

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 14, 2014

IN RE: DAVEN S. L.¹

**Appeal from the Chancery Court for Maury County
No. A01112 Stella L. Hargrove, Chancellor**

No. M2013-02376-COA-R3-PT - Filed May 14, 2014

Father of one child appeals the termination of his parental rights on the grounds of abandonment by wilful failure to support and visit and the finding that termination of his parental rights would be in the child's best interest. Finding no error we affirm.

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

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P. J., M. S., and ANDY D. BENNETT, J., joined.

Jacob J. Hubbell, Columbia, Tennessee, for the appellant, Matthew B. L.

Lawrence D. Sands, Columbia, Tennessee, for the appellees, Jennivy P. A. L. S. and Cody B. S.

OPINION

Matthew L. ("Father") and Jennivy S. ("Mother") are the biological parents of Daven L., born out of wedlock in December 2004. Mother married Cody S. on March 14, 2012, and they filed a Petition for Termination of Parental Rights and Petition for Adoption in Maury County Chancery Court on March 23, alleging that Father had wilfully failed to pay child support and visit as provided in Tenn. Code Ann. § 36-1-113(g)(1), and contending that adoption would be in the child's best interest. Father had filed a Petition to Establish Paternity in Maury County Juvenile Court on March 2. A hearing was held on Father's petition on March 26 and the court entered an order on April 12 declaring Father to be the

¹ This Court has a policy of protecting the identity of children in parental termination cases by initializing the last names of the parties.

biological father of Daven and transferring the case to Chancery Court to be consolidated with Mother's petition.

The case was heard on July 24, 2013, and on July 29 the court entered an order finding that Father had wilfully failed to visit and failed to support Daven and that termination of Father's parental rights would be in Daven's best interest; accordingly, the court terminated Father's rights.²

Father appeals, articulating the following issues:

- I. Whether the trial court erred in finding by clear and convincing evidence that Father willfully failed to visit the child when Mother hindered his attempts at visitation, and when Father filed a petition seeking visitation within the four month statutory period.
- II. Whether the trial court erred in finding by clear and convincing evidence that Father's failure to pay child support was willful.
- III. Whether the trial court erred in finding by clear and convincing evidence that termination of Father's parental rights was in the best interest of the child.

I. STANDARD OF REVIEW

A parent has a fundamental right to the care, custody, and control of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174 (Tenn. 1996). Thus, the state may interfere with parental rights only if there is a compelling state interest. *Nash-Putnam*, 921 S.W.2d at 174–75 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)). Our termination statutes identify “those situations in which the state’s interest in the welfare of a child justifies interference with a parent’s constitutional rights by setting forth grounds on which termination proceedings can be brought.” *In re W.B.*, 2005 WL 1021618, at *7 (citing Tenn. Code Ann. § 36-1-113(g)). A party seeking to terminate the parental rights of a biological parent must prove at least one of the statutory grounds for termination. Tenn. Code Ann. § 36-1-113(c)(1); *In re D.L.B.*, 118 S.W.3d 360, 366–67 (Tenn. 2003); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). Secondly, the party must prove that termination of the parental rights of the biological parent is in the child’s best interest. Tenn. Code Ann. § 36-1-113(c)(2).

Because of the fundamental nature of the parent’s rights and the grave consequences of the termination of those rights, courts must require a higher standard of proof in deciding

² Because neither party received a copy, the order was re-entered on September 23, 2013.

termination cases. *Santosky*, 455 U.S. at 766– 69; *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Thus, both the grounds for termination and the best interest inquiry must be established by clear and convincing evidence. Tenn. Code Ann. § 36-3-113(c); *In re Valentine*, 79 S.W.3d at 546. In light of the heightened standard of proof in these cases, a reviewing court must adapt the customary standard of review set forth by Tenn. R. App. P. 13(d). *In re M.J.B.*, 140 S.W.3d 643, 654 (Tenn. Ct. App. 2004). As to the court’s findings of fact, our review is *de novo* with a presumption of correctness unless the evidence preponderates otherwise, in accordance with Tenn. R. App. P. 13(d). *Id.* We must then determine whether the facts, as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements necessary to terminate parental rights. *Id.*

II. DISCUSSION

Tenn. Code Ann. § 36-1-113(g)(1) establishes abandonment, as defined at Tenn. Code Ann. § 36-1-102, as a ground for terminating parental rights. Tenn. Code Ann. § 36-1-102 (1)(A)(i) defines “abandonment” for this purpose as follows:

For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child.

In *In re Audrey S.*, 182 S.W.3d 838 (Tenn. Ct. App. 2005), the court discussed wilfulness in the context of termination cases:

The concept of “willfulness” is at the core of the statutory definition of abandonment. A parent cannot be found to have abandoned a child under Tenn. Code Ann. § 36–1–102(1)(A)(i) unless the parent has either “willfully” failed to visit or “willfully” failed to support the child for a period of four consecutive months. . . . In the statutes governing the termination of parental rights, “willfulness” does not require the same standard of culpability as is required by the penal code. Nor does it require malevolence or ill will. Willful conduct consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent. Conduct is “willful” if it is the product of free will rather than coercion. Thus, a person acts “willfully” if he or she is a free agent, knows what he or she is doing, and intends to do what he or she is doing. . . . Failure to visit or support a child is “willful” when a

person is aware of his or her duty to visit or support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so. Failure to visit or to support is not excused by another person's conduct unless the conduct actually prevents the person with the obligation from performing his or her duty . . . or amounts to a significant restraint of or interference with the parent's efforts to support or develop a relationship with the child. The parental duty of visitation is separate and distinct from the parental duty of support. Thus, attempts by others to frustrate or impede a parent's visitation do not provide justification for the parent's failure to support the child financially.

The willfulness of particular conduct depends upon the actor's intent. Intent is seldom capable of direct proof, and triers-of-fact lack the ability to peer into a person's mind to assess intentions or motivations. Accordingly, triers-of-fact must infer intent from the circumstantial evidence, including a person's actions or conduct.

Id. at 863–64 (citations and footnotes omitted).

A. Abandonment by Failure to Support

Father acknowledges his failure to pay support but contends that his failure was not willful because he lacked the capacity to pay support during the four month period preceding the filing of the petition.

The child support payment record introduced as Exhibit 2 shows that no support payments were made from September 2011 to July 2012, which includes the four months preceding the filing of the Petition for Termination. Father testified that he was working doing odd jobs, including working at a concrete company and painting, and making between \$7.50 and \$8.00 per hour, during the relevant four month period; he testified that he had also worked sporadically at various restaurants prior to the four month period.

The record clearly and convincingly supports the finding that Father had the capacity to provide support during the relevant time period and that his failure to pay support was willful within the meaning Tenn. Code Ann. § 36-1-102 (1)(A)(i). While Father's testimony relative to his employment was elusive, it was clear that he could find employment when he desired to do so.³

³ We note also that the trial court made the following finding:

B. Failure to visit⁴

Father contends that his failure to visit Daven was not wilful because Mother hindered his attempts to visit and because he filed a petition for visitation within the relevant four month period.

Both Mother and Father testified that in 2009, after Father's release from prison, he was given a list of requirements by Mother to be completed in order to visit Daven. Father testified that he complied with the requirements but that Mother hindered his attempts to visit nonetheless. Mother testified that it was not until after the proceedings were in progress that Father wrote her a note stating that he had complied with the requirements⁵; Mother testified

The Court finds [Father] to be a dishonest, perpetual criminal who wants to go and come as he pleases, accept no responsibility, answer to no one and blame the system and everyone but himself for his lot in life.

The findings of the trial judge in a non-jury case are entitled to great weight where the trial judge saw and heard the witnesses and observed their manner and demeanor on the stand and was therefore in a much better position than the appellate court to judge the weight and value of their testimony. *See Duncan v. Duncan*, 686 S.W.2d 568, 571 (Tenn. Ct. App. 1984). Upon our review of the record, the evidence does not preponderate against this finding.

⁴ Mother testified that Father had not seen Daven since 2007 and did not send cards or letters:

- Q. And I think you testified that to your recollection [Father] hasn't seen Daven since Daven was roughly three, so - -
- A. Yes, sir.
- Q. - - we're talking 2007 sometime?
- A. Yes, sir.
- Q. Okay. Since then, although he may not have seen him, has he sent letters, cards, called to speak directly to Daven?
- A. No letters, cards, nothing like that. He would call on occasion, maybe once or twice a year, something like that. It was never nice. It was never, you know, I'd like to speak with my son. Can we try to figure something out? . . .
- ***
- Q. Any birthday cards, birthday presents?
- A. No, sir.
- Q. Ever?
- A. No, sir.

Father does not contest this evidence.

⁵ Father's note, dated October 31, 2012, was introduced as an exhibit.

that she decided to let the court handle the matter. In the order of termination, the court stated:

[Mother] testified that [Father] tried for no more than 30 days to accomplish the list. Respondent testified that he successfully completed the list and that [Mother] still refused to let him be a part of Daven's life. The Court does not believe [Father].

In addition to the credibility finding inherent in the ruling, to which we give considerable deference,⁶ the evidence supports the determination that Mother did not inappropriately hinder Father's access to Daven. At the time Mother established the requirements, Daven was three years old, Father had just been released from prison and had a history of erratic personal and criminal behavior as well as sporadic involvement in Daven's life and in that of Mother; we agree with the trial court that the requirements Mother imposed were reasonable.⁷ Notably, even though the requirements were established in 2009, Father took no action to contest them or to establish visitation until shortly before the petition to terminate his rights was filed in March 2012. The finding that Father's failure to visit was wilful is supported by clear and convincing evidence.⁸

C. Best Interest

Once a ground for termination has been proven by clear and convincing evidence, the trial court must then determine whether it is the best interest of the child for the parent's rights to be terminated, again using the clear and convincing evidence standard. The legislature has set out a list of factors at Tenn. Code Ann. § 36-1-113(i) for courts to follow in determining the child's best interest. These factors are:

⁶ Where there is conflict in testimony, the trial court is in a superior position than the reviewing court to observe the demeanor of the witnesses and evaluate their credibility. *McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn. 1995). As a result, appellate courts afford "considerable deference" to the trial court's findings of credibility and the weight to be given testimony. *Cutler-Hammer v. Crabtree*, 54 S.W.3d 748, 753 (Tenn. 2001). The Tennessee Supreme Court has instructed that "great weight" must be given to the factual findings made by the trial court that rest on determinations of credibility. *See Randolph v. Randolph*, 937 S.W.2d 815, 819 (Tenn. 1996).

⁷ The court specifically found Mother to be credible.

⁸ The fact that Father filed his petition to establish paternity and set visitation shortly before Mother filed the petition to terminate his rights does not preponderate against the finding that his failure to visit was wilful. This was a fact which was considered and rejected by the trial court, largely on the basis of the court's finding that Father lacked credibility and the finding quoted in footnote 3, *supra*.

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

The list is not exhaustive, and the statute does not require every factor to appear before a court can find that termination is in a child's best interest. *See In re S.L.A.*, 223 S.W.3d 295, 301 (Tenn. Ct. App. 2006) (citing *State of Tennessee Dep't of Children's Servs. v. T.S.W.*, No. M2001-01735-COA-R3-CV, 2002 WL 970434 at *3 (Tenn. Ct. App. May 10, 2002); *In re I.C.G.*, No. E2006-00746-COA-R3-PT, 2006 WL 3077510 at *4 (Tenn. Ct. App. Oct. 31, 2006)).

The trial court made specific findings as to factors (1), (3), (4), (5), (7), (8) and (9). In finding that termination of Father's parental rights was in Daven's best interest, the court noted:

Each of the factors weighs strongly against [Father]. [Father] has not maintained regular visitation or other contact with the child; no relationship has been established between Respondent and Daven since age 3; [Father] has never consistently paid child support for the child even though court ordered to do so on March 29, 2010; and [Father] has refused to even attempt to make an adjustment of circumstances, conduct or conditions as to make it safe and in the child's best interest to be in his home. [Father] is currently in jail. He has never demonstrated that he wanted to provide a physical environment that is healthy and safe for the child. The Court finds that [Father] prefers to be free of any responsibility for the child. He wants all the rights, but none of the responsibilities.

The evidence clearly and convincingly supports the trial court's factual findings and consideration of the applicable statute in determining that termination of Father's parental rights would be in the best interest of Daven.

III. CONCLUSION

For the foregoing reasons, we affirm the decision of the trial court terminating Father's parental rights.

RICHARD H. DINKINS, JUDGE