

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 14, 2015 Session

IN RE LANDON H.

**Appeal from the Circuit Court for Maury County
No. 14822 Stella L. Hargrove, Judge**

No. M2014-01608-COA-R3-JV – Filed February 25, 2016

This case began as a petition for dependency and neglect filed in juvenile court by the child's grandmother. The child's father filed his own petition seeking custody. The juvenile court found the child to be dependent and neglected and awarded custody to the father. Upon appeal to circuit court, mother stipulated the child was dependent and neglected as of the date the petition was filed. The circuit court accepted the stipulation and found the child dependent and neglected on the date of the petition. After a five-day hearing on the proper disposition of the child, the circuit court awarded custody jointly to the child's mother and grandmother, with certain conditions. The father appeals the circuit court's decision, arguing the court erred in awarding custody to the mother and the grandmother. Because the circuit court failed to determine whether the child was dependent and neglected as of the date of the de novo hearing, we vacate the circuit court's order and remand for a new hearing.

**Tenn. R. App. 3 Appeal as of Right; Judgment of the Circuit Court Vacated and
Case Remanded**

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Judy A. Oxford, Franklin, Tennessee, for the appellant, Nicholas H.

Cara E. Lynn, Columbia, Tennessee, for the appellee, Amanda A.

S. Jason Whatley, Columbia, Tennessee, for the appellee, Judy D.

OPINION

I. BACKGROUND

Amanda A. (“Mother”) and Nicholas H. (“Father”) had a short-term relationship and then parted ways when Father enlisted in the United States Army. By the time Mother discovered she was pregnant, Father had started basic training. Their child, Landon H., was born in late June 2007. The Army deployed Father to South Korea in August.

While there is some dispute over when and how Father learned Mother was pregnant with his child, in February 2008, Father filed a parentage petition in the Juvenile Court for Maury County, Tennessee. After DNA testing confirmed he was Landon’s father, the juvenile court entered a legitimation order. Because Father was actively serving in the armed forces, the court ordered temporary visitation during Father’s leave. Since 2008, Father has consistently paid child support.

After Landon’s birth, Mother moved in with her mother and step-father, Judy D. (“Grandmother”) and Rufus D. (“Grandfather”) (collectively, “Grandparents”). For the first year or two of his life, Mother and Landon continued to live with Grandparents. After that, Mother was “in and out all the time.” When Landon was six months old, Grandmother filed her first dependency and neglect petition in juvenile court, alleging Mother was unstable, had a volatile temper, and had never taken full responsibility for the child. Ultimately, the juvenile court dismissed the petition.

While Father originally enlisted in the Army for four years, he served for six years. During his second year, he re-enlisted for an additional four years. He did so in order to obtain additional job skills to increase his marketability as a civilian. Father served overseas in 2007, 2008, and 2009. Each year he received approximately two weeks of leave. During his leaves, Father arranged with Grandmother to have visitation with Landon.

Grandparents have provided a loving, stable home for Landon since his birth. Landon has a strong relationship with Grandparents, who have been involved in all aspects of his life. Grandfather taught him how to throw a baseball, fish, and swim. Grandparents have attended almost all of his school functions, including parent-teacher conferences.

Mother’s connection with Landon has not been as close. In 2008, Mother became involved with Wendell Witherspoon, a relationship of which Grandmother did not approve. Mr. Witherspoon fathered Mother’s two other children. In early 2009, Mother moved in with Grandmother and Landon again when she was pregnant with her second child, Eli, but left after a few months. After Eli’s birth, Mother started taking prescription pain medication for

back pain and became addicted. During this time period, she also pled guilty to three misdemeanor charges stemming from fraudulent use of a credit card and received probation. After Mother became pregnant with her third child, Mr. Witherspoon went to prison on drug charges.

On December 11, 2009, the Tennessee Department of Children's Services ("DCS") filed a petition seeking a declaration that Landon and Eli were dependent and neglected. As grounds, DCS alleged Mother's substance abuse and emotional instability. Father sought custody of Landon in the proceeding. The juvenile court denied Father's request but awarded him visitation. The juvenile court later dismissed the dependency and neglect petition upon the motion of DCS.

Father was not deployed overseas in 2010, and Mother and Father agreed on an increased visitation schedule. During this time, Father had a relationship with a woman he met on the internet and fathered a second child, a son named Kristopher. Father visited with Kristopher shortly after his birth but was deployed overseas again from June 2011 to June 2012.

During 2011 and 2012, Mother continued to run afoul of the law. In 2011, Mother violated her probation by failing to appear for a drug screen and to pay court costs. She spent three months in jail. On March 13, 2012, Mother violated her probation again. On May 7, 2012, she was arrested for driving on a revoked license, leaving the scene of an accident, and a variety of other moving violations.

Mother returned to Grandmother's home in early 2012 while she was still pregnant with her third child. Mother wanted to overcome her addiction to the prescription pain medicine, Lortab, but she learned an abrupt stop could harm the baby. With Grandmother's help, she found an obstetrician who specialized in high-risk births. This doctor prescribed Subutex, another medication she could take that would not harm the baby. During this period she also tried to find a drug treatment program, but she had difficulty finding a program that would accept her while she was pregnant. She was able to spend two weeks at The Elam Center at Meharry Medical College for addiction treatment, but she left the program without completing it. She lived with Grandmother and Landon only sporadically during 2012.

II. PROCEDURAL HISTORY

A. PROCEEDINGS BEFORE THE JUVENILE COURT

On September 12, 2012, Grandmother filed the dependency and neglect petition in the Juvenile Court for Maury County, Tennessee, that generated this appeal. At the time, Mother had custody of Landon. Grandmother claimed Mother was drug addicted, homeless, and in danger of incarceration for violation of various court orders. Based on the petition, the juvenile court awarded Grandmother emergency temporary custody.

On October 25, 2012, Father filed his own petition in the juvenile court seeking custody of Landon. His petition adopted Grandmother's allegations of dependency and neglect. At the time, Father was stationed in Texas, but he anticipated leaving the military in February 2013.

On November 27, 2012, the juvenile court held an adjudicatory hearing on both petitions. One witness testified, Allison Clanton, a licensed clinical social worker. Grandmother sought out Ms. Clanton because of anxiety Grandmother claimed Landon was experiencing over visitation with Father. At the conclusion of Ms. Clanton's testimony, Mother stipulated that Landon "was dependent and neglected while in her custody." Unable to proceed with the dispositional phase because of the lateness of the hour, the juvenile court then set another hearing date. Pending the dispositional hearing, the juvenile court ordered that Landon would remain in Grandmother's custody with Father exercising visitation.

Following the dispositional hearing, on October 22, 2013, the juvenile court issued an order finding Landon dependent and neglected and awarding custody to Father. The court delayed the change of custody until the end of the school semester and also ordered that Landon receive counseling. During the transitional period between the entry of the order and the change in custody, the court granted Father "very liberal visitation" and Mother supervised visitation.

Grandmother and Mother appealed the juvenile court's ruling to the circuit court. Father moved to dismiss Mother's appeal on the grounds that a juvenile court's custody order must be appealed to the Court of Appeals, not the circuit court, pursuant to Tennessee Code Annotated § 37-1-159(g). Although there is no order on the motion to dismiss included in the record, the circuit court apparently denied Father's motion.¹

¹ Denial of the motion was appropriate. Father's petition for custody was subsumed within the dependency and neglect proceeding. *See In re D.Y.H.*, 226 S.W.3d 327, 331 (Tenn. 2007) (holding petition to change custody filed after a finding of dependency and neglect could be heard by juvenile court under its

B. DE NOVO HEARING IN CIRCUIT COURT

The circuit court held a de novo hearing over five days: January 27 and 28, 2014; March 4 and 5, 2014; and April 15, 2014. On the first day of the hearing, Mother stipulated that Landon was dependent and neglected at the time the petition was filed, September 12, 2012. All parties relied on Mother's stipulation and agreed that the circuit court hearing would focus solely on the child's disposition.

Father testified first. At the time of the hearing, he resided in Richwood, Ohio and worked as a computer systems engineer for a defense contractor. Father decided to seek custody of Landon to give him a better life, a life free from drugs and turmoil. Father explained he was concerned about the domestic violence surrounding Mother. Grandmother admitted that the police have been called to her home a number of times for incidents related to Mother.

Father claimed he sought a good relationship with his son even though his military service kept him away for much of Landon's early life. Grandmother testified Father has consistently exercised his weekly phone visitation. Father's family testified to Father's good relationship with Landon. Since his military service has ended and Father's visitation has increased, Grandmother admitted Landon now looks forward to his visits with Father. Father testified that Landon and he enjoy fishing, boating, and camping together. Father admitted, however, he has never attended a parent-teacher conference and does not know the names of Landon's teachers or scout master.

Father's personal circumstances changed significantly during the pendency of the proceedings in juvenile court. In April 2013, Father met another woman on an internet dating site. Within a month of meeting, Father and the woman, Jessica B., moved in together and, shortly thereafter, became engaged. Ms. B. has two children of her own from previous relationships: a two-year-old son and a four-year-old daughter. Ms. B.'s daughter has special needs. Her daughter had a stroke at birth, which has led to issues with her heart and lungs. She also has a bleeding disorder and a spinal malformation. She is fed with a feeding tube, takes multiple medications, and is monitored by a special machine at night. Developmentally, she is at the level of a two year old. Ms. B. prepares special food for her and gives her medicine.

dependency and neglect jurisdiction) and *Tenn. Dep't of Children's Servs. v. Owens*, 129 S.W.3d 50, 55 (Tenn. 2004) (holding any custody decision that is made during a dependency and neglect proceeding is a part of the dependency and neglect proceeding and appealable to circuit court).

If he is awarded custody of Landon, Father would be parenting five children under the age of eight. In addition to Ms. B.'s two children, Father had primary custody of his three-year-old son, Kristopher, and at the time of the hearing, Ms. B. and Father were expecting their first child together. Father testified that he saw no difficulty in caring for a newborn, a two-year old, a three-year old, a four-year old with special needs, and Landon. Father lived near his extended family and testified he could get assistance from family members if necessary. Ms. B. did not work outside the home. Because of Father's work schedule and daily commute, Ms. B. would bear a significant portion of the child care responsibility, especially in the mornings.

Although Father's income was sixty-five thousand dollars per year, his monthly expenses were often roughly equivalent to his monthly income. He did not receive any child support from Kristopher's mother. The fathers of Ms. B.'s children made child support payments, but they were behind in those payments. Ms. B. does receive some social security disability payments for her special needs daughter, food stamps, and payments under the Special Supplemental Nutrition Program for Women, Infants and Children or WIC. However, Father acknowledged that, when he and Ms. B. marry, her benefit payments may change.

Mother's circumstances also changed during the juvenile court proceeding. Shortly after Grandmother filed her dependency and neglect petition in juvenile court, Mother gave birth to her third child, Willow. DCS took custody of Willow and Eli because of Mother's self-reported drug use. Subsequently, Mother completed a thirty-day inpatient drug treatment program at Buffalo Valley. Mother testified she has not taken any prescription pain medication since January 2013.

DCS placed a number of requirements on Mother to regain custody of Eli and Willow, which Mother fulfilled. She obtained a valid driver license, paid her tickets, did home visits, and found stable housing. She also passed all of the drug screens required by DCS. Mother also attended ninety AA meetings in ninety days after her discharge from Buffalo Valley. Mother admitted, however, that she never got a sponsor and that she basically stopped attending AA meetings after that initial ninety-day period. Ultimately, DCS returned custody of Eli and Willow to Mother in January 2014, earlier than scheduled.

At the time of the hearing, Mother was working for an auto salvage and towing business answering service calls. She leased a one-bedroom apartment, but she was looking for a larger place for when her lease expires. Although Mother spent the past four and a half years on probation for fraud charges, she had paid all of her court costs and was no longer on probation.

Grandmother testified that, after Mother overcame her drug addiction, she totally changed her attitude about parenting Landon. Because Mother was currently behaving as a mother should, Grandmother had no objection to returning custody of Landon to Mother. Mother was involved in Landon's activities, such as t-ball and cub scouts, and she attended Landon's kindergarten graduation. Mother visited Landon at Grandmother's house two to three times per week and kept him most weekends. She committed to having no further contact with Mr. Witherspoon.

Ms. Clanton testified concerning her individual therapy sessions with Landon and the various family members and her attachment assessment. Ms. Clanton conducted these sessions over the course of a year, from October 2012 to October 2013. Ms. Clanton determined from her sessions with Landon that he was having difficulty adjusting to the new events in his life: a new school, visiting Father in Ohio, and Mother's erratic behavior. Ms. Clanton found Landon's strongest, most secure relationship was with his Grandparents. She was unable to fully assess Landon's relationship with Mother because she was in a rehabilitation facility at the time and recovering from Willow's birth. She did see the loving nature of Landon's interactions with Mother. In assessing Father's relationship with Landon, she found Father's strength was structure and clear communication but his weakness was nurturing. While Father and Ms. B. both testified that Landon had a good relationship with Ms. B. and her children, Ms. Clanton testified that Landon had difficulty adjusting to Father's new relationship.

On August 11, 2014, the circuit court issued a final order, finding Landon dependent and neglected and awarding custody to Mother, with three conditions: (1) the custody is joint with Grandmother; (2) Mother must have no contact with Wendell Witherspoon when Landon is in her custody; and (3) Mother must get a sponsor and attend AA meetings. Father timely filed a notice of appeal on August 18, 2014. Father argues the circuit court erred in its custody award.

III. ANALYSIS

A. STANDARD OF REVIEW

We review the trial court's findings of fact *de novo*, accompanied by a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *In re D.Y.H.*, 226 S.W.3d 327, 329 (Tenn. 2007). We review conclusions of law *de novo* without a presumption of correctness. *In re D.Y.H.*, 226 S.W.3d at 329.

B. DEPENDENCY AND NEGLECT PROCEEDINGS

Tennessee courts have long recognized the right of a biological parent to the care and custody of his child. *In re Adoption of Female Child*, 896 S.W.2d 546, 547 (Tenn. 1995) (quoting *Hawk v. Hawk*, 855 S.W.2d 573, 577 (Tenn. 1993)). This right, however, is not absolute and may be limited under certain circumstances. *In re Samaria S.*, 347 S.W.3d 188, 201 (Tenn. Ct. App. 2011). One of those circumstances is when a child is declared dependent and neglected. *Id.*

“The primary purpose of dependency and neglect proceedings ‘is to provide for the care and protection of children whose parents are unable or unwilling to care for them.’” *Id.* (quoting *Tenn. Dep’t of Children’s Servs. v. M.S.*, No. M2003-01670-COA-R3-CV, 2005 WL 549141, at *9 n.11 (Tenn. Ct. App. Mar. 8, 2005)). “If a child is deemed dependent and neglected, the child is often removed from the custody of the parent who is responsible for the dependency or neglect.” *In re K.A.P.*, No. W2012-00281-COA-R3-JV, 2013 WL 6665012, at *5 (Tenn. Ct. App. Dec. 17, 2013). “If the parents’ conduct . . . is sufficiently serious, a finding of dependency and neglect may be the foundation for a proceeding to terminate the parents’ parental rights.” *In re Gaven R.*, No. M2005-01868-COA-R3-CV, 2007 WL 2198288, at *7 (Tenn. Ct. App. July 23, 2007).

Juvenile courts have exclusive, original jurisdiction to hear dependency and neglect petitions. Tenn. Code Ann. § 37-1-103(a)(1) (2014). Once the juvenile court has accepted jurisdiction in a dependency and neglect case, no other court may take any action affecting the child’s custody without first obtaining approval of the juvenile court. *Tenn. Dep’t of Human Servs. v. Gouvitsa*, 735 S.W.2d 452, 457 (Tenn. Ct. App. 1987). “Juvenile courts have the authority to make custody decisions with regard to children who are the subjects of a dependent and neglect proceeding.” *In re S.L.M.*, 207 S.W.3d 288, 297 (Tenn. Ct. App. 2006). In the absence of an intervening event,² the juvenile court’s custody decision is a part of the dependency and neglect proceeding. *In re D.Y.H.*, 226 S.W.3d at 331.

Ordinarily, dependency and neglect cases are tried in two phases: the adjudicatory phase and the dispositional phase. *Id.* § 37-1-129(c); *but see In re Caleb L.C.*, 362 S.W.3d 581, 595 (Tenn. Ct. App. 2011) (holding the statute permits the trial court to combine both phases into one hearing). First, the court must determine whether a child is dependent and neglected within the meaning of the statute. Tenn. Code Ann. §§ 37-1-129(a)(1), 37-1-

² The juvenile court retains jurisdiction over that child until one of four intervening events occurs: (1) the case is dismissed; (2) the case is transferred to another court; (3) an adoption petition is filed; or (4) the child turns eighteen. Tenn. Code Ann. § 37-1-103(c) (2014); *see also In re D.Y.H.*, 226 S.W.3d at 330.

102(b)(12) (2014). Only if the court has determined a child to be dependent and neglected will the court proceed to the dispositional phase. *Id.* § 37-1-129(c).

The petitioner “must prove all the elements of [the] case by clear and convincing evidence.” *In re Gaven R.*, 2007 WL 2198288, at *7. Clear and convincing evidence should produce a firm belief in the truth of the allegations and eliminate any real doubt about the correct conclusion to be drawn from the evidence. *In re Isaiah L.*, 340 S.W.3d 692, 705 (Tenn. Ct. App. 2010). “This heightened burden of proof minimizes the risk of erroneous decisions.” *In re Gaven R.*, 2007 WL 2198288, at *7.

C. FINDING OF DEPENDENCY AND NEGLECT

Appeals from a juvenile court’s order in a dependent and neglect proceeding are made to the circuit court. The circuit court must hear witnesses and try the case de novo. Tenn. Code Ann. § 37-1-159(a)(2014). “A *de novo* trial is ‘[a] new trial on the entire case—that is, on both questions of fact and issues of law—conducted as if there had been no trial in the first instance.’” *Cornelius v. Tenn. Dep’t of Children’s Servs.*, 314 S.W.3d 902, 906 (Tenn. Ct. App. 2009) (quoting *Kissick v. Kallaher*, No. W2004-02983-COA-R3-CV, 2006 WL 1350999, at *3 (Tenn. Ct. App. May 18, 2006)). “Consequently, the circuit court is not ‘reviewing’ the juvenile court’s decision; instead, it is conducting a new proceeding as though the petition was originally filed in circuit court.” *Id.*

The de novo hearing requirement directs the circuit court to determine whether the child is dependent and neglected as of the time of the new hearing. *See Green v. Green*, No. M2007-01263-COA-R3-CV, 2009 WL 348289, at *9-10 (Tenn. Ct. App. Feb. 11, 2009). The circuit court must make a fresh determination based on the evidence presented. *Tenn. Dep’t of Children’s Servs. v. T.M.B.K.*, 197 S.W.3d 282, 289 (Tenn. Ct. App. 2006); *In re Isaiah L.*, 340 S.W.3d at 707. If the circumstances of the parties have changed by the time of the de novo hearing, these changed circumstances are relevant to the circuit court’s decision. *See Green*, 2009 WL 348289, at *4 (acknowledging the factual basis for the juvenile court’s dependency and neglect finding had been eliminated by time of de novo trial).

Here, Mother stipulated on the first day of the de novo hearing, January 27, 2014, that Landon was dependent and neglected on September 12, 2012. The circuit court accepted the stipulation, found Landon dependent and neglected, and moved to the dispositional phase. The circuit court failed to independently determine whether Landon was dependent and neglected at the time of the hearing. If the conditions of dependency and neglect do not exist at the time of the hearing, the circuit court must dismiss the petition. *Green*, 2009 WL 348289, at *4. *See also In re K.A.P.*, 2013 WL 6665012, at *7 (holding the evidence of mother’s past behavior was not sufficient to find son dependent and neglected); *In re Alysia*

M.S., 2013 WL 1501710, at *8 (affirming circuit court's decision to dismiss petition when conditions existing at time of the juvenile court hearing were no longer present at de novo trial).

We conclude the circuit court erred in finding Landon dependent and neglected based on Mother's stipulation of dependency and neglect as of the date of Grandmother's petition. The court must determine whether the child was dependent and neglected within the meaning of the statute as of the date of the de novo hearing. Only if Landon were dependent and neglected at that time was the court empowered to consider the proper disposition of the child. Tenn. Code Ann. § 37-1-129(c) (2014). Otherwise, the circuit court was required to dismiss Grandmother's petition. *See In re Alysia M.S.*, 2013 WL 1501710, at *8.

IV. CONCLUSION

Because the record lacks clear and convincing evidence that Landon was dependent and neglected as of the date of the de novo hearing, we vacate the decision of the circuit court. We remand for a new adjudicatory hearing on the issue of dependency and neglect. Ordinarily, once this Court vacates the circuit court decision, the juvenile court's custody decision would again become effective.³ Tenn. Code Ann. § 37-1-159(b) (2014). Under these circumstances, we stay the juvenile court's custody order and order the custody and visitation arrangement set by the circuit court to remain in effect pending further hearing. If the circuit court determines after a new hearing that the child is dependent and neglected in Mother's custody, in the dispositional phase, the circuit court shall consider the Father's petition for custody. If the circuit court determines that the child is not dependent and neglected or Grandmother withdraws her petition, Father may proceed with his petition for custody.

W. NEAL MCBRAYER, JUDGE

³ The effect of a juvenile court order in a dependency and neglect proceeding is not automatically stayed on appeal. Tenn. Code Ann. § 37-1-159(b) (2014). We note Grandmother filed a motion in the circuit court to stay the effect of the juvenile court order, but an order on the motion does not appear in the record. Our review of the transcript of the hearing in circuit court leads us to conclude Landon is still in Tennessee in the joint custody of Mother and Grandmother.