IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRIAN A., et al.	)	
	)	Civil Action No. 3-00-0445
v.	)	Judge Campbell
	)	Magistrate Brown
PHIL BREDESEN, et al.	)	

AMICUS BRIEF
OF THE TENNESSEE COUNCIL OF JUVENILE AND FAMILY COURT JUDGES
IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

The Tennessee Council of Juvenile and Family Court Judges (the "TCJFCJ" or the "Council"), respectfully submits this amicus brief in support of Plaintiffs' motion, pursuant to the July 2001 *Brian A.* Settlement Agreement and the January 2009 Modified *Brian A.* Settlement Agreement, and pursuant to Fed. R. Civ. P. 65 and Local Rule 65.01, for a temporary restraining order or, in the alternative, a preliminary injunction, enjoining implementation of Section 30 of Public Chapter No. 531, which amended Tennessee Code Annotated § 37-2-205 by adding a new subsection "f" ("Plaintiffs' Preliminary Injunction Motion"; Docket Entry No. 297).

INTRODUCTION

The TCJFCJ is the official organization of Tennessee judges having juvenile court jurisdiction. Created by legislation in 1982, and existing informally for over forty years before that, the Council presents the collective, independent voice and perspective of the judges who, every day, decide whether to commit children to the custody of the Tennessee Department of Children's Services ("DCS") as dependent and neglected, unruly or delinquent.

The cases of children and families brought before juvenile court judges in this state present issues of profound seriousness and ramifications. The most basic notions of due process and equal protection mandate that every commitment decision be made solely on the facts of each case, and that children not be treated differently based on factors unrelated to their cases. Yet both the intended and actual result of T.C.A. § 37-2-205(f) (the "Over-Commitment Law") is to impermissibly intrude on the independence of Tennessee's juvenile courts, and to deny the equal protection of the law to children appearing before those courts.

The perspective of Tennessee's juvenile court judges is timely, useful and necessary to the administration of justice in this Court's determination of Plaintiffs' Preliminary Injunction Motion. For the reasons set forth herein, the requested injunction should be granted.

FACTS CONCERNING THE TCJFCJ

The TCJFCJ was created by the Tennessee General Assembly through legislation that became effective July 1, 1982. The TCJFCJ is the official organization of Tennessee judges having juvenile court jurisdiction. (T.C.A. § 37-1-501). For over forty years prior to enactment of that legislation, the Council existed as an informal association of juvenile court judges. Throughout its history the Council has represented juvenile court judges and court staff, providing an independent voice with regard to issues affecting children, youth, families and communities.

The Council meets semi-annually for consideration of matters pertaining to the discharge of the official duties and obligations of its members. To ensure the efficient and prompt administration of justice in the juvenile courts of Tennessee, the Council promotes best court

practices and a better understanding of the problems and needs of the dependent and neglected, unruly and delinquent children coming before the courts. The Council strives to maximize and enhance the courts' resources and legal options in meeting the needs of children and families and providing protection to the community.

The Executive Committee, elected by the membership of the TCJFCJ, is the governing board of the Council and consists of the president, vice president, secretary/treasurer, immediate past president, seven directors, any Tennessee judge serving as an officer of the National Council of Juvenile and Family Court Judges, and a judge selected to represent the TCJFCJ on the Tennessee Judicial Council. The Constitution of the TCJFCJ provides that any judge, judge-elect, magistrate, judge pro tem, or former judge of any court exercising juvenile jurisdiction is eligible for active membership.

The TCJFCJ, as of April 2005, became a part of the Tennessee Supreme Court's Administrative Office of the Courts. The TCJFCJ publishes annual statistical reports on the activities and workloads of the state's juvenile courts, using data provided to the TCJFCJ by the courts and the clerks of the courts.

The TCJFCJ has been charged by the Tennessee General Assembly to "actively pursue the ends and purposes" described above. (*See* T.C.A. § 37-1-504 (b)). This Memorandum of Law is submitted in this matter in furtherance of that legislative encouragement.

ARGUMENT

THE OVER-COMMITMENT LAW WILL SUBSTANTIALLY AFFECT THE CAPACITY OF TENNESSEE JUVENILE COURT JUDGES TO MAKE DECISIONS BASED SOLELY ON THE FACTS OF THE CASES BEFORE THEM

The 2001 *Brian A.* Settlement Agreement and the January 2009 Modified *Brian A.* Settlement Agreement contain 14 "Principles of the *Brian A.* Settlement Agreement." Among these is the following:

> [C]hild welfare decision-makers must have the professional capacity to make determinations as to when making efforts to preserve the biological family, or leaving the child with that family, is neither safe for the child nor likely to lead to an appropriate result for the child.

January 2009 Modified *Brian A.* Settlement Agreement, at § I(A)(2).

This provision of the *Brian A.* consent decree has been in place to prevent DCS from taking actions that interfere with a judge's capacity to make independent case-by-case decisions regarding removal and commitment since the consent decree was first approved and entered by this Court in 2001. The provision is, not surprisingly, entirely consistent with Tennessee law as it existed prior to the enactment of T.C.A. § 37-2-205(f) and DCS's implementation of the Over-Commitment Law. Tennessee law for many years has provided that the juvenile court may make various dispositions for children found to be dependent or neglected (T.C.A. § 37-1-130) or delinquent (T.C.A. § 37-1-131). One disposition option is to "transfer temporary legal custody to . . . the department of children's services." For a child found to be dependent or neglected, the court is required to make the disposition "best suited to the protection and physical, mental and moral welfare of the child." For a child found to be delinquent, the court is required to make the disposition "best suited to the child's treatment, rehabilitation and welfare." These are clearly

case-by-case determinations to be made by the court. If state custody can safely be avoided, it should be. (*See, e.g.,* T.C.A. § 37-1-166 (requiring a judge, before ordering commitment to custody, to explicitly find that reasonable efforts have been made to avoid the child's removal and preserve the family, and that "there is no less drastic alternative to removal")). However, the well-being of the child, not the financial impact on the state or the county, should guide this decision. (*See, e.g., id.* at (d)(3) (requiring a judge to find that "continuation of the child's custody with the parent or legal guardian is contrary to the best interests of the child")).

Prior to the enactment and implementation of T.C.A. § 37-2-205(f), no limits or financial consequences to a Tennessee county were set which affected the number of children that could receive a certain disposition for which the court determined the child was "best suited." The Over-Commitment Law obviously has the potential to influence a judge's professional determination whether leaving a child with a family will lead to an inappropriate result for the child. Now, judges will inevitably be influenced by the potential financial consequences to the county in which they hold court relative to every custody determination before the court. As a result, juvenile court judges will be substantially hampered in their capacity to make decisions based solely on the facts of the cases before them.

T.C.A. § 37-2-205(f) IMPERMISSIBLY INTRUDES ON THE JUDICIAL INDEPENDENCE OF TENNESSEE'S JUVENILE COURTS

In a broader sense, T.C.A. § 37-2-205(f) is an unauthorized intrusion by the executive and legislative branches of the state government into the decision making process of the judiciary and impermissibly erodes judicial independence.

> A truly independent judiciary is one that issues decisions and makes judgments which are respected and enforced by the legislative and executive branches; that

> receives an adequate appropriation from Congress; and that is not compromised by politically inspired attempts to undermine its impartiality . . . . Judicial independence includes the independence of an individual judge as well as that of the judiciary as a branch of government. Individual independence (otherwise known as decisional independence) is both substantive, in that it allows judges to perform the judicial function subject to no authority but the law, and personal, in the sense that it guarantees judges job tenure, adequate compensation and security.

An Independent Judiciary: Report of the Commission on Separation of Powers and Judicial Independence, at ii-iii (Chicago: American Bar Association, 1997).

> Judicial independence is the freedom we give judges to act as principled decision-makers. The independence is intended to allow judges to consider the facts and the law of each case with an open mind and unbiased judgment. When truly independent, judges are not influenced by personal interests or relationships, the identity or status of the parties to a case, or external economic or political pressures.

Brennan Center for Justice Resources: Questions and Answers about Judicial Independence. (Brennan Center for Justice, 2001).

The actual impact of the Over-Commitment Law is to create an environment where parties and observers have a legitimate basis to question the impartiality of every juvenile judge in this state. Every judge is paid by the county in which he or she serves and every juvenile court budget is established by a county legislative body. While the commitment of a child to state custody is certainly a drastic alternative, the need for commitment is to be decided by a neutral arbiter who is well-versed in the juvenile law, free from outside influence. Through the Over-Commitment Law the state legislature, at the request of DCS, has created the potential for financial penalties to counties that commit more children than other counties across the state, without regard to intrinsic or extrinsic factors that may necessitate such commitment.

This penalty on counties will inevitably lead to public criticism of the local juvenile judge for obligating scarce county resources. Already, in some counties, juvenile judges are required to provide frequently updated information to their county commissions regarding the number of children committed and the proximity of the "cap" number. It is likely that juvenile judges will be requested to appear before their local legislative bodies and will be asked to justify decisions made in cases the details of which are confidential. No judge should be required to publicly justify decisions made on the bench, especially in cases where the underlying reasons for such decisions must, by law, remain confidential.

T.C.A. § 37-2-205(f) uses terms that cast aspersions on judges who exceed the limit set by the legislature, such as "over-commitment" and "underlying problems." These terms infer that the judge has done something wrong if the limit is exceeded, even if DCS recommended commitment in bringing most of the commitment petitions, and even if the judge's commitment decisions were never appealed. When a judge makes these "wrong" decisions, the judge's county will be punished by being billed by the state. T.C.A. § 37-2-205(f) assumes that in these situations the judge is at fault.

Neither the legislative nor the executive branch may intrude into the disposition of court cases without running afoul of the separation of powers doctrine. However, this attempt by the legislature as a whole to place pressure on judges to make a certain decision does just that, and is also no less inappropriate than for an individual member of the legislature to tell a judge to decide a case a certain way.

The executive branch of government has also joined with the legislative branch in attempting to pressure judges into making the decision it desires. In response to the mandates of T.C.A. § 37-2-205(f), on September 9, 2009 the Commissioner of DCS – an executive agency –

sent a letter to the juvenile court judges across the State of Tennessee. In this letter the Commissioner stated that DCS wants "to ensure that each court reaches the best decision for each child, and that children enter DCS custody only when that is the least drastic alternative to ensure the child's safety and well-being." The letter makes clear that the executive branch believes that its role is to guide judicial decision-making in a particular way. This belief is entirely inappropriate.

A more overt invasion of judicial independence is difficult to envision.

T.C.A. § 37-2-205(f) DENIES EQUAL PROTECTION OF THE LAW TO TENNESSEE'S CHILDREN, INCLUDING MEMBERS OF THE *BRIAN A.* CLASS

In several ways, T.C.A. § 37-2-205(f) will result in a denial of the equal protection of the law to children coming before juvenile courts in Tennessee. Within a particular county, children who appear before the court at a time when the "commitment cap" has not been exceeded will be the beneficiaries of dispositions that are not influenced by the threat of financial penalties to the county. However, children who come before the court near or after the time when the commitment cap has been reached in that same county will not be so fortunate – dispositions in these cases will include the consideration of the financial consequences to the county of commitment to state custody. Thus, even if commitment to state custody is the best disposition for a particular child, the mere timing of the case will affect, unconsciously or otherwise, the judge's commitment decision.

The same denial of equal protection will occur at the county level throughout the state. Children in counties that are at or near the commitment cap will be treated one way; those in counties comfortably below the cap will be treated another.

It is anticipated that Defendants will allege that T.C.A. § 37-2-205(f) is merely a budget measure necessitated by the dire condition of the state's economy. However, such an assertion lacks credibility when the statute is closely reviewed. The statute arbitrarily treats dependent and neglected and delinquent children differently (and fails even to mention children adjudicated as unruly). Commitment rates for the two groups are determined separately. By way of example, as of June 30, 2009, Hardeman County had committed twenty children who were adjudicated dependent and neglected and/or unruly.[1] The state average is purported to be twenty-six children for a county of the same population as Hardeman County. Under T.C.A. § 37-2-205(f) Hardeman County can commit up to seventy-eight dependent and neglected children – three times the state average – before the county would be billed. With regard to children adjudicated delinquent, the state average is nine, giving Hardeman County a "cap" of twenty-seven delinquent commitments. Hardeman County has already committed thirty children as delinquents in this fiscal year, and has therefore exceeded its delinquent cap by three children.

Combined, Hardeman County could commit one hundred and five children before the judge would be considered to have "overcommitted". In accordance with the statute's purpose, if DCS has budgeted for one hundred and five children to be committed from Hardeman County, why should Hardeman County be charged for the three "excess" delinquent children when the DCS budget would allow for payment for those three children if they had instead been committed to state custody as dependent and neglected or unruly?

The juvenile courts of this state cannot be expected to retain public confidence in their impartial disposition of cases if they are forced to labor under such an arbitrary and illogical

[1] The department's most recent calculations of the "caps" include children adjudicated as unruly in the category as children determined to be dependent and neglected, although P.C. 531 makes no reference at all to unruly children.

statute. A person might reasonably assume that a judge would begin to commit children under the category that is most comfortably below the "cap." This perception, regardless of its accuracy, will inevitably erode confidence in the integrity of the judicial process.

CONCLUSION

Based on the foregoing, as well as the arguments made on behalf of the Plaintiffs in their Preliminary Injunction Motion (Docket Entry No. 297), the TCJFCJ respectfully requests the issuance of a preliminary injunction by this honorable Court, and a declaration that the subject statute is void and unenforceable as a matter of law.

Dated: October __, 2009

Respectfully submitted,