

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs October 17, 2003

**STATE OF TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES v.
L.L.T. , ET AL.**

**Appeal from the Juvenile Court for Hamilton County
No. 176,037 Suzanne Bailey, Judge**

Filed December 30, 2003

No. E2003-00501-COA-R3-JV

The trial court terminated the parental rights of L.L.T. ("Mother") with respect to her minor child, J.C.T. (DOB: January 31, 2002), a male. Mother appeals, arguing that the evidence preponderates against the trial court's findings, by clear and convincing evidence, (1) that statutory grounds for termination exist and (2) that termination is in the best interest of the child. We affirm.

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

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS and D. MICHAEL SWINEY, JJ., joined.

Cara C. Welsh, Chattanooga, Tennessee, for the appellant, L.L.T.

Paul G. Summers, Attorney General and Reporter, and Juan G. Villaseñor, Assistant Attorney General, for the appellee, State of Tennessee Department of Children's Services.

OPINION

I.

On February 6, 2002, the Tennessee Department of Children's Services ("DCS") filed a petition for temporary custody of six-day-old J.C.T. The petition alleges that J.C.T. was a dependent and neglected child "because medical tests revealed that he had cocaine in his blood upon birth." The petition goes on to state that Mother had tested positive for cocaine and that she admitted to using cocaine while she was pregnant. In addition, the petition states that Mother claimed her

boyfriend, M.S. (“Father”), is the biological father of the child, rather than her husband, J.T.¹ Upon the filing of the petition, the juvenile court entered an order placing temporary care and custody of the child with DCS. The child has remained in foster care since his custody was first granted to DCS.

On June 18, 2002, DCS filed a petition to terminate the parental rights of Mother, Father, and J.T.² At or about the time of the filing of the petition, Mother was incarcerated in Chattanooga for writing a bad check. A bench trial was held in the instant case on January 22, 2003; Mother was still incarcerated at the time of trial. At the conclusion of the trial, the court terminated the parental rights of Mother,³ finding, by clear and convincing evidence, that grounds for terminating Mother’s parental rights existed and that termination was in the best interest of the child.

Once Mother was released from jail in Chattanooga, she was extradited to Georgia to serve time for an unpaid \$3,000 fine. A DCS quarterly progress report dated November 5, 2002, signed by Mother’s DCS case manager and a DCS supervisor, states that Mother’s Georgia probation officer “is recommending [that Mother] be placed in detention until such time [as the \$3000 fine is] worked off.” The report goes on to state that the probation officer indicated that it could take from six to eight months for Mother to work off the fine. A uniform affidavit of indigency, filed with Mother’s notice of appeal on February 27, 2003, lists Mother’s current address as a detention facility in Trenton, Georgia.

II.

Our review of this non-jury case is *de novo*; however, the record comes to us accompanied by a presumption of correctness that we must honor unless the evidence preponderates against the trial court’s findings. Tenn. R. App. P. 13(d). No presumption of correctness attaches to the lower court’s conclusions of law. *Jahn v. Jahn*, 932 S.W.2d 939, 941 (Tenn. Ct. App. 1996).

III.

The law is well-settled that “parents have a fundamental right to the care, custody, and control of their children.” *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)). However, this right is not absolute and may be terminated if there is clear and convincing evidence justifying termination under the pertinent statute. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

¹In her response to the petition for temporary custody, filed February 20, 2002, Mother stated that her husband, J.T., abandoned her around 1992 and that she had been unaware that she could obtain a divorce “without the presence of her husband.” Mother went on to state that she had been dating Father for approximately four years.

²J.T.’s parental rights, as putative father of the child, were terminated on October 29, 2002, by entry of a default judgment. J.T. did not appeal the termination of his parental rights.

³Father agreed to the termination of his parental rights.

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, the evidence presented at trial, and the trial court’s findings, implicate the following statutory provisions:

Tenn. Code Ann. § 36-1-113 (Supp. 2003)

* * *

(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 [Tenn. Code Ann.] § 36-1-102, has occurred;

(2) There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care pursuant to the provisions of title 37, chapter 2, part 4;

* * *

Tenn. Code Ann. § 36-1-102 (Supp. 2003)

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 have willfully failed to make reasonable payments toward the support of the child;

(ii) The child has been removed from the home of the parent(s) or guardian(s) as the result of a petition filed in the juvenile court in which the child was found to be a dependent and neglected child, as defined in [Tenn. Code Ann.] § 37-1-102, and the child was placed in the custody of the department or a licensed child-placing agency, that the juvenile court found, or the court where the termination of parental rights petition is filed finds, that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child's situation prevented reasonable efforts from being made prior to the child's removal; and for a period of four (4) months following the removal, the department or agency has made reasonable efforts to assist the parent(s) or guardian(s) to establish a suitable home for the child, but that the parent(s) or guardian(s) have made no reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date;

* * *

(iv) 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 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 has willfully failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent's or guardian's incarceration, or the parent or guardian has engaged in conduct prior to incarceration which exhibits a wanton disregard for the welfare 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 the willful failure, for a period of four (4) consecutive months, to provide monetary support or the willful failure to provide more than token payments toward the support of the child;

(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;

* * *

Tenn. Code Ann. § 37-2-403 (Supp. 2003)

(a)(1) Within thirty (30) days of the date of foster care placement, an agency shall prepare a plan for each child in its foster care. . . .

* * *

(2)(A) The permanency plan for any child in foster care shall include a statement of responsibilities between the parents, the agency and the caseworker of such agency. . . .

* * *

(C) Substantial noncompliance by the parent with the statement of responsibilities provides grounds for the termination of parental rights, notwithstanding other statutory provisions for termination of parental rights,

IV.

Mother raises four issues for our consideration: (1) whether the evidence supports the trial court's finding of abandonment; (2) whether the evidence supports the trial court's finding that Mother failed to substantially comply with the permanency plan; (3) whether the evidence supports the trial court's finding that DCS made reasonable efforts to reunify Mother with the child; and (4) whether the evidence supports the trial court's finding that termination of Mother's parental rights is in the best interest of the child.

A.

With respect to Mother's abandonment of the child, the trial court found as follows:

[Mother] willfully abandoned the child for more than four (4) consecutive months next preceding the filing of the petition in that [Mother's] visits could only be considered token and [Mother] failed to pay child support. [Mother and Father] missed many visits and arrived late for others. [Mother] spent most of her visits talking to others or in the restroom

Mother admitted that she paid no child support during the entire time her child was in the custody of DCS, which, at the time of trial, amounted to almost one year. We recognize that Mother was incarcerated from June, 2002, through the time of trial in January, 2003, and that she probably had no resources to pay child support. However, in the more than four months preceding Mother's incarceration that the child was in the custody of DCS, Mother paid absolutely nothing toward the support of her child, even though she was working part-time. When questioned about this matter at trial, Mother responded that she "never knew [she] had to" pay child support. However, this Court has previously held that "the support of one's children should not be conditioned upon whether one has been placed under a court order to do so." *State Dep't of Human Servs. v. Manier*, C/A No. 01A01-9703-JV-00116, 1997 WL 675209, at *5 (Tenn. Ct. App. W.S., filed October 31, 1997). Mother asserts that, while she did not pay any money toward the support of the child, she did provide the child with "clothes and odds and end[s] things" when she visited him prior to her incarceration. Such gifts, however, constitute nothing more than token support, pursuant to Tenn. Code Ann. § 36-1-102(1)(B).

With respect to the allegation of willful failure to visit the child for four consecutive months, Mother testified that she attended all but one of the visitation sessions allowed to her by DCS prior to her incarceration. Mother stated that she notified DCS of her inability to attend one session due to an injury. However, the child's original DCS caseworker testified that Mother missed two visitation sessions and that Mother always arrived late for visitation. During visitation, the caseworker testified that she "would have to go get [Mother] out of the bathroom [because Mother would] be putting makeup on." The caseworker also testified that Mother fell asleep during at least three of the sessions and that she could smell alcohol on Mother's breath on at least two occasions.

Moreover, on at least four of the sessions attended by Father, the caseworker stated that Mother and Father would get into loud arguments in the presence of the child.

We hold this visitation by Mother amounts to nothing more than token visitation, pursuant to Tenn. Code Ann. § 36-1-102(1)(C). While Mother may have attended all but one or two visitation sessions, the concept of “visitation” is much more than a mere physical presence. The testimony of the caseworker, which was believed by the trial court, indicates that Mother spent her visitation sessions applying makeup, sleeping, and arguing with Father, rather than properly focusing her attention on and caring for the child. Such “perfunctory” presence with the child does not preclude a finding of abandonment under the statute. Accordingly, we find that the evidence does not preponderate against the trial court’s finding that there was clear and convincing evidence of Mother’s abandonment of the child. *See* Tenn. Code Ann. § 36-1-102(1)(C).

B.

The trial court found that Mother “failed to comply in a substantial manner on the reasonable responsibilities” of the permanency plan. The plan, dated February 14, 2002, required Mother to do the following: (1) pay child support; (2) complete parenting classes; (3) undergo and complete an alcohol and drug assessment and participate in any necessary treatment; (4) stop the use of all alcohol and non-prescribed medications; (5) submit to random drug and alcohol tests; (6) visit the child regularly; (7) obtain a clean, safe, and adequate home of her own; and (8) obtain and maintain employment or apply for public assistance.

The evidence is clear and convincing that Mother failed to substantially comply with her obligations as set forth in the permanency plan. Mother admitted that she paid no child support. While Mother testified that she attended all but one of the parenting classes, she did not complete the parenting classes as required under the plan. Mother never completed the required alcohol and drug assessment, missing seven of nine appointments in a three-week period. Mother failed to submit to eight requested drug tests. On the two occasions that Mother did comply with the request for drug screening, she tested positive for cocaine. Mother missed two visitation sessions with the child. Prior to being incarcerated in June, 2002, Mother made no attempt to find a home of her own, living instead with Father’s parents. Mother did have part-time employment up until the time of her incarceration, and Mother did attend Alcoholics Anonymous meetings while she was incarcerated.

The evidence does not preponderate against the trial court’s findings with respect to the allegations that Mother failed to substantially comply with the permanency plan.

C.

Mother next contends that the trial court erred in determining that DCS made reasonable efforts to “reunify [Mother] with her child as required by [Tenn. Code Ann. §] 37-1-166.”⁴ This court has previously held that, with respect to the reasonable efforts of DCS in a termination case, the proper code provision is Tenn. Code Ann. § 36-1-113(i)(2) (Supp. 2003). *See State Dep’t of Children’s Servs. v. Malone*, No. 03A01-9706-JV-00224, 1998 WL 46461, at *1 (Tenn. Ct. App. E.S., filed February 5, 1998). Tenn. Code Ann. § 36-1-113(i) provides, in pertinent part, as follows:

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:

* * *

(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;

The evidence in the record is clear that DCS made reasonable efforts to assist Mother with her parenting skills and with her drug addiction in order to facilitate the return of the child to Mother. DCS provided Mother and Father with a list of community services available to them, which included contact information on parenting classes, alcohol and drug counseling and assessments, housing assistance, and employment assistance. Mother admitted at trial that she knew she had a number of responsibilities under the permanency plan that she had to fulfill in order to regain custody of the child, including parenting classes, alcohol and drug treatment, a stable home, and part-time or full-time employment. However, as was repeatedly noted by DCS, Mother failed to comply with these requirements. As this court has held, “[t]he statute does not require a herculean effort on the part of DCS,” but rather the statute requires that DCS “make ‘reasonable efforts.’” *Malone*, 1998

⁴Tenn. Code Ann. § 37-1-166 (2001) provides, in pertinent part, as follows:

(a) At any proceeding of a juvenile court, prior to ordering a child committed to or retained within the custody of the department of children’s services, the court shall first determine whether reasonable efforts have been made to:

(1) Prevent the need for removal of the child from such child’s family; or

(2) Make it possible for the child to return home.

(b) Whenever a juvenile court is making the determination required by subsection (a), the department has the burden of demonstrating that reasonable efforts have been made to prevent the need for removal of the child or to make it possible for the child to return home.

WL 46461, at *2. Accordingly, the evidence does not preponderate against the trial court's finding that DCS made reasonable efforts to reunite Mother with the child.

D.

Finally, Mother argues that there is "no clear and convincing evidence" that termination of Mother's parental rights is in the best interest of the child. The factors a court must consider when deciding whether termination is in a child's best interest are set forth in Tenn. Code Ann. § 36-1-113(i) (Supp. 2003):

(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;

(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;

* * *

(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 [Tenn. Code Ann.] § 36-5-101.

There is no question that Mother has failed to make a lasting adjustment of her circumstances such that it would be safe for the child to be in Mother's home. *See* Tenn. Code Ann. § 36-1-113(i)(1). Mother failed to complete the required parenting classes and the required alcohol and drug assessment. Mother failed two drug screens, testing positive for cocaine – the very substance that led to the removal of the child in the first place. Mother failed to obtain proper housing as required by the plan in the months prior to her incarceration.

As we have previously noted, Mother failed to make a lasting adjustment to her circumstances following the reasonable efforts of DCS. *See* Tenn. Code Ann. § 36-1-113(i)(2). While Mother attended all but two of her visitation sessions with the child, she consistently arrived late and engaged in nothing more than token visitation. *See* Tenn. Code Ann. § 36-1-113(i)(3). There is no absolutely no evidence that a meaningful relationship was ever established between Mother and the child. The child's original caseworker testified that Mother spent her "visitation" sessions applying makeup in the bathroom, sleeping, or arguing with Father. *See* Tenn. Code Ann. § 36-1-113(i)(4). Because of Mother's failure to establish a safe home environment for the child, the return of the child to Mother would certainly have a profoundly negative physical, psychological, and emotional impact on the child. *See* Tenn. Code Ann. § 36-1-113(i)(5).

As the trial court found, Mother's "home environment is not safe for the child, due to the criminal activity or the use of drugs and alcohol." *See* Tenn. Code Ann. § 36-1-113(i)(7) & (8). There is no question that Mother has failed to pay child support. *See* Tenn. Code Ann. § 36-1-113(i)(9).

We conclude that the evidence contained in the record does not preponderate against the trial court's finding by clear and convincing evidence that the termination of Mother's parental rights is in the best interest of the child.

V.

The judgment of the trial court is affirmed. This case is remanded for enforcement of the trial court's judgment and for collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, L.L.T.

CHARLES D. SUSANO, JR., JUDGE