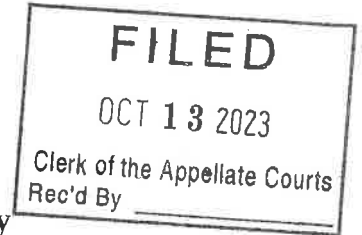


IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 5, 2023 Session

IN RE PRESTON H.

Appeal from the Juvenile Court for Williamson County
No. 39316-21-JT2 Sharon Guffee, Judge



No. M2022-00786-COA-R3-PT

W. NEAL MCBRAYER, J., concurring.

I concur in the result reached by the Court and in its analysis in all but one respect. In considering whether the father of Preston H., Christopher W. (“Father”), established an affirmative defense to the claim that he abandoned his child by failure to support, the Court reasons that it is unnecessary to determine “whether willfulness [of Father’s failure to support] presents a question of law, fact, or a mixed question of fact and law.” In my view, the outcome of the appeal depends on that determination.

For almost two decades, to terminate parental rights, Tennessee law required proof that the failure to support was willful. *See, e.g., In re Mattie L.*, 618 S.W.3d 335, 345-46 (Tenn. 2021); *In re Adoption of Angela E.*, 402 S.W.3d 636, 640 (Tenn. 2013); *In re D.L.B.*, 118 S.W.3d 360, 366-67 (Tenn. 2003). Under the former regime, whether a parent failed to support a child presented a question of fact. *In re Adoption of Angela E.*, 402 S.W.3d at 640. But whether the proven facts amounted to clear and convincing evidence of willfulness presented a question of law. *Id.*; *see also In re Mattie L.*, 618 S.W.3d at 342.

Effective July 1, 2018, the definition of “abandonment” changed. *See* 2018 Tenn. Pub. Acts 1088, 1104. Under the new regime, proof of willfulness is no longer required to establish abandonment by failure to support. Tenn. Code Ann. §§ 36-1-113(g)(1) (Supp. 2020), 36-1-102(1)(A)(i) (2021). Instead, “lack of willfulness” is an affirmative defense that must be proven by a preponderance of the evidence. *Id.* § 36-1-102(1)(I). The trial court must be convinced that it was “more likely true than not true” that the failure to support was not willful. *See McEwen v. Tenn. Dep’t of Safety*, 173 S.W.3d 815, 825 n.19 (Tenn. Ct. App. 2005) (explaining the preponderance of the evidence standard).

These changes alter the standard of review. Findings made by a preponderance of the evidence are accorded a presumption of correctness. *See* TENN. R. APP. P. 13(d). The

presumption is overcome only if the evidence preponderates against the finding that the failure to pay support was not willful. *See id.* In other words, whether there was a lack of willfulness is a question of fact, not a question of law.¹ *But see In re John A.*, No. E2020-00449-COA-R3-PT, 2021 WL 32001, at *6 (Tenn. Ct. App. Jan. 4, 2021).

Here, the trial court found that Father's failure to pay support for the four-month period preceding the filing of the petition to terminate was not willful. Given the presumption of correctness that must be accorded that finding, I would affirm the dismissal of the petition to terminate Father's parental rights.

s/ W. Neal McBrayer

W. NEAL MCBRAYER, JUDGE

¹ Willfulness is a fact question in most other contexts. *See, e.g., Seals v. H & F. Inc.*, 301 S.W.3d 237, 252 (Tenn. 2010) (quoting 57A AM. JUR. 2D *Negligence* § 290 (2004)) (willful and wanton conduct); *Strickland v. Strickland*, 644 S.W.3d 620, 633 (Tenn. Ct. App. 2021) (willful violation of a court order); *Cain-Swope v. Swope*, 523 S.W.3d 79, 91 (Tenn. Ct. App. 2016) (willful and voluntary unemployment or underemployment); *see also Dog House Invs., LLC v. Teal Props., Inc.*, 448 S.W.3d 905, 916 (Tenn. Ct. App. 2014) (holding that knowledge and intent, component parts of the willfulness inquiry, present questions of fact).