IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
ASSIGNED ON BRIEFS APRIL 22, 2003

IN THE MATTER OF M.T.
A Child Under Eighteen Years of Age

Direct Appeal from the Circuit Court for Gibson County
No. 7803 William B. Acree, Jr., Judge

No. W2002-03050-COA-R3-CV - Filed October 14, 2003

This is a suit for the termination of parental rights. The child came into state custody in June 1999 and a trial took place on July 25, 2002. The trial court entered an order terminating parental rights of the mother and the mother appealed to this court. For the reasons stated below, we affirm the order of the trial court.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed

ALAN E. HIGHERS, J., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

J. Mark Johnson, Trenton, for Appellant

Paul G. Summers, Attorney General & Reporter, Pamela A. Hayden-Wood, Assistant Attorney General, Nashville, TN, for Appellee

OPINION

Facts and Procedural History

On August 22, 1997, Appellant Sheila Trull ("Sheila") gave birth to her daughter, M.T. ("M.T."). Only days after M.T. was born, Sheila tested positive for drugs, and, believing that M.T. might be affected, the Tennessee Department of Children's Services ("DCS") investigated the situation. Upon further inquiry, DCS determined that Sheila did have a history of drug abuse and attempted suicide, but declined to intervene as Sheila's family was assisting in raising M.T. and the situation was under control.

Sheila continued to retain custody of M.T. until April 1998, when Sheila was charged with aggravated assault for stabbing her mother's boyfriend, William Young ("Young"), with a knife.

Sheila went to prison on a reduced plea of simple assault. Once DCS received notice of this incident, Sheila's mother, Brenda Trull ("Brenda"), was given custody of M.T. Sheila was subsequently released and resumed living with Brenda and M.T. Sheila was referred to the Carey Counseling Center where she was diagnosed with having bipolar disorder mixed with psychosis and poly-substance dependence. In Sheila's situation, the substances of dependence are alcohol, cocaine and cannabis.

On June 8, 1999, Sheila and Brenda took M.T. to the Humboldt General Hospital, and she was later transferred to the Jackson-Madison County General Hospital Pediatric Intensive Care Unit. M.T. had taken some of Sheila's prescription medicine, Depakote, and at 3:00 a.m., Sheila found some of her pills were missing. Though Sheila did not know if M.T. had taken some of the pills, she knew some were missing. Rather than taking M.T. to the hospital immediately, Sheila and Brenda slept until 1:00 p.m. the following afternoon and, when they were unable to wake M.T., they took her to the emergency room.

Upon this incident, M.T. was removed from Brenda's custody and transferred to a foster parent, Sue James ("Sue"), because of DCS's concerns of either neglect or inadequate supervision. Sue was M.T.'s foster parent until October 2000. Immediately upon taking custody, M.T. was in need of medical assistance from various specialists. One of M.T.'s legs was very weak due to a decreased tendon reflex, and M.T. was unable to stand on it very well. M.T. went to the Kiwanis for speech therapy. M.T. also required the assistance of an ophthalmologist as she was far-sighted and her eyes crossed. She also went to regular pediatric exams and a neurologist. In addition, she has since been diagnosed with ADHD for which she receives medication.

By June 29, 1999, DCS had developed M.T.'s initial permanency plan, outlining the responsibilities the involved parties had, what their duties were, and when visitation for Sheila and M.T. would occur. Sheila and Brenda both attended the meeting at which the responsibilities in the permanency plan, and non-compliance with them, were explained, and both agreed with the plan and signed it. The permanency plan called for visitation weekly at the Burger King in Humboldt. This schedule of visitation abruptly ended when Sheila was incarcerated in April 2000 for aggravated assault. Between the end of June 1999 and the beginning of April 2000, Sheila visited M.T. on eight occasions out of a possible forty. When she did visit M.T., there was little conversation between Sheila and M.T. At all of her visits with M.T., Sheila paid no attention to M.T., sat with her back to M.T., and went outside to smoke. This evidence was undisputed by Sheila at trial. At most of the other scheduled times, Brenda and other family members would show up and visit with M.T., but twenty percent of the time, no one showed up. Sheila admitted in her testimony that the reasons for failing to visit M.T. at Burger King were either drunkenness or hangovers from drunkenness. The dates on which Sheila visited M.T. were: June 30, July 8, 15, 29, September 9 and December 30, 1999, and February 24, and March 17, 2000.

On April 4, 2000, only five days after a second permanency plan was developed by DCS, Sheila was arrested and charged with attempted murder, which was later reduced to aggravated assault. Sheila was drunk and slit the throat of Jerry Bell, Brenda's boyfriend at the time. While in

prison, the DCS case manager, Leslie Nims ("Nims"), attempted to converse with Sheila, but Sheila only spoke with her for a few minutes and did not ask about M.T. Sheila, from the time M.T. went into state custody, did not contact Nims even though Sheila knew Nims was the DCS case manager. Sheila also did not send any cards, gifts or support to M.T. after M.T. entered state custody.

Since June 1, 2001, M.T. has lived with new foster parents who intend to adopt her if she becomes available for adoption. M.T. has since grown closer to her foster parents and calls her foster mother "mom" as well as telling other children that her foster mother is her mother. M.T. shows no signs that she remembers Sheila and, when the DCS adoption case worker, Linda Spain ("Spain") would visit, M.T. never asked about her birth mother.

While in prison, Sheila held two jobs; one of those jobs was described as being "in horticulture" and the other was an "industrial cleaner." In addition, Sheila took some optional courses including a parenting program, anger management, expanded food and nutrition education, and drug abuse counseling.

Sheila was released from prison on May 23, 2002, and was contacted by Spain. Spain informed Sheila that a foster care review board meeting was coming up and that Sheila should attend. At no time during that conversation did Sheila ask to visit M.T.

Sheila currently lives with William Young, the victim of Sheila's assault with a knife in 1998, in Young's two-bedroom trailer home. Sheila, at the time of the trial, was in the middle of receiving a divorce and intended to marry Young soon thereafter. When visited by Spain and Nims on July 8, 2002, to review the case's quarterly report, Sheila showed Spain and Nims the room she was fixing up for M.T. but at no point requested to visit M.T. According to the Carey Counseling Center outpatient therapist, Donna Richardson, Sheila still has a bipolar disorder with psychosis and poly-substance dependence but they are in "partial remission." A Carey Counseling psychological examiner, David Robins, met with Sheila on six occasions since her release from prison in 2002 and testified that she was stable and did not appear to be on any illicit drugs or under the influence of alcohol. At the time of trial, Sheila remained unemployed but had applied for work at two nursing homes, Subway, and Kentucky Fried Chicken. Before being imprisoned in April 2000, Sheila had never held a job for more than two months. Young currently is employed in refrigerator and air conditioning repair work and earns between $400 and $700 per week.

The Tennessee Department of Children's Services filed a petition to terminate the parental rights of the appellant, Sheila Diane Trull, to M.T., the child at issue, on May 18, 2001, in the Circuit Court for Gibson County. Trial took place on July 25, 2002, before the Honorable William B. Acree, sitting by interchange for the Honorable Clayton Peeples. The trial court entered an order to terminate Sheila Trull's parental rights on August 29, 2002, and Ms. Trull timely filed a notice of appeal on September 5, 2002. She presents the following issue for our review: whether the trial court committed prejudicial error in finding that clear and convincing evidence of grounds for termination of parental rights exists and that such termination is in the best interests of her daughter.

Standard of Review

In order for a court to terminate a person's parental right to their child, it must make a finding by clear and convincing evidence that one of the grounds for termination exists and that such termination is in the best interests of the child. Tenn. Code Ann. § 36-1-113(c)(1)(2). Because the case was tried before a trial court without a jury, we must review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. If the evidence does not preponderate against the findings, we must affirm, absent an error of law. T.R.A.P. 13(d). If the trial court has not made a specific finding of fact as to a particular matter, we must review the facts in the record under a purely *de novo* review. *Fields v. State,* 40 S.W.3d 450, 457 n.5 (Tenn. 2001); *In the Matter of Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). For all issues of law, we review them *de novo* upon the record with no presumption of correctness. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993); *In the Matter of Valentine,* 79 S.W.3d at 546.

Law and Analysis

It has long been recognized that a parent has a fundamental right to the care, custody and control of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). However, the rights a parent has to one's children are not absolute and may be terminated upon evidence that at least one ground for termination exists and such termination is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c)(1)(2) & (g). Because such a finding would terminate a recognized, fundamental right, Tennessee law requires a heightened standard of proof by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c)(1). Clear and convincing evidence has been defined in Tennessee as "evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992). The grounds upon which parental rights may be terminated are enumerated in Tennessee Code Annotated section 36-1-113(g) and "the existence of any one of the statutory bases will support a termination of parental rights." *In re C.W.W., N.W.W., Z.W.W., & A.L.W.*, 37 S.W.3d 467, 473 (Tenn. Ct. App. 2000) (citations omitted).

The ground which this court shall address concerns abandonment of the child for a period of four consecutive months prior to the parent's period of incarceration if the parent was incarcerated at the time the proceeding was initiated.[1] Pursuant to the Tennessee Code Annotated and for the purposes of section 36-1-113(g)(1), "abandonment" by a parent or guardian means that:

> A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has

[1]Though the trial court found that the Department of Children's Services had established the grounds of abandonment by failure to support, Tenn. Code Ann. §§ 36-1-113(g)(1) and 36-1-102(1)(A)(i), removal of the child by court order for six months with poor persisting conditions of the parent, Tenn. Code Ann. § 36-1-113(g)(3), substantial non-compliance of the parent with the permanency plan, Tenn. Code Ann. § 36-1-113(g)(2), and mental incompetence of the parent, Tenn. Code Ann. § 36-1-113(g)(8), this court need not address the trial court's rulings on those issues, as only one ground for termination must be proven by clear and convincing evidence.

> been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and either has willfully failed to visit or has willfully failed to support or make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent's or guardian's incarceration. . . .

Tenn. Code Ann. § 36-1-102(1)(A)(iv).

In addition, "willfully failed to visit" is defined as "the willful failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation[.]" Tenn. Code Ann. § 36-1-102(1)(E). "Token visitation" is also defined in the Code as visitation which "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[.]" Tenn. Code Ann. § 36-1-102(1)(C).

Appellant in her brief contends that the trial court erred in finding that she willfully abandoned her child. She first argues that the trial court erred because there was no period of four consecutive months before incarceration in which Appellant willfully failed to visit her child. From the point at which DCS took custody of M.T. to the day of Appellant's incarceration in April 2000, Appellant visited her child eight times out of a possible forty visits. Specifically, Appellant appeared at the scheduled visitation time on June 30, July 9, July 15, July 29, September 9, December 30, 1999, and February 24, and March 17, 2000. Though Appellant testified that she believed she visited M.T. "[p]robably thirteen" times rather than just eight, Sue James, M.T.'s foster parent at that time, and Leslie Nims, the DCS case manager, both testified, and the trial court found, that Appellant only visited on eight occasions. Appellant's testimony is uncertain and, therefore, insufficient to overcome the presumption of correctness in favor of the trial court's findings.

Next, Appellant contends that the trial court erred as a matter of law when it found that, given the dates on which Appellant did show up for the visitation time, there was a period of four consecutive months in which Appellant willfully failed to visit her daughter. Though these dates are spaced apart such that there is no period of four consecutive months, the trial court found, and this court agrees, that the visitation was "token" within the meaning of the statute. Appellant's argument fails to take into account that "token" visitation means *either* perfunctory visitation *or* visitation of such an *infrequent nature* as to establish minimal contact with the child. Tenn. Code Ann. § 36-1-102(1)(C). The trial court apparently found that Appellant's visitation was "token" because of its infrequency.[2] It is true that Tennessee courts have found the ground of abandonment exists by virtue

[2]The trial court made three references in its findings. Specifically, it stated at one point: "[i]n fact, [Appellant] saw the child – let's see, about four weeks in a row – during June of 1999, and July, 1999, until December 30, 1999, [Appellant] didn't see the child. Excuse me, except for one time [Appellant] did. Then after that, [Appellant] only saw the child about once a month two or three different times." Later, the trial court again made reference to the visitation schedule stating: "[Appellant][has not] seen the child when [Appellant] had an opportunity to do so, [Appellant] went from July of 1999, and December, 1999, and saw the child one time." Finally, in its order, the trial court found that: (continued...)

of a parent's visits being infrequent though avoiding the technical requirement of a four consecutive month period without visitation. *See e.g.*, *Adoption of Kratochvil v. Kratochvil*, 1998 WL 681334, (Tenn. Ct. App. 1998). In addition to the infrequent nature of the visits, Sue James testified that "at all of the mother's [visits]," "[Appellant] didn't pay any attention to [M.T.]. She kept her back to her. There wasn't any inter-reaction [sic] between her and [M.T.] at that time. [Appellant] would just sit there and eat or go out and smoke. There wasn't a lot of talking and playing." After reviewing the record, this account of Appellant's visits went undisputed on cross examination of Ms. James, direct examination of Appellant, or examination of any other witness. We find that such infrequency, coupled with the nature of the visits themselves, constituted "token" visitation within the meaning of Tennessee Code.

In addition, failing to visit one's child must be "willful" to constitute abandonment. Tenn. Code Ann. § 36-1-102(1)(E). When asked why she did not visit her daughter on more occasions, Appellant admitted that she was probably drinking alcohol or had a hangover from periods of intoxication. Such failure to visit was not for reasons such as employment or illness. In light of the fact that the visits were scheduled in advance for every Thursday at 9 a.m. according to the permanency plan of June 1999, such behavior shows an indifference on the part of Appellant in failing to visit her child. It was Appellant's choice to drink in excess such that she would be unable to appear at the scheduled visitation times. Such a choice evidences a willful failure on Appellant's part to exercise her visitation rights. Therefore, we find that Appellant's failure to visit for more than token visitation was willful. This willful failure to engage in more than token visitation was proven by clear and convincing evidence and established a ground for termination of Appellant's parental rights. Since only one ground for termination of parental rights must be established by clear and convincing evidence, this court does not address the trial court's findings on the other grounds for termination.[3]

In addition to a ground for termination, a petitioner must also prove by clear and convincing evidence that such termination is in the best interests of the child. Tenn. Code Ann. § 36-1-113(c)(2). The legislature has set out what a trial court must consider in determining what is in a child's best interests. Specifically, section 36-1-113(i) of the Tennessee Code Annotated provides:

> In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:
>
> (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;

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[2](...continued)
"Respondent Sheila Diane Trull has willfully failed to visit or to engage in more than token visitation for more than four (4) consecutive months immediately preceding the filing of the Petition (prior to incarceration)."

[3]See *supra* note 1.

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

Tenn. Code Ann. § 36-1-113(i).

We find the holding that termination of Appellant's parental rights is in the best interest of the child to be supported by clear and convincing evidence in the trial court below. First, the last time that the Appellant saw her daughter was on March 17, 2000, when M.T. was only two and a half years old. Linda Spain, the DCS adoption case worker for M.T., testified, and the trial court found, that M.T. has no memory of Appellant and that M.T. calls her foster mother "mom." Spain further testified that M.T. tells the other children that her foster mother is her mom and that M.T. had not asked about her real mother. No evidence was presented to support a finding that a meaningful relationship existed between Appellant and M.T. Second, the trial court must consider the effect of a change in caretakers on the child. The trial court stated that this child in particular has special physical and mental needs which it found the Appellant unable to meet. Linda Spain further testified that M.T. had tested low in language and math skills, that she was receiving speech therapy, that she had Attention Deficit Hyperactivity Disorder, and that disrupting M.T.'s current placement would be very detrimental to the child. These circumstances, coupled with the fact that M.T. was placed in state custody because of Appellant's neglect, suggest that termination of Appellant's parental rights and allowing the new foster parents to adopt M.T. would be in the child's best interests. Next, the trial court found that visitation rights were only exercised on eight occasions out of a possible forty from the time M.T. was placed in state custody to the point that Appellant was incarcerated in April of 2000. This lack of visitation cuts against Appellant's argument that termination of parental rights would not be in the child's best interests. Another factor the trial court incorporated in its findings

was the fact that Appellant had provided no child support for M.T. Though Appellant was either unemployed or in prison while M.T. remained in state custody, the evidence in the record shows that Appellant has sent M.T. no gifts, birthday or Christmas cards, or any other type of support to indicate that Appellant took any parental responsibility for M.T. While Appellant testified that her reason for sending nothing was because a person in Leslie Nims' office indicated that M.T. would not receive whatever Appellant sent, this is not supported by any evidence other than Appellant's testimony.

In addition, the trial court found that the environment that Appellant would provide would be dangerous to the child. The court below found that Appellant's previous neglect almost killed M.T. when the child took some of Appellant's prescription pills. Additionally, the court was concerned about Appellant's criminal record for assault and aggravated assault and found that such a history for violence pointed to termination of Appellant's parental rights. Not only does Appellant have a criminal record which includes violent crimes, but she is currently living, and at the time of trial is planning to marry, a victim of one of her assaults, William Young. Finally, though Appellant has been drug and alcohol free since entering prison in April of 2000, the trial court found that the evidence supported a finding that there is a danger the Appellant would return to her old habits of abusing drugs and alcohol. This finding is supported by the testimony of Donna Richardson, an outpatient therapist at Carey Counseling Center who worked with the Appellant and her mother in their rehabilitation. Richardson testified that Appellant had been diagnosed, as of June 2002, with bipolar disorder, psychosis and poly-substance dependence, all in partial remission.

We understand Appellant's situation of completing her time in prison and wishing to start over again. However, the law requires this court to consider what is in the best interest of the child, not the best interest of the parent. Our review of the record, and the findings thereon, correlate with the findings of the trial court on the issue of what the best interest of M.T. are. We find clear and convincing evidence that termination of Appellant's parental rights and allowing M.T. to move on with her life are in the child's best interest.

Conclusion

For the foregoing reasons, we affirm the judgment of the trial court. Costs are judged against Appellant, Sheila Dianne Trull, for which execution may issue, if necessary.

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ALAN E. HIGHERS, JUDGE