IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 10, 2003 Session

STATE OF TENNESSEE, DEPARTMENT OF CHILDREN'S SERVICES v. CARAH PAIGE JONES DEMARR

Appeal from the Juvenile Court for Lawrence County
No. 050696 Lee England, Judge

No. M2002-02603-COA-R3-JV - Filed August 13, 2003

This case involves termination of parental rights of a mother and custody of the child. The child at issue was found wandering away from his mother's house on March 3, 1999, and was taken into DCS custody, after which the matter languished for over a year without appropriate administration by DCS and with the mother having very little contact with her child. The mother eventually moved out of state and requested that her child be transferred to that state. The case was not transferred, and the mother continued to receive very little cooperation from DCS and have sparse communication with her child. She was, however, attempting to fulfill the requirements of the DCS prepared Permanency Plan. Her parental rights were terminated by the Juvenile Court for Lawrence County in December 2001 for abandonment by willful failure to visit and willful failure to support the child for four months prior to the filing of the termination petition. We reverse the trial court's finding that the mother's failure to visit and failure to support was willful.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Reversed and Remanded

WILLIAM B. CAIN, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, J., and CAROL J. McCOY, SP. J., joined.

David L. Allen and C. Wayne Tomerlin, Lawrenceburg, Tennessee, for the appellant, Carah Paige Jones Demarr.

Paul G. Summers, Attorney General & Reporter and Elizabeth C. Driver, Assistant Attorney General, for the appellee, State of Tennessee, Department of Children's Services.

OPINION

I. HISTORY

In January of 1999, Appellant, Carah Paige Jones Demarr, left her "husband"[1] in Texas and moved to Tennessee to escape an abusive relationship. When she arrived in Tennessee with her three year old child, K. (the child at issue in this matter), she was pregnant and very close to giving birth. She moved in with her aunt where she resided for approximately five weeks.

On February 17, 1999, Carah gave birth to a daughter who has resided continually with her from birth. After her daughter's birth, Carah experienced complications which she described as a "sack infection." She testified that she was extremely sick and nauseous for several weeks after the delivery.

Around the first of March, she moved into an apartment with her new baby and three year old son. Carah testified that when they moved into the apartment the lock on the exterior door was broken. On March 3, 1999, while she was sick, K. got out of the house and was discovered wandering several blocks away, close to a busy highway. After the child was reported walking near the road, he was taken into police custody; an officer then proceeded to Carah's apartment. Prior to being contacted by the officer, Carah discovered that K. was missing and called to report his disappearance to the police. When the officer arrived at her home, she did not know where K. was. She was subsequently charged with neglect, and K. was turned over to the Department of Children's Services (DCS).

The following day, March 4, 1999, DCS filed its Affidavit of Reasonable Efforts and Petition for Temporary Custody. A Protective Custody Order was issued that same day. At the termination hearing now on appeal, Carah's attorney chose to stipulate to these custody documents. No further evidence was presented by DCS with regard to any investigation into the incident prompting K.'s removal, and DCS offered no testimony or evidence to refute Carah's assertions regarding her post-delivery illness and the conditions under which K. escaped the apartment.

Administratively, it appears from the record that DCS did nothing further in Carah's case until March of 2000, when a Permanency Plan was finally put into place, and the record and testimony reveal little, if anything, that happened between the time the child was taken on March 3, 1999 and December of 1999, when a DCS worker began to take a special interest in Carah's situation. A few phone calls from Carah were recorded prior to December 1999, but the record is devoid of any evidence that anyone at DCS had much direct involvement in her case from March of 1999 until October 16, 1999, when Lisa Morgan became the "team coordinator" for Lawrence County. However, even after Ms. Morgan began work in October, DCS appears to have made no attempt to assist Carah in any way. There is no evidence in the record that anyone informed her of how or when she could regain custody of her child, nor were any services offered to assist her in gaining custody. K. was placed in a foster home fifty miles away from Carah and, under DCS rules,

[1] Although Carah refers to Kevin Demarr as her "husband," she stated that they were never legally married and that she was his common law wife. However, the record reflects no marriage, common law or otherwise, between Carah and Kevin Demarr.

Carah was unable to contact K. directly at his foster home. Even phone calls must be made through a DCS office. She had no reliable car, no assistance, a new baby, and at times, no phone.

In November of 1999, Debbie Belew became Carah's case manager. Neither the record nor Ms. Belew's testimony demonstrate any effort on Ms. Belew's part to assist Carah with obtaining public services, daycare, or housing. Another case worker, Shawn Cline, even testified at trial that, as there was no permanency plan, there would have been no way for Carah to regain custody of her son until such time as a permanency plan had been put in place and deemed accomplished. The only assistance Carah received was from a man named Dean Holt who worked for DCS as a foster parent coordinator. Mr. Holt was not her case manager but became interested in the case when he was working with K.'s foster parents and realized he knew K.'s family and had lived with Carah's great grandmother at one time.

Mr. Holt helped get visitation started beginning in December of 1999. He began transporting K. the one hundred mile round trip to a location near Carah where they could have regular visitation. At this time, Carah was living with her grandmother. These visits went extremely well, as evidenced by excerpts from DCS's own records. December 15, 1999: "They had a two hour visit. Mom was very loving toward [K.]. [K.] loves his mother and baby sister. Carah seems to be really trying to improve herself and regain custody of [K.]" December 29, 1999: "[K.] loves his mother and sister very much. This was a very good visit. Carah brought gifts for [K.] and they enjoyed being together." January 12, 2000: "This was a good visit, grandmother was also there to visit [K.]. Carah loves this child and seems to be doing her best to regain custody." February 23, 2000: "Carah seems to really love [K.]. They interacted very well and he was very upset when he had to leave his mother." March 29, 2000: "I carried [K.] to visit at home with his mother today. [K.] seems to really enjoy being at home with his mother and little sister." April 10, 2000: "I transported [K.] to spend the night with his mom today. [K.] was thrilled to death to see his mom and baby sister. . . . [K.] cried all the way back to Loretto. . . . It is awfully hard on this little boy being separated from his mom." During this period, Carah also completed a parenting class, even though this was not a requirement of her Permanency Plan, wherein she received an A+.

Mr. Holt next set up a five day visit during which K. was to spend five days with his mother at her grandmother's home. Carah called Mr. Holt the morning the visit was to begin to let him know she was staying with a friend in Lawrenceburg and request that K. be brought there. Mr. Holt refused and stated that the visit would have to take place at her grandmother's house in Waynesboro. Carah testified at the hearing that she had been staying with a female friend in Lawrenceburg who eventually became her roommate. On the day of the visit, she began having car trouble, as she was driving an extremely old vehicle with numerous mechanical problems. She testified that two men were assisting her in trying to fix the vehicle and gave her a ride back to her grandmother's house. Mr. Holt testified that Carah arrived forty-five minutes late for the scheduled meeting and in an extremely irate and irrational state. She stated upon arrival that she would not be staying at her grandmother's house, packed her bags, and left. Carah testified that she spoke with Mr. Holt and was told that she would not be allowed her visitation. She further testified that she contacted Mr.

Holt later that same day to request that she be allowed to go forward with her five day visit at her grandmother's house. Mr. Holt, again, refused to allow the visit.

Earlier, on March 22 of 2000, a Permanency Plan was finally completed. The plan stated dual goals of "return to parent" and "adoption." Under the section entitled "reasonable efforts," a list of services to assist in preventing removal of the child from the home is provided with the notation to check all the services that were provided in the instant case. Some of the services include daycare, emergency homemaker services, exploration of relative resources, homemaker services, in-home family preservation, and vocational rehabilitation. No items under this section are checked, as it appears that no services were offered to Carah. Under this plan, the issues to be dealt with prior to reunification of Carah and her son were (1) a permanent home, (2) adequate supervision of K., and (3) availability of Carah for K. The "changes expected" section provides: "Carah will have a stable safe home for herself and her two children within six months;" "Carah will demonstrate the ability to provide age -appropriate child care alone or by enlisting the help of another person who is able to provide such care and supervision;" "Carah will show more interest than just with visits, she will send cards, letters, etc. to show [K.] more interest in him."

Prior to the aborted five day visit, Mr. Holt seemed to believe that Carah would regain custody of her child and apparently found her grandmother's house to be a stable and safe enough home. With regard to reunification at that point, Mr. Holt's testimony revealed:

> Q. And, so, is it the Department's position that the mother should be caring for [K.] and the younger child?
>
> A. Yes, ma'am.
>
> Q. And during that visit - - As far as we know, she actually did, 4/10 of 2000 to 4/11 of 2000?
>
> A. Yes, ma'am.
>
> Q. Now did we schedule another visit after that, Mr. Holt?
>
> A. Yes, we did. That visit went very well.
>
> Q. Okay.
>
> A. I remember that visit very - - very well. [K.] cried hysterically when I had to go pick him up that morning, when I carried him back to Loretta. I mean, he cried - - the whole trip, he cried.
>
> And so, we scheduled another visit for, like, a five (5) day. We was going to let him - - let her keep him five (5) days.
>
> Q. Uh-huh (affirmative).
>
> A. And that was right there close to Easter. So that's - - that Easter weekend was when he was supposed to be at home with his mother.
>
> Q. And after the - - the April the 11th visit, did you feel positive that reunification might be a possibility?
>
> A. Yes, ma'am, I did. I thought, you know, I - - I believe Carah is going to get herself together, and maybe this little boy can have his mamma back; yes, I sure did.

Although Carah's actions at the time of the Easter weekend visit are of concern, DCS ceased to make any further efforts to reunify Carah and her son after that incident. However, Carah was apparently still working towards completion of the permanency plan, as she contacted DCS several times to inform them of her progress in obtaining a job, furthering her education, and securing housing. Yet, for reasons not revealed by either side, no further visits took place between Carah and her son that summer.

On May 5, 2000, a review board meeting took place regarding Carah's case. The only evidence we have from DCS's files regarding this meeting is on a summary apparently prepared by a worker named Lisa Morgan. The notation states: "Carah was notified of the meeting. She was living in Tennessee at this time. Did not attend the FCRB." There is no evidence in DCS's records of how, by whom, or when Carah was notified of this meeting. Also, sometime in May, her case manager since November of 1999 ceased employment with DCS. The record does not reflect that Carah had an active case manager assigned to her from May of 2000 through June of 2001.

Prior to leaving Texas, Carah had been charged with a misdemeanor assault of her "husband" and was placed on probation. As a result of her pleading guilty to the child neglect charge, her probation was revoked and a warrant was issued for her arrest in Texas. Carah testified that, as a result of this warrant, she had been unable to obtain any public housing in Tennessee. On August 14, 2000, she contacted DCS to let them know she would be returning to Texas to serve her thirty days in jail and take care of the warrant. Carah also claimed that she went to Judge England's office to explain the situation to him prior to leaving.

On September 19, 2000, she again contacted DCS to let them know that she had served her time and had been released from jail. She also informed them that she would be living with her parents in Texas in a home they owned. She contacted DCS again on October 2, October 11, and December 18 to provide DCS with updated information and ask that K. and her case be transferred to Texas. Finally, on December 8, 2000, the local DCS office made a request to the Administrator for the Interstate Compact for Placement of Children in Nashville, Tennessee for transfer of her case. However, the request for a home study and transfer was not sent to Texas until April 17, 2001. DCS filed a Petition to terminate Carah's parental rights on January 26, 2001.

Since being released from jail, Carah has continued to reside at the home owned by her parents. It is a three bedroom house in a middle class subdivision that her father has allowed her to live in indefinitely. However, all the utilities are in Carah's name and are her responsibility. Her father has also provided her with money to assist her with living expenses until she could get on her feet.

Carah testified that she stayed in Texas because she believed she had a better chance of fulfilling the goals of the Permanency Plan there with the help of her family, and the record reflects that, from the time she returned to Texas until the termination hearing, Carah constantly believed that she was simply waiting for her case and her son to be transferred to Texas. In conversation after conversation with DCS workers she asked about the transfer and when it would happen. Carah

apparently believed that by staying in Texas, residing in the middle class house provided by her father, clearing up the arrest warrant issued for her in Texas, working through Texas social services to gain assistance, and getting herself and her new baby to a point where she could find gainful employment and child care she would fulfill the requirements of DCS in Tennessee and re-obtain custody of her son. The record does not reflect that she was ever told anything different.

Telephone records show that some type of hearing was had in Tennessee around March 7, 2001. Carah apparently traveled to Tennessee for this hearing and was allowed visitation with her son pursuant to an order by Judge England. At this first visit in almost a year, K. was not interested in seeing his mother. The next day another visit took place wherein K., again, did not want to speak with or see his mother. After returning to Texas, regular telephone communication was scheduled between Carah and K. Although Carah missed several of the telephone visits for various reasons, the record shows a fairly consistent level of communication between Carah and K. after her return to Texas.

The Texas home study was completed and returned to Tennessee on June 26, 2001. This home study found that Carah lived in a 1200 square foot home consisting of three bedrooms, two bathrooms, a garage, a living room, and a dining room kitchen combination. The home was found to be neat and clean. The backyard was enclosed with a fence, and all gates were locked. The home was found to be safe with no hazards other than a fan in Carah's room that did not have a protective covering. The house also had no air conditioning at the time of the inspection, but Carah stated that she was working to save money to purchase a new unit. (By the time of the termination hearing, air conditioning had been installed.) The social worker who performed the home study also had concerns regarding Carah's mental health and her stability. These concerns were primarily based on statements made by Carah's 'friends' and the fact that her mother had been diagnosed with bipolar disorder and her sister also had some type of mental illness. The social worker, further, felt that some of the information provided by Carah contained inconsistencies. The final recommendation of the Texas report stated, "based on the concerns noted in the home study, I do not recommend that K. Demarr be returned to Carah Jones. A psychological and/or psychiatric evaluation is strongly recommended to determine [if] Carah has a mental health problem." DCS workers who testified at the trial indicated that K. was not returned at that time based on the Texas home study report. There is no evidence that the findings of this home study were discussed with Carah or that DCS offered her any assistance in clearing up those issues that the Texas social worker found to be of concern.

On September 4, 2001, a second Permanency Plan was drafted by Shawn Cline, the DCS worker who took over Carah's case in June 2001. This Permanency Plan, again, provided for concurrent goals of "return home" and "adoption." The goals of the plan were: "Carah will have a stable home within six months;" "Carah will demonstrate the ability to provide age-appropriate child [care] alone or by obtaining the assistance of another person;" "Carah will maintain her weekly phone call schedule, send cards, letters, etc. to show K. more interest in him."

At the time of the termination hearing on December 6, 2001, Carah had been living in the same three bedroom home provided by her father for over a year. During this time she had also been responsible for seeing that all utilities were paid. She had completed career development training and was participating in Texas' welfare to work program. She was also working for Goodwill Industries making $6.00 an hour but was hoping to obtain regular full time employment through the state's assistance making $9.00 or $10.00 per hour upon returning to Texas. After beginning work, Carah placed her daughter in child care with a certified babysitter. However, at the time of trial, her child care was provided by the State of Texas, and the same child care would be available for K. should he be returned to her.

At the hearing of this matter, Judge England was somewhat reluctant to look at the behavior of DCS and what effect it may have had on Carah's case and her constitutional rights. At one point, around the middle of the trial, while Carah's attorney was attempting to question a DCS worker regarding the contents of the Permanency Plan and whether the requirements had been fulfilled, the court stated:

> THE COURT: Okay, let's - - Mr. Allen, let's move on. I mean, we've asked that question and asked that question and asked that question. The permanency plan - - I think where we are missing the point, here, is the permanency plan says, okay, if the judge doesn't terminate the rights, we have got to return this child to the home. Okay?
>
> And – And – I really would like to get on with the proof in this case about this woman's conduct involving this child. You know, that's the proof that I really want to hear.
>
> And so far, I've got a little bit of that; but as far as getting a lot of it, I haven't.
>
> MR. ALLEN: Of course, Judge, we tried to introduce that proof through our exhibit – I believe it is No. 7, might be No. 8.
>
> THE COURT: Well, what I am looking at, right now, is a woman who has – since Ap – since August and she moved to Texas – August of 2000 – has called this child like it was a sort of a by-the-way friend. And that's what I am looking at.
>
> MR. ALLEN: Of course, she could not call the child directly, as you know, Judge.
>
> THE COURT: Uh-huh (affirmative). And she chose to move to Texas. And what I – what I want to see and what I would like to hear, from this point on, is proof and the evidence dealing with these requirements of this statute of abandonment and best interests. And not what they – not what DCS has done or failed to have done, because I agree that – And I think they have had their problems with some of their personnel about complying with the permanency plans and foster care review. We don't even get those reports, anymore.
>
> But I – I think we need to move on. And I think it is time to move on to that proof, to get to the meat of this matter.

After taking this matter under advisement for several days, the court issued its ruling on December 13, 2001. While addressing the parties, the court stated:

> And what I have to look at is the conduct of the mother in this case – the respondent – over the last several years – last several months, and particularly since April of 2000 when, apparently, at that time, she had been visiting with the child and had been doing pretty good with her visits and things were progressing along. But for some reason or another, she decided to – to abandon that path.
>
> And, you know, the Court is not considering whether or not her employment is stable or whether or not she has got the best home in Texas or anything like that, because she is obviously being able to take care of this child that she has got.
>
> But for some reason or another, this mother has just totally and completely – and it is clear and convincing to me, from the evidence that I have seen – has decided just to forgo all parental responsibilities for this child. You know? If – If we hadn't have tried this case last week, I wonder when she would have had a face to face visit with this child.
>
> And this move to Texas in – in August of 2000 might have been the best thing in her life, but it certainly wasn't the best thing in her life in trying to be a mother to this child.
>
> She has had, apparently, no face to face visits with him and – and – with [K.] and – and – and, obviously, no, you know, real contact with him or no effort to make contact with him. And I understand San Antonio is a long way away from here; but, still, at that, she has made no effort to be a mother, at all, to this child or concerned about this child. It is just sort of, well, he's okay. He's – You know, he's all right. Just sort of a casual relationship, like you would have with, you know, with a – with a distant cousin, so to speak.
>
> I am going to find that – that I am going to terminate her parental rights and I am going to find that it is in the best interest of this child to do so.
>
> And I am sure that the Court of Appeals is going to look at this case. I appreciate you attorneys in presenting this case. And I think that it was presented as best it could be on both sides, but there is just a lot of things in my mind.
>
> I mean – And it wasn't mentioned one way or the other. I mean, what about this child's birthdays and Christmases and these times? What happened at – at those times and where was the, you know, the – the contact to – between this mother and this child?
>
> And – And it just – It is clearly not presented and it is clearly not, you know, one way or the other. And, of course, the Court of Appeals may remand that for additional proof; but I – I just don't see this mother showing any parental responsibility toward [K.]
>
> And I don't know how long we have to go on before – or how long that conduct has to continue before courts can find that there has been an abandonment, but I am finding that there was an abandonment in his case.

The court terminated her parental rights finding abandonment by willful failure to visit and willful failure to support the child.

> MS. MILLER: So it will be abandonment on – on – straight for non-visitation; is that correct? And what about non-payment of support –
> THE COURT: And non –
> MS. MILLER: – will you grant us that?
> THE COURT: Well, abandonment on –
> MS. MILLER: Both of them?
> THE COURT: – visitation and support.
> MS. MILLER: Okay. And then –
> THE COURT: For very little if no support.
> MS. MILLER: Okay.
> THE COURT: Just token support. A lack of contact with the child. A lack of interest in the child. Not remembering birthdays, Christmases that have come and gone.

Four issues are presented for review: (1) "Whether the Trial Court Erred in Finding That, by Clear and Convincing Evidence, Carah Demarr Abandoned Her Child by Willfully Failing to Pay Support Within Four Months of the Filing of the Petition to Terminate Parental Rights;" (2) "Whether the Trial Court Erred in Finding That, by Clear and Convincing Evidence, Carah Demarr Abandoned Her Child by Willfully Failing to Visit Her Child Within Four Months of the Filing of the Petition to Terminate Parental Rights;" (3) "Whether the Trial Court Erred When it Concluded, by Clear and Convincing Evidence, That it Was in the Best Interest of the Child That the Parental Rights of Carah Demarr Be Terminated;" (4) "Whether the Failure of DCS to Consult the Putative Father Registry Within Three Days of the Filing of the Petition for Termination Is a Fatal Flaw Requiring a Dismissal of this Action." We find that the judge erred in terminating Carah's parental rights in that there was no clear and convincing evidence of abandonment, either by willful failure to visit or willful failure to support K.

II. LAW

The salient issue presented in this case for our determination boils down to whether or not Carah abandoned her son by either willfully failing to visit or willfully failing to support her child for four consecutive months immediately prior to the filing of the Petition to terminate her parental rights. *See* Tenn. Code Ann. § 36-1-102(1)(A)(i)(2003).

It has long been recognized by the courts in Tennessee that parents have a fundamental right to the care, custody, and control of their children. *See In re: Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1989). In recognition of this fundamental right, courts apply a higher standard for determining if grounds for termination exist.

> Termination of a person's rights as a parent is a grave and final decision, irrevocably altering the lives of the parent and child involved and "severing forever all legal rights and obligations" of the parent. Tenn.Code Ann. § 36-1-113(*l*)(1). Because of its consequences, which affect fundamental constitutional rights, courts apply a higher standard of proof when adjudicating termination cases. *See O'Daniel v. Messier*, 905 S.W.2d 182, 186 (Tenn.Ct.App.1995). To justify the termination of parental rights, the grounds for termination, and the fact that termination is in the best interests of the child, must be established by clear and convincing evidence. *See* Tenn.Code Ann. § 36-1-113(c)(Supp.2000); *State Dep't of Human Servs. v. Defriece*, 937 S.W.2d 954, 960 (Tenn.Ct.App.1996). "This heightened standard serves to prevent the unwarranted termination or interference with the biological parents' rights to their children." *In re M.W.A.*, 980 s.W.2d 620, 622 (Tenn.Ct.App.1998).
>
> > The "clear and convincing evidence" standard defies precise definition. While it is more exacting than the preponderance of the evidence standard, it does not require such certainty as the beyond a reasonable doubt standard. Clear and convincing evidence eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence. It should produce in the fact-finder's mind a firm belief or conviction with regard to the truth of the allegations sought to be established.
>
> *O'Daniel*, 905 S.W.2d at 188 (citations omitted).

Brown v. Rogers, No. M2000-01277-COA-R3-CV, 2001 WL 92083, at * 2-3 (Tenn.Ct.App.Feb.5,2001).

> Parental rights may be terminated in only a limited number of statutorily defined circumstances. Before termination, one or more of the asserted statutory grounds must be proved by clear and convincing evidence and the court must determine, also using the clear and convincing evidence standard, that termination is in the child's best interest. *See* Tenn.Code Ann. § 36-1-113(c)(2)(Supp.1999).

In re: T.S., No. M1999-01286-COA-R3-CV, 2000 WL 964775, at *4 (Tenn.Ct.App. July 13, 2000).

The clear and convincing evidence standard is a heightened standard of proof used due to the seriousness of the constitutional rights to be determined.

> This court recently attempted to describe the clear and convincing evidence standard, explaining that
>
> > Although it does not require as much certainty as the "beyond a reasonable doubt" standard, the "clear and convincing evidence" standard is more exacting than the "preponderance of the evidence" standard. *O'Daniel v. Messier*, 905 S.W.2d 182, 188 (Tenn.App.1995); *Brandon v. Wright*, 838 S.W.2d 532, 536 (Tenn.App.1992). In order to be clear and convincing,

> evidence must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n. 3 (Tenn.1992); *O'Daniel v. Messier*, 905 S.W.2d at 188. Such evidence should produce in the fact-finder's mind a firm belief or conviction as to the truth of the allegations sought to be established. *O'Daniel v. Messier*, 905 S.W.2d at 188; *Wiltcher v. Bradley*, 708 S.W.2d 407, 411 (Tenn.App.1985). In contrast to the preponderance of the evidence standard, clear and convincing evidence should demonstrate that the truth of the facts asserted is "highly probable" as opposed to merely "more probable" than not. *Lettner v. Plummer*, 559 S.W.2d 785, 787 (Tenn.1977); *Goldsmith v. Roberts*, 622 S.W.2d 438, 441 (Tenn.App.1981); *Brandon v. Wright*, 838 S.W.2d at 536.
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> *Bingham v. Knipp*, No. 02A01-9803-CH-00083, 1999 WL 86985, at *3 (Tenn.App.Feb.23, 1999).

In re: M.C.G., No. 01A01-9809-JV-00461, 1999 WL 332729, at *6 (Tenn.Ct.App.May 26, 1999); *see also In re: C.W.W., N.W.W., Z.W.W., and A.L.W.*, 37 S.W.3d 467, 474 (Tenn.Ct.App.2000) *perm. to appeal denied* (Nov. 20, 2000).

In order to find that a parent abandoned a child for the purposes of terminating the parents' parental rights under section 36-1-102(1)(A) of the Code, the supreme court has made it clear that an element of intent, as defined in case law prior to adoption of the current statutory definition of abandonment, must be found. *See In re: Swanson*, 2 S.W.3d 180, 189 (Tenn.1999).

> Abandonment imports any conduct on the part of the parent which evidences a settled purpose to forego all parental duties and relinquish all parental claims to the child. It does not follow that the purpose may not be repented of, and, in proper cases all parental rights again acquired . . . but when abandonment is shown to have existed, it becomes a judicial question whether it really has been terminated, or can be, consistently with the welfare of the child.
>
> *Ex Parte Wolfenden*, 48 Tenn.App. 433, 441, 348, S.W.2d 751, 755 (1961) (citations omitted). This Court has stated that the conduct must amount to an " 'absolute, complete and intentional relinquishment of all, parental control and interest . . . [in] the child' in order to constitute abandonment." *O'Daniel v. Messier*, 905 S.W.2d 182, 187 (Tenn.App.1995) (quoting *Fancher v. Mann*, 58 Tenn.App. 471, 478, 432 S.W.2d 63, 66 (1968)). The evidence of abandonment must show "an actual desertion, accompanied with an intention to entirely sever, so far as it is possible to do so, the parental relationship and throw off all obligations growing out of the same. *O'Daniel*, 905 S.W.2d at 187 (Tenn.App.1995) (quoting *Fancer v. Mann*, 58 Tenn.App. 471, 476, 432 S.W.2d 63, 65 (1968)). Abandonment must be proven by clear and convincing evidence. *O'Daniel*, 905 S.W.2d at 187. When considering

> whether an abandonment exists, courts do not look at protestations of affections and intentions expressed by the natural parents, but look at the past course of conduct. *Koivu v. Irwin*, 721 S.W.2d 803, 807 (Tenn.App.1986). Abandonment by natural parents may be found only when, being given benefit of every controverted fact, such inference follows from the evidence as a matter of law. *Ex Parte Wolfenden*, 48 Tenn.App. at 444, 348 S.W.2d at 756.

In Re Gordon, 980 S.W.2d 372, 374-75 (Tenn.Ct.App.1998) *perm. to appeal denied* (Oct. 5, 1998) (quoting *In re Adoption of Thompson v. Montieth*, 943 S.W.2d 393, 395 (Tenn.App.1996)).

III. ANALYSIS

A. Failure to Visit

In looking at the facts of this case, we cannot see that there was clear and convincing evidence that Carah abandoned her child through willful failure to visit. The trial judge, in this matter, attempted to divorce the actions of DCS from Carah's actions and the outcome of this situation. However, such separation is simply not possible. In this case, DCS has the burden of proving, through clear and convincing evidence, that Carah's failure to visit was willful. Intertwined in this proof are the actions of DCS and its employees which may have infringed on Carah's constitutional rights, discouraged her visitation, provided her with incorrect information regarding her rights and responsibilities, or failed entirely to inform her of her rights and responsibilities.

K. was removed from Carah as a result of one incident which was, based on the record provided to this Court, not adequately investigated nor properly pursued by DCS. Carah was repeatedly told to accomplish goals like obtaining a job, obtaining her GED, and attending parenting classes, which ultimately had no relation to her ability to regain custody of her child. She was also repeatedly told to move out of a perfectly safe and adequate home owned by a relative simply because her name was not on the lease or deed. While caring for a newborn baby, for whom she was also responsible, she was told that she would have to return to employment and place her new baby in daycare prior to receiving custody of her son. Meanwhile, the only actual issues relevant to K.'s return should have been that Carah live in a safe residence, that she understand the importance of locking doors and supervising her children, and that she have assistance with childcare in circumstances where Carah might be ill or unable to be at home with her children.

Although we do not condone or excuse Carah's periods of sparse contact with her son, Carah was placed in a position where she had no ability to contact her son directly. Her only contact was required to be through DCS workers who have, heretofore, failed to offer any assistance to Carah and failed to show much concern for Carah herself or the situation in which she was placed.

In an apparent attempt to accomplish the goals placed on her by DCS, including those of obtaining employment and obtaining her GED not actually listed in the Permanency Plan but repeatedly discussed and emphasized by DCS workers, Carah voluntarily submitted to the arrest

warrant in Texas and allowed herself to be incarcerated for thirty days to clear her record. Then she proceeded to care for her daughter, find a home where she could live, seek out employment, attempt to further her education, and search for daycare that she could afford on the small amount she could earn with no high school diploma.

Carah showed concern for her son and a desire to regain custody in constantly working to achieve all the goals outlined by DCS and calling the DCS office periodically to update them regarding her process. She also made numerous inquiries as to whether or not her case could be transferred to Texas. Whether due to DCS communications, or their lack of communication, Carah seemed to believe for a year after she left Tennessee that her son would be transferred to the Texas authorities and that she was accomplishing the goals necessary for reunification. Based on the facts in this case, the evidence is absolutely not clear and convincing that Carah showed "an intention to entirely sever, so far as possible to do, the parental relationship and throw off all obligations growing out of the same."

Although there was no direct communication with K. for the four months before the filing of the Petition, we do not see clear and convincing evidence that this neglect constituted an intention to abandon the child. There is no evidence in the record that Carah was explained the definition of abandonment and how her failure to maintain contact would affect her rights; and there is no record that DCS ever explained to Carah that by staying in Texas she could lose her son permanently. After Carah moved to Texas, and actually after the failed Easter visit, DCS seemed to cease any further attempts to reunite Carah and her son. Carah was given no further assistance with visitation; indeed, there is no evidence in the record that DCS made a single offer to set up visitation or telephone calls with K. until visitation was ordered by Judge England in March of 2001. Our courts have found, in abandonment cases where one parent obstructs the visitation of another parent, that failure to visit is not willful. *See Hickman v. Hickman*, No. E2000-00927-COA-R3-CV, 2000 WL 1449853 (Tenn.Ct.App. Sept. 28, 2000). We find this reasoning to also be applicable where DCS is involved. The intimidation imposed by a government agency with the ability to yank a child away from a parent after one mistake and, apparently, provide case management, assistance, and return of that child at their whim must surely be intimidating at best.

B. Failure to Support

As with abandonment by failure to visit, abandonment by failure to support a child for four consecutive months prior to filing of the Petition to Terminate must contain the requisite element of intent and must be proven by clear and convincing evidence. *Swanson*, 2 S.W.3d 180. Once again, we cannot see clear and convincing evidence that Carah's failure to support K. was willful.

In the four months prior to filing the Petition to Terminate, Carah was released from a thirty day incarceration, unemployed, the sole parent of a baby under one year old, and without a high school diploma or any discernable job skills. Although Carah periodically held a job at a convenience store and received assistance from her father, it is evident that her income was extremely meager given her responsibility to her new baby and the laundry list of requirements she

believed necessary to regain custody of her son. In another recent case wherein DCS placed onerous burdens on a mother before she could regain custody of her son and that mother took an extraordinary long period of time to effect changes in her life that would allow reunification with her child, this Court stated:

> Even after a child has been validly committed to the custody of the Department of Children's Services, the State's first priority is to restore the family unit if at all possible. *See In Re Drinnon*, 776 S.W.2d 96 (Tenn.Ct.App.1988). To that end, the Department must submit a written affidavit to the court in each proceeding where the child's placement is at issue, certifying that it has made reasonable efforts to reunify the family. Tenn.Code Ann. § 37-1-166. Section (g)(1) of that statute defines reasonable efforts as "the exercise of reasonable care and diligence by the department to provide services related to meeting the needs of the child and the family."
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> It is evident from the record that both the Court and the Department have been very conscientious in monitoring M.M.V.'s progress, and that of her child, and it is well-documented that the primary obstacle to their reunification has always been the lack of stable housing, followed closely by lack of stable employment. However, although the Department has filed five "Affidavit[s] of Reasonable Efforts" with the trial court, there is no evidence that DCS offered her any assistance at all with either of these needs prior to January of 2000, when Ms. Graves became her case manager.
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> In fact, it appears that DCS made M.M.V.'s housing situation more difficult by deciding that she would have to move out of her two-bedroom apartment if she wished to be re-united with her son. There can be no doubt that the Department is entitled to establish appropriate standards for suitable housing. We believe, however, that when doing so results in the abandonment of a settled residence, the Department is also obligated to make an effort to help its client find new lodging.
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> The only representative of the Department of Children's Services to testify was Ms. Graves. She admitted that she never made a referral to help M.M.V. obtain housing, but insisted that she told M.M.V. "that if there was anything I could do to help, to let me know and I would do what I could." She also testified that when the subject of housing came up at one point, M.M.V. told her that she could get an apartment. When Ms. Graves was asked if she didn't feel that housing was a problem for M.M.V., she answered "I can't identify problems that are not identified to me," and elsewhere she stated that she thought housing "would not be a major or difficult area to correct."
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> It is obvious, however, that suitable housing would not be so easy for someone in M.M.V.'s position to acquire without assistance. While her reluctance to ask the Department for help is one of the sources of M.M.V.'s current problems,

> it appears to us that the social workers at the Department have an obligation to use their superior insight and training to help their clients with the problems the Department itself has identified, even when not specifically asked to do so by the client.

In Re D.D.V., No. M2001-02282-COA-R3-JV, 2002 WL 225891 at *8 (Tenn.Ct.App.Feb.14,2002). In determining that the mother's failure to support did not constitute abandonment in that case, the Court stated:

> The proof shows that while the Department included a child support obligation in its plan of care from the very beginning, almost no emphasis was placed on this portion of the plan, and the Department always considered the acquisition of housing more crucial. Patty Graves testified that M.M.V. had paid a total of $138 in child support, and that her last payment was made on June 21, 2000. Other parts of the record showed that her total payments amounted to about $200, and that M.M.V.'s total income for the three years preceding trial was about $6,000.
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> We note that Tenn.Code Ann. § 36-1-102 defines willful failure to support as either a failure to pay any support whatsoever, or a failure to pay more than token support. Token support is defined as support which, "under the circumstances of the individual case, is insignificant given the parent's means." Tenn.Code Ann. § 36-1-102(1)(B).
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> We believe that under the unusual circumstances of this case, M.M.V.'s failure to pay child support cannot be considered willful, nor can the support she paid be considered insignificant, given her limited means, her basic living expenses, the stringent housing requirements placed upon her by the Department, and the scanty assistance it provided her.

Id. at *9.

DCS's failures in the case at bar are even more egregious than in *In Re DDV*. In Carah's case, no child support was ever ordered by the court nor was a child support obligation placed in either Permanency Plan. DCS provided no monitoring or assistance for almost a year. There is no evidence in the record that Carah was ever requested by DCS to provide any form of support for her child, nor was it ever explained to her that failure to provide support could result in losing her child permanently. DCS continually reiterated the need for her to find a place of her own, regular employment, and childcare, all without offering any assistance. Considering the burdens placed on Carah by DCS, her limited income, and her lack of understanding of the importance of paying child support to her parental rights, we find no clear and convincing evidence that her failure to pay was willful.

IV. PUTATIVE FATHER REGISTERY

Tennessee Code Annotated section 36-1-113(d)(3)(A)(i)(2001) requires that, "[t]he petition, or allegations in the adoption petition, shall contain a verified statement that: (i) The putative father registry maintained by the department has been consulted within three (3) working days of filing of the petition and shall state whether there exists any claim on the registry to the paternity of the child who is the subject of the termination or adoption petition." DCS admits that the register was consulted more than three days prior to filing the petition, but alleges that Carah, as the child's mother, has no standing to challenge DCS's failure to consult the registry as required. We agree with DCS on this issue.

This registry exists to protect rights of putative fathers, to allow men who think they might be the father of a child to receive notification of adoption or termination of parental rights proceedings involving that child. *See* Tenn. Code Ann. § 36-2-318. The requirement is not for the purpose of protecting mothers, and the mother does not have standing to assert a right held by another party. *See In Re Estate of Price*, No. M2002-00332-COA-R3-CV, 2002 WL 31890885, at *2-3 (Tenn.Ct.App.Dec.31, 2002); *see also In Re Adoption of MJS*, 44 S.W.3d 41, 58-59 (Tenn.Ct.App.2000), *perm. to appeal denied* (2001).

V. CONCLUSION

This matter shows the depth and breadth of complications that can arise in a conflict between DCS and a parent's rights. The trial court was intent on focusing on the best interests of the child and the mother's actions alone; however, given the behavior of DCS in this matter and the fact that part of DCS's burden was to prove the willful nature of Carah's conduct, the court's considerations were overly limited. The trial court was uninterested in reviewing the actions of DCS and how they may have caused or contributed to the problems faced by Carah. In cases such as this, DCS's actions need to be examined, as well as the trial court's role in holding DCS's feet to the fire to see that its duties are properly performed and that parents' constitutional rights are protected.

Although Carah will win no award for mother of the year, she has shown some initiative and willingness to overcome her circumstances in spite of a past abusive relationship, a mother with mental illness, and her status as a single mom with two young children. There is also no allegation of child abuse, drug use, or alcohol abuse by Carah. She did the right thing in choosing to take responsibility for past actions and return to Texas to serve the necessary time to clear her record. This responsibility should not be discouraged. In addition, her father has been a good example to her of how a child is a life long responsibility. After finding her in extremely difficult circumstances, he provided her with a home to live in and monetary assistance.

Interestingly, DCS found the home and income provided by her father to be inadequate for return of her child and determined that she could not make the choice to be a stay-at-home mom, supported by a willing family member. They determined that she must place her children in daycare and seek employment outside the home. Yet, DCS found it perfectly acceptable that K.'s foster mother stay at home with her children and foster children while her husband provided a home and income. With regard to Carah's dependence on her family and its role in DCS's failure to return her

child to her, one DCS worker testified, "Depending on someone else to provide income for you is not a permanent life for a child. You may - - That person may be killed in an automobile accident. You know, you never know. You may not have that income. If she doesn't have a job, she wouldn't have a way to support her and her children." This attitude is baffling. With regard to the home provided by her father, the following testimony was given:

> Q. If Carah Jones resided in a three (3) bedroom home, owned by her father, in a middle class neighborhood that was quite, clean and neat, and the home had three (3) bedrooms and it was clean, with a fenced-in back yard that was locked, and the electrical outlets had covers, this home was safe, other than it needed some air conditioning and had a fan without a cover, if she lived in a home like that, would she have met the permanency plan and goal for her residence?
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> A. No, because that cannot be considered a permanent home, because it is provided by her father and she never knows when that is going to cease.
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> Q. So a mother living in a home that belongs to her father is a neglectful mother, basically?
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> A. No, that's not what I said. I said that didn't meet the requirements of the permanency plan, because it can't be counted as a permanent home. The instability in her family, her father could kick her out at any moment.

No evidence of instability between Carah and her father was presented.

Although written as a dissent to a termination case with particularly tragic and heartbreaking circumstances, the eloquent words of Judge Nearn are worth repeating.

> The best interest of the child is the paramount issue in the matter of custody. *Walker v. Walker*, (1983 Tenn.App.W.S.) 656 S.W.2d 11, 17. If this were simply a custody matter, there would be no dissent, for I believe the facts require that, for now, custody remain with the state. However, this is not a custody matter; it is a matter of the final termination of all parental rights of Mr. and Mrs. Riley. As noted in *Ex parte Wolfenden*, (1961 M.S.) 48 Tenn.App. 433, 348 S.W.2d 751, it is one thing to say to parents that they are deprived of custody; but it is an altogether different thing to say that they are no longer parents. Simply put, it is my opinion that before the state, operating through a Court, may say to parents that you may never see your child again, that you may never touch and embrace your child again, that you may never hear your child say "Mommy" or "Daddy" again, before the State can say all that, the parent must have willfully done something wrong.
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> The state has the right to terminate one's life only when some heinous wrong has been willfully done. If that be true, then under which constitutional power granted by the people does the state have the right, without a finding of willful wrongdoing, to terminate forever the parental relationship, which in most cases is

> more precious than life itself? I believe none exists. It certainly cannot be done under the guise of the best interests of the child. If that were so, then every child living in dire poverty would be subject to being taken away from poor parents so that they could be adopted by more affluent and equally caring parents. Our law clearly provides for the element of willfulness in abandonment cases. Even if a technical abandonment is shown, if the abandonment is not willful because of some circumstance such as incarceration, there can be no abandonment. *See* T.C.A. § 37-1-102(1)(Supp.1984). As has been said, honest poverty is no disgrace and is not a justifiable cause for the loss of fundamental rights such as the "freedom of personal choice in matters of family life." *See Santosky v. Kramer*, (1982) 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599. Neither is mental incompetence. If a mental incompetent commits an act that ordinarily would be considered a crime, the law does not consider it as such. Of course, such a person may be deprived of liberty when the person is a danger to himself or others, but even so, the deprivation of liberty is never considered in law to be permanent. The deprivation of liberty exists only so long as the mental condition exists. *See Jones v. United States*, (1983) 463 U.S. 354, 103 S.Ct. 3043, 3053, 77 L.Ed.2d 694. The law is ever hopeful that the condition will change for the better, although it recognizes that such improvement may never happen. The point is that the sentence is not final. The termination of parental rights, however, is just as final as a death sentence.
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> In *Santosky v. Kramer, supra*, the Supreme Court of this nation recognized that, in parental termination matters, due process constitutional issues are presented. The termination is not to be decreed solely on the best interests of the child; parental rights must be considered as well.

Dep't. of Human Services v. Riley, 689 S.W.2d 164, 172-73 (Tenn.Ct.App.1984).

Carah may be guilty of being young, naive, immature, and selfish; but these conditions generally improve with age and assistance. Once again, we wish to make it clear that this Court does not condone Carah's immaturity, selfishness, and neglect of her son. However, considering the overall facts of this case, we do not find clear and convincing evidence that Carah willfully abandoned her child.

It should also be noted that this case contained a general lack of evidence in many areas and on both sides. But, the burden of proof is on the state to show clear and convincing proof of abandonment. We find it interesting that DCS presented no evidence to contradict Carah's testimony regarding her illness on the day K. was found and the circumstances that led to his escaping the house. DCS presented no evidence regarding any investigation into that incident, no evidence of attempts to contact family members for placement, and no evidence of any attempt to provide in home services to Carah or assist her with obtaining appropriate daycare. Nor did DCS ever find Carah's situation of enough concern to remove her second child.

Unfortunately, the practical result of this situation to the child is an extreme emotional attachment to his foster family and estrangement from his mother. The child will likely suffer as much in being reunified with his mother as he did in being initially taken away. All parties to the case are responsible for this result in varying degrees, including the court. We realize that the best interests of the child dictate a different result than that reached by this Court; however, the constitutional protections afforded a parent are the first line of consideration. Unless the element of willfulness necessary to constitute abandonment is proven, the court can never reach the "best interests" analysis.

The trial court must now review the custody issue left in this case in an attempt to contain the damage done to the child and to Carah's parental rights and craft an appropriate remedy that will take into account her parental rights and K.'s welfare, as it appears that Carah has substantially complied with the requirements of the second Permanency Plan. The Order of the trial court is vacated, and the case is remanded with instructions to conduct a hearing to determine custody and an appropriate plan for returning K. to his mother, if return is found to be appropriate.

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WILLIAM B. CAIN, JUDGE