IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 1, 2023

IN RE PARKER F. ET AL.

Appeal from the Circuit Court for Robertson County
No. 74CC5-2021-CV-221 Kathryn Wall Olita, Judge

No. M2022-01110-COA-R3-PT

A father appeals the termination of his parental rights to two children. The trial court concluded that the petitioners proved four statutory grounds for termination by clear and convincing evidence. The court also concluded that there was clear and convincing evidence that termination was in the children's best interest. After a thorough review, we agree and affirm.

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

W. NEAL MCBRAYER, J., delivered the opinion of the court, in which THOMAS R. FRIERSON II and KENNY W. ARMSTRONG, JJ., joined.

Joe R. Johnson II, Springfield, Tennessee, for the appellant, Robert B.

Emily C. Green, Springfield, Tennessee, for the appellees, Morgan R. and James R.

OPINION

I.

A.

Kayla B. ("Mother") and Robert B. ("Father") are the biological parents of two children, Farrah and Dakota. After the parents separated in 2016, Mother retained custody of the children.[1] On November 12, 2017, police arrested Mother on drug charges. Father was incarcerated at the time. Farrah was three years old; Dakota was 19 months. With the

[1] Mother also had custody of another child from a previous relationship.

parents' agreement, the juvenile court awarded the maternal grandparents temporary legal and physical custody of the children.

Father was released from jail in 2018. He attempted to see the children, but the maternal grandparents objected. The maternal grandmother, Valerie L. ("Grandmother"), later explained that she was concerned about Father's drug addiction.

Father sent the children cards and gifts. And he made one monetary payment of $309 in July 2019. He also continued to incur new criminal charges, such as drug possession. On March 4, 2020, he was again arrested on drug charges. This time, he was sentenced to six years for felony possession of methamphetamines for resale.

Due to the anticipated length of Mother's incarceration, the grandparents decided that they needed some help caring for the children. They met James and Morgan R. ("Adoptive Parents") through a friend at church. The children were introduced to the Adoptive Parents in July 2019. By fall, they were spending weekends at Adoptive Parents' home. In October, the grandparents suggested a more permanent arrangement.

The original plan was for Adoptive Parents to assume custody of the children in May of 2020, when the school year ended. But the COVID pandemic accelerated the timetable. The children moved into Adoptive Parents' home a month early. The juvenile court officially transferred temporary physical and legal custody to Adoptive Parents on September 24, 2020. Mother consented to the transfer through counsel. Father received notice of the custody transfer, but took no immediate action.

Father did not contact Adoptive Parents until July 25, 2021. Farrah was then six; Dakota, five. Around this same time, Father also sent Adoptive Parents $25 and some cards for the children.

On August 31, 2021, the Adoptive Parents petitioned to terminate the parental rights of both parents and to adopt. The petition alleged multiple grounds for termination of Father's parental rights: abandonment by willful failure to visit or support; abandonment by wanton disregard; and failure to manifest an ability and willingness to assume custody of the children.

B.

The court heard from multiple witnesses at trial, including Mother, Father, Adoptive Parents, and Grandmother. As this appeal only concerns the termination of Father's parental rights, we focus on the facts relevant to Father.

Father was still incarcerated. But he emphasized his exemplary behavior in prison. He had no disciplinary infractions. He never joined a gang. He was housed in the "honor

pod." He passed all his drug tests. He even completed a cognitive behavioral therapy course and a faith-based therapy project.

Father hoped to be paroled in the near future. If not granted parole, he believed he would be released by September 2023. After his release, he planned to live with his parents and work in the family business. He expected to earn approximately $55,000 a year.

He recognized that he did not have a meaningful relationship with his children when he was last arrested. But he blamed Grandmother. He claimed that he asked Grandmother for visitation back in 2018. She refused. She only allowed him to drop gifts off at the mailbox. One time, she even tried to have him arrested when he came to her house. And she often failed to answer his calls. He claimed that he filed "multiple visitation petitions," but they "got vanished" when Grandmother filed an adoption petition. Still, he continued to ask Grandmother for access to his children when he was not incarcerated.

Grandmother agreed that Father asked to visit the children in 2018. She denied his request because she did not know whether he was still using drugs. She explained that they "went to court about it," and Father tested positive for drugs at the hearing. So she did not allow him access to the children. She did not recall receiving any cards, gifts, or phone calls from Father during the four months preceding his latest incarceration.

Father admitted that he could have paid more child support. He was employed in 2019. But he maintained that Grandmother told him that she did not need any money. And he sent cards and gifts for the children. He also recalled sending a bag of school supplies in August 2019.

Father agreed that he had not seen his children since October 2016. Still, he sought an opportunity to forge a new relationship with them. He conceded that he had an extensive criminal record, and he had been repeatedly incarcerated since his children were born. Yet he brushed it off as mostly driving charges. And he insisted that he had turned his life around and that he was ready to be a parent.

The trial court terminated the parental rights of both Father and Mother. As to Father, it concluded there was clear and convincing evidence of all alleged grounds for termination. It also concluded that the evidence was clear and convincing that termination of Father's parental rights was in the children's best interest.

II.

A parent has a fundamental right, based in both the federal and state constitutions, to the care and custody of his own child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174 (Tenn. 1996); *In re Adoption of Female Child*, 896 S.W.2d 546, 547 (Tenn. 1995).

But parental rights are not absolute. *In re Angela E.*, 303 S.W.3d at 250. The government's interest in the welfare of a child justifies interference with a parent's constitutional rights in certain circumstances. *See* Tenn. Code Ann. § 36-1-113(g) (2021).

Tennessee Code Annotated § 36-1-113 sets forth both the grounds and procedures for terminating parental rights. *In re Kaliyah S.*, 455 S.W.3d 533, 546 (Tenn. 2015). Parties seeking termination of parental rights must first prove the existence of at least one of the statutory grounds for termination listed in Tennessee Code Annotated § 36-1-113(g). Tenn. Code Ann. § 36-1-113(c)(1). If one or more statutory grounds for termination are shown, they then must prove that terminating parental rights is in the child's best interest. *Id.* § 36-1-113(c)(2).

Because of the constitutional dimension of the rights at stake in a termination proceeding, parties seeking to terminate parental rights must prove both the grounds and the child's best interest by clear and convincing evidence. *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010) (citing Tenn. Code Ann. § 36-1-113(c); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 808-09 (Tenn. 2007); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002)). This heightened burden of proof serves "to minimize the possibility of erroneous decisions that result in an unwarranted termination of or interference with these rights." *Id.* "Clear and convincing evidence" leaves "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). It produces a firm belief or conviction in the fact-finder's mind regarding the truth of the facts sought to be established. *In re Bernard T.*, 319 S.W.3d at 596.

We review the trial court's findings of fact "de novo on the record, with a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise." *In re Taylor B.W.*, 397 S.W.3d 105, 112 (Tenn. 2013); TENN. R. APP. P. 13(d). We then "make [our] own determination regarding whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, provide clear and convincing evidence that supports all the elements of the termination claim." *In re Bernard T.*, 319 S.W.3d at 596-97. We review the trial court's conclusions of law de novo with no presumption of correctness. *In re J.C.D.*, 254 S.W.3d 432, 439 (Tenn. Ct. App. 2007).

Only Father has appealed. He challenges both the grounds for terminating his parental rights and the determination that termination was in the children's best interest.

A.

1. Abandonment by Incarcerated Parent

One of the statutory grounds for termination of parental rights is "[a]bandonment by the parent." Tenn. Code Ann. § 36-1-113(g)(1). There are "alternative definitions for

abandonment." *In re Audrey S.*, 182 S.W.3d 838, 863 (Tenn. Ct. App. 2005); *see also* Tenn. Code Ann. § 36-1-102(1)(A) (2021) (defining the term "abandonment"). One definition, found at Tennessee Code Annotated § 36-1-102(1)(A)(iv), applies when a parent, like Father, was incarcerated during all of the four-month period before the termination petition was filed.

An incarcerated or previously incarcerated parent can be deemed to have abandoned a child in several ways. Such a parent abandons his child by either failing to visit or failing to support the child "for four (4) consecutive months immediately preceding the parent's . . . incarceration." Tenn. Code Ann. § 36-1-102(1)(A)(iv)(a). For Father, this period ran from November 4, 2019 to March 3, 2020. An incarcerated or previously incarcerated parent also is deemed to have abandoned a child by "engag[ing] in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child." *Id.* § 36-1-102(1)(A)(iv)(c). Here, the trial court concluded that each of these grounds of "abandonment" applied to Father.

a. Failure to Visit

Father did not visit his children during the relevant four-month period. According to Grandmother, he did not even try. Father argues that the maternal grandparents thwarted his attempts to visit and/or contact his children.

"A parent's failure to visit may be excused by the acts of another only if those acts actually prevent the parent from visiting the child or constitute a significant restraint or interference with the parent's attempts to visit the child." *In re M.L.P.*, 281 S.W.3d 387, 393 (Tenn. 2009). The trial court found that Father did not show that the maternal grandparents thwarted any specific attempt to visit or contact the children between November 2019 and March 2020. The evidence does not preponderate against this finding. But Father claims that his lack of effort during the four-month period was justified in light of Grandmother's previous conduct. *See In re Adoption of Destiny R.D.*, No. M2011-01153-COA-R3-PT, 2012 WL 1066496, at *9 (Tenn. Ct. App. Mar. 27, 2012) ("Virtually all termination cases involving abandonment include consideration of events that occurred prior to the critical four month period, because those events illuminate the motivations of the parties and the situations they find themselves in during that period."); *In re Alex B.T.*, No. W2011-00511-COA-R3-PT, 2011 WL 5549757, at *6 (Tenn. Ct. App. Nov. 15, 2011) ("[T]his Court . . . may consider prior actions to determine if a failure to visit or support during the relevant period was excused by the actions of others.").

When Father was released from jail in 2018, he attempted to visit his children, but Grandmother resisted his efforts. She was concerned about his history of drug addiction. And her concerns appeared to be justified when Father failed a drug test in court. Father claims that he filed multiple visitation petitions in 2018. But his petitions disappeared when Grandmother filed for adoption. The trial court did not credit his testimony on this

point.[2] But even if Father's testimony is true, it is undisputed that he did not renew his efforts after Grandmother dropped her adoption petition.

We conclude that the evidence is clear and convincing that Father abandoned his children by failing to visit. The evidence does not preponderate against the trial court's finding that Father failed to establish that his conduct was not willful. Father made some initial efforts to visit his children that Grandmother steadfastly resisted out of concern for the children's safety. And he may have filed a petition with the court. But he never renewed his efforts after Grandmother dropped her adoption petition. *See In re M.L.P.*, 281 S.W.3d at 393 (concluding that a parent's failure to visit was willful when the parent did not actively pursue his legal remedies). Nor did he make any effort to address his drug problems. Instead, he continued to incur new criminal charges. *Cf. In re McKenzi W.*, No. M2017-01204-COA-R3-PT, 2018 WL 3773914, at *5 (Tenn. Ct. App. Aug. 9, 2018) (explaining that "our courts have consistently held that a parent who makes no attempt to meet the conditions to regain visitation has willfully abandoned the child").

b. Failure to Support

We also conclude that the evidence is clear and convincing that Father abandoned his children by failing to make reasonable payments toward their support. "[F]ailed to support" or "failed to make reasonable payments toward such child support" is statutorily defined as "failure . . . to provide monetary support or the failure to provide more than token payments towards the support of the child." Tenn. Code Ann. § 36-1-102(1)(D).

Father failed to make any support payments during the four-months preceding his incarceration. And he admitted that he was employed and able to pay at least some child support during this period of time. As the trial court noted, his two monetary payments and the gift of school supplies occurred outside of the relevant four-month period. While Grandmother never asked Father for money, this does not excuse Father's failure to pay. *See David A. v. Wand T.*, No. M2013-01327-COA-R3-PT, 2014 WL 644721, at *8 (Tenn. Ct. App. Feb. 18, 2014) (rejecting a parent's argument that "adoptive parents' failure to request child support relieved him of the obligation to support his children"); *In re Brookelyn W.*, No. W2014-00850-COA-R3-PT, 2015 WL 1383755, at *12 (Tenn. Ct. App. Mar. 24, 2015) ("Mother's statement that she did not want support from Father is insufficient to excuse Father's duty to support, as her statement neither prevented Father from attempting to support the child nor constituted a significant interference with any non-existent efforts on Father's behalf."). All parents are presumptively aware of their obligation to support their children. Tenn. Code Ann. § 36-1-102(1)(H).

[2] The trial court found that it was undisputed that Father "has not taken any independent legal action to regain formal visitation."

c. Wanton Disregard

The evidence is likewise clear and convincing that Father abandoned his children by "engag[ing] in conduct prior to [his] incarceration that exhibit[ed] a wanton disregard for the welfare of the child[ren]." *Id.* § 36-1-102(1)(A)(iv)(c). "Wanton disregard" is not a defined term. Commonly, actions amounting to "wanton disregard reflect a 'me first' attitude involving the intentional performance of illegal or unreasonable acts and indifference to the consequences of the actions for the child." *In re Anthony R.*, No. M2014-01753-COA-R3-PT, 2015 WL 3611244, at *3 (Tenn. Ct. App. June 9, 2015). Such actions may include, either alone or in combination, "probation violations, repeated incarceration, criminal behavior, substance abuse, and the failure to provide adequate support or supervision for a child." *In re Audrey S.*, 182 S.W.3d at 867-68. But, ultimately, the question is "whether the parental behavior that resulted in incarceration is part of a broader pattern of conduct that renders the parent unfit or poses a risk of substantial harm to the welfare of the child." *Id.* at 866.

Here, the record establishes such a pattern of conduct. Father has an extensive criminal record. He has been in jail for at least part of almost every year since his children were born. Among other things, Father has been charged with theft, joyriding, felony and misdemeanor drug possession, evading arrest, driving under the influence, and driving on a revoked license. He has multiple probation violations. And he repeatedly failed to appear for his court dates, thus compounding his legal issues. Most recently, he was sentenced to six years in prison for felony possession of methamphetamines with intent to resell. When not incarcerated, Father failed to act in the children's interest. He continued to use illegal drugs. He did not financially support his children.

2. Failure to Manifest an Ability and Willingness to Assume Custody

Finally, the court found termination of Father's parental rights appropriate under Tennessee Code Annotated § 36-1-113(g)(14). Under this ground, a parent's rights may be terminated if he or she

> [1] has failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility of the child, and [2] placing the child in the person's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child.

Id. § 36-1-113(g)(14). Both prongs must be established by clear and convincing evidence. *In re Neveah M.*, 614 S.W.3d 659, 674 (Tenn. 2020). As to the first prong, the petitioner may prove that a parent is either unable or unwilling to "assume legal and physical custody or financial responsibility for the child." *Id.* at 677.

The trial court found that Father failed to manifest a willingness to assume custody or financial responsibility for his children. We agree. At trial, Father shared his love for his children and his desire to parent them. But desire alone is insufficient. In the court's view, Father's conduct during the past five years did not reflect a true willingness to care for his children. Father also lacked the ability. Thirteen months remained on Father's current sentence. Even with parole, it would be several weeks, if not months, before he was released. And he acknowledged that he had no home to offer the children.

The evidence is equally clear and convincing that placing the children in Father's custody would pose a risk of substantial harm to their psychological welfare. Returning children to the custody of a virtual stranger carries a risk of substantial harm. *See In re Braelyn S.*, No. E2020-00043-COA-R3-PT, 2020 WL 4200088, at *17 (Tenn. Ct. App. July 22, 2020) (reasoning that returning the child to a "virtual stranger" in light of his strong bond with his current caregivers would constitute substantial harm). The children have not seen Father since 2016. At that time, Farrah was two, and Dakota was six months old. Father conceded that he no longer had a relationship with the children. The children had bonded with their current caregivers, with whom they have been living for just over two years.

B.

Because "[n]ot all parental misconduct is irredeemable," our parental termination "statutes recognize the possibility that terminating an unfit parent's parental rights is not always in the child's best interests." *In re Marr*, 194 S.W.3d 490, 498 (Tenn. Ct. App. 2005). Tennessee Code Annotated § 36-1-113(i) lists twenty factors for courts to consider in a best interests analysis. The "factors are illustrative, not exclusive, and any party to the termination proceeding is free to offer proof of any other factor relevant to the best interests analysis." *In re Gabriella D.*, 531 S.W.3d 662, 681 (Tenn. 2017). In reaching a decision, "the court must consider all of the statutory factors, as well as any other relevant proof any party offers." *Id.* at 682.

The focus of this analysis is on what is best for the child, not what is best for the parent. *In re Marr*, 194 S.W.3d at 499. The analysis should consider "the impact on the child of a decision that has the legal effect of reducing the parent to the role of a complete stranger." *In re C.B.W.*, No. M2005-01817-COA-R3-PT, 2006 WL 1749534, at *6 (Tenn. Ct. App. June 26, 2006). Although "[f]acts relevant to a child's best interests need only be established by a preponderance of the evidence, . . . the combined weight of the proven facts [must] amount[ ] to clear and convincing evidence that termination is in the child's best interests." *In re Carrington H.*, 483 S.W.3d 507, 535 (Tenn. 2016).

The trial court found that Father had not shown continuity or stability in meeting the children's needs. Tenn. Code Ann. § 36-1-113(i)(1)(C), (O). He did not visit the children or provide financial support while they were in protective custody. *Id.* § 36-1-

113(i)(1)(E), (S). He did not have a secure and healthy relationship with the children. And the court did not believe that there was a reasonable expectation that Father could create such a relationship in the future. *Id.* § 36-1-113(i)(1)(D).

The court also found that Father had not demonstrated a sense of urgency in seeking custody of the children or in addressing his drug addiction and criminal activity. *Id.* § 36-1-113(i)(1)(M). It recognized that Father had taken advantage of the classes available to him while incarcerated. *Id.* § 36-1-113(i)(1)(K). Yet, it could not determine whether Father had succeeded in making a lasting change. *Id.* § 36-1-113(i)(1)(J). Father concedes that he has not been an ideal father. But he argues that he turned his life around while in prison and that he is ready to be a parent to his children. We commend Father for his efforts while incarcerated. But we agree with the trial court that it remains to be seen whether Father can remain drug-free and law abiding after his release.

As the court recognized, the children were in a "loving, stable, and satisfactory home." They had bonded with Adoptive Parents. They never talked about Father. Given their ages, it is doubtful they remember him. A change in caregivers at this stage "would no doubt be harmful." *Id.* § 36-1-113(i)(1)(A), (B), (H). Father does not question the children's bond with Adoptive Parents. Rather, he argues that he does not intend to disrupt their current living arrangement. He only wants a chance to form a relationship with the children. But we must consider the best interest factors from the child's viewpoint, not the parent's. *In re Marr*, 194 S.W.3d at 499.

The evidence does not preponderate against the trial court's findings. The combined weight of the proven facts amounts to clear and convincing evidence that termination is in the children's best interest. These children have been in protective custody for almost five years. They have no relationship with Father. He cannot offer them a safe and loving home at this point. Whether he has truly changed remains to be seen. Adoptive Parents give the children the earliest possible chance at permanency.

III.

We affirm the termination of Father's parental rights. The record contains clear and convincing evidence to support more than one statutory ground for termination. We also conclude that terminating Father's parental rights was in the children's best interest.

s/ W. Neal McBrayer
W. NEAL MCBRAYER, JUDGE