IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 22, 2016 Session

IN RE A.E.T.

Appeal from the Juvenile Court for Coffee County
No. 14J0136 Timothy R. Brock, Judge

No. M2015-01193-COA-R3-PT – Filed July 26, 2016

DCS filed a petition to terminate the parental rights of T.E.W. (Father)[1] to his child, A.E.T. (the Child), on two grounds. Following a bench trial, the court entered a termination order, finding, by clear and convincing evidence, that Father had been sentenced by a federal court to a term of imprisonment of more than ten years, at a time when the Child was not yet eight years of age. The court also found that termination was in the Child's best interest. DCS had sought to terminate Father's parental rights based on abandonment by wanton disregard, but the trial court initially declined to do so. After the trial, DCS realized that the parties had made a mutual mistake, the result of which was to render invalid the sole ground for termination found by the trial court. At the request of DCS, the trial court re-opened the proof. In light of additional evidence, the court entered a new order that terminated Father's parental rights, this time finding DCS had established the ground of wanton disregard by clear and convincing evidence. The court adopted its earlier holding regarding the Child's best interest. Father appeals. We affirm the judgment of the trial court as modified.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed as Modified; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which ANDY D. BENNETT, and JOHN W. MCCLARTY, JJ., joined.

Peter Trenchi, Sewanee, Tennessee, for appellant, T.E.W.

Herbert H. Slatery III, Attorney General and Reporter, and Rebekah A. Baker, Senior Counsel, Nashville, Tennessee, for the appellee, State of Tennessee.

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[1] In the same petition, DCS sought to terminate the parental rights of the Child's mother, B.J.T. (Mother). Those rights were terminated in an order entered October 23, 2014. Mother's case is not before us on this appeal.

OPINION

I.

The Child was born February 9, 2005. For most of his life, he and Father lived off and on with E.H. (Father's sister). Father was arrested in August 2010 and pleaded guilty in November 2012 to "conspiracy to manufacture and distribute 5 grams or more of methamphetamine (actual) and fifty grams or more of a mixture and substance containing methamphetamines." On February 25, 2013, Father was sentenced to 130 months in federal prison, with an estimated release date in 2020.

For a time, the Child remained in the home of Father's sister, along with sister's minor grandchildren, A.A.T. and A.T.T. In January 2013, DCS removed all three children from her home and took them into protective custody. Father's sister had tested positive for benzodiazepines, oxycodone, and opiates and failed to produce a valid prescription. She also was found to have a number of other individuals residing in her home who were either using or under the influence of drugs. On November 14, 2013, the trial court adjudicated the Child dependent and neglected – a condition to which Father stipulated based upon his "incarceration and inability to provide care for [the Child] at this time." Father's sister moved for the children to be returned to her, but her request was denied. Afer a hearing, the court found evidence (1) that she was "involved in abuse or misuse of prescription drugs," (2) that during a visit with the three children she "insinuated" they would face "ramifications . . . if they testified unfavorably regarding her," and (3) that the children were "adamant that they did not want to" live with her. The three children remained in foster care.

On February 11, 2014, DCS filed a petition to terminate Father's parental rights to the Child. It sought to terminate Father's rights based on two grounds – abandonment by an incarcerated parent's conduct evidencing wanton disregard for the Child, pursuant to Tenn. Code Ann. §§ 36-1-113(g)(1) and 36-1-102(1)(A)(iv) (2014), and Father's "confine[ment] in a correctional or detention facility by order of the United States District Court as a result of a criminal act under a sentence of ten (10) or more years and the child [was] under eight (8) years of age at the time the sentence was entered by the Court," pursuant to Tenn. Code Ann. § 36-1-113(g)(6) (2014). A bench trial followed on October 2 and 13, 2014. Father participated by telephone. Father did not contest the ground for termination embodied in Tenn. Code Ann.§ 36-1-113(g)(6), but instead challenged the termination based solely on the Child's best interest. The court terminated Father's parental rights by an order entered October 23, 2014, finding clear and convincing evidence that Father had been sentenced to more than ten years in federal prison and that termination was in the Child's best interest. The trial court, however, determined that DCS had failed to meet its burden to prove wanton disregard.

After the trial, DCS realized the Child turned eight about two weeks *before* Father was sentenced. As a result, the "age" element of Tenn. Code Ann. § 36-1-113(g)(6) was not met. Within thirty days of the court's judgment, DCS filed a motion, asking the court for a new trial and/or to alter or amend, reconsider, or vacate its final order. In response, the trial court re-opened proof. The court heard new evidence on March 23 and April 2, 2014. The court again entered an order terminating Father's parental rights, but this time on the basis that DCS had established, by clear and convincing evidence, the ground of wanton disregard. The court reiterated its prior holding that termination was shown, clearly and convincingly, to be in the Child's best interest. Father appeals.

II.

Father presents four issues, which we restate as follows:

> Whether the trial court erred by allowing wanton disregard testimony outside the scope of what was identified in the petition and responses to interrogatories and by considering testimony about acts that were responsible for Father's prison sentence already in evidence.
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> Whether DCS proved by clear and convincing evidence that Father abandoned the Child by acting with a wanton disregard for the Child's welfare.
>
> Whether the trial court erred by finding DCS failed to establish wanton disregard by clear and convincing evidence and then changing course in reliance on new evidence that is irrelevant or inadmissible.
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> Whether DCS failed to make reasonable efforts in the best interest of the Child by leaving him in a placement that effectively destroyed his kinship relationship with his similarly placed cousins, which is now subject to being permanently severed.

III.

A parent's right to the care, custody, and control of his or her child is fundamental and protected by both the federal and state constitutions. ***Stanley v. Illinois***, 405 U.S. 645, 651, (1972); ***Hawk v. Hawk***, 855 S.W.2d 573, 577 (Tenn. 1993). "This right is superior to the claims of other persons and governments, yet it is not absolute." ***In re S.L.A.***, 223 S.W.3d 295, 298-99 (Tenn. Ct. App. 2006). In Tennessee, "[p]arties seeking to terminate a biological parent's parental rights must prove . . . the existence of at least

one of the statutory grounds for termination" and "that terminating the parent's parental rights is in the child's best interests." ***In re S.M.***, 149 S.W.3d 632, 639 (Tenn. Ct. App. 2004) (citing Tenn. Code Ann. § 36-1-113(c)(1)-(2)) (footnotes omitted). The petitioner must prove both criteria by clear and convincing evidence. ***In re Valentine***, 79 S.W.3d 539, 546 (Tenn. 2002). To meet this standard, there must be " 'no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.' " ***Id.*** (quoting ***Hodges v. S.C. Toof & Co.***, 833 S.W.2d 896, 901 n.3 (Tenn. 1992)).

The Supreme Court has further provided that our standard of review for termination of parental rights cases is as follows:

> An appellate court reviews a trial court's findings of fact in termination proceedings using the standard of review in Tenn. R. App. P. 13(d). ***In re Bernard T.***, 319 S.W.3d [586,] 596 [(Tenn. 2010)]; ***In re Angela E.***, 303 S.W.3d [240,] 246 [(Tenn. 2010)]. Under Rule 13(d), appellate courts review factual findings de novo on the record and accord these findings a presumption of correctness unless the evidence preponderates otherwise. ***In re Bernard T.***, 319 S.W.3d at 596; ***In re M.L.P.***, 281 S.W.3d 387, 393 (Tenn. 2009); ***In re Adoption of A.M.H.***, 215 S.W.3d 793, 809 (Tenn. 2007). In light of the heightened burden of proof in termination proceedings, however, the reviewing court must make its own determination as to whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, amount to clear and convincing evidence of the elements necessary to terminate parental rights. ***In re Bernard T.***, 319 S.W.3d at 596-97. The trial court's ruling that the evidence sufficiently supports termination of parental rights is a conclusion of law, which appellate courts review de novo with no presumption of correctness. ***In re M.L.P.***, 281 S.W.3d at 393 (quoting ***In re Adoption of A.M.H.***, 215 S.W.3d at 810). Additionally, all other questions of law in parental termination appeals, as in other appeals, are reviewed de novo with no presumption of correctness. ***In re Angela E.***, 303 S.W.3d at 246.

In re Carrington H., 483 S.W.3d 507, 523-24 (Tenn. 2016). Appellate courts give "great weight to a trial court's decisions regarding the credibility of the witnesses who have testified before it." ***In re Audrey S.***, 182 S.W.3d at 867 (citing ***Jones v. Garrett***, 92 S.W.3d 835, 838 (Tenn. 2002)).

IV.

A.

Father challenges the admissibility of certain evidence relied upon by the trial court. He claims that he had inadequate notice of DCS's intent to present the subject evidence. We will first address his position with respect to notice.

B.

The evidence at issue consists of Father's criminal convictions incurred prior to the Child's birth and testimony regarding Father's conduct around the time of his 2010 arrest. Father argues that evidence was "not noted in the pleading nor in the response to interrogatories" and that it should be excluded. To support this position, Father cites ***In re Landon H.***, M2011-00737-COA-R3-PT, 2012 WL 113659 (Tenn. Ct. App., filed Jan. 11, 2012). In that case, the plaintiffs failed to file a petition that "specifically allege[d] the statutory ground of abandonment" or gave notice of what conduct "was alleged to constitute abandonment by wanton disregard. . . ." ***Id.*** at *6. We note that "[e]ven if a petition fails to identify the grounds for termination, it can be argued that the appropriate ground was tried by implied consent of the parties." ***Weidman v. Chambers***, No. M2007-02160-COA-R3-PT, 2008 WL 2331037, at *6 (Tenn. Ct. App., filed June 3, 2008) (citation omitted). In ***Landon***, we held that wanton disregard was not tried by implied consent. ***Landon***, 2012 WL 113659, at *6. As a result, we vacated the trial court's order and remanded the case for consideration of whether termination was proper under a ground that had been pled. ***Id.*** at *1. We noted the following:

> [C]ourts must strictly apply the procedural requirements in cases involving the termination of parental rights. *Providing notice of the issues to be tried is considered a fundamental component of due process*. *The pleadings limit the ruling to the grounds of termination alleged*, because to find otherwise would place the parent at a disadvantage in preparing a defense. Thus, a trial court cannot terminate parental rights based on a ground that is not alleged in the complaint.

Id. at *4 (emphasis added; internal citations and quotation marks omitted).

Unlike in ***Landon***, DCS in this case clearly pleaded abandonment by wanton disregard as a ground for termination in its original petition and alleged the conduct supporting its claim:

GROUNDS FOR TERMINATION [of Father]
Ground 1.
Abandonment by Incarcerated Parent
Tenn. Code Ann. § 36-1-113(g)(1) and § [36-1-102(A)(iv)]

* * *

> 20. . . . [P]rior to the incarceration, [Father] engaged in conduct which individually and in the aggregate exhibited a wanton disregard for the welfare of the [C]hild. Specifically, [Father] was engaged in methamphetamine production over a three year period which ended with his arrest and subsequent conviction in Federal Court on February 25, 2013, when he was sentenced to 10 years in federal prison. . . . [Father] spent little time with the [C]hild prior to his imprisonment and had turned the care and custody of the [C]hild over to the [C]hild's aunt for most of the [C]hild's life. [Father] knew or should have known that the [C]hild's aunt was not providing appropriate care for the [C]hild and that there was drug abuse occurring amongst adult members of that household.

(Emphasis removed; bracketing added; capitalization in original.)

At a hearing on March 23, 2015, after the court had re-opened the proof, DCS submitted several records showing criminal convictions that Father had incurred prior to the Child's birth.[2] The trial court relied on this evidence in its initial final order. Father contends that the evidence is inadmissible because DCS failed to notify him that it would offer such proof to establish wanton disregard. However, on the last day of trial, Father's counsel admitted that opposing counsel "may have sent me electronic copies" of Father's convictions prior to the time they were presented at trial. When the trial court pressed further and asked Father's counsel directly whether opposing counsel had sent him such information in some form, he responded, "I suspect that he did." The trial court found Father had received sufficient notice that his prior convictions would be offered to establish wanton disregard.

Father also challenged testimony given on April 2, 2014, by James Sherrill, an investigator with the Coffee County Sheriff's Office. Sherrill testified to his encounters with Father around the time of Father's arrest. Father maintains the testimony is

[2] DCS submitted evidence of convictions Father incurred from 1993 to 2003 for vehicular homicide, public intoxication, theft, assault, violations of orders of protection, domestic violence, and burglary.

inadmissible, saying "the trial court erred . . . by considering testimony about acts that were responsible for the prison sentence already in effect."

"Because of the fundamental nature of parental rights, courts must take a very strict view of procedural omissions that could put a parent at a disadvantage in preparing for trial." ***In re W.B., IV***, Nos. M2004-00999-COA-R3-PT and M2004-01572-COA-R3-PT, 2005 WL 1021618, at *10 (Tenn. Ct. App., filed Apr. 29, 2005) (citing ***In re M.J.B.***, 140 S.W.3d 643, 651 (Tenn. Ct. App. 2004)). In this case, however, we have determined that Father clearly had notice. Pursuant to Tenn. R. Civ. P. 8.01,[3] Tennessee follows a liberal notice pleading standard where "[a] complaint need not contain detailed allegations of all the facts giving rise to the claim, but it must contain sufficient factual allegations to articulate a claim for relief." ***Webb v. Nashville Area Habitat for Humanity, Inc.***, 346 S.W.3d 422, 427 (Tenn. 2011) (internal citations and quotation marks omitted). DCS's original petition put Father on notice that DCS would seek to terminate his parental rights on the ground of wanton disregard. DCS's subsequent post-trial motion and supporting documents indicated that DCS intended to present further evidence to establish wanton disregard. Father's counsel essentially admitted that opposing counsel provided him with certified copies of Father's convictions prior to presenting them at trial. The original petition also put Father on notice that acts related to his prison sentence would form, in part, the basis of DCS's claim that Father abandoned the Child by acting with a wanton disregard of him. For all of these reasons, we decline to find that DCS gave Father insufficient notice.

C.

We next address whether DCS established by clear and convincing evidence that Father abandoned the Child by wanton disregard. Termination of parental rights proceedings may be initiated when the parent has abandoned the child, as defined in Tenn. Code Ann. § 36-1-102. Tenn. Code Ann. § 36-1-113(g)(1). Pursuant to Tenn. Code Ann. § 36-1-102(1)(A)(iv), abandonment can occur when

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[3] We note that this case was filed in juvenile court. However, Tenn. Code Ann. § 36-1-113(a) provides that "jurisdiction to terminate parental or guardianship rights resides concurrently in the chancery, circuit, and juvenile courts." The Supreme Court has previously pointed out that where a rule of civil procedure would apply in both chancery and circuit court proceedings to terminate parental rights and application of the same rule "would not compromise the efficacy of juvenile proceedings," then the rule of civil procedure may apply in a juvenile court proceeding. ***Gonzalez v. State Dep't of Children's Servs.***, 136 S.W.3d 613, 617 (Tenn. 2004) (*see also* ***State ex rel. Taylor v. Taylor***, No. W2004-02589-COA-R3-JV, 2006 WL 618291, at *1-2 (Tenn. Ct. App., filed Mar. 13, 2006)). Previously, we considered Tenn. R. Civ. P. 8.01 in our analysis of a matter filed in juvenile court in ***Baral v. Bombard***, No. M2000-02429-COA-R3-JV, 2002 WL 1256246, at *8 (Tenn. Ct. App., filed June 5, 2002).

> [a] parent . . . is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent . . . has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and . . . the parent . . . has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child[.]

Here, it is undisputed that Father was sentenced to 130 months in prison on February 25, 2013 and that DCS filed its petition to terminate Father's rights to the Child on February 11, 2014. Father was incarcerated when DCS initiated this termination proceeding. Therefore, the first of two tests in Tenn. Code Ann. § 36-1-102(1)(A)(iv) have been met.

Turning to the next test in the same statutory subsection, we note that "wanton disregard" is not defined. "The actions that our courts have commonly found to constitute 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., filed June 9, 2015). Similarly, "a parent's poor judgment and bad acts that affect the children constitute a wanton disregard for the welfare of the children." ***In re William B.***, No. M2014-01762-COA-R3-PT, 2015 WL 3647928, at *3 (Tenn. Ct. App., filed June 11, 2015) (quoting ***State, Dep't of Children's Servs. v. Hood***, 338 S.W.3d 917, 926 (Tenn. Ct. App. 2009)) (internal quotation marks omitted). Tennessee courts have "repeatedly held that probation violations, repeated incarceration, criminal behavior, substance abuse, and the failure to provide adequate support or supervision for a child can, alone or in combination, constitute conduct that exhibits a wanton disregard for the child." ***In re Audrey S.***, 182 S.W.3d 838, 867-68 (Tenn. Ct. App. 2005).

"[A] parent's decision to engage in conduct that carries with it the risk of incarceration is itself indicative that the parent may not be fit to care for the child." ***In re Jamazin H.M.***, No. W2013-01986-COA-R3-PT, 2014 WL 2442548, at *9 (Tenn. Ct. App., filed May 28, 2014) (citing ***In re Audrey S.***, 182 S.W.3d at 866). Thus, a parent's incarceration "is a strong indicator that there may be problems in the home that threaten the welfare of the child." ***In re Audrey S.***, 182 S.W.3d at 866. Still, incarceration alone is not enough to terminate an individual's parental rights. ***Id.*** Since termination proceedings concern a fundamental right, those cases "require individualized decision making." ***In re M.J.B.***, 140 S.W.3d at 653 (citing ***In re Swanson***, 2 S.W.3d 180, 188 (Tenn. 1999)). "A statutory scheme that made the mere fact of incarceration a ground for the termination of parental rights, without regard to the length of confinement, the nature of the underlying offense or offenses, and the effect, if any, of the parent's criminal

conduct and incarceration on the child, would raise serious constitutional questions." ***In re Audrey S.***, 182 S.W.3d at 866, n.37. A parent's incarceration serves as a "triggering mechanism," which "allows the court to take a closer look at the child's situation to determine 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. "[P]arental conduct exhibiting wanton disregard for a child's welfare may occur at any time prior to incarceration . . . ." ***In re William B.***, 2015 WL 3647928, at *3 (quoting ***Hood***, 338 S.W.3d at 926) (internal quotation marks omitted).

In this case, Father pleaded guilty in November 2012 to participating in a conspiracy to make and distribute methamphetamines. Father testified at trial in October 2014 that he had full custody of the Child during the time period in which he was charged with making and distributing methamphetamines. Father admitted that prior to his incarceration, he knew that making methamphetamine could subject him to a jail sentence and that going to jail meant that he effectively would be unavailable to parent the Child. As previously noted, following the first trial, the court declined to find Father abandoned the Child by wanton disregard:

> DCS urges that [Father's] knowing involvement in the manufacture of methamphetamines put him at significant risk — if apprehended — of being separated from his son, and further cites [Father's] failure to make any contact with the [C]hild through letter or telephone since the [C]hild was put in DCS custody in January[ ] 2013 as evidence of wanton disregard.
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> The court finds that without more, a single conviction of this crime would not establish wanton disregard[.]

After the court re-opened the proof, DCS submitted further evidence of Father's criminal history and the testimony by Officer Sherrill. He testified about the events surrounding Father's arrest. Sherrill testified that he is a "meth certified" officer and has been for at least seven years. He explained that he has worked on numerous narcotics cases and with approximately three hundred methamphetamine labs. Sherrill testified he is trained to recognize the signs and symptoms of methamphetamine use. During the course of the investigation into Father's activities, Sherrill had between fifteen and twenty encounters with him. He testified that Father "was definitely using methamphetamine" and that he had held that opinion for about "two years before all of this started."

At trial, Sherrill described two specific encounters with Father. In August 2010, he responded to a call from a woman who alleged Father had assaulted her. According to

Sherrill, the woman "had numerous bruises about her body . . . . She advised that she'd been beaten, stomped, hit with a ball bat." Sherrill described Father as "very irate" and unwilling to talk with him. Father resisted arrest. Sherrill stated that while at the residence, he observed meth material, *i.e.*, "numerous coffee filters, rubber gloves, benzel scales, Theraflu, and some wet coffee filters." After the incident, Father was charged with aggravated assault, domestic violence, and promotion of methamphetamine. The assault and domestic violence charges were later dismissed. Sherrill testified that on another instance he arrived at a residence with other investigators to execute a search warrant related to methamphetamine. He reported that upon their arrival, Father ran out the back door of the residence and threw a glass jar containing muriatic acid at Sherrill, who was standing approximately twenty feet away. Fortunately, Sherrill was not hit. He testified that he identified the contents of the jar based on its odor and the fumes rising from the jar. Father was charged with assault.

At the close of the trial in April 2015, the trial court considered the new evidence and this time held:

> 2. . . . DCS has presented clear and convincing evidence that now establishes this as a ground for termination based upon the following:
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>> a. At the time of the filing of the February 11, 2014 petition to terminate [Father's] parental rights, the [C]hild's Father was incarcerated in federal prison for 130 months after being convicted on February 25, 2013 of "Conspiracy to Manufacture and Distribute Five Grams or More of Methamphetamine (actual) and Fifty Grams or More of a Mixture and Substance Containing Methamphetamine" in violation of 21 U.S.C. Sections 841(a)(1)(b)(1)(B). He was incarcerated in August[ ] 2010.
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>> b. In the months before [Father] was originally arrested in August 2010 on the federal charges, he had been the subject of multiple investigations by the Coffee County Sheriff[']s Department. Officer James Sherrill testified that [Father] had on several occasions engaged in violent behavior. Officer Sherrill testified that [Father] was involved in a domestic assault of a female . . . . [Father] assaulted Officer Sherrill at the time of his arrest on this charge.

c. On another occasion, [Father], who was in a home being investigated for methamphetamine production, fled from Officer Sherrill, and while fleeing, threw a glass jar containing muriatic acid at the officer.

d. The court finds Mr. Sherrill[4] has abused drugs. Mr. Sherrill testified that [Father] was described on these occasions as being very belligerent and having the appearance of being under the influence of methamphetamines. The federal sentencing order . . . states: "The Court will recommend that the defendant receive 500 hours of substance abuse treatment from the BOP Institution Residential Drug Abuse Treatment Program. The Court will further recommend that the defendant be evaluated for mental health issues by the BOP and receive appropriate treatment".

e. [Father] has a long history of criminal convictions prior to his 130-month federal conviction.

i. Vehicular homicide . . . — December, 1993 — six year sentence. . .

ii. Public Intoxication — December, 1997. . . . 30 days . . .

iii. Theft — May 2001 —11 months — theft of merchandise (39-14-103[ )]. 11 month[s], 29 day sentence to serve 30 days . . .

iv. Assault — March 2002 — Assault. 11 month, 29 days sentence to serve 6 months . . .

v. Violation of Order of Protection — July 2001. . . . Victim and [the C]hild had been

[4] It is clear that the court misspoke when it referred to "Mr. Sherrill." It was obviously referring to Father.

> threatened by [Father] following issuance of protective order. 10-day sentence. . .
>
> vi. Assault & Domestic Violence — November 2001. 11 months, 29 days . . .
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> vii. Violation of Order of Protection, January 2003. 10 days . . .
>
> viii. Escape, February 2007. 10 days . . .
>
> ix. Assault, November, 2003, 11 months, 29 days . . .
>
> x. Aggravated Burglary, November, 2003. Two years . . .

* * *

Based upon the evidence before this court, it appears that [Father] was incarcerated at the time of the filing of this petition for termination on a sentence of 130 months. The court finds that his incarceration at that time is a triggering event which allows this court to consider whether there is other evidence to indicate whether [Father] has engaged in a pattern of behavior which evidences a wanton disregard for the welfare of the [C]hild. The Court finds that [Father] has a long history of criminal activity as evidenced by convictions beginning in 1993. While the majority of the convictions occurred more than 10 years prior to his most recent conviction, the court heard compelling testimony from Officer James Sherrill indicating that [Father] was apparently engaged in drug abuse and criminal activity in the period just prior to his last arrest in August[] 2010.

[Father] participated in this hearing by telephone and was afforded the opportunity to testify. He did not refute any evidence presented by DCS in this regard. The court accordingly is permitted to make an inference by his silence that his testimony in response to the proffered evidence would be unfavorable to his position in this cause. The court finds that the totality of the proof before this court on this issue establishes by clear and convincing evidence that [Father has]

> abandoned this [C]hild based upon 36-1-113(g)(1) and TCA 36-1-102(1)(A)(iv) as an incarcerated parent by his exhibiting a pattern of behavior that evidences a wanton disregard for the welfare of [the Child].

The evidence does not preponderate against the trial court's factual findings that since the Child's birth and prior to his 2010 arrest, Father engaged in violent behavior, abused drugs, and committed acts that resulted in a lengthy prison sentence, in spite of Father's awareness of the risk of incarceration. We must, however, address the trial court's reliance on Father's convictions listed in section (2)(e) of the trial court's final order, all of which occurred *prior to the Child's birth in 2005*. We note that while paragraph (2)(e)(viii) indicates Father received a conviction for "Escape" in February 2007, citing exhibit 30, this is not supported by the record. Exhibit 30 deals with Father's prior charges for a violation of an order of protection and an escape from police custody, where both incidents occurred in November 2002. Exhibit 30 indicates that a judgment was entered on January 27, 2003, wherein the court found Father guilty of violating an order of protection and dismissed the escape charge. No other conviction for "escape" appears in the record, nor does the record indicate Father incurred any conviction in 2007. Of the remaining convictions listed in paragraph (2)(e) of the final order, each occurred at least one year or more before the Child's birth.

Before the Child was born, Father was repeatedly convicted of dangerous offenses. The trial court, in part, relied on these, stating "his incarceration . . . is a triggering event which allows this court to consider whether there is other evidence to indicate whether [Father] has engaged in a pattern of behavior which evidences a wanton disregard for the welfare of the [C]hild." Father continued his criminal behavior *after the Child was born*. Still, to determine whether abandonment by wanton disregard occurred, "our courts have extended the definition of 'child' to include the period of pregnancy," but "[l]ogically, a person cannot disregard or display indifference about someone whom he does not know exists." ***In re Anthony R.***, 2015 WL 3611244, at *3 (internal citations omitted). At the time Father committed the acts that resulted in the convictions listed in paragraph (2)(e) of the trial court's order, the Child did not exist and Father did not know that the Child would someday come to exist. Therefore, we will not rely on them in our consideration of whether Father abandoned the Child by wanton disregard.

Although Father incurred only one criminal conviction since the Child's birth, we find it significant that this federal conviction imposed a 130-month sentence. Additionally, Father's criminal behavior related to the production and distribution of methamphetamines had been ongoing for several years before his 2010 arrest. Based on Sherrill's testimony at trial – which the court found to be "compelling" – Father "was definitely using methamphetamine" and had been doing so for at least two years. Therefore, while there was only one conviction since the Child's birth, Sherrill's testimony and the information leading to Father's conviction indicates Father's criminal

behavior was ongoing. According to Father's own testimony, he had custody of the Child during this time. Sherrill's testimony also describes Father's violent behavior as he resisted arrest and incurred several charges for violent behavior toward other individuals, including an assault charge for throwing a mason jar of muriatic acid at Sherrill. Father's drug use, criminal behavior, and violent acts during the time he had custody of the Child establish clearly and convincingly that his actions constitute abandonment of the Child by wanton disregard.

D.

DCS filed a timely motion under Rule 59[5] that admitted a mutual mistake among the parties that invalidated the sole ground for termination relied upon by the trial court in its initial final order. In the same motion and supporting documents, DCS argued it was necessary for the court to consider new evidence because at the original trial Father did not contest a ground for termination. Father's counsel stated on the first day of trial, "In terms of the proof for termination, there's probably not much I can resist on one of the grounds . . . because the ten-year prison sentence element is probably not something I can refute." Accordingly, the trial court found in its original termination order, "Counsel for [Father] does not contest the grounds for termination found by this court against him." A court need not find more than one ground to terminate a parent's parental rights. Tenn. Code Ann. § 36-1-113(c)(1). DCS admitted that it failed to fully investigate the ground of wanton disregard because Father did not challenge any of the alleged grounds for termination. The parties later learned they had relied on a mutual mistake of fact regarding the Child's age on the day Father was sentenced. We find no abuse of discretion in the trial court's decision to grant DCS's motion and re-open proof in this matter. Once the proof had been re-opened, the trial court did not abuse its discretion or err in any way in considering new evidence and reaching a different conclusion after doing so. As discussed in greater detail earlier in this opinion, we declined to hold that the additional evidence DCS submitted after proof was re-opened was inadmissible due to insufficient notice. We hold that the evidence presented at the later hearings was relevant to the determination of whether Father was guilty of abandonment by wanton disregard. This, of course, does not include Father's criminal convictions prior to the Child's birth.

V.

Having found that DCS established by clear and convincing evidence a ground to terminate Father's parental rights, we must now determine whether DCS established by the same quantum of evidence that the termination is in the Child's best interest. ***In re***

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[5] The motion filed by DCS relies on both Rule 59 and Rule 60. The latter rule is not applicable since 60.02 specifically refers to a request for relief from a "*final* judgment, order or proceeding." DCS's motion was not directed at a "final judgment, order, or proceeding."

Jamazin H.M., 2014 WL 2442548, at *10. To determine best interest, Tenn. Code Ann. § 36-1-113(i) directs the court to consider the following non-exclusive factors:

> (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, controlled substances or controlled substance analogues 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.

In this present action, Father is set to remain in prison until 2020. His counsel acknowledges Father is not in an "immediate position to change [his] circumstances." When Father had custody of the Child, he never had his own housing. Instead, they resided with Father's sister, from whose home the Child was later removed. Father has no plans for housing when he is released from prison.

Under Tenn. Code Ann. § 36-1-113(i)(2), the best interest analysis requires us to "consider DCS's reasonable efforts, or the lack thereof" in determining whether the parent has failed to effect a lasting adjustment. ***In re Kaliyah S.***, 455 S.W.3d 533, 554 (Tenn. 2015) (footnote and citation omitted). "As with other factual findings made in connection with the best-interest analysis, reasonable efforts must be proven by a preponderance of the evidence, not by clear and convincing evidence." ***Id.*** at 555 (citation omitted). Father asserts in his brief that DCS "failed to make reasonable efforts in the best interest of the Child by leaving him in a placement that effectively destroyed his kinship relationship with his similarly placed cousins, which is now subject to being permanently severed." (Emphasis omitted.) Father maintains DCS failed by not "maintaining a placement where [the Child] could remain placed with his two older cousins . . . with whom he had a strong kinship bond." He adds that "[w]hile this is not the traditional reasonable efforts/best interest argument . . . what constitutes preserving his best future legal kinship options with his cousins should be the primary measure of his best interest in this scenario."

For the following reasons, we find DCS made reasonable efforts to reunite the family. Shortly after removing the children from the home of Father's sister in 2013, DCS established a permanency plan among Father, Mother, and Father's sister. In the plan, DCS sought to reunite the Child with Father's sister. The reunification effort with Father's sister ended after the court found that she was involved in the abuse of drugs. DCS family service worker Holly Womack, the case manager for this matter, testified she wrote Father about the Child, but received no response. Father testified he received her correspondence.

Further, DCS took steps to preserve the Child's relationship with his cousins, A.A.T. and A.T.T, both of whom are several years older than the Child. The Child was initially placed in the same foster home as his cousins. Upon entering State custody, the Child threatened suicide, and DCS responded by instituting therapy for the Child. DCS detected problems for the Child in the initial foster home. Unlike his older cousins, the Child and the initial foster father regularly had conflicts with one another. There was also difficulty between the Child and his oldest cousin, A.A.T. Testimony at trial revealed A.A.T. attempted to parent the Child. According to Womack, "she would tell [the Child] what to do, what he could not do, what he could wear." Womack stated that the Child was often left confused at whether to listen to A.A.T. or the foster parents, which resulted in behavioral problems for him. Womack testified that she and the foster

parents tried to intervene. The initial foster parents expressed a willingness to adopt the Child's cousins – who at the time of trial were the subject of a separate termination proceeding – but not the Child, citing their own advanced age and the Child's behavioral issues. The Child's cousins wished to be adopted by the initial foster parents. Womack said that when discussions began about moving the Child to another home, the Child again threatened suicide. He was taken to the hospital and attended by a crisis center. DCS moved the Child to a new foster home with W.W. and encouraged visitation among the Child and his cousins. W.W., the Child's current foster mother, is a special education teacher and also lives with her adopted son, who is similar in age to the Child at issue here. W.W. expressed a willingness to adopt the Child and help maintain the relationship he has with his cousins, who live about twenty minutes away. We conclude, by a preponderance of the evidence, that DCS made reasonable efforts to reunite the family

The trial court found Father has not maintained regular contact with nor paid support for the Child and that the parents' home had "a history of substance abuse and criminal activity." The trial court further found the Child has a strong bond with W.W. and her adopted son. W.W. is willing to adopt the Child and "to facilitate continued contact by [the Child] with his cousins [A.A.T.] and [A.T.T.]." The evidence does not preponderate against the trial court's findings of facts in its best interest analysis. The trial court held that the Child currently resides "in an appropriate home and it is in the Child's best interests to remain there." For the above reasons, we also hold, as a matter of law, that DCS proved by clear and convincing evidence that the termination of Father's parental rights is in the Child's best interest.

VI.

In summary, we modify the trial court's judgment to delete the court's reliance on Father's conduct that occurred before the Child was born. In all other respects, we affirm the trial court's judgment.

VII.

The judgment of the trial court is affirmed as modified. Costs on appeal are assessed to the appellant, T.E.W. This case is remanded to the trial court for enforcement of the court's judgment, as modified, and collection of costs assessed below.

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CHARLES D. SUSANO, JR., JUDGE