IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 15, 2002 Session

C.D.C., ET AL. v. C.E.D.

Appeal from the Chancery Court for Hamblen County
No. 99-46 Thomas R. Frierson II, Chancellor

FILED MAY 6, 2002

No. E2001-02086-COA-R3-CV

This is an adoption case in which the petitioners seek to terminate parental rights. N.M.C. ("Mother"), the biological mother and custodian of the two affected children, joined her husband, C.D.C. ("Stepfather"), in petitioning the trial court to terminate the parental rights of C.E.D. ("Father") – the children's biological father – as an adjunct to Stepfather's request to adopt the children. The trial court refused to terminate Father's parental rights, finding that the petitioners had failed to prove the asserted grounds for termination by clear and convincing evidence. Mother and Stepfather appeal, arguing that the evidence preponderates against the trial court's findings. We disagree. Accordingly, we affirm the trial court's judgment.[1]

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and D. MICHAEL SWINEY, J., joined.

Douglas R. Beier, Morristown, Tennessee, for the appellants, C.D.C. and N.M.C.

Jonathan R. Perry, Morristown, Tennessee, for the appellee, C.E.D.

OPINION

I. *Background*

Mother and Father were divorced in 1996. Mother was awarded the sole custody of the parties' children, who were born in 1991 and 1993 respectively, and Father was granted supervised

[1] Oral argument was heard in this case on April 15, 2002, at Knoxville Catholic High School, as part of this Court's C.A.S.E. (**C**ourt of Appeals **A**ffecting **S**tudent **E**ducation) project.

visitation. Because Father was not working at the time of the divorce, the trial court reserved the issue of child support for a future determination.

In 1997, Mother married Stepfather. Two years later, Mother and Stepfather filed the subject petition seeking to terminate Father's parental rights so Stepfather could adopt the children.[2] Mother and Stepfather claimed that Father had abandoned the children by willfully failing to pay child support and by willfully failing to visit the children. Following a bench trial, the court ruled that Mother and Stepfather had failed to show by clear and convincing evidence that Father had abandoned the children. Accordingly, he refused to terminate Father's parental rights.

II. *Standard of Review*

In this non-jury case, our review is *de novo* upon the record of the proceedings below; but the record comes to us with a presumption of correctness that we must honor "unless the preponderance of the evidence is otherwise." T.R.A.P. 13(d). The trial court's conclusions of law, however, are reviewed *de novo* with no such presumption. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993).

III. *Law*

A parent has a fundamental right to the care, custody and control of his or her child. ***Stanley v. Illinois***, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). However, it is clear that this right is not absolute; it may be terminated by a court if there is clear and convincing evidence justifying such termination under the applicable statute. ***Santosky v. Kramer***, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Clear and convincing evidence is evidence which "eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence." ***O'Daniel v. Messier***, 905 S.W.2d 182, 188 (Tenn. Ct. App.1995).

The issues raised in the pleadings, and the trial court's findings, cause us to focus on the following statutory provisions:

T.C.A. § 36-1-113 (2001)

> (a) The chancery and circuit courts shall have concurrent jurisdiction with the juvenile court to terminate parental or guardianship rights to a child in a separate proceeding, or as a part of the adoption proceeding by utilizing any grounds for termination of parental or guardianship rights permitted in this part or in title 37, chapter 1, part 1 and title 37, chapter 2, part 4.

---

[2] Father instituted a separate action, seeking specific visitation rights and the setting of his child support obligation. The trial court designated Father's claim as a companion case to that of the termination case and ordered that the two claims be adjudicated together. The cases were apparently severed following the entry of judgment in the adoption case.

* * *

(c) Termination of parental or guardianship rights must be based upon:

(1) A finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and

(2) That termination of the parent's or guardian's rights is in the best interests of the child.

* * *

(g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:

(1) Abandonment by the parent or guardian, as defined in [T.C.A.] § 36-1-102, has occurred;

* * *

T.C.A. § 36-1-102 (2001)

As used in this part, unless the context otherwise requires:

(1)(A) *"Abandonment" means, for purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, that:*

(i) *For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or make reasonable payments toward the support of the child;*

* * *

(B) For purposes of this subdivision (1), "token support" means that the support, under the circumstances of the individual case, is insignificant given the parent's means;

> (C) For purposes of this subdivision (1), "token visitation" means that the visitation, under the circumstances of the individual case, constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child;
>
> (D) *For purposes of this subdivision (1), "willfully failed to support" or "willfully failed to make reasonable payments toward such child's support" means that, for a period of four (4) consecutive months, no monetary support was paid or that the amount of support paid is token support;*
>
> (E) *For purposes of this subdivision (1), "willfully failed to visit" means the willful failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation*;

(Emphasis added).

Thus, we must decide if the evidence in the record before us preponderates against the trial court's conclusion that the evidence fails to show, in a clear and convincing manner, that Father has "abandoned" his children by willfully failing to visit them and by willfully failing to provide them with monetary support. We address first the petitioners' contention that Father "abandoned" his children by willfully failing to visit them. Before doing so, we examine the trial court's rationale for refusing to terminate Father's parental rights.

IV. *Findings of the Trial Court*

In the course of its opinion, the trial court stated the following:

> Based upon the testimony of the parties and witnesses and the evidence presented, the Court determines that [Father]'s failure to pay child support for the benefit of his children during the relevant period does not demonstrate a settled purpose to forego all parental duties and to relinquish all parental claims. No Order of the Court established the amount of his child support obligation and [Mother] expressed to [Father] her desire that she not receive support from him. Accordingly, the Court concludes that [Mother and Stepfather] have failed to show by clear and convincing evidence that [Father] has abandoned the minor children based upon his failure to pay child support.
>
> With reference to [Father]'s failure to visit the children during this relevant period, the evidence supports a finding that he did not

> exercise visitation during the four months preceding the filing of the petition. Since the divorce, substantial animosity has grown between [Father] and [Mother]. Though [Mother] has not denied visitation, [Father's] attempts to establish dates for same have been met with minimal effort by [Mother] to encourage and facilitate a close and continuing, non-custodial parental relationship.
>
> Based upon the evidence presented, the Court specifically finds that [Mother and Stepfather] have failed to show by clear and convincing evidence that [Father's] failure to visit with the children during the four months preceding the petition for adoption constitutes abandonment as defined by T.C.A. 36-1-102. Such failure to visit has not been shown to be willful or motivated by conscious disregard or indifference to his parental responsibilities. Instead, the failure to visit has been caused by geographic distance, the parties' acrimony and the oldest child lacking a desire for a meaningful relationship with his father. Accordingly, the Court concludes that [Father] has not abandoned the minor children by virtue of his failure to visit with them.

(Footnote omitted).

V. *Discussion*

A. Proof of Failure to Visit

At the time of the parties' divorce, Father was granted reasonable visitation with the children, which was to be supervised by Mother or her parents.[3] However, after the divorce, Father moved to Virginia. His residence was approximately seven hours away from Mother and the children. As a result, Father testified that it was difficult for him to exercise his visitation rights with the children with any regularity. The testimony reflects that Father visited the children on 11 or 12 occasions from the time of the divorce until July, 1998; these visitations generally occurred around holidays or the children's birthdays.

Father testified that in the late summer of 1998, he made an attempt to establish a time for visitation with the children, but he was unable to work out a convenient time with Mother. When asked whether he believed the children were too busy or whether Mother was attempting to keep the children from seeing him, Father stated:

---

[3] There was an assertion at trial that the trial court's order had erroneously stated that visitation would be supervised by Mother, or *Mother's* parents. Mother testified that the order was supposed to provide that Father's visitation would be supervised by Mother or *Father's* parents. The fact that most of Father's visitation rights were exercised in the presence of his parents is consistent with that assertion.

> I thought it was a mix of both. I know that [Mother and Stepfather] keep [the children] active in extracurricular activities. But on the other part, I thought when I was talking to [Mother], it was always an excuse as to a reason why I would not be able to see [the children]. There was never a compromise – when I would make a suggestion for a time, there was a reason why they could not or would not be able to for a visitation, but there was never, well, the following week is good. There was never any open-ended, you know, to set up something else for visitation. It was always a no.

In addition, Father stated that he was unable to visit the children over the Christmas holidays, due to the fact that he did not receive enough advance notice of the children's availability for visitation to enable him to submit a timely request to take leave from work. Father did say, however, that he sent Christmas gifts to the children via his parents, who were able to travel to Tennessee to see them over the holidays.

The trial testimony further reveals that Father made several attempts to telephone the children in the fall of 1998, but as Mother and Stepfather did not have an answering machine, he was unable to leave a message for the children. Father testified that he did speak with Mother on at least two occasions in November, 1998, regarding a birthday gift for the youngest child. Mother told Father that the gift he had purchased and was intending to mail was inappropriate for the child.[4] Father testified that he then returned the original gift and purchased other gifts for the child. Father stated that after he described the new gifts to Mother, she told him that the child did not need anything; consequently, Father did not send the new gifts.

With respect to the parties' oldest child, Mother repeatedly emphasized in her testimony that the child did not want to have a relationship with Father, and stated that when Father would make telephone calls to the children, the oldest child would not talk to Father.

We are persuaded that the evidence before us does not preponderate against the trial court's finding that Mother and Stepfather failed to prove, by clear and convincing evidence, that Father abandoned the children by willfully failing to visit. It is uncontroverted that in the four months preceding the filing of the petition to terminate Father's parental rights, Father did not visit the children. However, we find that the evidence does not preponderate against the trial court's conclusion that his failure to visit was not shown to be willful by clear and convincing evidence, as is required by the statutory scheme. It is clear from our review of the trial testimony that the relationship between Mother and Father was, at best, strained. The evidence supports the trial court's finding that, while Mother never prevented Father from exercising his visitation rights, Mother did very little to accommodate Father's efforts to establish visitation. Furthermore, the fact

[4] The gift was a cartoon movie, "Small Soldiers," that Father had never seen. Mother was familiar with the film and informed Father that it contained some violence and bad language that would not be appropriate for the child.

that Mother and Father lived seven hours apart, coupled with the oldest child's resistance to maintaining a relationship with Father, certainly hindered Father's visitation efforts.

Based upon all of this evidence, we find that the evidence does not preponderate against the trial court's conclusion that it was not demonstrated, by clear and convincing evidence, that Father's failure to visit the children was willful or, in the language of the trial court, "motivated by conscious disregard or indifference to his parental responsibilities," and that, therefore, this failure to visit did not constitute abandonment of the children as defined in T.C.A. § 36-1-102(1)(E).

B. Proof of Failure to Support

T.C.A. § 36-1-102(1)(A)(i) defines "abandonment" to include "willfully failed to support or make reasonable payments toward the support of the child." ***Id***. In subsection (1)(D) of the statute, this latter concept is defined as follows:

> For purposes of this subdivision (1), "willfully failed to support" or "willfully failed to make reasonable payments toward such child's support" means that, for a period of four (4) consecutive months, no monetary support was paid or that the amount of support paid is token support;

The constitutionality of the aforesaid definition was challenged in the case of ***In re Swanson***, 2 S.W.3d 180 (Tenn. 1999). In that case, the biological father "contend[ed] that the statutory definition [as set forth in T.C.A. § 36-1-102(1)(D)] of 'willfully failed to support' and 'willfully failed to make reasonable payments toward such child's support' is unconstitutional because the definition contains no element of intent with regard to failure to support." The Tennessee Supreme Court agreed and opined as follows:

> Since the statutory definitions of "willfully failed to support" and "willfully failed to make reasonable payment toward such child's support" in effect create an irrebuttable presumption that the failure to provide monetary support for the four months preceding the petition to terminate parental rights constitutes abandonment, irrespective of whether that failure was intentional, we hold that those definitions are unconstitutional. The statutory definitions simply do not allow for the type of individualized decision-making which must take place when a fundamental constitutional right is at stake. Therefore, they impermissibly infringe upon a parent's right to the care and custody of his or her children.

In re Swanson, 2 S.W.3d 180, 188 (Tenn. 1999).

Having found the statutory definition of "willfully failed to support" and "willfully failed to make reasonable payments toward such child's support" to be unconstitutional, the Supreme Court held that "the definition that was in effect under prior law shall be applied." ***Id***. In a footnote, the Supreme Court stated that "[w]e wish to make it clear that the definition previously in effect was the definition as it existed in 1994." ***Id***. at 189, n.14.

In 1994, there were different standards of "abandonment" depending upon whether the case was a proceeding to terminate parental rights unaccompanied by an adoption request or was an adoption proceeding. The Supreme Court in ***Swanson*** articulated the 1994 standard applicable to adoption cases – the standard that is once again in effect following the holding in ***Swanson***:

> The courts of this state also articulated a standard that was used to determine "abandonment" in adoption cases. In 1959, the Court of Appeals held that trial courts were not bound by the statutory definition of "abandonment" when making such a determination in an adoption proceeding. The Court held that "'[a]bandonment imports any conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child....'" ***Ex parte Wolfenden***, 49 Tenn.App. 1, 5, 349 S.W.2d 713, 714 (1959) (quoting 1 Am.Jur. *Adoption of Children* § 42). This Court adopted an identical standard in ***In re Adoption of Bowling***, 631 S.W.2d 386, 389 (Tenn. 1982).
>
> To determine whether the parent's conduct had evinced "a settled purpose to forego all parental duties and to relinquish all parental claims to the child," the courts developed several factors: (1) the parent's ability to support the child; (2) the amount of support provided; (3) the extent and nature of the contact between the parent and the child; (4) the frequency of gifts; (5) whether the parent voluntarily relinquished custody of the child; (6) the length of time the child has been separated from the parent; and (7) the home environment and conduct of the parent prior to removal. *See* ***O'Daniel v. Messier***, 905 S.W.2d 182, 187 (Tenn.Ct.App. 1995).

Id. at 184. Since the instant case is an adoption case, we will apply the standard set forth in the above quote from ***Swanson***.

When the divorce of Mother and Father was finalized in the instant case, the trial court reserved the issue of child support, ostensibly due to the fact that Father was not employed at the time of the divorce and had no means with which to support the children. For approximately two years, Father's parents mailed checks to Mother of either $350 per month or $500 per month, for the purpose of supporting the children, although they obviously were under no legal obligation to do so.

In November, 1997, the children's paternal grandmother contacted Mother, informing her that Father had requested that she stop sending the monthly checks. Mother testified at trial that "it was fine with me for her not to send any money." When questioned about Father's decision to ask his parents to stop sending money to Mother, Father testified that Mother "told me directly that she didn't need my money, she didn't need my parents' money, that she – that basically she was able to provide a home for [the children] without me."

After Mother and Stepfather filed their petition to adopt, Father mailed Mother two child support payments – a $350 money order and a $500 cashier's check. Mother did not cash these payments.

As the trial court stated, there was no court order entered establishing the amount of child support to be paid by Father,[5] and Mother clearly indicated to Father and his parents that she did not want to receive any child support from them. There is evidence in this record that tends to support a finding that Father wanted to maintain a role in the lives of his children. While he can certainly be criticized for not providing more support and for not asserting his parental rights in a more forceful manner, his conduct must be viewed in the context of Mother's apparent desire to keep him from playing an active role in the children's lives. The law requires "clear and convincing" evidence of abandonment. When Father's conduct is measured against this quantum of proof standard, we cannot say that the evidence preponderates against the trial court's determination that the proof falls short of "evinc[ing] a settled purpose [on the part of Father] to forego all parental duties and relinquish all parental claims to the child[ren]." *See* ***Ex parte Wolfenden***, 349 S.W.2d at 714. The law requires that "serious or substantial doubt" as to whether a parent has abandoned his or her child must be resolved in favor of the parent. *See* ***O'Daniel***, 905 S.W.2d at 188.

VI. *Conclusion*

The judgment of the trial court is affirmed. This case is remanded for collection of costs assessed below, pursuant to applicable law. Costs on appeal are taxed to the appellants, C.D.C. and N.M.C.

CHARLES D. SUSANO, JR., JUDGE

[5] We do not mean to suggest that the lack of a court order would, in all cases, relieve an obligor of his or her duty to support minor children. However, we believe it is one factor in the instant case that must be taken into consideration in determining whether Father's conduct "evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child." *See* ***Ex parte Wolfenden***, 349 S.W.2d at 714.