

**IN THE COURT OF APPEALS OF TENNESSEE, WESTERN SECTION  
AT JACKSON**

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**IN THE MATTER OF:**

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)       Shelby County Juvenile Court No. E4059  
)

**DANNY RAY FILLINGER, JR.,**

DOB: 6/27/89,

**AMY MICHELLE FILLINGER,**

DOB: 6/1/90,

)       C. A. No. 02A01-9409-JV-00223  
)  
)

Children Under Eighteen Years of Age,

**AGAPE CHILD AND FAMILY  
SERVICES, INC.**

Petitioner/Appellee,

VS.

**DANNY FILLINGER, SR. and  
TERESA FILLINGER,**

Respondents/Appellants.

**FILED**

**May 22, 1996**

**Cecil Crowson, Jr.**  
Appellate Court Clerk

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From the Juvenile Court of Shelby County at Memphis.

**Honorable A. V. McDowell, Special Judge**

**Barbara B. Johnson,**

Memphis Area Legal Services, Inc., Memphis, Tennessee

Attorney for Respondents/Appellants.

**Leah J. Roen,** Memphis, Tennessee

Guardian Ad Litem for Danny Ray Fillinger, Jr. and Amy Michelle Fillinger,

**B. R. Hester,** Bartlett, Tennessee

Attorney for Petitioner/Appellee Agape Child and Family Services, Inc.

OPINION FILED:

**AFFIRMED AND REMANDED**

**FARMER, J.**

**HIGHERS, J. :** (Concurs)

**LILLARD, J. :** (Concurs)

The parental rights of Danny and Teresa Fillinger to their children, Danny Ray, Jr. and Amy Michelle,<sup>1</sup> were terminated by the Juvenile Court of Memphis and Shelby County after a hearing on May 4, 1994. The hearing was pursuant to a petition filed by Agape Child and Family Services, Inc. (Agape) in whose custody the children had remained since August 1992. The trial court granted the petition after making the requisite statutory<sup>2</sup> findings. The Fillingers have appealed, presenting the following issues for our review:

1. Whether there is clear and convincing evidence in the record to support the trial court's decision that it is in the best interest of the children to terminate the parental rights of the natural parents pursuant to Tenn. Code Ann. 37-1-147.
2. Whether termination of parental rights was proper when the evidence in the record indicates that [Agape] did not comply with the requirements of Tenn. Code Ann. 37-2-403.
3. Whether the parents were denied due process by the trial court which failed to appoint counsel.

The record indicates that Agape first came into contact with the Fillinger children in June 1992 when they were living with their maternal grandmother and a request was made for help with their care. Mrs. Fillinger was incarcerated and Mr. Fillinger was in a drug rehabilitation program. The Fillingers have three older children<sup>3</sup> (not subject to this appeal) who were at the time of the termination hearing in the custody of the Tennessee Department of Human Services (DHS).

At the hearing, Laura Khokhar, a social worker with Agape, testified that Danny, Jr. and Amy are currently in foster care. Khokhar stated that in January 1994, she discussed a "plan for reunification" with the Fillingers. The plan called for the two to provide the agency with certain items of proof namely, rent receipts, paycheck stubs, verification of active involvement in either the AA or NA organizations and drug screens. According to Khokhar, these items were not provided as requested. The two also failed to pay any child support to the agency after April 1993. Khokhar stated that she had no "verification of employment" of either parent at the time of the hearing.

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<sup>1</sup>At the time of the termination hearing, the children were ages 4 and 3, respectively.

<sup>2</sup>T.C.A. § 37-1-147, which is discussed more fully in a subsequent portion of this opinion. This statute has since been amended effective January 1, 1996.

<sup>3</sup>Mr. Fillinger is the step-father of the eldest child.

Khokhar's testimony further indicates that the utilities at the Fillingers' current residence were disconnected in April 1994. The Fillingers' landlord testified that they had failed to pay rent on an apartment, leased in December 1993, for the preceding 4 months and that during eviction proceedings, the Fillingers filed bankruptcy.

Khokhar found the Fillingers uncooperative in terms of satisfying the agency's plan which would have restored custody of their children. She opined, "I've had meetings with them telling them exactly what they needed to do. And if they could provide that information and it could be approved, we wouldn't be here. But they continue to show a lack of housing stability."

Mrs. Fillinger testified that she and her husband had completed parenting classes. She stated that the LeBonheur Center for Children in Crisis (CCC), whom the record indicates evaluated the family at the behest of DHS, requested "very little counseling" of her and that "all [her] drug screens have [come] back negative." She stated that Agape had denied her request for additional visitation with the children or to reschedule their visits due to Mr. Fillinger's hours of employ. She admitted abusing drugs since 1991. She stated that she now attends AA meetings 3 or 4 times a day and has been drug and alcohol free for 10 months. She maintained that her continued sobriety along with her children are her "main concern[s]." She described her current employ as that of housekeeper "for a few people." Prior thereto, she was employed at Shoney's for a week. She quit because her shift included closing, and after closing hours, people would drink and use drugs. She feared a relapse.

On cross-examination, Mrs. Fillinger was asked to describe her and her husband's work history. She listed various places of employment, all of which were for relatively short time periods. She admitted that she and her husband have had problems with job stability, but reasoned that such was due to his bout with pneumonia and a job related injury to her pelvis. According to Mrs. Fillinger, she and her husband planned to get new housing within three to six months provided that Mr. Fillinger maintained a job he was to begin the day following the hearing. She acknowledged that their financial problems "[look] like the same history as . . . before", but insisted that their inability to maintain employment is due to their physical ailments. She said that she and her husband hit rock bottom and are now "very slowly climbing up." She is now "doing everything . . . to get

things in order.” She opined, “[e]verything that has been set up for me to go to, I have gone to.” She conceded that she is “still messed up, but [she’s] working on it.”

Mrs. Fillinger admitted that she had been incarcerated three times, all on theft related charges. Mr. Fillinger has twice been incarcerated for robbery, with the most recent occurring eight or nine years prior to the hearing. He was most recently arrested (within two years) for shoplifting and given a misdemeanor citation. The record indicates that one of the elder children was with him at the time and was also cited.

The trial court ruled from the bench as follows:

These cases disturb me as much as anything that I have to deal with. But here I’ve got these people who have got their lives messed up and we’ve jeopardized these children, . . .

But I believe I have done everything I can. I’ve had these people from AGAPE down here about three or four times. I know they’re getting put out with these cases being continued.

I’ve done everything I could to see that the Fillingers have their absolute day in court and had their absolute ability to show me that they are the right people for these children to be with. I cannot find that.

The court’s final judgment expressly found that the Fillingers had failed to substantially fulfill their responsibilities under the foster care plan; that the conditions under T.C.A. § 37-1-147(d)(1) were present; and that it was, therefore, in the children’s best interests that the Fillingers’ parental rights be terminated.

In addressing Appellants’ second issue first, we note that originally it was argued that the agency failed to comply with the requirements of T.C.A. § 37-2-403.<sup>4</sup> The issue has been somewhat altered to reflect the supplementing of this record to include the agency’s foster care file on the family. It is now Appellants’ contention that Agape failed to make reasonable efforts to rehabilitate the family or to comply with its own plan, including establishing communications with

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<sup>4</sup>The statute sets forth the required contents of a foster care plan. It has since been amended effective January 1, 1996.

the other agencies “allegedly” recommended for the Fillingers.

The record reveals an initial court approved foster care plan for this family as of August 5, 1992. It declares the “foster care service goal” as a “return” to the parents and identifies the problem contributing to the removal of the children as “[t]he mother and father both are battling drug addiction . . . . There is no stable housing and the father has just now begun a new job. The mother is not due for release from prison until late October, 1992.” The plan states that the services to be provided are help in arranging substance abuse counseling, parenting classes and encouragement of job stability. The “tasks” identified for the parents were to obtain substance abuse counseling, attend parenting classes, obtain and retain stable employment and adequate housing, visit the children and submit to random drug screens. The agency’s “tasks” were to “[m]ake referral for evaluation and counseling” and “[m]aintain contact with other agencies offering services to the family.”

A “progress report,” dated November 13, 1992, states that the children are adjusting well to their foster homes. The report indicates that the older Fillinger children were residing at the time with their maternal grandfather. Both parents were employed (Mrs. Fillinger having been released from incarceration) and residing in an efficiency apartment. The report states that the Fillingers were not submitting to random drug screens and that the agency had made a referral for “counseling and career development.”

The foster care plan for the family was reviewed by the Foster Care Advisory Review Board on November 16, 1992 as evidenced by a “certificate of review.” The certificate indicates that the “projected plan for permanency” was a “return home” and that the parents’ and agency’s progression towards compliance with the case plan was “sufficient.”

The next progress report is dated January 16, 1993. It indicates that the three older children were living with their parents. Mr. Fillinger’s work in construction was described as sporadic due to illness. It states that Mrs. Fillinger was arrested in October 1992 for shoplifting. Their unaccomplished tasks at this time were failure to obtain counseling and housing, attend parenting classes or submit to random drug screens. According to the report, the agency contacted

Mrs. Fillinger's probation counselor who confirmed that she had not attended counseling since October. Also, no drug screens were on record with Med Lab. The "continued or additional risk factors" were the mother's re-arrest the month following her release from incarceration, her failure to attend counseling as scheduled and both parents' failure to submit to drug screens as requested. The report notices a "pattern of deceit" by both parents when questioned about these failures. The plan was again reviewed by the Board on February 16, 1993. At this time, the parents' compliance with the case plan was described as minimal or none and the agency's as "sufficient."

The next progress report was completed on July 19, 1993. It indicates that the children had been placed in the same foster home. Both parents were unemployed. The older children remained with them. The Fillingers were evicted from their apartment, Mrs. Fillinger was again arrested for shoplifting, in Mississippi. Both had failed to provide requested drug screens, attend counseling or visit their children as scheduled. The plan states that the Fillingers had not completed any activities asked of them and that Mr. Fillinger stated that he had no intention of providing drug screens or attending counseling sessions. The agency for the first time suggests a "goal change." Accordingly, the Board's review of the plan on July 19, 1993 resulted in a recommendation that the plan be changed to one of adoption for the children. The agency's compliance with the case plan was viewed as "sufficient."

The next report is dated August 2, 1993, again recommending that the children be placed for adoption as the family situation remained unchanged. Thus, a new foster care plan was initiated by the agency with the goal being adoption. This plan states that the Fillingers "refused to attend any counseling services or take drug screens [as] requested or follow any suggestions offered by their social worker."

Finally, a report dated January 18, 1994 indicates employment for the Fillingers and foster care placement for the three older children. It notes the Fillingers' uncooperativeness. The Board's review on January 18, 1994 found minimal or no progress on behalf of the parents and the agency's efforts "sufficient."

Clearly, the record in this case establishes the agency's implementation of a foster

care plan for this family and reasonable efforts on its behalf to reunify the family. We hold this issue without merit.

Appellants additionally question whether their due process rights were denied by the trial court's failure to appoint them counsel. In *State ex rel. T.H. by H. H. v. Min*, 802 S.W.2d 625 (Tenn. App. 1990), the middle section of this Court held that an indigent parent does not have an absolute right to counsel in a proceeding affecting their parental rights. *Min*, 802 S.W.2d at 626 (citing *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981)). In determining whether due process entitles the parent to the appointment of counsel, the court is to examine the parent's interest, the state's interest and the risk that failure to appoint counsel will result in an erroneous decision. *Min*, 802 S.W.2d at 626. *Min* continued:

Because the competing interests of the parents and the state are evenly balanced, the third part of the test -- the chance that the failure to appoint counsel will result in an erroneous decision -- becomes the main consideration in this case. Both, the parents and the state, share an interest in an accurate and just decision. *Id.* To help assess the risk of an unfair proceeding resulting in an erroneous decision, the courts in *Lassiter* and [*Davis v. Page*, 714 F.2d 512 (5th Cir. 1984)] have listed several factors that bear on the question. They include: (1) whether expert medical and/or psychiatric testimony is presented at the hearing; (2) whether the parents have had uncommon difficulty in dealing with life and life situations; (3) whether the parents are thrust into a distressing and disorienting situation at the hearing; (4) the difficulty and complexity of the issues and procedures; (5) the possibility of criminal self-incrimination; (6) the educational background of the parents; and (7) the permanency of potential deprivation of the child in question.

*Id.* at 626-27. (Citations omitted.)

The court in *Min* held that the parents there were entitled to the appointment of counsel in certain proceedings wherein they faced the possibility of losing custody of their child. *Id.* at 627. In considering the foregoing factors, *Min* reasoned that the parents were poorly educated, with fourth and sixth grade educations; that medical and psychological information was used at the hearing against them of which they were unaware until admitted into evidence; that much of the testimony at the hearing was hearsay; that the parents did not understand the basic court procedure and had trouble asking questions; that long-term protective services had been provided to the parents,

including assistance with their bills and homemaker services; that when asked by the court to make a statement, one parent “rambled from subject to subject” and the other “said nothing at all”; and finally, that one parent had been potentially exposed to criminal prosecution after speaking. *Id.*

In our case, the record shows that Mr. Fillinger has an eighth grade education and that Mrs. Fillinger obtained her GED. Both parties testified at the termination proceeding and Mrs. Fillinger cross-examined witnesses. A review of the transcript of the proceeding clearly shows that hearsay testimony was presented. The CCC’s report of its evaluation on the family, however, could not have come as a surprise to the Fillingers as it appears based solely on information that they provided. Most importantly, however, the record indicates that the termination hearing scheduled November 10, 1993 was postponed until January 5, 1994, due to the Fillingers’ request that they be allowed time to obtain an attorney. At the scheduled hearing on January 5, the Fillingers had not obtained counsel.<sup>5</sup> The record does not suggest that they requested the court to appoint them counsel.

We conclude that the facts in *Min* are not so similar to the current ones as to compel a finding of error by the trial court in failing to appoint counsel for the Fillingers. The Fillingers were active participants in the termination proceeding and the record lends no indication that either failed to understand its nature or consequences. Certainly their own request to obtain counsel indicates such understanding.

We now turn our attention to the merits of this case, which we review *de novo* upon the record with a presumption of correctness of the trial court’s findings of fact. Absent error of law, we are to affirm those findings, unless the evidence preponderates otherwise. Rule 13d T.R.A.P.; *see, e.g., Tennessee Dep’t of Human Services v. Riley*, 689 S.W.2d 164 (Tenn. App. 1984). The trial court terminated the parental rights of the Fillingers based on its finding that the following statutory conditions were shown to exist by “clear and convincing evidence”:

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<sup>5</sup>According to the agency’s January 18, 1994 progress report, this hearing was also postponed because of the Fillingers’ insistence that they “would act on the foster care plan.” The hearing was also delayed two other times for different reasons. The trial court referred to these continuances in its ruling from the bench.



(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;

T.C.A. § 37-1-147(d).

The Fillingers concede that at the time of the termination hearing, they “were not at a point to have custody returned,” but, nonetheless, argue that the trial court's decision to terminate was premature considering their progress towards reunification. They point to the favorable recommendation made by the CCC in its report released just prior to the hearing, and those of DHS. Indeed, it appears from the record that the plans of DHS remain that of reunification for the three older children and their parents. As to the CCC evaluation, after interviewing the entire Fillinger family, it recommended “that custody be gradually returned . . . .” and that DHS “remain in a position of monitoring the family to assure that the following recommendations, as well as the other needs of the children are met.” The recommendations were family therapy, individual psychotherapy for Mrs. Fillinger, attendance of support groups, such as AA, submission to random drug screenings, employment and verification thereof and possibly, individual therapy for Mr. Fillinger. The evaluation also acknowledged the “longevity” of the Fillingers' problems.

It would appear that the CCC's recommendations are virtually the same as those of Agape back in 1992. Certainly the testimony of Mrs. Khokhar indicates that the same problems remain for the Fillingers and we find nothing in the record to preponderate against the trial court's finding that the Fillingers failed to fulfill their responsibilities under the foster care plan. While we appreciate the Fillingers' testimonies that they are now attempting to change their lives, and we certainly hope that these attestations are realized, the fact that they are still confronting the same problems as in 1992 cannot go unnoticed. The CCC recommended a gradual return based on information received from the Fillingers. Clearly a return of this nature greatly diminishes the

children's chances of an early integration into a stable and permanent home especially when considering the nature and "longevity" of their problems. Moreover, the recommendation was based on the parents' willingness to follow the steps suggested. Only these parents know for certain whether they are willing to redress the problems in their lives. The record before this Court does not indicate such resolve on their part. In the two years the children were with Agape, this certainly is not apparent. Even the CCC evaluation fails to suggest that the Fillingers' present conditions are remediable so as to allow the children's return to them "in the near future." We do not believe these children should be made to bear the brunt of their parents' seemingly one step forward, two steps backwards approach to life.

It is extremely unfortunate that we must ever render a decision such as this to terminate the rights of any parent. Under the record that exists before this Court, however, we believe that such a decision is in the best interests of these children which is, of course, our paramount concern. Accordingly, we hold that there exists clear and convincing evidence on which to base the trial court's decision terminating the parental rights of the Fillingers.

The judgment of the trial court is affirmed and this cause remanded for any further proceedings necessary and consistent herewith. Costs are assessed against Danny and Teresa Fillinger, for which execution may issue if necessary.

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FARMER, J.

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HIGHERS, J. (Concurs)

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LILLARD, J. (Concurs)