IN THE COURT OF APPEALS OF TENNESSEE

GRETTA MAUREEN ODOM WINTERROTH,	)	C/A NO. 03A01-9506-CH-00182
	)	WASHINGTON COUNTY CHANCERY COURT
Plaintiff-Appellant,	)	
	)	
	)	
	)	
v.	)	HONORABLE THOMAS J. SEELEY, JR.
	)	JUDGE, Sitting by Interchange
	)	
	)	
THOMAS ALLEN WINTERROTH,	)	
	)	
Defendant-Appellee.	)	VACATED AND REMANDED

FREDERICK M. LANCE, Johnson City, for Appellant

No appearance for the Appellee

O P I N I O N

Susano, J.

This litigation started out as a divorce case. Gretta Maureen Odom Winterroth (mother) sued her husband, Thomas Allen Winterroth (father), for an absolute divorce, custody of their two children, and other relief not pertinent to this appeal. A "Final Decree" was entered on December 17, 1990. This case took on a much different character when, over two and a half years later, the trial court entered an "Agreed Order of Termination of Parental Rights" (Agreed Order) by the terms of which mother gave up her parental rights to her children, Amber Winterroth and Heather Winterroth. The controversy now before us had its beginning on August 19, 1994, when mother filed a motion pursuant to Tenn. R. Civ. P. 60.02 seeking to set aside the Agreed Order. The trial court denied mother's motion. This appeal followed.

I

In order to put this dispute in perspective, some background is necessary. The parties' final divorce judgment awarded father "temporary custody" of the parties' children. The judgment recited that the award of "temporary custody" was subject to

> the provision that [mother] has advised the court that custody is to be placed in her subject to reasonable visitation by [father] when she is able to regain custody; . . .

On July 11, 1991, mother filed a post-final judgment petition asking that she be awarded custody of the parties' children. Mother's petition was heard on September 5, 1991, and denied by order entered September 20, 1991. That order provided

that father "shall continue to have primary custody of the parties' two minor children . . . with reasonable and liberal visitation rights being reserved to . . . [mother]." For the first time, mother was ordered to pay child support.

On December 23, 1991, father filed what he styled a "Petition to Modify Final Order." Among other things, that pleading prayed that the court "consider holding [mother] in contempt for her willful failure to provide child support."

Apparently, an order was entered on May 14, 1992, awarding father a child support arrearage of $2,011. We say apparently because that order is not in the record before us; but the agreed order setting it aside is. That order was entered on June 10, 1992.

The next order in the court file is the Agreed Order terminating mother's parental rights. Also in the record is a letter dated August 3, 1993, addressed to the trial judge from counsel for father. That letter is revealing as to what transpired in this case:

> Dear Judge Seeley:
>
> Enclosed is a copy of an Agreed Order of Termination of Parental Rights which was signed by Mr. Guinn [mother's then counsel] on May 6, 1992. For some reason the original Order was apparently never received by the Clerk and thus was never entered.
>
> What is in the file is an Agreed Order to set aside a portion of the Agreed Order of Termination of Parental Rights in so far as it affected an arrears [sic] owed by the [mother]. We waived the arrears [sic] in

> return for the [mother's] agreement to terminate parental rights. You will note that the Agreed Order of Termination is signed by [mother] and her attorney.
>
> We would appreciate your signing this order and mailing back to us in the enclosed self-addressed stamped envelope so that we may then file it with the clerk.

The Agreed Order terminating mother's parental rights was entered August 23, 1993.

II

On this appeal, mother claims that she did not fully understand the legal effect of the Agreed Order[1]. She testified below that her attorney told her that

> . . . she faced jail time for failing to pay her child support and/or keep it current, and that her way to avoid jail was to agree to having her parental rights terminated.

She further testified that she "never desired to have her parental rights terminated"; that she still had love and affection for her children; and, despite the language of the Agreed Order to the contrary, that she thought she could still visit with her children.

At the hearing below, the trial court also received the testimony of the two attorneys involved in this case at the time the Agreed Order was entered. Mother's attorney acknowledged

[1]The Agreed Order was signed by mother and her then counsel.

that she was upset when she agreed to the termination of her parental rights; but he denied that he told her that she was going to jail for the arrearage unless she gave up those rights. He also testified that he explained the legal significance of her approval of the Agreed Order.

The trial court found that "no grounds exist under Rule 60, T.R.C.P., which would permit the Court to set aside the [Agreed Order]."

Mother's motion addressed itself to the sound discretion of the trial court. ***Toney v. Mueller Company***, 810 S.W.2d 145, 147 (Tenn. 1991). We find no abuse of that discretion as to the issue raised by the appellant.

III

We have concluded that the sole issue raised by the appellant is without merit. Normally, this would require us to affirm the trial court; but in this case we believe there is a fundamental error that requires us to vacate the judgment below. Our review of the record persuades us that the trial court was without jurisdiction--power--to enter the Agreed Order that terminated mother's parental rights to her children. This error is of such a magnitude to require our intervention even in the absence of the issue being presented for review by the appellant. T.R.A.P. 13(b)[2]. *See also* T.R.A.P. 36(a).

The Agreed Order granted the following relief:

> WHEREFORE IT IS ORDERED AND ADJUDGED:
>
> 1. That the parental rights of the Defendant, Gretta Walker, as to her children, Heather and Amber Winterroth, shall be henceforth terminated.
>
> 2. That Defendant, Gretta Walker, shall have no further contact with said children and shall be restrained from coming about the person of either child and from the person of Thomas Winterroth and Cindy Winterroth.
>
> 3. That the prior orders of this Court in this action are modified to terminate any obligation of child support on the part of Defendant.
>
> 4. That the costs of this cause are taxed primarily against the Defendant and secondarily to the Plaintiff.

[2]T.R.A.P. 13(b) provides, in pertinent part, that "[t]he appellate court shall also consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review, . . ."

Certain aspects of this matter, some of which are self-evident, are worth noting. First, no petition was filed by anyone seeking a termination of parental rights. Second, no basis for terminating mother's parental rights is set forth in the Agreed Order other than mother's desire to relinquish those rights. Third, no guardian ad litem was appointed to represent the interests of the children. Fourth, no benefit to the children appears on the face of the Agreed Order; on the contrary, the children have lost not only a parent, but also a source of support.

The Agreed Order obviously did not have the effect of making Mr. Winterroth any more of a parent than he already was. It also did not affect his rights and obligations as a custodial parent, for the simple reason that he already had custody of the children. In short, there is no good reason appearing on the face of the record why the Agreed Order was entered.

It is clear that the Washington County Chancery Court had subject matter jurisdiction to terminate parental rights *under certain circumstances*. That grant of jurisdiction is found at T.C.A. § 37-1-104(c) and also in the adoption code, T.C.A. § 36-1-101, *et seq*. T.C.A. § 36-1-110 is a part of the adoption scheme. That statute provides, in subsection (a), as follows:

> In all cases where a court of competent jurisdiction has not heretofore terminated the parental rights and placed the child with the department or a licensed child-placing agency for adoption, then on written notice of not less than ten (10) days to the parent, parents, or guardian of the person, if the address be known, or if unknown, then by

> publication, as provided by law, the court[3] in the adoption proceeding or in a proceeding brought for the purpose of rendering a child available for adoption is hereby authorized to determine that an abandonment has taken place.

It is clear beyond any doubt that the power conferred in T.C.A. § 36-1-110(a) only pertains to an "adoption proceeding" or to a "proceeding brought for the purpose of rendering a child available for adoption." The instant case is neither. Therefore, the exercise of jurisdiction in this case cannot be justified by T.C.A. § 36-1-110(a). It simply does not apply to this case.

T.C.A. § 36-1-110(b) and T.C.A. § 37-1-104(c) confer additional subject matter jurisdiction on chancery courts. These statutes address essentially the same subject matter. T.C.A. § 36-1-110(b) provides as follows:

> The chancery and circuit courts shall *also* have concurrent jurisdiction with the juvenile court of a *separate proceeding* to determine whether or not a child has been abandoned and to terminate the parental rights.

(Emphasis added). T.C.A. § 37-1-104(c) states the following:

> The juvenile court has concurrent jurisdiction with the circuit and chancery courts in proceedings to terminate parental rights pursuant to § 37-1-147, or in cases where a child has been abandoned as defined by § 37-1-102(b)(1).

[3]The definition section of the adoption code defines "court" to "mean[] the chancery or circuit court." *See* T.C.A. § 36-1-102(4).

It is clear that a chancery court now has power to terminate parental rights over and above its power to do so in the adoption context. *Cf*. the supplanted holding of ***St. Peter's Orphan Asylum Association v. Riley***, 311 S.W.2d 336 (Tenn. App. 1957).

Both T.C.A. § 36-1-110(b) and T.C.A. § 37-1-104(c) contemplate a proceeding in which parental rights are terminated *and* the child is placed with a third party. The definition of an "abandoned child" (T.C.A. § 36-1-102(1)(A)) as that concept is alluded to in T.C.A. § 36-1-110(b) is instructive:

> "Abandoned child" means:
>
> (i) A child whose parents have willfully failed to visit or have willfully failed to support or make reasonable payments toward such child's support for four (4) consecutive months immediately preceding institution of an action or proceeding to declare the child to be an abandoned child. For purposes of this part, a father who has willfully failed to visit or willfully failed to support or make reasonable payments toward the support of the child's mother during the four (4) months immediately preceding the birth of the child is deemed to have willfully failed to visit or willfully failed to support or make reasonable payments toward the support of the child. In no instance, however, shall a final order terminating the parental rights of a parent pursuant to this section be entered until at least thirty (30) days have elapsed since the date of the birth of the child; or
>
> (ii) When, as the result of a petition filed in the juvenile court, the court has found a child to be a dependent and neglected child as defined in § 37-1-102, removed the child from the home of the parents and placed the child in the temporary custody of the department of human services or the licensed child-placing agency, and for a period of four (4) months the department or agency has given assistance to the parents in an effort to establish a suitable home for the child,

> as the result of a petition filed in the chancery or circuit court by the department or the agency and the parents are duly before the court by service of process, the court finds that the parents have made no effort to provide a suitable home, have shown a lack of concern as to the child's welfare and have failed to achieve a degree of personal rehabilitation as would indicate that, at some future date, they would provide a suitable home for the child, the chancery or circuit court shall have jurisdiction to decree the child an abandoned child, to terminate the parental rights and appoint a duly authorized representative of the department or the licensed child-placing agency having custody of the child as guardian of the person of the child with authority to place the child for adoption and to consent to the adoption in loco parentis.

T.C.A. § 36-1-102(1)(A). T.C.A. § 36-1-110(b) and T.C.A. § 36-1-102(1)(A), when read *in pari materia* make it clear that when parental rights are terminated, the court is to "appoint a duly authorized representative of the department [of human services] or the licensed child-placing agency having custody of the child as guardian of the person of the child with authority to place the child for adoption and to consent to the adoption in loco parentis." That was not done in this case because the trial court obviously did not perceive that it was proceeding under this statutory scheme.

T.C.A. § 37-1-104(c) refers to T.C.A. § 37-1-147 and T.C.A. § 37-1-102(b)(1). Subsection (A) of T.C.A. § 37-1-102(b)(1) is, by its terms, not applicable here. Subsection (B) of T.C.A. § 37-1-102(b)(1) pertains to an "incarcerated" parent and also has no application to the facts of this case. The remaining part of T.C.A. § 37-1-102(b)(1) provides as follows:

> "Abandoned child" means a child whose parents have willfully failed to visit or have willfully failed to support or make reasonable payments toward his support for four (4) consecutive months immediately preceding institution of an action or proceeding to declare the child to be an abandoned child;

It will be noted that the latter code section refers to a "proceeding to declare the child to be an abandoned child." That reference leads to T.C.A. § 37-1-147, entitled in the code "Termination of parental rights":

> (a) The petition to terminate parental rights shall comply with § 37-1-121 and state clearly that an order for termination of parental rights is requested and that the effect thereof will be as stated in the first sentence of § 37-1-148.
>
> * * *
>
> (c) Parental rights may be terminated under chapter 2, part 4 of this title or on the basis of abandonment as provided in this part or under subsection (d).
>
> (d) After hearing evidence on a termination petition, the court may terminate parental rights if it finds on the basis of clear and convincing evidence that termination is in the child's best interest and that one (1) or more of the following conditions exist:
>
> (1) The child has been removed from the custody of the parent by the court for at least one (1) year and the court finds that:
>
> (A) The conditions which led to the removal or other conditions which in all reasonable probability would cause the child to be subjected to further abuse or neglect and which, therefore, prevent the child's return to the care of the parent(s) still persists;
>
> (B) There is little likelihood that these conditions will be

remedied at an early date so that the child can be returned to the parent in the near future; and

(C) The continuation of the legal parent and child relationship greatly diminishes the child's chances of early integration into a stable and permanent home;

(2) The parent has been found to have committed severe child abuse against the child;

(3) The parent has been sentenced to more than two (2) years' imprisonment for conduct which has been or is found to be severe child abuse;

(4) The parent has been found to have committed severe child abuse against the child if the child is under eleven (11) years of age at the time of the abuse, or any sibling of the child if the sibling is under eleven (11) years of age at the time of the abuse, one (1) or more times; provided, that this section shall only apply to proceedings to terminate parental rights filed by the department of human services or a licensed child placing agency. Prior to entering an order pursuant to this section, the court shall consider reports prepared in light of the possible termination of parental rights by those persons specified in § 37-1-130(c); however, the court shall not base its decision exclusively on such reports; or

(5) The parent has been found to have committed one (1) or more acts of aggravated rape against a child under the age of thirteen (13) years. The district attorney general or the department of human services may initiate proceedings pursuant to this subdivision.

* * *

(f) The court shall file written findings of fact which are the basis of its conclusions on the issues within thirty (30) days of the close of the hearing or, if an appeal or petition for certiorari is filed, within five (5) days thereafter, excluding Sundays.

The trial court was not proceeding under T.C.A. § 37-1-147. There were no written findings of fact that would indicate an exercise of jurisdiction under T.C.A. § 37-1-104(c). Furthermore, there was no compliance with the companion statute, T.C.A. § 37-1-136:

> (a) When parental rights are terminated under this part or under chapter 2, part 4 of this title, the court shall award the complete custody, control and guardianship of the child to the department of human services or a licensed child-placing agency with the right to place the child for adoption and to consent to the adoption in loco parentis.
>
> (b) The court may not change, set aside or modify such order in a case where the parental rights have been terminated and the child has been awarded to the department or to a licensed child-placing agency, except with the consent of the department or such licensed child-placing agency when it is necessary to care for or safeguard the interest or welfare of such child.

We conclude that the trial court lacked subject matter jurisdiction to terminate the parental rights of mother in a post-divorce setting in the absence of a proceeding filed pursuant to and in strict compliance with the grant of jurisdiction found in the adoption code or T.C.A. § 37-1-104(c).

In the letter to Judge Seeley, counsel for the father candidly admitted that the father "waived the [child support] arrears [sic] *in return for* the [mother's] agreement to terminate parental rights" (emphasis added). We cannot countenance such a "bargain." The rights of parents and children are too precious to condone such activity. A parent's right to a child may only "be terminated if there is clear and convincing evidence

justifying such termination *under the applicable statute*." (Emphasis added). ***In re Drinnon***, 776 S.W.2d 96, 97 (Tenn. App. 1988) (citing ***Santosky v. Kramer***, 455 U.S. 745, 102 S. Ct. 1388, 71 L.Ed.2d 599 (1982)). The fact that mother may have wanted to terminate her parental rights is immaterial. A party cannot confer subject matter jurisdiction on a court where no such jurisdiction exists under law. ***Seagram Distillers Co. v. Jones***, 548 S.W.2d 667, 671 (Tenn. App. 1976).

Since the trial court lacked subject matter jurisdiction under the circumstances of this case, its judgment terminating mother's parental rights is void. ***Magnavox Co. of Tenn. v. Boles & Hite Const***., 583 S.W.2d 611, 613 (Tenn. App. 1979); ***Brown v. Brown***, 281 S.W.2d 492, 497 (Tenn. 1955).

The judgment of the trial court is vacated. Costs on appeal are assessed against the appellee. This case is remanded for such further proceedings as may be necessary, consistent with this opinion.

_____
Charles D. Susano, Jr., J.

CONCUR:

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Houston M. Goddard, P.J.

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Herschel P. Franks, J.