condition of the child;

(6) The prior history or record, if any, of the child;

(7) The recommendation, if any, of the referring party or agency;

(8) Any other circumstances which indicate that informal adjustment would be consistent with the welfare and safety of the child and the protection of the public.[198]

Confinement of the juvenile is prohibited during the adjustment period.[199] Nothing learned by the juvenile court staff during the adjustment process, including the fact of an attempted informal adjustment, may later be used against the juvenile in the event of a court hearing.[200]

The informal adjustment requires court approval. Due to this puzzling requirement, there is, in the author's opinion, very little difference between an informal adjustment and a pretrial diversion. With diversion, however, the program for the child may go beyond "counsel and advice."

1.18.2 - - Pretrial Diversion

Pretrial diversion in delinquency cases is governed by Rule 23 of the Tennessee Rules of Juvenile Procedure.

The Rule first requires a "designated court officer" to determine that "the child does not wish to contest the allegations of the petition."[201] Next, the court officer must determine that a court hearing is not necessary and must advise the child and his or her parent of their rights in the matter. Then the parties may reach agreement to suspend the proceedings against the child under terms and conditions negotiated with the court officer. Finally, the agreement must be approved by the court.[202]

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[198] Tn. R. Juv. P. 14(a).
[199] Tn. R. Juv. P. 14(d)(5).
[200] Tn. R. Juv. P. 14(c)(2)
[201] Tn. R. Juv. P. 23(a).
[202] Tn. R. Juv. P. 23(a).

The term of the diversionary period may be a maximum of six months, unless sooner discharged by the court. The term may be extended for an additional six month term after notice and a hearing.[203]

If the child fails to fulfill the terms of the diversion agreement, or if new delinquency or unruly charges are filed against the child, the original petition "may be reinstated" against the child and the case moves forward in a normal fashion.[204] If the child completes the diversion agreement satisfactorily, the petition is dismissed with prejudice.[205]

The Advisory Commission Comments to Juvenile Procedure Rule 23 discuss the intent behind the procedure and the distinction between diversion and informal adjustment:

> Pretrial diversion is intended by the committee to replace the former practice of holding cases open for further action. The procedures set forth in this rule essentially allow for a process similar to informal adjustment, with no official finding as to guilt, except that the court in the person of the judge (or referee) is involved in that there must be court approval of any agreement.

It is to be noted that the comments above stress the fact that the court must approve the agreement and seem to assume that such is the distinction between diversion and an informal adjustment. However, the Rule 14(a) is clear that an informal adjustment is "subject to court approval."

The Attorney General has opined that a juvenile who has been adjudicated delinquent is not entitled to pretrial diversion if the juvenile appeals the delinquency determination to circuit or criminal court.[206]

1.19 - The Adjudication and Dispositional Process In General

Prior to a determination of guilt, a child charged with the commission of a delinquent act is treated much the same as any other citizen charged with a crime. The child is entitled to most, if not all (other than trial by jury), of the rights enjoyed by an adult accused. The child is entitled to a full and fair hearing before a neutral and detached judge and is accorded the right to de novo appeal in the event of a finding of guilt. The child, represented by counsel, may introduce proof and testify in his or her behalf or remain silent, may confront and cross examine witnesses, enjoys the benefit of the exclusionary rule regarding evidence illegally obtained, is entitled to corroboration of confessions legally obtained, may subpoena witnesses, may engage in discovery, and

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[203] Tn. R. Juv. P. 23(b).
[204] Tn. R. Juv. P. 23(c).
[205] Tn. R. Juv. P. 23(d).
[206] Tn. Op. Atty. Gen. 05-012 (January 26, 2005).

may rely on the rules of evidence. The state must be represented by a prosecutor and bears the burden of proof beyond a reasonable doubt.[207]

Adjudicatory Hearing. Rather than denominated a "trial," the proceeding in which the guilt or innocence of the child is determined is called the adjudicatory hearing. Proof and procedure at this hearing must be in full accord with all evidentiary, statutory and constitutional strictures..

At this hearing, the court determines whether the allegations contained in the petition or citation have been proved in accordance with the applicable standard of proof. Tennessee Juvenile Procedure Rule 28 provides guidance to the court in the conduct of the adjudicatory hearing and states:

> The adjudicatory hearing is the proceeding at which the court determines whether the factual allegations of the petition are true and whether the evidence supports a finding that a child is delinquent, unruly, dependent, neglected or abused, or supports a finding authorizing the termination of parental rights as provided in Rule 39. If any of the above findings are made, the determination of the appropriate disposition is to be made pursuant to a dispositional hearing in accordance with Rules 32 and 33 of these rules or, in termination of parental rights cases, Rule 39.[208]

It is the author's practice, as well as the practice of every juvenile court with which the author is familiar, to allow the juvenile, his or her counsel, and his or her parents to negotiate with the district attorney for a settlement of the charges. This may occur on the day the adjudicatory hearing is scheduled, but more often occurs on a "settlement day" or during the "settlement docket." If agreement cannot be reached, the matter is then scheduled for the adjudicatory hearing. As can be imagined, this process will differ among the various juvenile courts in Tennessee. Procedure in small, rural counties will most definitely be different from procedure in urban areas.

It is the author's experience that most delinquency charges are settled either through informal adjustment or an agreement with the district attorney. The agreement with the state may require a plea of guilt with disposition settled, or an informal adjustment may be agreed upon, or a diversion. The possibilities are numerous and vary depending upon the case.

If, after hearing, the allegations in the petition are not proved beyond a reasonable doubt, the court must dismiss the petition.[209] If the allegations in the petition are proved beyond a reasonable doubt, resulting in a finding of guilt against the child, the court then proceeds to a determination as to whether the child is in need of treatment or rehabilitation, which may be separate (at least legally) from the dispositional hearing.

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[207] See, Chapter, subsection Rights of the Child.
[208] Tn. R. Juv. P. 28(a).
[209] Tn. R. Juv. P. 23(d)(2).

The practitioner should note that the statute and rule call for three distinct proceedings (again, at least legally), a proceeding to determine guilt, a proceeding to determine whether the child is in need of treatment or rehabilitation, and the dispositional hearing.[210] These hearings may be held immediately after the adjudicatory hearing or at a later date.[211]

If the court finds that the allegations in the petition have been proved beyond a reasonable doubt, but also finds that the child is not in need of treatment or rehabilitation, the court *may* dismiss the petition.[212]

In the event the court finds the child guilty but also finds that the child is not in need of treatment or rehabilitation, the statute (Tenn. Code Ann. § 37-1-129 (b)) allows the court to dismiss the petition but does not require the court to do so (use of the term "may" in the statue cited). In the event the court does not dismiss the petition, the court should proceed with the dispositional hearing, but Tennessee Rules of Juvenile Procedure 28(d)(3) would seem to preclude this. It is the author's opinion that there may be some tension between the statute and rule, and that the only course for the court would be to enter a finding of guilt but impose no disposition other than return to parents.

The statute provides that the commission of acts constituting a felony, or which reflect "recidivistic tendency," in the absence of evidence to the contrary, would indicate a need for treatment or rehabilitation.[213] Rule 29(d)(3) contains similar language but omits "recidivistic tendency" as indication of the need for treatment or rehabilitation.

In the author's experience, the hearing regarding the need for treatment or rehabilitation and the dispositional hearing are conducted concurrently, although the statute and rule, when read together, would allow each to be conducted at a later date - with the result that the matter may see three separate hearings. Upon a finding of guilt during the adjudicatory hearing, it is usual for the court to proceed immediately with the treatment/rehabilitation finding and disposition hearing as one proceeding. The practitioner who desires separate hearings on either or both post-adjudicatory hearings, should be prepared to advance solid reasons justifying the later hearings.

Dispositional Hearing. It is in the dispositional hearing that the court decides the appropriate punishment and/or treatment regimen to address the child's behavior or condition. The court is limited by statute as to disposition alternatives (*See, e.g.*, Tenn. Code Ann. § 37-1-131). These alternatives are discussed more thoroughly below.

Tennessee Juvenile Procedure Rule 32 states the purpose of the dispositional hearing:

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[210] *See, e.g.*, Tenn. Code Ann. § 37-1-129 (b); Tn. R. Juv. P. 27(d)(2).
[211] *See, e.g.*, Tenn. Code Ann. § 37-1-129 (b); Tn. R. Juv. P. 27(d)(2).
[212] Tenn. Code Ann. § 37-1-129(b) (emphasis supplied).
[213] Tenn. Code Ann. § 37-1-129(b).

> The purpose of dispositions in juvenile court actions is to design an appropriate plan to meet the needs of the child and to achieve the objectives of the state in exercising jurisdiction. When possible, the initial approach should involve working with the child and the family in their own home so that the appropriate community resources may be involved in care, supervision, and treatment according to the needs of the child.

In concert, the Advisory Commission Comments to Tennessee Juvenile Procedure Rule 32 aids in understanding the desired philosophy framing the disposition decision:

> In choosing among statutorily permissible dispositions in delinquent and unruly cases, the judge should select the least restrictive disposition both in terms of kind and duration that is appropriate to the seriousness of the offense, the degree of culpability indicated by the circumstances of the particular case, and the age and prior record of the child. A child should not be committed to any institution if, consistent with the public safety, the child can be treated and rehabilitated through community-level resources.

The dispositional hearing is separate and distinct from the adjudicatory hearing to which it relates. It may be held, however, immediately following the adjudicatory hearing or at a later date in the discretion of the court."[214]

It is the author's experience (and practice) that most dispositional hearings in delinquency matters occur immediately after the adjudicatory hearing. On occasion, the state or the juvenile will move to defer the dispositional hearing to allow for additional evidence to be presented which may impact the court's decision. In traffic cases, frequently the State will wish to research the juvenile's driving history depending on the specific offense involved. Common traffic offenses inviting scrutiny from the state include drag racing, reckless driving, leaving the scene, open container and, of course, driving under the influence. Restitution issues may require additional time. Also, the juvenile may wish to present proof of character and/or responsibility and may need time to gather witnesses, or to gather proof of completion of rehabilitation or educational programs.

1.20 - Investigations

The practitioner should be aware of the powers of the juvenile court to order various investigations which may have a bearing upon the disposition of the case. In addition to investigations conducted by law enforcement, the district attorney's office, and, or, the Department of Children's Services, the court may order a general investigation pursuant to Tenn. Code Ann. § 37-1-128(a) and a predisposition report pursuant to Rule 33 of the Rules of Juvenile Procedure.

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[214] Tn. R. Juv. P. 32(a).

[Practice Point: The practitioner should fully examine the court file to determine whether any investigations have been ordered and whether any reports have been filed. Although such reports would be subject to the rules of evidence at the Adjudicatory Hearing, reliable hearsay and "the juvenile court record of the child" is admissible at the Dispositional Hearing. In addition, the standard of proof at the Dispositional Hearing is preponderance of the evidence.[215] It is best to not be caught unawares of the contents of any such reports.]

1.21 - Guilty Pleas

The court is required to conduct a plea colloquy[216] before accepting a guilty plea in a delinquent matter. Generally, the court must inform the juvenile of the nature of the charge, possible dispositional consequences, his or her rights, including the right to counsel, to plead not guilty, to have a trial to determine guilt, to confront and cross examine witnesses, and the privilege against self incrimination, and then determine the voluntariness of the plea and the factual basis for the plea.[217] This rule further requires the court to abide by a dispositional agreement if that agreement is part of the plea agreement; if the court rejects the guilty plea, the dispositional agreement is void.[218]

1.22 Dispositional Alternatives - In General.

The statute governing dispositions of delinquency cases is Tenn. Code Ann. § 37-1-131, and it provides that a court "may make any of the following orders of disposition best suited to the child's treatment, rehabilitation and welfare:"

> 1. Any order authorized by § 37-1-130 for the disposition of a dependent or neglected child [see below for elaboration];
>
> 2. Placing the child on probation under the supervision of the probation officer of the court or DCS, under conditions and limitations the court prescribes;
>
> 3. Placing the child in an institution, camp or other facility for delinquent children operated under the direction of the court or other local public authority;
>
> 4. Commit the child to the Department of Children's Services (subject to TCA § 37-1-129(e)), which commitment shall not extend past the child's nineteenth birthday;

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[215] *See*, Tn. R. Juv. P. 32(f).
[216] BLACK'S LAW DICTIONARY, 300 (9th Ed. 2009) (A colloquy is defined as an informal discussion, such as an oral exchange between a judge, prosecutor and defense counsel, and a criminal defendant in which the judge ascertains the defendant's understanding of the proceedings and the defendant's rights).
[217] Tn. R. Juv. P. 21.
[218] Tn. R. Juv. P. 21(d).

5. Assessing a fine not to exceed fifty dollars ($50.00) for each offense that constitutes a violation of a state law or municipal ordinance;

6. Committing the child to the custody of the county department of children's services in those counties having such a department; and

7. Ordering the child to perform community service work with such work being in compliance with federal and state child labor laws. For first-time delinquent acts involving alcohol or beer, in its order for community service work, the court may require the juvenile to spend a portion of such time in the emergency room of a hospital, only if, and to the extent, the hospital agrees with such action.[219]

To elaborate on dispositional alternative number 1 above - namely any order authorized by Tenn. Code Ann. § 37-1-130 for the disposition of a dependent or neglected child, - such statute allows the following dispositions:

1. Subject to the restrictions of § 37-1-129(e) [powers of DCS with regard to children in DCS custody], permit the child to remain with the child's parents, guardian or other custodian or other custodian, subject to conditions and limitations as the court prescribes, including supervision as directed by the court for the protection of the child;

2. Subject to the restrictions of § 37-1-129(e) [powers of DCS with regard to children in DCS custody], and subject to conditions and limitations as the court prescribes, transfer temporary legal custody to or grant permanent guardianship in accordance with part 8 of this chapter to any of the following:

A) Any individual who, after study by the probation officer or other person or agency designated by the court, is found by the court to be qualified to receive and care for the child;

B) The department of children's services;

C) An agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child; or

D) An individual in another state with or without supervision by an appropriate officer under § 37-1-142.

3. To the county department of children's services, if any;

4. Without making any of the foregoing disposition orders, transfer custody of the child to the juvenile court of another state if authorized by

[219] Tenn. Code Ann. § 37-1-131(a).

and in accordance with § 37-1-141 if the child is or is about to become a resident of that state.

If the court places the juvenile into state's custody, the court may not order a specific placement, but all placement decisions are to be made by the Department of Children's Services.[220]

The disposition alternatives are, unless mutually exclusive by their nature, are cumulative and are not exclusive. Further disposition alternatives are provided in additional statutes as discussed below. The practitioner should especially be aware of the court's obligations under the Juvenile Offender Act, or Drug Free Youth Act, with regard to offenses involving drugs or alcohol, among other offenses, and the juvenile's driver's license.

Juvenile judges and practitioners should take note that the court's powers on disposition are quite broad. The "conditions and limitations" language of the statute give the court great leeway in fashioning a treatment program for the child.

1.22.1 -- Restitution

When a juvenile is found to be delinquent, the court "shall determine" whether the child's conduct resulted in any monetary damages, and, if so, shall order the child to make appropriate restitution.[221] The statute also provides for conversion of the restitution award to a civil judgment in the appropriate circumstances.[222]

1.22.2 -- Participation of Parents

Upon a finding that the parents did not take reasonable steps to control the juvenile's delinquent conduct, the court may require the parents to participate in the child's treatment program, seek assistance from school or public assistance officials or private resources to provide treatment for the child, complete community service work with the child, and to provide appropriate supervision over the child to ensure the court's orders are being followed.[223] The court's order may be enforced by the contempt power.[224]

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[220] Tenn. Code Ann. § 37-1-129(e). *See also*, *State v. E.G.P.*, 2003 WL 22134896, *3, 28 TAM 44-10, 2003 Civ. App. LEXIS ____ (Tenn. Ct. App. 2003) ("The juvenile court cannot usurp the properly exercised functions of the DCS. Any action, not wholly discretionary, taken by DCS may be subject to judicial review in accordance with established procedure, but initial determinations respecting placements are the responsibility of the Agency."); Op. Tenn. Atty. Gen. 97-111 (1997) (Juvenile court does not have the authority to order a delinquent child in the custody of DCS to be placed in a hardware secure facility.).

[221] Tenn. Code Ann. § 37-1-131(b).

[222] Tenn. Code Ann. § 37-1-131(b).

[223] Tenn. Code Ann. § 37-1-174(a). See also, Tenn. Code Ann. § 37-1-103(d) ("The court is authorized to require any parent or legal guardian of a child within the jurisdiction of the court to participate in any counseling or treatment program the court may deem appropriate and in the best interest of the child.").

[224] Tenn. Code Ann. § 37-1-174(b).

1.22.3 -- Community Service Work: Statutory Immunity

The statute grants immunity to certain recipients of a juvenile's community service work. Such recipients include charitable organizations, municipalities, counties or political subdivisions thereof. Provided the recipient exercises due care in the supervision of the juvenile, the immunity protects against liability resulting from injuries or death sustained by the juvenile, injuries sustained by any other person caused by the juvenile, or any liability arising out of any act of the juvenile while working.[225]

1.22.4 -- Required Notification of School

The court must notify the appropriate school principal when a juvenile is adjudicated guilty of certain listed offenses, or other offenses if the "circumstances surrounding the offenses" cause the court to feel notification should occur. The Youth Service Officer, probation officer, or DCS (in the case the child is in DCS's custody), are to make the written notification within five days of the court order or before the child begins or resumes school. Appropriate law enforcement authorities may also be notified.[226]

1.22.4 -- Corporal Punishment

Pursuant to Tennessee Attorney General's opinion, a juvenile court does not have the authority to order parents to discipline the child by means of corporal punishment, nor does the judge have the authority to administer corporal punishment. The Opinion [227] noted that two Tennessee statutes expressly allowed for the infliction of corporal punishment (public school teachers and principals – Tenn. Code Ann. § 49-6-4103, and penal and reform schools – Tenn. Code Ann. § 49-6-4402), but the disposition statutes do not give a juvenile judge such authority.

1.22.5 -- Banishment from County

The Attorney General has opined that a juvenile court does not have the authority to order a child to be removed from his or her home county or to enjoin the child from returning to his or her home county.[228] The General's opinion first noted that the court making such an order may lack specific statutory authority and that such authority could not be found in the "conditions and limitations" language of the disposition statutes. The Opinion stated:

> Nevertheless, the statutes equally clearly give a juvenile court some discretion to attach undefined 'conditions and limitations' to a child's disposition. (citations omitted) Such 'conditions and limitations' may be attached by a juvenile court to the transfer of legal custody of a dependent

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[225] Tenn. Code Ann. § 37-1-131(a)(7).
[226] Tenn. Code Ann. § 37-1-131 (a)(2)(B), (C) & (D).
[227] Op. Tn. Atty. Gen. 95-040 (April 18, 1995).
[228] Op. Tn. Atty. Gen. 99-007 (January 25, 1999).

> or neglected child or a delinquent child to an entity other than the Department of Children's Services (citations omitted), or as a condition of probation of a delinquent or unruly child. (citations omitted) Under the rules of statutory construction, however, the 'conditions and limitations' available to the court do not in our view include an order removing a child from the child's home county and enjoining a child from returning to or residing in the child's home county. Absent a finding that such an order is justified by a rehabilitative purpose and is no broader than is necessary to achieve that purpose, such an order would likely be deemed punitive in nature and therefore illegal.

Opinion no. 99-007 next focused on the apparent lack of a rehabilitative purpose underlying such a banishment order:

> Accordingly, it is well settled under the juvenile statutes that a juvenile court must act to rehabilitate a child rather than to punish a child. (citations omitted) '[W]ithout question it has been the purpose of the juvenile statutes ... to reform and rehabilitate rather than to punish.'" *State v. Jackson*, 503 S.W.2d 185, 187 (Tenn. 1973).
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> * * *
>
> No rehabilitative purpose appears assignable to an order removing a child from the child's home county and enjoining the child from returning. Such an order would require a finding that an entire county and its population threatened the child's rehabilitation. While one can imagine, for instance, a scenario in which a particular neighborhood might be dominated by pernicious influences from which a child requires isolation, in such a case the juvenile court can specifically fashion an order to keep the child from those influences. To simply order the child removed from an entire county, however, 'appears excessive in relation to the alternative purpose assigned.' (citations omitted) ... The evident purpose of entering such an order would be either to punish the child or, more likely, to export the child (and any potential for disruption to the community caused by the child's behavior) to another locale. Neither purpose qualifies as rehabilitative.

1.23 Traffic Matters - Classification

The Tennessee statutory scheme creates a separate class of juvenile offenders known as "traffic violators." These juveniles are not classed as delinquent or unruly (with exceptions) but belong to a special statutory class. The statute provides as follows: "[i]f the court finds that the child violated a traffic law or ordinance, the court may decree the child to be a traffic violator...."[229] The definition of "delinquent act" excludes all traffic offenses except for leaving the scene involving death or injury, DUI, vehicular homicide, or any other traffic offense classified as a felony:

[229] Tenn. Code Ann. § 37-1-146(b).

> 'Delinquent act' means an act designated a crime under the law ... and the crime is not a traffic offense as defined in the traffic code of the state other than failing to stop when involved in an accident pursuant to § 55-10-101, driving while under the influence of an intoxicant or drug, vehicular homicide or any other traffic offense classified as a felony.[230]

The result of these two statutes is that juveniles who violate traffic laws (with the listed exceptions) are classified as "traffic violators." The court's treatment of such juveniles is to be determined in accordance with subsections (b) of the statute. Those juveniles who violate one of the listed exceptions would be classified as delinquents.

1.23.1 – Traffic Matters - Nonjudicial Disposition

Similar to informal adjustment, a traffic citation may be disposed of "nonjudicially under the supervision of the judge," with the juvenile having the right to a hearing before the judge.[231]

In the author's court, first time traffic offenders - with some exceptions – are handled nonjudicially by the probation staff unless a hearing is requested. Exceptions are made for drag racing, reckless driving, accidents involving property damage or injury, excessive speed, etc. The standard terms of the informal adjustment include traffic school, costs and community service. In other juvenile courts with which the author is familiar, similar procedures are in place – including a standard fine.

1.23.2 Traffic Matters - - Disposition Alternatives

The juvenile court's disposition options include all disposition alternatives under the delinquency disposition statute (Tenn. Code Ann. § 37-1-131), plus the following four additional disposition alternatives:

> 1. Suspend and hold the child's driver license for a specified or indefinite time;
>
> 2. Limit the child's driving privileges as an order of the court;3
> 3. Order the child to attend traffic school, if available, or to receive driving instructions; or
>
> 4. Impose a fine of not more than fifty dollars ($50.00).[232]

The disposition alternatives are cumulative and are not exclusive.

1.23.3 Traffic Matters - - Waiver of Jurisdiction

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[230] Tenn. Code Ann. § 37-1-102(b)(9).
[231] Tenn. Code Ann. § 37-1-146(a).
[232] Tenn. Code Ann. § 37-1-146(b).

The statute provides that the juvenile court may waive jurisdiction to the adult traffic court in "any case or class of cases" in which the juvenile is age sixteen or older, or the juvenile may pay a designated fine to the "traffic bureau."[233]

1.23.4 Traffic Matters - - Juvenile Offender Act

Often referred to as the "Drug Free Youth Act," the statute provides that a juvenile who is found guilty of certain listed offenses will lose his or her driver's license for a period of at least one year.[234] Such an action is called an "order of denial." The listed offenses are as follows:

> ...any criminal offense, status offense, violation, infraction or other prohibited conduct involving the possession, use, sale, or consumption of any alcoholic beverage, wine or beer, or any controlled substance as defined and enumerated in title 39, chapter 17, part 4, or involving the possession or carrying of a weapon school property....[235]

Upon adjudication, the court "shall prepare and send" to the Department of Safety an order of denial of the license within five days of the adjudication.[236] The suspension of the license is accomplished by the Department of Safety by administrative procedure upon receipt of the court order, with no opportunity for a hearing.[237] The period of suspension is, in the case of a first order of denial, one year or until the juvenile turns seventeen, whichever is longer, and, in the case of a second or subsequent order of denial, two years or until the juvenile turns eighteen, whichever is longer.[238]

With exceptions, the court may, upon petition, review and withdraw the order of denial at any time; however, the court may not withdraw the order within ninety days in the case of a first order, or one year in the case of a second order. The court may not withdraw the order if the underlying offense involves driving while intoxicated or impaired.[239] A prerequisite to the filing of a petition to withdraw an order is that the juvenile is required to complete a course in driving safety, early intervention, youth alcohol education, or weapons safety.[240] The District Attorney must be provided notice of any such petition and has the right to be heard thereon.[241]

During the period of denial, the juvenile may apply for a restricted driver's license in accordance with Tenn. Code Ann. § 55-10-705. The practitioner will note that the

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[233] Tenn. Code Ann. § 37-1-146(c).
[234] *See generally*, Tenn. Code Ann. §§ 55-10-701 & 55-10-702.
[235] Tenn. Code Ann. § 55-10-701(a).
[236] Tenn. Code Ann. § 55-10-701(a).
[237] Tenn. Code Ann. § 55-10-702(a).
[238] Tenn. Code Ann. § 55-10-702(a)
[239] Tenn. Code Ann. § 55-10-701(b).
[240] Tenn. Code Ann. § 55-10-703.
[241] Tenn. Code Ann. § 55-10-701(c).

conditions for issuance of a restricted license are more strict than the conditions for an adult restricted license.

Juvenile court judges and practitioners should be aware that the triggering events requiring notice to the Department of Safety are either the child being "convicted of the offense" or the child being "adjudicated a delinquent child." Because an adjudication of delinquency requires both a determination of guilt (i.e., a conviction) and a finding that the child is in need of treatment and rehabilitation, the court is required to notify the Department when the child has been found guilty of the offense even if the court determines that the child in not in need of treatment and rehabilitation.

1.24 Transfer to Adult Court – In General/Background

A juvenile charged with a delinquency may be transferred to adult court under certain circumstances. When such a transfer occurs, the juvenile is treated as any other adult in the criminal justice system and may be prosecuted and punished as any other adult with one exception - that the death penalty is not applicable. The statute and rule governing this process are, respectively, Tenn. Code Ann. § 37-1-134 and Tn. R. Juv. P. 24.

The term "transfer" is used in Tennessee's statutes and rules, but occasionally the reader may see the term "waiver" (of juvenile jurisdiction) used in the literature or elsewhere. These terms refer to the same process.

The transfer process is a departure from the philosophy underlying the juvenile court system, namely, that the focus should be on rehabilitation of the child and a treatment regimen should be tailored for each child and his or her circumstances.[242] The reasons usually given for this departure involve a "get tough on crime" approach by elected officials. Typical commentary is as follows:

> 'Adult time for adult crime.' Almost from the moment they entered the political lexicon in the early '90s, these five words, this simple rhyme, began sparking a movement that has reshaped our nation's policy towards adolescent crime in a few short years.
>
> For almost a century, state laws throughout the nation adhered to the notion that children and youth who misbehave and break laws should be subject to a different system of justice than adult criminals – a system focused more on rehabilitation than punishment, more on the needs of troubled youth than on the society's interest in just deserts.

[242] Tenn. Code Ann. § 37-1-101(a)(1) & (2) ("This part shall be construed to effectuate the following public purposes: (1) Provide for the care, protection, and wholesome moral, mental and physical development of children coming within its provisions; (2) Consistent with the protection of the public interest, remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior and substitute therefore a program of treatment, training and rehabilitation....").

> Children, because they are less competent and more vulnerable than adults, should not be held as culpable for their wrongdoings. Except in extreme cases, they deserve the chance to mature and reform themselves rather than being branded for life with a criminal record for mistakes made in childhood. Though challenged occasionally, this notion retained pre-eminence throughout most of the century.
>
> Then in the 1990's, the consensus collapsed. 'Adult time for adult crime' became a political rallying cry, a guaranteed applause line in any candidate's stump speech. The rhyme also proved a consistent winner in public opinion polls: 80 percent and more of voters in most opinion surveys in the '90s agreed that youthful offenders who commit serious crimes should receive the same punishments as adult wrong-doers.[243]

Some commentators have speculated that the trend of punishing juveniles as adults may take juvenile justice back to the era before the establishment of juvenile court systems:

> As we enter a new millennium and discussions arise concerning juvenile crime, a turning point in the history of juvenile justice has emerged. Politicians, policy-makers, and the general public demand that juveniles take responsibility for their actions and call for punishments typically reserved for adults. This movement is allowing more and more juvenile offenders to be prosecuted in the adult criminal court. Such a movement may eventually take us back to the type of punishments that occurred before the end of the 19th century when the child saving movement sought to soften the response to juvenile crime, ushering in an era of rehabilitation within the newly established juvenile court....[244]

Another motivation for the "get tough" approach has been a real, if perhaps misplaced, fear of juvenile offenders who are thought of as "super predators," wildly preying on unsuspecting citizens:

> Fear of out-of-control juvenile crime and a coming generation of 'super-predators,' compellingly if erroneously described publicly and to Congress in 1996, has undermined the traditional practice of treating young offenders as different from adult criminals – less culpable because of their age and more amenable to rehabilitation. In recent years, the focus has turned to punishment and in particular to the transfer of increasing numbers of youthful offenders from juvenile to criminal courts....

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[243] Richard A. Mendel, *LESS HYPE, MORE HELP: Reducing Juvenile Crime, What Works – and What Doesn't*, 38, (American Youth Policy Forum 2000).

[244] Randall G. Shelden, Michelle Hussong, *Juvenile Crime, Adult Adjudicaiton, and the Death Penalty: Draconian Policies Revisited*, 3, Justice Policy Journal: Analyzing Criminal and Juvenile Justice Issues and Policies, Vol. 1, No. 2 (Spring 2003).

* * *

> The premise on which the separate juvenile system rests is that children are developmentally different from adults and thus are more amenable to treatment and rehabilitation. The juvenile justice process centers on the individual child and takes into account the child's problems and needs, focusing less on punishment than on helping the child to change and so minimize the likelihood of future criminal behavior.
>
> During the past ten years, fear of juvenile crime and criminals has undermined the basic concepts on which the juvenile court was founded. State legislatures and the federal government have turned increasingly to the more punitive adult model, requiring that even pre-teen children in some instances be treated as if they were equal in culpability and understanding to adults who commit similar crimes.[245]

Other commentators have noted similarly and have made the point that retribution is a motivating factor underlying some transfer decisions:

> As confidence in the rehabilitation potential of juveniles – portrayed in the media as younger and more violent than their predecessors – has declined, the 'retributive justice' model has increasingly been offered as the solution to the perceived ineffectiveness of the earlier model.[246]

One area of agreement among most, however, is the benefit of a transfer in the event of violent crime, the concern shifting to the protection of the public:

> ...To put anyone but the violent in prison accomplishes little; there are cheaper and more effective ways. 'The ideal correctional system would have shorter sentences, on average than the current one. Long sentences should be reserved for those who pose intense and intractable threats to public safety and those whose crimes require very severe punishment on retributive grounds.'[247]

Likewise, an excerpt from a sentencing memorandum points out the need for additional controls in the case of violent crimes: "[h]ere the offense is of the most serious nature. A person was murdered. The impact upon the victim and his family is devastating. A firearm was used in the commission of the offense. Community protection dictates that a long-term program is necessary."[248]

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[245] Malcolm C. Young, Jennie Gainsborough, *Prosecuting Juveniles in Adult Court, An Assessment of Trends and Consequences*, p. 2, The Sentencing Project (Jan. 2000).

[246] Elizabeth W. McNulty, *The Transfer of Juvenile Offenders to Adult Court: Panacea or Problem?*, 62, Law & Policy, Vol. 18 (Jan./April 1996).

[247] Judge Lindsay G. Arthur, *Punishment Doesn't Work!*, 40 Juvenile and Family Court Journal (Summer 2000).

[248] Judge Eugene A. Moore, *Sentencing Opinion: People of the State of Michigan v. Nathaniel Abraham*, Juvenile and Family Court Journal, Vol. 51, No. 2 (Spring 2000).

Public opinion also favors transfer in cases of violent offenses: "[t]he public also took into consideration the severity of the crimes in their opinions toward waiver decisions; they were more likely to favor trying juveniles as adults for violent offenses than for either property or drug offenses."[249]

1.24.1 -- Tennessee's Process

The transfer process begins with the filing of a delinquency petition against the juvenile. The statute provides that "...the court, before hearing the petition on the merits, may transfer the child to the sheriff ... to be held ... and to be dealt with as an adult in the criminal court of competent jurisdiction."[250] The Rule gives a bit more guidance in the matter, providing: "When the allegations of the petition are so serious and/or the child's age or record is such that transfer...is likely or probable, the court should not hear the case on its merits, but shall proceed to conduct a probable cause hearing only...."[251]

The statute's language is a bit awkward and seems to place the initial decision as to seek a transfer on the court: "...the court ... may transfer the child...." Perhaps contrary to the statutory language alone, but consistently with the language of the statute and rule read together, the procedure is for the district attorney to seek a transfer by filing an appropriate petition.

The statute then lists four conditions which must be satisfied before the juvenile may be transferred.

1.24.2 - - First Condition

The first determining factor is the juvenile's age. If the juvenile is sixteen years of age or more at the time of the alleged offense, the juvenile is eligible for transfer regardless of the alleged offense. If, however, the juvenile is less than sixteen years of age at the time of the alleged offense, the juvenile may not be transferred unless the charged offense is first degree murder, second degree murder, rape, aggravated rape, rape of a child, aggravated rape of a child, aggravated robbery, especially aggravated robbery, kidnapping, aggravated kidnapping or especially aggravated kidnapping or an attempt to commit any such offense.[252]

1.24.3 - - Second Condition

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[249] Bohsiu Wu, *Determinants of Public Opinion Toward Juvenile Waiver Decisions*, Juvenile and Family Court Journal, 11 (Winter 2000).
[250] Tenn. Code Ann. § 37-1-134(a).
[251] Tn. R. Juv. P. 24.
[252] Tenn. Code Ann. § 37-1-134(a)(1).

The second condition is that a hearing must be held "on whether the transfer should be made."[253] The hearing must be conducted in accordance with Tenn. Code Ann. §§ 37-1-124, 37-1-126, and 37-1-127. The Tennessee Rule of Juvenile Procedure is more specific in regard to the hearing:

> (2) At the transfer hearing: (i) A prosecutor shall represent the state; (ii) The child shall be represented by an attorney; (iii) The child may testify as a witness in his or her own behalf and call and examine witnesses and produce other evidence in his or her own behalf...; and (iv) Each witness shall testify under oath or affirmation and be subject to cross examination.
>
> (3) The same rules of evidence shall apply as are applicable to a general sessions preliminary hearing.[254]

1.24.4 - - Third Condition

The third condition is that reasonable written notice of the time, place, and purpose of the hearing must be given to the juvenile and the juvenile's parents or guardian at least three days prior to the hearing.[255]

1.24.5 - - Fourth Condition

The fourth condition is that the court must find that there are "reasonable grounds" 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.[256]

It is this fourth condition which is sometimes referred to as the "three pronged test" regarding transfer decisions.

1.24.6 - - Reasonable Grounds – Delinquent Act

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[253] Tenn. Code Ann. § 37-1-134(a)(2); *See also*, *State v. Womack*, 591 S.W.2d 437 (Tenn. Ct. App. 1979) (right of juvenile to full and fair transfer hearing is virtually identical to the right of an adult to a full and fair preliminary hearing before a general sessions judge); *Sawyers v. State*, 814 S.W.2d 725 (Tenn. 1991) (right to transfer hearing described as "fundamental procedural right.").

[254] Tn. R. Juv. P. 24(b). *See also*, *Mullins v. Lane*, 484 F. Supp. 237 (E.D. Tenn. 1979) (juvenile entitled to counsel at transfer hearing).

[255] Tenn. Code Ann. § 37-1-134(a)(3).

[256] Tenn. Code Ann. § 37-1-134(a)(4).

With respect to the first component of the fourth condition (reasonable grounds to believe child committed the delinquent act), the court in *State v. Reed* held that the phrase "reasonable grounds" has been used interchangeably with "probable cause."[257] The United States District Court in *McGaha v. State* ruled that a juvenile transfer hearing is a probable cause hearing and is not a hearing at which guilt or innocence may be determined.[258] As such, jeopardy does not attach:

> There cannot be any dispute that if the Juvenile Court acted pursuant to Tenn. Code Ann. § 37-234(a)(4)(i), and restricted its finding of guilt or innocence to the questions of reasonable grounds to believe that the petitioner committed the delinquent act, petitioner's subsequent plea of guilty could not have violated his double jeopardy right. 'Without a risk of a determination of guilt, jeopardy does not attach....' (citations omitted) The state court records filed by the State of Tennessee render it abundantly clear that the only finding made by the Juvenile Court Judge concerning petitioner's guilt or innocence of the underlying charges related to the issue of probable cause. Such a finding does not raise a double jeopardy issue.... A Juvenile Court Judge is not free, therefore, to adjudicate guilt or innocence pursuant to Tenn. Code Ann. § 37-229(b) at the same time that the transfer determination is made. The characterization by the Tennessee Supreme Court of the juvenile transfer hearing as 'essentially a probable cause hearing,' (citation omitted) does not appear to depend upon what actually transpired at a particular hearing, but depends rather on the limited statutory authority possessed by a Juvenile Court Judge in a transfer hearing.[259]

1.24.7 - - Reasonable Grounds - Committability

Addressing the second component of the fourth condition (reasonable grounds to believe child not committable to mental institution), Rule 24(b)(4) sets forth a presumption that the child is not committable to such an institution:

> Unless the child appears in any way to be mentally ill or mentally retarded, and unless personally or through counsel, asserts that the child is

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[257] 2010 WL 3432663 , 35 TAM 40-22, 2010 Tenn. Crim. App. LEXIS 715, * 28 (Tenn. Crim. App. 2010); citing, among others, *State v. Lewis*, 36 S.W.3d 88, 97 (Tenn. Crim. App. 2000) (holding that "[p]robable cause is a 'reasonable grounds for suspicion, supported by circumstances indicative of an illegal act.'"), and *State v. Cecil L. Groomes*, 2000 WL 1133542 , ___ TAM ___, 2000 Tenn. Crim. App. LEXIS 618, *7 (Tenn. Crim. App. 2000) (stating that a juvenile court must determine at a transfer hearing whether "there was probable cause to believe that the juvenile committed the crime...."), and *State v. Freddie Morrow and Damien Darden*, 1998 WL 917802 , 24 TAM 7-17, 1998 Tenn. Crim. App. LEXIS 1299, *5 (Tenn. Crim. App. 1998) (referring to the "reasonable grounds" determination in the context of a juvenile transfer hearing as the "probable cause" determination).

[258] 461 F. Supp. 360 (E. D.Tenn. 1978).

[259] *McGaha v. State*, *Id.* at 361.

> mentally ill or retarded, it shall be presumed that the child is not committable to an institution for the mentally ill or mentally retarded, and the court may so find.

The Advisory Commission Comments to Rule 24 suggest that, notwithstanding the presumption of noncommittability, the better practice would be to have the juvenile evaluated:

> Regarding § 37-1-134, and subsection (b)(4) of Rule 24, it has been held by both the Tennessee Court of Appeals and Court of Criminal Appeals that, although the burden of proof is on the prosecution on such issue, there is a presumption of noncommittability similar to that relating to sanity in criminal trials. Such presumption can be rebutted by evidence introduced by the defendant, and in such event the burden would shift back to the prosecution to persuade the court the child is not committable. *See Boyd v. State,* Tenn. Crim. App. (December 30, 1979); *State v. Miller*, Tenn. App. Middle Section (June 25, 1976). The committee suggests, however, that it is good practice in any case for the court to arrange for testing and evaluation, evidence of which may be introduced by either of the parties or the court on the issue of committability.

1.24.8 - - Interests of the Community - Statutory Factors

The statute, Tenn. Code Ann. § 37-1-134(b), provides guidance to the court "in making the determination required by subsection (a)." The statute lists several factors the court "shall consider, among other matters," as follows:

> (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.

Clear from the language of the statute itself ("among other matters"), the court may go beyond the list of factors in determining whether a juvenile should be transferred. Interpreting an earlier version of the statute, the Tennessee Supreme Court stated:

> In making a decision whether a juvenile is amenable to treatment or rehabilitation, the juvenile judge may consider many factors including testimony by expert witnesses, the type of facilities available, length of stay in these facilities, the seriousness of the alleged crime, and the attitude and demeanor of the juvenile.[260]

In *State v. Strickland* the court found particular significance in the proof at the transfer hearing regarding the ineffectiveness of short term rehabilitative programs available to the juvenile court in light of the juvenile's age:

> There was also testimony that the short term rehabilitative programs for juveniles are largely ineffective. This is certainly sufficient evidence to uphold the finding of the Juvenile Judge that a juvenile who had committed armed robbery, rape, and murder would not be amenable to treatment or rehabilitation in a period of six (6) to nine (9) months.[261]

The practitioner representing a relatively older juvenile facing a transfer hearing must be prepared to offer to the court some assurance that the juvenile is amenable to rehabilitation. If the juvenile is - for example - age 16 or 17 and the charge is a serious felony the juvenile court will likely focus on the short period of time remaining before the juvenile "ages out" of juvenile jurisdiction (even if jurisdiction is extended to age 19). The court will question whether such a juvenile can be successfully treated in the juvenile system given the juvenile's advanced age. Some states grant the juvenile court authority to keep a juvenile in the juvenile system longer than age 19; some states grant such jurisdiction until age 21 or even age 25; some state's schemes offer a "blended" approach, allowing the juvenile court to defer the transfer decision until a later age - often age 25 - at which the juvenile can be tested to determine if he or she has been truly rehabilitated. If rehabilitation has not been achieved, the juvenile would be placed into the adult system (or sentenced in the adult system – some states require a decision regarding guilt as a condition to the continued favorable treatment in the juvenile system). Tennessee's system, however, does not give the juvenile court such flexibility, terminating jurisdiction over the juvenile at age 19 at the latest.

The *State v. Reed* court further discussed a juvenile's "continual accruing" of serious criminal charges which, while not listed as a factor, may be considered by the juvenile court:

> We conclude that, while not specifically enumerated in the list of statutory factors a juvenile court shall consider when deciding whether to transfer a juvenile to

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[260] *State v. Strickland*, 532 S.W.2d 912, 920 (Tenn. 1975). *See also*, *State v. Reed*, 2010 WL 3432663 , 35 TAM 40-22, 2010 Tenn. Crim. App. LEXIS 715, *17 (Tenn. Crim. App. 2010) ("This list is by no means exclusive.").

[261] *Id.* at 920.

> Circuit Court, a juvenile's continual accruing of charges involving serious criminal offenses, including aggravated rape and other crimes against a person, is relevant to many of the enumerated factors in the statute.... We conclude the fact that the Defendant's being a suspect in several other serious criminal offenses was relevant to his amenability to treatment and rehabilitation.[262]

1.24.9 - - Statements Made at Transfer Hearing

Any statements made by the juvenile at the transfer hearing are not admissible against the child, over objection, in the criminal proceedings following the transfer.[263]

1.24.10 - - Effect of Transfer

If the juvenile court transfers the juvenile to adult court, the jurisdiction of the juvenile court is terminated with regard to any other or further criminal charges then pending or which the juvenile may incur after the date of the transfer. In such a case, the juvenile is to be treated as an adult with regard to such charges.[264] However, if the juvenile is acquitted on the charge resulting in the transfer, or if such charge is dismissed in the adult court, the juvenile court retains jurisdiction over the juvenile.[265] The judge who conducted the transfer hearing is disqualified from presiding over the matter in adult court.[266]

1.24.11 - - Denial of Transfer

If the juvenile court does not transfer the juvenile, the court is to "set the petition ... for trial on its merits in juvenile court or may immediately proceed to hold the adjudicatory hearing with the consent of the respondent."[267] However, the judge who presided over the transfer hearing may not preside over the adjudicatory hearing if a party objects.[268]

1.24.12 - - Appeal

An immediate appeal from a decision to transfer a juvenile is limited to one specific situation. The Rule provides that an appeal from an order of transfer "shall be by motion for an acceptance hearing in accordance with Tenn. Code Ann. § 37-1-159."[269] The statute, however, denies an appeal from a transfer order and allows an acceptance hearing (in adult court) in only one limited instance (if a nonlawyer judge presided over the transfer hearing):

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[262] *State v. Reed*, 2010 WL 3432663 , 35 TAM 40-22, 2010 Tenn. Crim. App. LEXIS 715, *35-*36 (Tenn. Crim. App. 2010).
[263] Tenn. Code Ann. § 37-1-134(f)(1).
[264] Tenn. Code Ann. § 37-1-134(c); *see also*, *State v. Darden*, 12 S.W.3d 455(Tenn. 2000).
[265] Tenn. Code Ann. § 37-1-134(c).
[266] Tenn. Code Ann. § 37-1-134(g).
[267] Tn. R. Juv. P. 24(b)(6).
[268] Tenn. Code Ann. § 37-1-134(g); Tn. R. Juv. P. 24(b)(6).
[269] Tn. R. Juv. P. 24(c).

> There is no civil or interlocutory appeal from a juvenile court's disposition pursuant to § 37-1-134. If and only if a nonlawyer judge presides at the transfer hearing in juvenile court, then the criminal court, upon motion of the child filed within ten (10) days of the juvenile court order, excluding nonjudicial days, shall hold a hearing as expeditiously as possible to determine whether it will accept jurisdiction over the child....[270]

Statute provides guidance to the criminal court in conducting the acceptance hearing, and contains provisions relating to appeals of the criminal court's acceptance decision.[271]

In *State v. Reed* the court acknowledged the limited avenues of appeal available to a juvenile who has been transferred to adult court, and also noted that a criminal court has no discretion as to whether to accept a transfer when the juvenile judge is a lawyer:

> There is no civil or interlocutory appeal from a juvenile court's decision that a child should be dealt with as an adult in the criminal court. *State v. Griffin*, 914 S.W.2d 564, 566 (Tenn. Crim. App. 1995) (citing Tenn. Code Ann. § 37-1-159(d)). If the juvenile court judge who presides over the transfer hearing is a lawyer, the statute does not provide for an acceptance hearing in criminal court, and the criminal court has no authority to decline jurisdiction.[272]

Extending discussion on the appeal issue and quoting from the *State v. Griffin* decision, the *Reed* court set forth the limited appeal procedure available to a transferred juvenile when the juvenile judge is a lawyer:

> If the juvenile judge who presides at the transfer hearing is a lawyer, the statute does not provide for an acceptance hearing in criminal court and apparently one cannot be held. Thus, it appears that the ruling of a lawyer juvenile judge is not reviewable by the criminal court and the criminal court has no alternative but to accept jurisdiction over the juvenile.
>
> * * *
>
> We note that the process of obtaining appellate review of a lawyer juvenile judge's order transferring a child to be tried as an adult is rather awkward. The criminal court has no authority to decline jurisdiction. Thus, the criminal court is put in a position of being forced to dispose of the case on the merits even though an appellate court must later determine whether the

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[270] Tenn. Code Ann. § 37-1-159(d).
[271] *See*, Tenn. Code Ann. § 37-1-159(d)- (f).
[272] *State v. Reed*, 2010 WL 3432663, 35 TAM 40-22, 2010 Tenn. Crim. App. LEXIS 715, at *18, *19 (Tenn. Crim. App. 2010).

> decision of the juvenile court transferring the child to the criminal court was correct. Thus, it appears that in order to review the decision of the lawyer juvenile judge, the juvenile in criminal court must either (1) enter a plea of not guilty and thus preserve the issue for review, if convicted, or (2) reserve the issue on a plea of guilty or nolo contendere pursuant to Rule 37(b)(2)(i) or (b)(2)(iv) of the Tennessee Rules of Criminal Procedure. The second alternative assumes that the decision of whether the juvenile should be tried as an adult is a 'certified question of law' that may be appealed pursuant to Rule 37.[273]

1.25 Appeals

Any decision of the juvenile court, with the exception of transfer cases under TCA § 37-1-134 as discussed above, is subject to appeal to either criminal court or circuit court for trial de novo.[274] The Advisory Commission Comments to Tennessee Juvenile Procedure Rule 36 note that the prohibition against double jeopardy prohibits the state from seeking an appeal from a dismissal in a delinquency or unruly case after a hearing on the merits.

A juvenile has the right to counsel in an appeal.[275] During the dispositional hearing, the court must inform the juvenile of the right to appeal, the time limits for doing so, and the right to counsel in all delinquency or unruly matters in which the juvenile is found guilty; the court is encouraged to so notify the parties in all other dispositional proceedings.[276] The Advisory Commission Comments to Tennessee Juvenile Rule 36 elaborate on the importance of informing the parties of the right to appeal:

> This rule requires that the juvenile court judge or referee inform any child found guilty of a delinquent or unruly offense of the right to appeal, etc., in subsection (c). Failure to so inform such a child may entitle the child to file a delayed appeal under the Juvenile Post Commitment Procedures Act, at Tenn. Code Ann. § 37-1-319. Subsection (d), while not mandatory, indicates the committee's strong intent that such notifications take place in all cases, both in the interest of informing parties of their rights, and in the interest of preserving the finality of judgments by avoiding any occasion for a writ of certiorari on the basis that a party was not so informed at the hearing or was without fault in being unaware of the right to appeal.

1.25.1 -- *De Novo* Trial

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[273] *State v. Reed*, 2010 WL 3432663, 35 TAM 40-22, 2010 Tenn. Crim. App. LEXIS 715, at *19, *21 (Tenn. Crim. App. 2010).
[274] *See gen.*, Tenn. Code Ann. § 37-1-159; Tn. R. Juv. P. 36.
[275] Tn. R. Juv. P. 36(b).
[276] Tn. R. Juv. P. 36(c).

The statute provides that the criminal or circuit court "shall hear the testimony of witnesses and try the case de novo."[277] The term *de novo* means "anew."[278] Accordingly, to try a matter de novo means to try "... a matter anew."; the same as if it had not been heard before and as if no decision had been previously rendered.[279]

1.25.2 -- Which Court?

A final order or judgment in a delinquency matter may be appealed to the "criminal court or court having criminal jurisdiction."[280]

1.25.3 -- Time Limit

Any appeal must be perfected within ten days, excluding nonjudicial days, following the juvenile court's disposition. Where matters are heard by a juvenile magistrate (or "referee" under previous statutes), the ten day period for appeal begins to run on "the date of the expiration of the time within which to request rehearing" in the event a rehearing is not requested following the magistrate's decision.[281] If there is a rehearing by the judge following a magistrate's decision, the appeal period "shall commence the day after the order of disposition is entered." Id.

1.25.4 -- Transfer Cases

In transfer cases under Tenn. Code Ann. § 37-1-134 (delinquency cases in which the juvenile is transferred to adult court), the statute is clear that there is no appeal of the court's disposition, but only the opportunity for an acceptance hearing in one limited circumstance:

> There is no civil or interlocutory appeal from a juvenile court's disposition pursuant to § 37-1-134. If and only if a nonlawyer judge presides at the transfer hearing in juvenile court, then the criminal court, upon motion of the child filed within ten (10) days of the juvenile court order, excluding nonjudicial days, shall hold a hearing as expeditiously as possible to determine whether it will accept jurisdiction over the child....[282]

1.25.5 -- Rehearings in Matters Tried by Magistrate

In a matter tried before a magistrate, any party may, within five judicial days of the transmittal to the judge of "all papers relating to the case, together with the magistrate's findings and recommendations," file a request for a rehearing before the juvenile judge. The judge must grant a rehearing upon such request or may order a

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[277] Tenn. Code Ann. § 37-1-159(a).
[278] BLACK'S LAW DICTIONARY, 500 (9th Ed. 2009).
[279] BLACK'S LAW DICTIONARY, (Hearing; Hearing *de novo*) 788 (9th Ed. 2009).
[280] Tenn. Code Ann. § 37-1-159(a).
[281] Tenn. Code Ann. § 37-1-159(a).
[282] Tenn. Code Ann. § 37-1-159(d).

rehearing on the court's own motion.[283] If a rehearing is not requested or provided for in Tenn. Code Ann. § 37-1-107(e), the date of disposition for appeal purposes is the date of expiration of the five day rehearing request period.[284]

It must be noted that it may be possible to try a delinquency matter three times in the event the juvenile is found delinquent: once before a magistrate; a rehearing before the juvenile judge; and, on appeal de novo to circuit or criminal court.

1.26 - Post Commitment Relief

If the court places the juvenile in the custody of the Department of Children's Services pursuant to its dispositional power, the juvenile may file a petition for post commitment relief with the circuit or chancery court after the appeals process has been exhausted.[285] Relief may be granted if the juvenile's commitment "is void or voidable because of the abridgement in any way of any right guaranteed by the laws or constitution of this state, or the Constitution of the United States, including a right that was not recognized as existing at the time of the trial if either constitution requires retrospective application of that right."[286]

1.27 - Probation Revocation

If the juvenile has been placed on probation, either county or state, pursuant to the court's dispositional power, the juvenile's probation may be revoked pursuant to Tennessee Juvenile Rule 35. The juvenile is entitled to all the rights of a child in a delinquency or unruly matter, and the hearing must be conducted "in the same manner as proceedings on petitions alleging delinquent or unruly conduct."[287]

The standard of proof in the revocation hearing is preponderance of the evidence. Upon a finding that the juvenile has violated a term of his or her probation, the court may extend the period of probation or make any other disposition which would have been allowed in the original proceeding.[288] The Attorney General has opined that a juvenile court may punish probation violations of delinquent children occurring after age eighteen in the same manner as violations occurring prior to age eighteen.[289]

1.28 - Modification and Vacation of Orders

An order of the court may be "set aside" or "changed, modified or vacated" under certain circumstances.

1.28.1 -- Vacation of Order

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[283] Tenn. Code Ann. § 37-1-107(e); Tn. R. Juv. P. 4(c).
[284] Tenn. Code Ann. § 37-1-159(a). *See also*, Time Limit, *supra*.
[285] *See gen.*, Tenn. Code Ann. § 37-1-301, et. Seq.
[286] Tenn. Code Ann. § 37-1-305.
[287] Tn. R. Juv. P. 35(a).
[288] Tn. R. Juv. P. 35(b).
[289] Op. Tenn. Atty. Gen. 05-130 (August 24, 2005).

Except for an order terminating parental rights pursuant to Tenn. Code Ann. § 37-1-113(q), an order may be "set aside" (Tennessee Juvenile Procedure Rule 34 uses the term "vacated") if one of the following circumstances is proved:

1. The order was obtained by fraud or mistake sufficient to satisfy the legal requirements in any other civil action;

2. The court lacked jurisdiction over a necessary party or of the subject matter; or

3. Newly discovered evidence so requires.[290]

1.28.2 -- Clerical Mistakes

Clerical mistakes "arising from oversight or omission" may be corrected at any time upon motion of any of the parties or on the court's own "initiative."[291]

1.28.3 -- Changed Circumstances

Except for orders terminating parental rights, committing a child to the Department of Children's Services or to an institution for delinquent children, or an order of dismissal, an order may be "changed, modified or vacated" upon a finding of changed circumstances and that the best interests of the child require such.[292]

1.28.4 -- Petition and Hearing Procedures

Except for correction of clerical mistakes (which may be handled by motion), any party seeking relief must file a petition in accordance with Tennessee Juvenile Procedure Rule 34(d).[293] After the provision of proper notice, the court must conduct a hearing in accordance with Tennessee Juvenile Procedure Rule 34(e).[294]

1.28.5 -- Who May File

Any party to the proceeding, the probation officer, or any other person having supervision or legal custody of or an interest in the juvenile may petition the court for relief.[295]

1.29 - Teen Court

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[290] Tenn. Code Ann. § 37-1-139(a); Tn. R. Juv. P. 34(b).
[291] Tn. R. Juv. P. 34(a).
[292] Tenn. Code Ann. § 37-1-139(b); Tn. R. Juv. P. 34(c).
[293] Tenn. Code Ann. § 37-1-139(d); Tn. R. Juv. P. 34(d).
[294] Tenn. Code Ann. § 37-1-139(e).
[295] Tenn. Code Ann. § 37-1-139(d); Tn. R. Juv. P. 34(d).

Tennessee statutes allow juvenile courts to form a "Teen Court" for certain delinquency matters.[296] In brief, a Teen Court is composed of teenagers chosen to decide the disposition of certain non-violent delinquent offenses. The juvenile defendant may be adjudicated delinquent by a juvenile judge or magistrate and disposition referred to the Teen Court (with a waiver of rights to participate in the program) as a deferred judgment, or the juvenile may agree to participate in the Teen Court program as an informal adjustment pursuant to Tenn. Code Ann. § 37-1-110.[297] The Teen Court, composed of five teenagers, then recommends to the juvenile judge a disposition selected from certain disposition options in the statute.[298] Upon successful completion of the program, the original delinquency petition is dismissed.[299]

1.30 - Juvenile Sex Offender Registry

The Tennessee Legislature recently enacted a requirement that certain juveniles must register as sex offenders.[300] For adjudications of certain offenses occurring after July 1, 2011, a juvenile aged fourteen or older must register as a sex offender in much the same way as is required of adult sex offenders. Upon conviction, the juvenile court is required to transmit to the Tennessee Bureau of Investigation certain information concerning the juvenile and the offense, which, in turn, notifies the appropriate law enforcement agency. The juvenile is then contacted by and required to report to the appropriate law enforcement agency for registration.

The information collected pursuant to this Public Chapter is kept confidential unless the juvenile receives a subsequent qualifying conviction in juvenile court. In such case, the juvenile is required to register for life and such information is made public (and presumptively published on the TBI's website) upon the juvenile reaching the age of eighteen.[301]

If the juvenile does not reoffend, the juvenile is eligible to have his or her registration terminated at age twenty five.[302] The qualifying offenses are as follows:

1. Aggravated Rape, under Tenn. Code Ann. § 39-13-502;

2. Rape, under Tenn. Code Ann. § 39-13-503;

3. Rape of a Child, under Tenn. Code Ann. § 39-13-522, provided the victim is at least four years younger than the offender;

4. Aggravated Rape of a Child, under Tenn. Code Ann. § 39-13-531; or

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[296] *See gen.*, Tenn. Code Ann. § 37-1-701, et. Seq.
[297] Tenn. Code Ann. § 37-1-702(b).
[298] Tenn. Code Ann. § 37-1-703.
[299] Tenn. Code Ann. § 37-1-702(d)(4).
[300] *See gen.*, TN Pub. Chpt. 483 (2011) (former House Bill 687) (amending Titles 37 and 40).
[301] *Id.*
[302] *Id.*

5. Criminal Attempt, under Tenn. Code Ann. § 39-12-101, to commit any of the offenses listed above.

The TBI provides assistance through its SOR Hotline (1-888-837-4170), and a helpful memo prepared by the Tennessee Bureau of Investigation concerning the registration of juvenile sex offenders is available from the TBI.

1.31 - School Resource Officer

The judge and practitioner should be aware that an official who is frequently in court in regard to delinquency matters is the School Resource Officer ("SRO"). This person is a law enforcement officer assigned to one or more public schools (K-12) in an effort to prevent and control criminal activity in the schools. This position is created in the School Security Act of 1981, codified at Tenn. Code Ann. § 49-6-4201, et. Seq. The SRO brings delinquent petitions on behalf of the school system concerning conduct of the students on school property.

The SROs are frequent petitioners in the author's court and, in the author's opinion, are an important part of the school system. The SRO is able to better understand each school's culture and resulting peer pressures and problems. The SRO is in a unique position to get to know the students, their peers and the various groups with whom the juvenile may be involved. The SRO is indispensable in combating drugs, fights and other disorderly conduct common to the school setting, and the SRO is an invaluable force against bullying behavior.

TENNESSEE JUDICIAL ACADEMY
JUVENILE COURT JUDGES

THE UNRULY PROCESS

By: Andy Brigham, Stewart County Juvenile Court

1:1 - Unruly Process in General

As is pointed out in the Delinquency materials, the new juvenile judge must understand that there is a wide variance among the several juvenile courts in Tennessee in handling unruly (as well as other) matters. The Juvenile Rules encourage this so long as such procedures do not conflict with relevant statutory and case law. Many differences arise from the inherent distinctions between courts in large urban areas and those in smaller rural areas. Other differences come from the differing philosophies held by the presiding juvenile judges. Still more differences are of an historical character: "We've always done it this way."

1.1.1 - New Juvenile Rules

Judges and practitioners should be aware that the Tennessee Supreme Court has instructed the Court Improvement Program, administered by the Administrative Office of the Courts, to revise the current Rules of Juvenile Procedure. This work is extensive and is ongoing and is expected to be presented to the General Assembly during the 2016 legislative session.

1.2 - Overview of the Unruly Process

An unruly matter generally follows the same procedural path as a delinquency matter (which, in turn, generally follows the same path as an adult criminal matter). Careful review of many of the applicable statutes and rules reveals that delinquency and unruly cases share many of the same procedures and substantive guidelines. In broad terms, a petition alleging unruly behavior is filed, the juvenile is afforded certain rights, negotiations may occur, if no agreement is reached or if no plea is entered, the court conducts an adjudicatory hearing, and, if the juvenile is found to be unruly, a dispositional hearing is held and a treatment program is put in place. The petitioner in an unruly matter is often the child's parent or guardian, or an official from the school system. Frequently, law enforcement brings unruly charges when the matter involves a runaway.

As with a delinquency matter, the juvenile facing unruly charges is afforded many opportunities to reach a settlement. Informal adjustment or even dismissal may be obtained during intake. The juvenile is usually given other opportunities to settle the

matter prior to the adjudicatory hearing; often the court exercises its broad powers in regard to informal adjustment and pretrial diversion. Some courts (usually courts with large dockets) settle all but the most egregious unruly matters without an adjudicatory hearing. Other courts, such as the author's, allow unsettled matters to go to hearing (usually truancy matters); just as common is the scenario in which the juvenile admits to the unruly charge and appears in court for a dispositional hearing. Such adjudicatory and dispositional hearings are often brief, involving the testimony of only one or two witnesses.

1.3 - Definition of Unruly

One of the three major classifications of children in juvenile court, an "unruly" child means a child in need of treatment and rehabilitation who:

> 1. Habitually and without justification is truant from school while subject to compulsory school attendance under [Tenn. Code Ann.] § 49-6-3007; or
>
> 2. Habitually is disobedient of the reasonable and lawful commands of the child's parent(s), guardian or other legal custodian to the degree that such child's health and safety are endangered; or
>
> 3. Commits an offense that is applicable only to a child; or
>
> 4. Is away from the home, residence or any other residential placement of the child's parent(s), guardian or other legal custodian without their consent. Such child shall be known and defined as a 'runaway.'[1]

While not an official part of the statutory scheme in Tennessee, the phrase "status offense" or "status offender" is often heard in reference to unruly juveniles. This phrase refers to the status occupied by the juvenile in the legal system and is synonymous with the use of the term "unruly" or "unruly offense."[2] An unruly offense is said to be a status offense due to the legal classification of a juvenile; it is the status of the juvenile, legally, which provides the legal basis for the offense. "Status" is defined as: "[t]he legal relation of individual to rest of the community. The rights, duties, capacities and incapacities which determine a person to a given class."[3]

In older iterations of the various juvenile statutory schemes, the term "incorrigible" is sometimes used in referring to the unruly class, bringing to mind a scene from a Charles Dickens novel.

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[1] Tenn. Code Ann. § 37-1-102(b)(25)(A). But *see*, Op. Tn. Atty. Gen. 02-100 (September 16, 2002) (An emancipated minor is not subject to the compulsory school attendance laws.).

[2] *See e.g.*, *State v. Russell*, 866 S.W.2d 578, 580 (Tenn. Crim. App. 1991) ("While delinquent children were those who had been found guilty of an act which would constitute a crime if committed by an adult, such was not the case for unruly children (also called status offenders).").

[3] BLACK'S LAW DICTIONARY, 1542 (9th Ed. 2009).

1.4 - Commencement and Intake

Relevant information regarding the commencement of unruly cases may be found in the Chapter entitled Beginning the Juvenile Court Process (filing of petitions, etc.), and information regarding intake in unruly cases is contained in the Chapter entitled Juvenile Court Personnel, subsection Intake Officer.

1.5 – Rights of Child in General

The law (both statutory and rule as well as case law) regarding the rights of a juvenile charged with an unruly offense is not as developed as is the law regarding the rights of a juvenile charged with a delinquency offense. This is owing to the fact that unruly offenses are not criminal in nature - being only "status offenses" - and the juvenile generally does not face a deprivation of liberty as a consequence. As a result, due process concerns are somewhat lessened and motivations for appeal (and consequent development of an appellate canon) are accordingly dampened. As will be discussed *infra*, there are exceptions to these general statements. The juvenile does face loss of liberty in some situations and the law generally responds to provide appropriate substantive and procedural protections. It is safe to say that when the unruly proceeding takes on the consequential aspects of a delinquency proceeding (i.e., the juvenile may be removed from his or her parent or guardian or otherwise deprived of liberty), the juvenile is entitled to appropriate protections, the substantive legal analysis being similar or the same as a delinquency proceeding.

1.6 - Right to Counsel

The juvenile is entitled to counsel "at all stages" of "proceedings alleging unruly conduct that place the child in jeopardy of being removed from the home...."[4] The juvenile has the right to counsel if indigent and the court must "ascertain whether the person knows of the right to counsel and of the right to be provided with counsel by the court if the person is indigent."[5] The Rules of the Supreme Court provide:

> [T]he court or appointing authority shall advise any party without counsel of the right to be represented throughout the case by counsel and that counsel will be appointed if the party is indigent and ... requests appointment of counsel: ... (E) Cases alleging unruly conduct of a child which place the child in jeopardy of being removed from the home pursuant to Tenn. Code Ann. § 37-1-132(b).[6]

The court is mandated to provide counsel for juveniles who are not represented by a parent or guardian in any unruly matter in which the child is in jeopardy of being removed from the home, or in which the juvenile's interests conflict with the parent or

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[4] Tenn. Code Ann. § 37-1-126(a)(1).
[5] TCA § 37-1-126(a)(3) ("If the person is indigent, the court shall provide counsel for the indigent person.").
[6] Tn. Sup. Ct. R. 13, §1(d)(2)(E).

guardian.[7] A person requesting appointed counsel must complete an affidavit of indigency on a form provided by the Administrative Office of the Courts.[8] An administrative fee "shall" be assessed to the child if he or she is provided with court appointed counsel.[9]

The judge and practitioner will note that although the statute provides that the juvenile is entitled to counsel only in matters in which the child is in jeopardy of being removed from the home, the juvenile enjoys the right to retain counsel in all unruly matters. The right to appointed counsel, however, is granted only in those unruly matters involving possible removal.

As in delinquency matters, the author has observed a wide variance regarding the administrative fee among the several juvenile courts with which the author is familiar. Some courts are diligent in assessing the fee while others are not so (notwithstanding the mandatory "shall" in the statute).

1.7 - Basic Rights at Hearing

The statute granting juveniles basic rights at hearings (Tenn. Code Ann. § 37-1-127) contains language limiting its applicability to delinquency proceedings in some of its provisions. For example, subsection (b) of Tenn. Code Ann. § 37-1-127 states that a child "charged with a delinquent act" enjoys the privilege against self incrimination, while subsection (a), granting juveniles the right to introduce evidence, be heard in his or her own behalf, and to cross examination, contains no limiting language. Subsections (c), regarding extra judicial statements, and (e), regarding corroboration of confessions, also contain such limiting language. Subsection (d), regarding the exclusionary rule, contains no such limiting language. This would allow the argument that this statute would apply partially to unruly proceedings, namely subsections (a) and (d). However, no authority can be found to directly support this conclusion.

Some authority exists, however, to limit the applicability of this statute only to delinquency proceedings. The court in *Colyer v. State*[10] stated (perhaps by way of dicta):

> [Tenn. Code Ann. §] 37-227 expressly bestows upon children *charged with a delinquent act* basic rights which were not uniformly recognized or granted in the juvenile courts of this state prior to the 1970 Act, but were then enjoyed by adults on trial in the criminal courts. (emphasis in original)[11]

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[7] Tenn. Code Ann. § 37-1-126(a)(4).
[8] Tn. Sup. Ct. R. 13, § 1(e)(1).

[9] Tenn. Code Ann. § 37-1-126(c)(1); Tn. Sup. Ct. R. 13, § 1(e)(4)(E).
[10] 577 S.W.2d 460 (Tenn. 1979) (superceded by statute as stated in *State v. Manus*, 632 S.W.2d 137 (Tenn. Ct. App. 1982)).
[11] *Colyer v. State*, 577 S.W.2d at 463. See also, *State v. Mitchell*, 596 S.W.2d 779, 784 (Tenn. 1980) (While not addressing the issue directly, the court discusses the statutory rights in the context of a delinquency proceeding).

While the applicability of the basic safeguards contained in Tenn. Code Ann. § 37-1-127 to unruly proceedings is unclear based on the above authorities, the author would posit that better practices would require the recognition of these rights in more serious unruly proceedings, such as those proceedings which may result in a commitment to DCS or otherwise in a removal from the home. Further, even in unruly proceedings which are less serious, the author would point out one of the statutory purposes of the juvenile court system: "Provide a simple judicial procedure through which this part is executed and enforced and in which the parties are assured a fair hearing *and their constitutional and other legal rights* recognized and enforced."[12] Certainly this directive would require basic due process protections for juveniles in unruly proceedings.

Finally, the language of Rule 28 strengthens the argument that juveniles are to be accorded procedural protections in unruly proceedings. Rule 28 provides that "all adjudicatory hearings" must be conducted in accordance with Tenn. Code Ann. §§ 37-1-124, 37-1-127 and 37-1-129. This provides further authority for the proposition that juveniles charged with unruly offenses are entitled to certain procedural and substantive rights.

1.8 - Standards of Proof

The proper standard of proof in an unruly Adjudicatory Hearing is clear and convincing.[13] This standard is less stringent than "beyond a reasonable doubt," but more stringent than "preponderance of the evidence." The standard of proof in the Dispositional Hearing is preponderance of the evidence. See Tenn. Code Ann. 37-1-129(c); Tn. R. Juv. P. 32(f).

1.9 - Compulsory Service of Process

A juvenile accused of unruly behavior has the right to have subpoenas issued to require "attendance and testimony of witnesses and production of papers at any hearing under this part." [14]

1.10 - Evidence Admissible

The Rules of Evidence are to apply in unruly adjudicatory hearings. Further, "in delinquent and unruly proceedings, no evidence that would be inadmissible in an adult criminal proceeding shall be admitted. In addition, in a delinquent or unruly case, no statement made by a child to the youth services officer or designated intake office during the preliminary inquiry and evaluation process, or pursuant to informal adjustment under

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[12] Tenn. Code Ann. § 37-1-101(a)(4) (emphasis added).
[13] Tenn. Code Ann. § 37-1-129(c); Tn. R. Juv. P. 28(e).
[14] Tenn. Code Ann. § 37-1-118.

[Tennessee Juvenile Procedure] Rule 14, shall be admissible against the child prior to the dispositional hearing."[15]

Rule 28(c) of Tennessee Juvenile Procedure, concerning Adjudicatory Hearings, provides that the court "shall consider only evidence which has been formally admitted." This is in distinct contrast to Tennessee Juvenile Procedure Rule 32(f) - concerning Dispositional Hearings - that provides that the court "shall consider only evidence which has been formally admitted, and the juvenile court record of the child." Clearly, the court may only consider evidence formally admitted during the Adjudicatory Hearing and may also consider the juvenile court record of the juvenile during the Dispositional Hearing. Further, the court may consider "reliable hearsay" during the Dispositional Hearing. Id. Examples given in the rule of "reliable hearsay" include "certified copies of convictions or documents such as psychiatric or psychological evaluations of the child or the child's parents or custodian or reports prepared by the Department of Children's Services." Id. This distinction is important because often the court file contains many items that have not been formally admitted during a hearing (reports of investigations, medical records and reports, etc.), which may be considered as "reliable hearsay," and evidence admitted during the preliminary hearing or perhaps a detention hearing (which also may include "reliable hearsay"[16]).

1.11 - Guardian ad Litem

In an unruly proceeding, the court "shall" appoint a guardian ad litem (GAL) "at any stage of a proceeding" upon application of a party or on its own motion when the child has no parent or guardian appearing on such child's behalf, or if the interests of the child and the parent or guardian conflict. The court may appoint a guardian ad litem "in any other case in which the interests of the child require a guardian."[17]

It is the author's experience that GALs are uncommon in unruly proceedings. This stems from the less drastic consequences attendant to most unruly matters and the fact that GALs are not required by statue or rule as in Dependency/Neglect cases. GALs do not receive compensation from the AOC in unruly proceedings - further contributing to their scarcity in such matters. Finally, unruly matters usually do not involve law enforcement (with the exception of runaways), DCS or any other formal agency (with the exception of truants) further contributing to the "less drastic" character of an unruly proceeding.

1.12 - Waiver of Rights

A juvenile may waive some or all of his or her rights but the waiver must comply with Tennessee Juvenile Procedure Rule 30 - especially Rule 30(d) which concerns waivers in the Adjudicatory Hearing. Generally, for any such waiver to be knowing and

[15] Tn. R. Juv. P. 28(c).
[16] Tn. R. Juv. P. 15(b) and Tn. R. Juv. P. 16(a).
[17] Tn. R. Juv. P. 37(a).

voluntary, the juvenile must first consult with "a knowledgeable adult who has no interest adverse to the child."[18]

1.13 - Detention in General

The discussion herein concerns prehearing detention as opposed to post-adjudication detention which is not available to the court as a disposition alternative in an unruly proceeding under Tenn. Code Ann. § 37-1-132 (but see, Appendix to the Rules – Valid Court Orders).

Although not used often in the unruly process (as opposed to common use of detention in the delinquency process - especially in larger areas), there is a wide divergence in practice concerning detention among the various juvenile courts in Tennessee. This is due in large measure to the differences in available resources to any specific court. For instance, the author's county is a small rural county with the closest contracted detention facility over 150 miles away. For practical reasons, this means that detention is used sparingly simply because of the logistics involved in transporting the juveniles. Also, detention is expensive and is a charge to the county. The author's county pays in excess of $135.00 per day to detain a juvenile. In contrast, juvenile courts in larger areas often have detention options available within the county; often these facilities are operated by the county. Courts in these jurisdictions, logically, are more apt to choose detention as a prehearing procedure. Further, courts in larger areas are more often faced with more numerous and more serious offenses justifying detention. Detention is rarely used in the unruly process because applicable law places strict limits on the length of detention (generally, 24 hours). This will be discussed more fully below.

The term "detention" is defined as follows: "'Detention' means confinement in a secure or closed type of facility that is under the direction or supervision of the court or a facility that is designated by the court or other authority as a place of confinement for juveniles."[19] As of this writing, the website for the Tennessee Commission on Children and Youth (http://www.tn.gov/tccy/jjshtml) lists seventeen Juvenile Detention Centers in Tennessee, eight Temporary Holding Facilities, and six Youth Development Centers.

Although not relevant to the unruly process, the phrase "Youth Development Center" is defined to be "... a hardware secure facility that houses children who have been adjudicated delinquent and who meet the criteria as established by the department [of children's services] for placement at such facility."[20]

1.13.1 - - Grounds for Detention

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[18] Tn. R. Juv. P. 30(d).
[19] Tenn. Code Ann. § 37-1-102(b)(13); *see also, State v. Carroll*, 36 S.W.3d 854, 862 (Tenn. Crim. App. 1999).
[20] Tenn. Code Ann.§ 37-5-103(16).

The statute, Tenn. Code Ann.§ 37-1-114, which sets forth the grounds for detention, contains three sections, with separate grounds, depending on the circumstances. First, subsection (a)(1) of this statute provides for the detention of a child charged with a delinquent or unruly act when there is probable cause to believe the child committed the act.[21] In addition to probable cause, subsection (a)(2) provides further that "...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 or legal custodian 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."

Subsection (b) of Tenn. Code Ann.§ 37-1-114 states that unruly children must not be detained in excess of twenty-four hours (excluding nonjudicial days) unless there has been a detention hearing and a finding that there is probable cause to believe that the child has violated a valid court order. In no event shall an unruly child be detained in excess of seventy-two hours, exclusive of nonjudicial days, prior to an adjudicatory hearing. It should be noted that subsection (c)(6) provides that an unruly child may be detained in a "secure facility" if there is probable cause to believe such child violated a valid court order or is a runaway.

The phrase "valid court order" is discussed in detail in the Appendix to the Rules of Juvenile Procedure. This phrase is used in other sections of Title 37 and the practitioner and judge should acquaint himself or herself with the concepts therein.

The phrase "nonjudicial days" is defined in both statute and the rules as "Saturdays, Sundays, and legal holidays. Nonjudicial days begin at 4:30 p.m. on the day preceding a weekend or holiday, and end at 8:00 a.m. on the day after a weekend or holiday."[22] "Legal holiday" is defined in Tenn. Code Ann. § 15-1-101.

1.13.2 - - Place of Detention

In general terms, upon taking a juvenile into custody, the law enforcement authorities must either release the juvenile into the custody of his parents, guardian or other custodian, or bring the child before the court, or deliver the child to a detention or shelter care facility designated by the court, or to a medical care facility.[23] Statute permits counties to contract with public or private agencies or authorities, or other juvenile courts, to place juveniles in detention or shelter care facilities.[24]

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[21] *See also*, Tn. R. Juv. P. 5(b).
[22] Tenn. Code Ann. § 37-1-102(b)(19); Tn. R. Juv. P. 2(11).
[23] Tenn. Code Ann. § 37-1-115(a); Tn. R. Juv. P. 5(c)(1) & (d)(3).
[24] Tenn. Code Ann. § 37-1-116(f).

The author's county, being small and rural, has no detention facility within the county and, consequently, contracts with several area detention facilities for the placement of juveniles accused of delinquent acts. If shelter care is required, the author's court relies upon the Department of Children's Services.

A child alleged to be unruly may be detained only in the following facilities:

1. A licensed foster home or a home approved by the court;

2. A facility by a licensed child care agency;

3. A detention home or center for delinquent children that is under the direction or supervision of the court or other public authority or of a private agency approved by the court; or

4. Subject to subsection (e) [of Tenn. Code Ann. §37-1-116], any other suitable place or facility designated or operated by the court.[25]

A juvenile may be detained "for as short a time as feasible, not to exceed forty-eight (48) hours" in a jail or other facility designed for adult inmates only under specific circumstances as outlined in Tenn. Code Ann. §§ 37-1-116(b)(4), (c), (e), and (h).[26] These circumstances are quite onerous. For example: the matter must involve a serious crime against the person, the facility must be approved by the Tennessee Corrections Institute, the county involved must meet certain population density requirements, there are no other facilities willing to contract for the placement of the child, and the court must make certain findings prior to admittance.[27]

1.13.3 - - Post Detention Procedure/Time Limits for Detention Hearings

Upon a child being detained, the intake officer is tasked with determining whether continued detention is warranted under the circumstances or whether the child should be released to his or her parents or guardian.[28] If the child is not released, a petition must be filed "promptly" but in no event no later than two days from the child coming into custody, not including Saturdays, Sundays, and legal holidays.[29]

The applicable statutes and rules sometimes use the phrase "Saturdays, Sundays, and legal holidays" and other times use the defined term "nonjudicial days." The practitioner and judge should note that these are one and the same.

If the child is accused of an unruly offense, a detention hearing must be held within twenty-four hours after the child is placed into detention to determine whether

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[25] Tenn. Code Ann. § 37-1-116(a).
[26] *See also*, Tenn. Rule Juv. Proc. 5(c)(3).
[27] Tenn. Code Ann. § 37-1-116(h).
[28] Tenn. Code Ann. § 37-1-117(a).
[29] Tenn. Code Ann. §§ 37-1-115(a)(2) & 37-117(b)(1); Tn. R. Juv. P. 5(c)(8 & (d)(4).

there is "probable cause to believe the child has violated a valid court order." Nonjudicial days are not included in the computation; however, a hearing must be held within seventy-two hours of the child being detained, excluding nonjudicial days (but within an overall time limit of eighty-four hours).[30]

An additional time constraint applies to the unruly situation: if probable cause was found to believe that the child had violated a valid court order, an *adjudicatory* hearing must be held within seventy-two hours of the child coming into custody. Again, the computation does not include nonjudicial days; however, a hearing must be held within eighty-four hours of the child being detained.[31]

There is some disagreement among some juvenile courts as to whether a juvenile court has authority to detain "unruly" longer than 24 hours. Some courts feel such authority does not exist and do not detain longer than 24 hours regardless of the circumstances. It is the author's opinion that such authority exists in narrow circumstances: when probable cause is found to believe that the child has violated a valid court order. This determination must be made within 24 hours.[32] Then an adjudicatory hearing must be held within the 72 – 84 hour time period. Further, after the adjudicatory hearing, the juvenile may continue to be held in detention for an unspecified time period.

However, the author wishes to go on record in stating that juveniles should not be detained for an unruly offense any longer than is absolutely necessary to achieve the objectives of the state in exercising jurisdiction.

1.13.4 - - Detention Hearing

The procedures the court is to use in conducting the detention hearing are provided in Juvenile Procedure Rule 15. Rule 15 confirms that the purpose of the detention hearing is to determine whether probable cause exists to believe the child committed the offense charged, and includes a listing of the rights enjoyed by the juvenile during the hearing. Reliable hearsay may be considered by the court during the detention hearing.[33]

1.13.5 - Rights During Detention

The juvenile is entitled to certain basic rights while in detention, which rights are spelled out at Tennessee Juvenile Procedural Rule 7. These rights include the right to telephone calls, mail, visiting hours, the juvenile shall not be subjected to intimidation or coercive questioning methods nor corporal punishment, and shall not be interviewed by unauthorized persons.

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[30] Tn. R. Juv. P. 6(b).
[31] Tn. R. Juv. P. 6(b).
[32] Tn. R. Juv. P. 6(b).
[33] Tn. R. Juv. P. 15.

The author would question whether a rule of procedure can validly affect the activities of the personnel at a detention facility.

1.14 - Determination of Unruly Status- Informal Adjustment and Pretrial Diversion

Two procedures exist which may avoid the necessity of a hearing. Both procedures are negotiated prior to the scheduled adjudicatory hearing, but only one requires court approval of the specific agreement reached.

1.15 - Informal Adjustment

Before or after a petition is filed, the designated court officer (usually the intake officer) may suspend or defer formal proceedings against a child pursuant to an informal adjustment. Although not defined in either the statute or rules, an informal adjustment is a method used to dispose of certain minor offenses and situations when the matter may be best handled outside the courtroom without the institution or continuation of formal charges. An informal adjustment is a voluntary procedure whereby the child and his or her parents or guardians agree to submit to a specifically tailored program designed to correct the child's behavior or to improve the child's environment or situation. The program may consist of counsel and advice, but may not include sanctions. Informal adjustment is specifically sanctioned by statute as set forth below:

> Before or after a petition is filed, the probation officer or other officer of the court designated by it, subject to its direction, may give counsel and advice to the parties with a view to an informal adjustment if it appears:
>
> > (1) The admitted facts bring the case within the jurisdiction of the court;
> >
> > (2) Counsel and advice without an adjudication would be in the best interest of the public and the child; and
> >
> > (3) The child and the child's parents, guardian or other custodian consent thereto with knowledge that consent is not obligatory.[34]

The rule contains several factors which the designated court officer is to consider in deciding whether to pursue an informal adjustment. See below.

In addition to being voluntary, a feature of informal adjustments is that they last only for three months, unless extended by the court for a period not to exceed an additional six months.[35] Being voluntary, a child may withdraw from the informal adjustment at any time.[36] In such case, formal court proceedings would again commence or resume against the child.[37] Likewise, the court officer supervising the informal

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[34] Tenn. Code Ann. § 37-1-110(a).
[35] Tenn. Code Ann. § 37-1-110(b); Tn. R. Juv. P. 14(d)(3).
[36] Tn. R. Juv. P. 14(c)(2)(iv).
[37] Tn. R. Juv. P. 14(c)(2)(viii).

adjustment may terminate the program and elect to allow formal proceedings to commence or resume against the child.[38]

Upon successful completion of the program, or in the discretion of the court officer supervising the informal adjustment for "other sufficient reasons," the matter is dismissed along with any charges which have been filed against the child.[39]

The designated court officer may consider certain factors in deciding whether to pursue an informal adjustment:

> (1) Whether the child has had a problem in the home, school or community which indicates that some supervision would be desirable;
>
> (2) Whether the child and the parent, guardian or legal custodian seem able to resolve the matter with the assistance of the designated court officer or other court staff, and without formal juvenile court action;
>
> (3) Whether further observation or evaluation by the designated court officer is needed before a decision can be reached;
>
> (4) The attitude of the child, the parent, guardian, or legal custodian, and/or any other affected persons or agencies;
>
> (5) The age, maturity and mental condition of the child;
>
> (6) The prior history or record, if any, of the child;
>
> (7) The recommendation, if any, of the referring party or agency;
>
> (8) Any other circumstances which indicate that informal adjustment would be consistent with the welfare and safety of the child and the protection of the public.[40]

Perhaps recognizing that personalities sometimes dominate an encounter, the attitude of the child, while a factor to be considered by the court official, is not to be the sole basis for a denial of informal adjustment: "It should be further noted that, although attitude may be a factor under section (a)(4) to consider in determining whether to undertake informal adjustment, it should not be the sole basis for denying informal adjustment."[41]

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[38] Tn. R. Juv. P. 14(c)(2)(viii) & 14(d)(2).
[39] Tn. R. Juv. P. 14(d)(1).
[40] Tn. R. Juv. P. 14(a).
[41] Tn. R. Juv. P. 14, adv. Comm.. cmts.

Confinement of the juvenile is prohibited during the adjustment period.[42] Nothing learned by the juvenile court staff during the adjustment process, including the fact of an attempted informal adjustment, may later be used against the juvenile in the event of a court hearing.[43]

Although the statute does not require court approval, the rule specifically states that informal adjustments are "subject to court approval." See Tn. R. Juv. P. 14(a).

1.16 - Pretrial Diversion

Pretrial diversion in unruly cases is governed by Rule 23 of the Tennessee Rules of Juvenile Procedure.

The Rule first requires a "designated court officer" to determine that "the child does not wish to contest the allegations of the petition."[44] Next, the court officer must determine that a court hearing is not necessary and must advise the child and his or her parent of their rights in the matter. Then the parties may reach agreement to suspend the proceedings against the child under terms and conditions negotiated with the court officer. Finally, the agreement must be approved by the court.[45]

The term of the diversionary period may be a maximum of six months, unless sooner discharged by the court. The term may be extended for an additional six month term after notice and a hearing.[46]

If the child fails to fulfill the terms of the diversion agreement, or if new delinquency or unruly charges are filed against the child, the original petition "may be reinstated" against the child and the case moves forward in a normal fashion.[47] If the child completes the diversion agreement satisfactorily, the petition is dismissed with prejudice.[48]

The Advisory Commission Comments to Juvenile Procedure Rule 23 discuss the intent behind the procedure and the distinction between diversion and informal adjustment:

> Pretrial diversion is intended by the committee to replace the former practice of holding cases open for further action. The procedures set forth in this rule essentially allow for a process similar to informal adjustment, with no official finding as to guilt, except that the court in the person of the judge (or referee) is involved in that there must be court approval of any agreement.

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[42] Tn. R. Juv. P. 14(d)(5).
[43] Tn. R. Juv. P. 14(c)(2)
[44] Tn. R. Juv. P. 23(a).
[45] Tn. R. Juv. P. 23(a).
[46] Tn. R. Juv. P. 23(b).
[47] Tn. R. Juv. P. 23(c).
[48] Tn. R. Juv. P. 23(d).

1.17 -The Adjudication and Dispositional Process in General

Unruly proceedings generally proceed much faster than delinquency or Dependency/Neglect matters. The nature of the subject matter and the less drastic dispositional consequences tend to abbreviate unruly proceedings. However, the formal legal structure is quite similar to a delinquency proceeding. Assuming no informal adjustment, formal charges are spelled out in a petition which is served on the child. The child is accorded many procedural rights as covered, *supra*. The child is entitled to a full and fair hearing before a neutral and detached judge and is accorded the right to de novo appeal in the event of a finding of guilt.

Adjudicatory Hearing. Rather than denominated a "trial," the proceeding in which the guilt or innocence of the child is determined is called the adjudicatory hearing.

At this hearing, the court determines whether the allegations contained in the petition have been proved in accordance with the applicable standard of proof. Tennessee Juvenile Procedure Rule 28 provides guidance to the court in the conduct of the adjudicatory hearing and states:

> The adjudicatory hearing is the proceeding at which the court determines whether the factual allegations of the petition are true and whether the evidence supports a finding that a child is delinquent, unruly, dependent, neglected or abused, or supports a finding authorizing the termination of parental rights as provided in Rule 39. If any of the above findings are made, the determination of the appropriate disposition is to be made pursuant to a dispositional hearing in accordance with Rules 32 and 33 of these rules or, in termination of parental rights cases, Rule 39.[49]

Proof and procedure at the adjudicatory hearing must be in accord with all evidentiary, statutory and constitutional strictures, although the proceeding is generally more relaxed and informal. The petitioner presents the case for the "State," with no involvement of the district attorney.

It has been the author's experience that most unruly proceedings result in an informal adjustment, an admission by the child or, especially in the case of truancy and runaway matters, consist in a short hearing in which only one or two witnesses testify with an opportunity for the juvenile to testify. The matter then proceeds to disposition.

As previously stated, the standard of proof in the Adjudicatory Hearing is clear and convincing; if the standard is not met, the court must dismiss the petition.[50] This standard is less stringent than "beyond a reasonable doubt," but more stringent than "preponderance of the evidence."

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[49] Tn. R. Juv. P. 28(a).
[50] Tn. R. Juv. P. 28(e)(1).

If the child is found to be an unruly child, the court then conducts a Dispositional Hearing in accordance with Juvenile Procedure Rule 32.

Dispositional Hearing. It is in the dispositional hearing that the court decides the appropriate punishment and/or treatment regimen to address the child's behavior or condition. The court is limited by statute as to disposition alternatives (*See, e.g.*, Tenn. Code Ann. § 37-1-132). These alternatives are discussed more thoroughly below.

Tennessee Juvenile Procedure Rule 32 states the purpose of the dispositional hearing:

> The purpose of dispositions in juvenile court actions is to design an appropriate plan to meet the needs of the child and to achieve the objectives of the state in exercising jurisdiction. When possible, the initial approach should involve working with the child and the family in their own home so that the appropriate community resources may be involved in care, supervision, and treatment according to the needs of the child.

In concert, the Advisory Commission Comments to Tennessee Juvenile Procedure Rule 32 aids in understanding the desired philosophy framing the disposition decision:

> In choosing among statutorily permissible dispositions in delinquent and unruly cases, the judge should select the least restrictive disposition both in terms of kind and duration that is appropriate to the seriousness of the offense, the degree of culpability indicated by the circumstances of the particular case, and the age and prior record of the child. A child should not be committed to any institution if, consistent with the public safety, the child can be treated and rehabilitated through community-level resources.

The dispositional hearing is separate and distinct from the adjudicatory hearing to which it relates. It may be held, however, immediately following the adjudicatory hearing or at a later date in the discretion of the court."[51]

It is the author's experience (and practice) that most dispositional hearings in unruly matters occur immediately after the adjudicatory hearing. On occasion, the juvenile will move to defer the dispositional hearing to allow for additional evidence to be presented which may impact the court's decision. Restitution issues may require additional time. Also, the juvenile may wish to present proof of character and/or responsibility and may need time to gather witnesses, or to gather proof of completion of rehabilitation or educational programs.

The standard of proof in the Dispositional Hearing is preponderance of the evidence and the court may consider evidence admitted during the hearing, the court record of the child, and reliable hearsay.[52]

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[51] Tn. R. Juv. P. 32(a).
[52] Tn. R. Juv. P. 32(f).

1.18 - Guilty Pleas

Guilty pleas in unruly matters are governed by Tennessee Juvenile Procedure Rule 21. The court is required to conduct a plea colloquy before accepting a guilty plea in an unruly matter. Generally, the court must inform the juvenile of the nature of the charge, possible dispositional consequences, his or her rights, including the right to counsel, and then determine the voluntariness of the plea and the factual basis for the plea. This rule further requires the court to abide by a dispositional agreement if that agreement is part of the plea agreement; if the court rejects the guilty plea, the dispositional agreement is void.[53]

1.19 - Dispositional Alternatives

The statute governing possible dispositions available to the court is Tenn. Code Ann.§ 37-1-132, which refers back to the delinquency dispositional statute (Tenn. Code Ann. § 37-1-131). The statute provides that the court may "make such disposition as authorized by § Tenn. Code Ann. § 131(a)(1), (2), (5), or (7) that is best suited to such child's treatment."[54] These dispositional alternatives are as follows:

> 1. Any order authorized by Tenn. Code Ann. § 37-1-130 for the disposition of a dependent or neglected child [see below for elaboration];
>
> 2. Placing the child on probation under the supervision of the probation officer of the court or DCS, under conditions and limitations the court prescribes [but see the limitation below];
>
> 3. Assessing a fine not to exceed fifty dollars ($50.00) for each offense that constitutes a violation of a state law or municipal ordinance;
>
> 4. Ordering the child to perform community service work with such work being in compliance with federal and state child labor laws.

To elaborate on dispositional alternative #1 above, namely any order authorized by Tenn. Code Ann. § 37-1-130 for the disposition of a dependent or neglected child, such statute allows the following dispositions:

> 1. Subject to the restrictions of Tenn. Code Ann. § 37-1-129(e) [powers of DCS with regard to children in DCS custody], permit the child to remain with the child's parents, guardian or other custodian or other custodian, subject to conditions and limitations as the court prescribes, including supervision as directed by the court for the protection of the child;

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[53] Tn. R. Juv. P. 21(d).
[54] Tenn. Code Ann. § 37-1-132(a).

2. Subject to the restrictions of Tenn. Code Ann. § 37-1-129(e) [powers of DCS with regard to children in DCS custody], and subject to conditions and limitations as the court prescribes, transfer temporary legal custody to or grant permanent guardianship in accordance with part 8 of this chapter to any of the following:

A) Any individual who, after study by the probation officer or other person or agency designated by the court, is found by the court to be qualified to receive and care for the child;

B) The department of children's services;

C) An agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child; or

D) An individual in another state with or without supervision by an appropriate officer under Tenn. Code Ann. § 37-1-142.

3. To the county department of children's services, if any;

4. Without making any of the foregoing disposition orders, transfer custody of the child to the juvenile court of another state if authorized by and in accordance with Tenn. Code Ann. § 37-1-141 if the child is or is about to become a resident of that state.

Notwithstanding the foregoing, however, the statute limits the court's authority to place a juvenile on state probation to two instances: when the juvenile has also been determined to be a delinquent child, or when the child has violated a valid court order.[55] An additional alternative is provided by the statute: "The court has the additional dispositional alternative of ordering the department to provide non-custodial services to a child found to be unruly."[56] The court may also require the child's parents to participate in any counseling or treatment program required for the child.[57]

If the court places the juvenile into state's custody, the court may not order a specific placement, but all placement decisions are to be made by DCS.[58]

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[55] Tenn. Code Ann. § 37-1-132(a).
[56] Tenn. Code Ann. § 37-1-132(a).
[57] Tenn. Code Ann. § 37-1-103(f) ("The court is authorized to require any parent or legal guardian of a child within the jurisdiction of the court to participate in any counseling or treatment program the court may deem appropriate and in the best interest of the child.").
[58] Tenn. Code Ann. § 37-1-129(e). *See also*, *State v. E.G.P.*, 2003 WL 22134896, *3, 28 TAM 44-10, 2003 Civ. App. LEXIS ____ (Tenn. Ct. App. 2003) ("The juvenile court cannot usurp the properly exercised functions of the DCS. Any action, not wholly discretionary, taken by DCS may be subject to judicial review in accordance with established procedure, but initial determinations respecting placements are the responsibility of the Agency."); Op. Tenn. Atty. Gen. 97-111 (1997) (Juvenile court does not have the authority to order a delinquent child in the custody of DCS to be placed in a hardware secure facility.).

1.20 Appeals

Any decision of the juvenile court finding a child to be unruly is subject to appeal to circuit court for trial de novo.[59] The Advisory Commission Comments to Tennessee Juvenile Procedure Rule 36 notes that the prohibition against double jeopardy prohibits the state from seeking an appeal from a dismissal in a delinquency or unruly case after a hearing on the merits.

A juvenile has the right to counsel in an appeal.[60] During the Dispositional Hearing, the court must inform the juvenile of the right to appeal, the time limits for doing so, and the right to counsel in all delinquency or unruly matters in which the juvenile is found guilty; the court is encouraged to so notify the parties in all other dispositional proceedings.[61] The Advisory Commission Comments elaborate on the importance of informing the parties of the right to appeal:

> This rule requires that the juvenile court judge or referee inform any child found guilty of a delinquent or unruly offense of the right to appeal, etc., in subsection (c). Failure to so inform such a child may entitle the child to file a delayed appeal under the Juvenile Post Commitment Procedures Act, at Tenn. Code Ann. § 37-1-319. Subsection (d), while not mandatory, indicates the committee's strong intent that such notifications take place in all cases, both in the interest of informing parties of their rights, and in the interest of preserving the finality of judgments by avoiding any occasion for a writ of certiorari on the basis that a party was not so informed at the hearing or was without fault in being unaware of the right to appeal.[62]

1.20.1 - - *De Novo* Trial

The statute provides that the circuit court "shall hear the testimony of witnesses and try the case de novo."[63] The term *de novo* means "anew, afresh, a second time;" accordingly, to try a matter de novo means to try "... a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered."[64]

1.20.2 - - Which Court?

A final order or judgment in an unruly matter may be appealed to the circuit court.[65]

1.20.3 - - Time Limit

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[59] See gen., Tenn. Code Ann. § 37-1-159; Tn. R. Juv. P. 36.
[60] Tn. R. Juv. P. 36(b).
[61] Tn. R. Juv. P. 36(c).
[62] Tn. R. Juv. P. 36, adv. comm. cmts.
[63] Tenn. Code Ann. § 37-1-159(a).
[64] BLACK'S LAW DICTIONARY, 789 (9th Ed. 2009).
[65] Tenn. Code Ann. § 37-1-159(a).

Any appeal must be perfected within ten days, excluding nonjudicial days, following the juvenile court's disposition. Regarding matters heard by a juvenile magistrate (or "referee" under previous statutes), the ten day period for appeal begins to run on "the date of the expiration of the time within which to request rehearing" in the event a rehearing is not requested following the magistrate's decision.[66]

1.20.4 - Rehearings in Matters Tried by Magistrate

In any matter tried before a magistrate, any party may, within five judicial days of the transmittal to the judge of "all papers relating to the case, together with the magistrate's findings and recommendations in writing," file a request for a rehearing before the juvenile judge.[67] The judge must grant a rehearing upon such request or may order a rehearing on the court's own motion.[68] If a rehearing is not requested or provided for in Tenn. Code Ann. § 37-1-107(e), the date of disposition for appeal purposes is the date of expiration of the five day rehearing request period.[69]

The practitioner and judge will note that it may be possible to try an unruly matter three times in the event the juvenile is found to be unruly: once before a magistrate; a rehearing before the juvenile judge; and, on appeal de novo to circuit court. Also, the right to appeal obtains upon the *disposition* of the unruly matter, not when the child is adjudicated. Although these two dates are almost always the same, the court may defer disposition to a later date.

The author would also note the rather unwieldy mechanism in place to determine the beginning of the appeal period: the date of the transmittal of the materials to the judge. In practice, this date may be difficult to determine for the practitioner and child. The court must strive to clarify this area so that appeal periods are fully respected and informed decisions may be made on behalf of the child.

1.21 - Post Commitment Relief

If the court places the juvenile in the custody of the Department of Children's Services pursuant to its dispositional power, the juvenile may file a petition for post commitment relief with the circuit or chancery court after the appeals process has been exhausted.[70] Relief may be granted if the juvenile's commitment "is void or voidable because of the abridgement in any way of any right guaranteed by the laws or constitution of this state, or the Constitution of the United States, including a right that was not recognized as existing at the time of the trial if either constitution requires retrospective application of that right."[71]

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[66] Tenn. Code Ann. § 37-1-159(a).
[67] Tenn. Code Ann. § 37-1-107(d) and (e); Tn. R. Juv. P. 4(c).
[68] Tenn. Code Ann. § 37-1-107(e); Tn. R. Juv. P. 4(c).
[69] Tenn. Code Ann. § 37-1-159(a).
[70] *See gen.,* Tenn. Code Ann. § 37-1-301, et. Seq.
[71] Tenn. Code Ann. § 37-1-305.

1.22 - Probation Revocation

If the juvenile has been placed on probation, either county or state, pursuant to the court's dispositional power, the juvenile's probation may be revoked pursuant to Rule 35. The juvenile is entitled to all the rights of a child in a delinquency or unruly matter, and the hearing must be conducted "in the same manner as proceedings on petitions alleging delinquent or unruly conduct."[72]

The standard of proof in the revocation hearing is preponderance of the evidence. Upon a finding that the juvenile has violated a term of his or her probation, the court may extend the period of probation or make any other disposition which would have been allowed in the original proceeding.[73]

1.23 - Modification and Vacation of Orders

With certain exceptions, an order of the court may be "set aside" or "changed, modified or vacated" under certain circumstances.

1.23.1 - - Vacation

Except for an order terminating parental rights pursuant to Tenn. Code Ann. § 37-1-113(q), an order may be "set aside" (Tennessee Juvenile Procedure Rule 34 uses the term "vacated") if one of the following circumstances is proved:

1. The order was obtained by fraud or mistake sufficient to satisfy the legal requirements in any other civil action;

2. The court lacked jurisdiction over a necessary party or of the subject matter; or

3. Newly discovered evidence so requires.[74]

1.23.2 - - Clerical Mistakes

Clerical mistakes "arising from oversight or omission" may be corrected at any time upon motion of any of the parties or on the court's own "initiative."[75]

1.23.3 - - Changed Circumstances

Except for orders terminating parental rights, committing a child to the Department of Children's Services or to an institution for delinquent children, or an order

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[72] Tn. R. Juv. P. 34(a).
[73] Tn. R. Juv. P. 34(b).
[74] Tenn. Code Ann. § 37-1-139(a); Tn. R. Juv. P. 34(b).
[75] Tn. R. Juv. P. 34(a).

of dismissal, an order may be "changed, modified or vacated" upon a finding of changed circumstances and that the best interests of the child require such.[76]

1.23.4 - - Petition and Hearing Procedures

Except for correction of clerical mistakes (which may be handled by motion), any party seeking relief must file a petition in accordance with Tennessee Juvenile Procedure Rule 34(d).[77] After the provision of proper notice, the court must conduct a hearing in accordance with Tennessee Juvenile Procedure Rule 34(e).[78]

1.23.5 - - Who May File?

Any party to the proceeding, the probation officer, or any other person having supervision or legal custody of or an interest in the juvenile may petition the court for relief.[79]

1.24 - Teen Court

Tennessee statutes allow juvenile courts to form a "Teen Court" for certain unruly matters.[80] Briefly, a Teen Court is composed of teenagers chosen to decide the disposition of certain non-violent unruly offenses. The juvenile defendant may be adjudicated unruly by a juvenile judge or magistrate and disposition referred to the Teen Court (with a waiver of rights to participate in the program) as a deferred judgment, or the juvenile may agree to participate in the Teen Court program as an informal adjustment pursuant to Tenn. Code Ann. § 37-1-110.[81] The Teen Court, composed of five teenagers, then recommends to the juvenile judge a disposition selected from certain disposition options in the statute.[82] Upon successful completion of the program, the original petition is dismissed. Conversely, if the program is not completed successfully, or if a new petition is filed against the juvenile, the original petition is reinstated and the case proceeds as usual.[83]

1.25 Valid Court Orders

A procedure often seen in unruly matters concerns Valid Court Orders, as defined in § 31.303(f)(3), Title 28, Code of Federal Regulations, and more fully described in the Appendix to the Tennessee Rules of Juvenile Procedure.

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[76] Tenn. Code Ann. § 37-1-139(b); Tn. R. Juv. P. 34(c).
[77] Tenn. Code Ann. § 37-1-139(d).
[78] Tenn. Code Ann. § 37-1-139(e).
[79] Tenn. Code Ann. § 37-1-139(d);Tn. R Juv. P. 34(d).
[80] *See gen.*, Tenn. Code Ann. § 37-1-701, et. Seq.
[81] Tenn. Code Ann. § 37-1-702(b).
[82] Tenn. Code Ann. § 37-1-703.
[83] Tenn. Code Ann. § 37-1-702(d)(4).

A Valid Court Order is significant because it expands the options available to the juvenile court regarding pre-adjudication detention of a juvenile and ultimate disposition of an unruly matter.

A Valid Court Order is an order of a juvenile court which meets the following criteria: the juvenile must be before a court of competent jurisdiction pursuant to a properly issued charging instrument, the Order must regulate future conduct of the juvenile, the juvenile must have been accorded due process prior to the Order's issuance, the court must have conducted a hearing and issued the Order based upon the facts and following proper legal procedures, the juvenile must have received adequate and fair warning, in writing, of the consequences of a breach of the Order at the time of its issuance, and such must be reflected in the court's minutes.

The case of *State v. Rodgers*[84] points out the necessity of a court order to comply fully with the Valid Court Order requirements. The juvenile judge issued an oral directive from the bench placing the juvenile on house arrest, which was never reduced to a written order. A few days later, the juvenile was charged with a violation of this order and was committed to a Youth Development Center. In ruling upon the juvenile's post-commitment relief request, the Tennessee Supreme Court held that the order was not a valid court order under the Appendix to the Tennessee Rules of Juvenile Procedure due to the fact that it had not been reduced to writing:

> Here, the juvenile court's oral directive regarding house arrest did not satisfy these requirements. Because the verbal order of 'house arrest' was never reduced to writing yet served as the single basis for the probation violation, the commitment to the Department of Children's Services was invalid. A juvenile must receive adequate and fair warning, in writing, of the consequences of violating an order of the court.
>
> The statutory requirements for the entry of a valid court order are mandatory. (citations omitted) The juvenile court '*must* have entered a judgment and/or remedy in accord with established legal principles based on the facts after a hearing which observes proper procedures.' (citations omitted) The juvenile '*must* have received adequate and fair warning of the consequences of violation of the order at the time it was issued and such warning *must* be provided to the juvenile ... in writing and be reflected in the court record and proceedings.' (citations omitted) (emphasis in original) These provisions provide no authority for the substitution of an oral directive for a valid court order.[85]

The Attorney General has opined that a juvenile adjudicated guilty of truancy, an unruly offense, may be ordered to comply with the compulsory school attendance laws but the order may not otherwise regulate the future conduct of the child.[86]

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[84] 235 S.W.3d 92 (Tenn. 2007)
[85] *State v. Rogers*, 235 S.W.3d at 96.
[86] *See*, Op. Tenn. Atty. Gen. 08-27 (February 15, 2008).

The author would point out that the usefulness of Tennessee Attorney General Opinion 08-27 regard to analysis of Valid Court Orders is suspect. It appears that the General is unfamiliar with the language contained in the Appendix to the Rules of Juvenile Procedure which state - "The order must be one which regulates future conduct of the juvenile." As may be recalled, this requirement is necessary for a court order to qualify as a Valid Court Order. The Opinion contains the following comment in footnote 6: "Although the request uses the phrase "Order Regulating Conduct" as if it were a formally recognized legal term under the Tennessee Code and/or the Rules of Juvenile Procedure, our research indicates that no such term is used in Tennessee law."

Similar safeguards are applicable in determining whether the juvenile has violated the Valid Court Order. Prior to and during the violation hearing the juvenile must be accorded appropriate due process rights, including the right to a hearing, the right to written notice of the charges served upon the juvenile a reasonable time prior to the hearing, the right to an explanation of the charges and the consequences of the hearing, the right to counsel including if indigent, the right to confront witnesses, the right to present witnesses, the right to a transcript or recording of the hearing, and the right to appeal.[87]

An accusation that a juvenile has violated a Valid Court Order allows for maximum pre-adjudication detention of 24 hours (exclusive of nonjudicial days), unless a probable cause determination has been made, then for a maximum of 72 hours (exclusive of nonjudicial days), at which time an adjudicatory hearing must be held.[88] A determination that a child has violated a Valid Court Order, even a child alleged to be unruly, allows the court to place the child on probation with the Department of Children's Services (DCS) or into DCS custody.[89]

Prior to placing the child into DCS custody, however, the court must determine that such placement is "the least drastic or restrictive alternative."[90] Further, the court must refer the child to the Department's juvenile family crisis intervention program to obtain a certification that such placement is the least drastic alternative.[91]

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[87] *See*, Op. Tenn. Atty. Gen. 08-27 (February 15, 2008).

[88] *Id.*, ("A juvenile accused of violating a valid court order may be held in secure detention beyond the 24-hour grace period permitted for a noncriminal juvenile offender under OJJDP monitoring policy...."). *See also,* Tenn. Code Ann. § 37-1-114(b) ("Children alleged to be unruly shall not be detained for more than twenty-four (24) hours, excluding nonjudicial days unless there has been a detention hearing and a judicial determination that there is probable cause to believe the child has violated a valid court order, and in no event shall such a child be detained for more than seventy-two (72) hours exclusive of nonjudicial days prior to an adjudicatory hearing."); Tn. R. Juv. P. 17(c) ("Cases of children in detention alleged to be unruly and in violation of a valid court order shall be adjudicated within seventy-two (72) hours exclusive of nonjudicial days of the time detained.").

[89] Tenn. Code Ann. § 37-1-132(a).

[90] Tenn. Code Ann. § 37-1-132 (b)(1).

[91] Tenn. Code Ann. § 37-1-132 (b)(2).

The court may, after the adjudicatory hearing, continue to detain the child under the Valid Court Order regulations. There appears to be no time limitation to this dispositional alternative.

This provision regarding Valid Court Orders is subject, from time to time, to legislative attempts to remove it as a detention and disposition option available to the juvenile court. The practitioner and judge should be aware that this area of the law may be subject to change or even repeal.