IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

IN RE: T.H., L.H., S.H., and L.H., Children under the age of 18	)	Davidson Juvenile Nos. 07-67-53, 07-67-54, 07-67-55, 07-67-56
	)	Appeal No. 01-A-01-9412-JV-00600

APPEAL FROM THE JUVENILE COURT FOR DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

THE HONORABLE ANDREW J. SHOOKHOFF, JUDGE

For the Respondent/Appellant:

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For the Petitioner/Appellee:

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Attorney General and Reporter

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AFFIRMED AND REMANDED

WILLIAM C. KOCH, JR., JUDGE

O P I N I O N

This appeal involves the termination of the parental rights of a father who physically or sexually abused his four daughters and his step-daughter. After removing the children from their home and placing them in foster care, the Department of Human Services petitioned the Davidson County Juvenile Court to terminate the father's parental rights. The juvenile court determined that the father had committed severe child abuse and terminated his parental rights with regard to his four biological children. The father asserts on this appeal that the juvenile court should not have admitted evidence of the outcome of related criminal and civil proceedings because these dispositions were on appeal at the time of the juvenile court hearing. We find that the juvenile court properly admitted and considered these records and that the record contains clear and convincing evidence supporting the juvenile court's decision to terminate the father's parental rights. Accordingly, we affirm the judgment.

I.

R.H.[1] and D.H. have four daughters who range in age from six to sixteen years old at the present time.[2] Prior to these proceedings, all four girls lived with their parents in Nashville. Another child, D.H.'s daughter from a previous relationship,[3] also lived with the family.

The Department of Human Services received a report in early 1990, that R.H.'s step-daughter, who was thirteen years old at the time, was pregnant with his child. When the department's case workers investigated the report, M.J. told them that the child's father was a boy closer to her own age. The investigation ended shortly thereafter, and M.J. gave birth to a son in April 1990.

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[1]In light of the conduct involved in this case, we have determined that the children's interests will be best served by omitting the names of the parties.

[2]The four daughters include T.H. (DOB Aug. 13, 1979), L.H. (DOB May 30, 1982), S.H. (DOB Nov. 7, 1984), and L.H. (DOB July 11, 1989).

[3]R.H.'s step-daughter is M.J. (DOB Dec. 19, 1976).

The department investigated R.H. again in early 1991 after receiving a report that he had severely beaten his step-daughter. The department's investigators discovered on this occasion that M.J. was pregnant once again.[4] They also learned that R.H. had been physically or sexually abusing M.J. as well as his own daughters for several years. Both M.J. and T.H. recounted how R.H. repeatedly beat them with various objects, forced them to disrobe, and sexually abused them by means of digital-vaginal penetration and sexual intercourse. Both girls told the social workers that these incidents began when they were approximately eight years old. They also stated that they had complained to their mother but that D.H. had not intervened to stop R.H.'s abuse from continuing.

In March 1991, the department filed an emergency petition in Davidson County Juvenile Court seeking to remove the children from their home and to place them in protective custody. The juvenile court granted the petition, and the department placed the children in foster homes. Several of the children required hospitalization and placement in therapeutic foster care. All four of the children remain in foster care to this day.

The juvenile court conducted a hearing in August 1993 with regard to the department's neglect and abuse petition. R.H. did not appear at the hearing but was represented by counsel. Both M.J. and T.H. testified about the multiple incidents of sexual and physical abuse perpetrated by R.H., and the juvenile court also admitted into evidence the out-of-court statements of L.H. and S.H. describing the abuse they had suffered from their father. Based on this evidence, the juvenile court determined that the department had established by clear and convincing evidence that the children were dependent, neglected, and abused. It also determined that D.H. had committed severe child abuse by failing to protect her daughters.

R.H., who had by then been arrested on sexual abuse charges, sought a de novo trial in the circuit court on the department's neglect-abuse petition. While the circuit court proceedings were pending, the Davidson County grand jury

[4]M.J. gave birth to her second child, a daughter, in September 1991. Blood testing later confirmed that R.H. was the biological father of both of M.J.'s children.

indicted R.H. on six counts of aggravated rape and three counts of rape for his conduct with regard to M.J. and T.H. A criminal court jury convicted R.H. on all counts in March 1994, and R.H. was sentenced to serve one hundred years in the state penitentiary. R.H. will not be eligible to be considered for parole until he has served more than one-half of his sentence.[5]

On May 11, 1994, the department filed a petition to terminate R.H.'s and D.H.'s parental rights. The juvenile court conducted a hearing on the department's petition in August 1994. The department's evidence at this hearing included certified copies of R.H.'s indictments and judgments of conviction and the juvenile court's own September 20, 1993 findings and order in the neglect-abuse proceeding. On October 17, 1994, the juvenile court entered an order finding that R.H. had committed severe child abuse and terminating his parental rights with regard to his four biological daughters.[6] R.H. has appealed.

II.

R.H. presents two relatively narrow evidentiary issues on this appeal. He asserts that the juvenile court should not have considered the certified copies of the judgments of his criminal convictions or its own order in the earlier neglect-abuse proceeding because these cases were on appeal when the juvenile court conducted the evidentiary hearing on the department's petition to terminate his parental rights. We have determined that the fact that these judgments were on appeal goes to their weight, not to their admissibility.

A.

We turn first to R.H.'s argument that the juvenile court improperly admitted into evidence the certified copies of the nine judgments of conviction in his criminal case. He asserts that these judgments were not final at the time of the

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[5]The Tennessee Court of Criminal Appeals affirmed R.H.'s convictions in an opinion released on October 25, 1995. *State v. Hunter*, App. No. 01-C-01-9410-CR-00335, 20 T.A.M. 46-28 (Tenn. Crim. App. Oct. 25, 1995).

[6]D.H.'s parental rights were terminated in a separate hearing, and she has not appealed this decision.

hearing in the juvenile court because they were on appeal and, therefore, that they were inadmissible.

R.H.'s argument concerning the admissibility of the nine judgments of conviction overlooks Tenn. R. Evid. 803(22) which governs the admissibility of final judgments of conviction. The rule embodies an exception to the hearsay rule for

> Evidence of a final judgment adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal case for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

There may have been some question about the admissibility of previous judgments of conviction prior to the adoption of the Tennessee Rules of Evidence. *See Smith v. Phillips*, 43 Tenn. App. 364, 374, 309 S.W.2d 382, 387 (1956). Following the adoption of Tenn. R. Evid. 803(22), however, judgments of conviction are routinely admitted to "prove any fact essential to sustain the judgment." The effect of the rule is to allow the admission of felony convictions but to prohibit the admission of misdemeanor convictions where the motivation to defend is often minimal or nonexistent. *See* Fed. R. Evid. 803(22) advisory committee's note; 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 803(22)[01], at 803-408 (Joseph M. McLaughlin general ed., 1995) ["*Weinstein's Evidence*"].

Tenn. R. Evid. 803(22) does not establish judgments of prior convictions as conclusive evidence of the facts necessarily determined in the underlying criminal proceeding. 4 *Weinstein's Evidence* ¶ 803(22)[01], at 803-410. The defendant may still attempt to rebut the evidence by offering to explain the circumstances surrounding the conviction or the underlying events or by offering mitigating evidence in response. *Lloyd v. American Export Lines*, 580 F.2d 1179, 1190 (3d Cir.), *cert. denied*, 439 U.S. 969 (1978); Michael H. Graham, *Federal Practice and Procedure: Evidence* § 6773, at 728 (interim ed. 1992). In the final analysis, the trier of fact must determine the weight to be given to the judgment

of conviction. Graham, *supra*, at 728; David F. Binder, *Hearsay Handbook* § 24.01, at 378 (3d ed. 1991).

Tenn. R. Evid. 803(22) states that the "pendency of an appeal may be shown but does not affect admissibility." The fact that an appeal is pending does not affect admissibility because this rule is based on the assumption that legal proceedings are correct and therefore inherently reliable. 4 *Weinstein's Evidence* ¶ 803(22)[01], at 803-413. Furthermore, given the strong motivation to defend a felony indictment, an indicia of trustworthiness exists in a judgment of conviction for a felony. *See* Binder, *supra*, § 24.04, at 386. Thus, even though a judgment of conviction may not be final for purposes of res judicata, the conviction is still admissible for "what it is worth." *Benham v. Plotner*, 795 P.2d 510, 512-13 (Okla. 1990); Fed. R. Evid. 803(22) advisory committee's note. The pendency of an appeal may affect the weight to be afforded to the judgment as evidence, but this is for the trier of fact to determine. *See Benham v. Plotner*, 795 P.2d at 513; Binder, *supra*, § 24.01, at 379.

The fact that R.H. had been convicted of aggravated rape and rape was relevant in the termination proceeding because Tenn. Code Ann. § 37-1-147(d)(3) (1991) permits terminating the parental rights of a parent "who has been sentenced to more than two (2) years' imprisonment for conduct which has been or is found to be severe child abuse." Severe child abuse has been defined to include aggravated rape and rape. Tenn. Code Ann. § 37-1-102(b)(19)(C) (1991). Based on Tenn. R. Evid. 803(22), we find that the juvenile court properly admitted and considered the evidence of R.H.'s nine judgments of conviction for rape and aggravated rape even though these convictions were on appeal at the time of the termination of parental rights proceeding.

B.

R.H. also argues that the juvenile court improperly admitted and considered its own September 30, 1993 order in the neglect-abuse proceeding. Using a similar lack-of-finality rationale, he asserts that this order was inadmissible in the termination of parental rights proceeding because he had filed a notice of his

intent to pursue a de novo trial of the neglect-abuse charges in circuit court. The juvenile court overruled R.H.'s objection on the ground that he had not taken steps to perfect his appeal.

The fact that R.H. had appealed the juvenile court's decision in the neglect-abuse case does not annul or destroy the juvenile court's judgment. The judgment was only suspended while the appeal was pending and would have continued in full force if the appeal was not pursued for any reason. *Taylor v. Ottinger,* 193 Tenn. 688, 693, 249 S.W.2d 899, 901 (1952). Until reversed or modified in the circuit court, the juvenile court judgment continues to exist and is presumptively correct.

The continuing validity of the juvenile court's judgment in the neglect-abuse case is not really a controlling issue in this case. Neither the department nor the juvenile court were seeking to treat the findings in the neglect-abuse case as conclusive in the termination of parental rights proceeding and were not using the juvenile court's September 30, 1993 order as evidence of the action taken on that date. The juvenile court referred to its earlier order in the neglect-abuse proceeding simply to explain that it had already heard evidence that R.H. had physically or sexually abused his four daughters and that this conduct amounted to severe child abuse for the purpose of Tenn. Code Ann. § 37-1-147(d)(2). R.H. had the opportunity but failed to present evidence to rebut the proof presented at the earlier hearing.

The fact that the neglect-abuse case might have been appealed does not prevent the juvenile court from relying on evidence presented in an earlier proceeding involving the same parties and the same issues. The trial court was not relying on its order as evidence of R.H.'s conduct but rather on the direct testimony and other evidence it had already heard. Since the evidence was presented in court and was subject to cross-examination by R.H.'s lawyer, it is not hearsay and bears sufficient indicia of reliability to warrant its consideration in a later, related proceeding.

III.

The goal of every termination of parental rights proceeding is to render a decision that will ultimately prove to be in the best interests of the child or children involved. *Tennessee Dep't of Human Servs. v. Riley*, 689 S.W.2d 164, 169 (Tenn. App. 1984). While the courts' primary focus is on the children, we cannot disregard the constitutionally protected liberty interests of the biological parents. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394-95 (1982); *In re Adoption of Female Child (Bond v. McKenzie)*, 896 S.W.2d 546, 547 (Tenn. 1995); *O'Daniel v. Messier*, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995). Accordingly, we must consider the interests of the children in the context of the biological parents' fundamental interests.

The gravity of the consequences of decisions in termination of parental rights cases[7] requires the courts to employ the "clear and convincing evidence" standard of proof. *See* Tenn. Code Ann. § 37-1-147(d); *In re Drinnon (Kilpatrick v. Brown)*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988); *Tennessee Dep't of Human Servs. v. Riley*, 689 S.W.2d at 165. This elevated standard is the level minimally required to achieve the subjective certainty that due process commands. *O'Daniel v. Messier*, 905 S.W.2d at 187-88; *Lee v. Holder*, App. No. 84-152-II, slip op. at 9, 10 T.A.M. 38-14 (Tenn. Ct. App. Aug. 20, 1985). Employing any less rigorous standard of review will not adequately balance the interests of the child with those of his or her parents and the State. *Santosky v. Kramer*, 455 U.S. at 769-70, 102 S. Ct. at 1403.

The record paints a sordid picture of R.H.'s physical or sexual abuse of his four children, as well as his step-daughter and a niece. Far from being isolated incidents, this abuse was repeated and continuous over several years. Three of R.H.'s children described the abuse they suffered at their father's hands, and their testimony was buttressed by the testimony of their step-sister and a cousin. As a result of this conduct, a criminal court jury convicted R.H. of six counts of

[7]A decree terminating parental rights legally obliterates the parent/child relationship. Tenn. Code Ann. § 37-1-148 (1991 & Supp. 1995) (repealed effective Jan. 1, 1996). As we have stated on previous occasions, "[t]he biological parents whose rights are terminated are reduced to the role of complete strangers as far as the child is concerned." *O'Daniel v. Messier*, 905 S.W.2d at 186; *see also In re Knott*, 138 Tenn. 349, 355, 197 S.W. 1097, 1098 (1917); *In re Adoption of Dearing (Adcock v. Saliba)*, 572 S.W.2d 929, 932 (Tenn. Ct. App. 1978).

aggravated rape involving his oldest daughter and step-daughter[8] and three additional counts of rape involving his step-daughter.[9]

Severe child abuse includes the commission of any act toward a child prohibited by Tenn. Code Ann. § 39-13-502 (aggravated rape) or Tenn. Code Ann. § 39-13-503 (rape). *See* Tenn. Code Ann. § 37-1-102(b)(19)(C). Parental rights may be terminated when a parent commits severe child abuse [Tenn. Code Ann. § 37-1-147(d)(2)], when a parent is convicted and sentenced to more than two years imprisonment for conduct amounting to severe child abuse [Tenn. Code Ann. § 37-1-147(d)(3)], or when a parent is found to have committed one or more acts of aggravated rape against a child under the age of thirteen [Tenn. Code Ann. § 37-1-147(d)(5)]. R.H.'s convictions for six counts of aggravated rape against his step-daughter and oldest daughter when they were under the age of thirteen provide sufficient grounds for terminating his parental rights. In addition, T.H.'s, L.H.'s and S.H.'s testimony concerning sexual abuse by their father when they were under eleven years of age also provides grounds for terminating R.H.'s parental rights with regard to his youngest child under Tenn. Code Ann. § 37-1-147(d)(4).

The record contains clear and convincing evidence requiring the termination of R.H.'s parental rights without considering his criminal convictions. Parental rights may also be terminated under Tenn. Code Ann. § 37-1-147(d)(1) if a child has been removed from his or her parents' home for at least one year[10] and if the conditions that led to the removal still persist,[11] if there is little likelihood that these conditions will be remedied at an early date,[12] if continuing the parents' relationship will hinder the child's chances of early integration into a stable and

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[8]These offenses were for aggravated rape because the victims were under thirteen years of age. *See* Tenn. Code Ann. §§ 39-13-502(a)(4) (1991) and 39-2-603(a)(4) (1982).

[9]These counts involved rapes of the step-daughter when she was older than thirteen. *See* Tenn. Code Ann. § 39-13-503 (1991).

[10]Tenn. Code Ann. § 37-1-147(d)(1).

[11]Tenn. Code Ann. § 37-1-147(d)(1)(A).

[12]Tenn. Code Ann. § 37-1-147(d)(1)(B).

permanent home,[13] and if terminating the parents' parental rights is in the child's best interests.[14]

R.H.'s children were removed from their parents and have been in foster care continuously since March 6, 1991. R.H. has not received treatment for his inclination to sexually abuse his children and is now serving a 100-year sentence for his crimes. Thus, the reasons for removing the children from their home still persists, and there is little likelihood that they will be remedied at an early date. Two of the children had been placed in possible adoptive homes at the time of the juvenile court hearing, and thus the record contains clear and convincing evidence that terminating R.H.'s parental rights will improve the chances of their placement in a stable and permanent home and that his daughters' best interests will be best served by terminating his parental rights.

IV.

We affirm the judgment terminating R.H.'s parental rights and remand the case to the juvenile court for whatever additional proceedings may be required. We also tax the costs of this appeal to the Tennessee Department of Human Services.

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WILLIAM C. KOCH, JR., JUDGE

CONCUR:

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HENRY F. TODD, P.J., M.S.

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SAMUEL L. LEWIS, JUDGE

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[13]Tenn. Code Ann. § 37-1-147(d)(1)(C).

[14]Tenn. Code Ann. § 37-1-147(d).