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

IN RE SERENITY B.

Appeal from the Chancery Court for Maury County
No. A02812 Robert L. Jones, Judge

No. M2013-02685-COA-R3-PT - Filed May 21, 2014

In this termination of parental rights proceeding, both Mother and Father maintain that the trial court erred in finding clear and convincing evidence that they willfully abandoned the child by failure to visit within the four months preceding the filing of the termination petition. Mother additionally claims that the trial court erred in finding clear and convincing evidence that it is in the best interest of the child to terminate Mother's parental rights. We affirm the trial court's findings that both parents abandoned the child by willfully failing to visit and that the termination of Mother's parental rights is in the child's best interest. Consequently, we affirm the trial court's decision to terminate the parental rights of both parents.

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

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

Adam C. Davis, Franklin, Tennessee, for the appellant, Isaiah B.

Stacy S. Neisler, Spring Hill, Tennessee, for the appellant, Erica L.

Mark A. Free, Columbia, Tennessee, for the appellees, John M. B. and Teresa D. B.

OPINION

BACKGROUND

Serenity F. B. was born to Erica L. ("Mother") and Isaiah B. ("Father") in September, 2011. Serenity was born addicted to methadone as a result of Mother's use of the drug during her pregnancy to treat an addiction. The Department of Children's Services ("DCS") obtained an order from the Maury County Juvenile Court allowing John B. and Teresa B. to take the child home from the hospital. The juvenile court eventually held that the child was dependent and neglected.

On September 6, 2012, John B. and Teresa B. filed a petition in the Chancery Court of Maury County to terminate parental rights and for adoption of the child based on the grounds of willful non-support of Serenity for the four months immediately preceding the filing of the petition, willfull failure to visit with Serenity for the four months immediately preceding the filing of the petition, and persistence of conditions. A trial was held on November 12, 2013. The trial court found there was clear and convincing evidence that both parents had willfully failed to visit the child in the four months preceding the filing of the petition. The trial court also found that Father had willfully failed to provide support for the child in the four months preceding the filing of the petition. The court made no finding as to the persistence of conditions. Finally, the court determined that it was in the best interest of Serenity to terminate both parents' parental rights. Both parents appealed.

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)). Pursuant to Tennessee Code Annotated Section 36-1-113(l)(1), "[a]n order terminating parental rights shall have the effect of severing forever all legal rights and obligations of the parent or guardian of the child against whom the order of termination is entered and of the child who is the subject of the petition to that parent or guardian."

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.*, M2004-00999-COA-R3-PT, 2005 WL 1021618, at *7 (Tenn. Ct. App. Apr. 29, 2005) (citing Tenn. Code Ann.§ 36-1-113(g)). To support the termination of parental rights, petitioners must prove both the existence of one of the statutory grounds for termination and that termination is in the child's

best interest. Tenn. Code Ann. § 36-1-113(c); *In re D.L.B.*, 118 S.W.3d 360, 368 (Tenn. 2003); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

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 termination cases. *Santosky*, 455 U.S. at 769; *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. § 36-1-113(c)(1); *In re Valentine*, 79 S.W.3d at 546. Clear and convincing evidence "establishes that the truth of the facts asserted is highly probable, and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *In re M.J.B.*, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004) (citations omitted). Such evidence "produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established." *Id.*

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). *Id.* at 654. As to the trial 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.*

ANALYSIS

Failure to Visit (both parents)

Abandonment, one of the grounds upon which parental rights may be terminated pursuant to Tenn. Code Ann. § 36-1-113(g)(1), is defined 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[.]

Tenn. Code Ann. § 36-1-102(1)(A)(i). "The concept of 'willfulness' is at the core of the statutory definition of abandonment." *In re Audrey S.*, 182 S.W.3d 838, 863 (Tenn. Ct. App. 2005). A parent's failure to visit or support a child is "willful" when the parent 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." *Id.* at 864. A parent who fails to support his or her child(ren) because the parent is financially unable to provide support is not willfully failing to provide support. *O'Daniel v. Messier*, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995). A parent's failure to visit or support may be excused by another person's conduct if that conduct "amounts to a significant restraint of or interference with the parent's efforts" to visit or support the child. *In re Audrey S.*, 182 S.W.3d at 864.

The trial court found that Mother exercised her visitation rights sporadically and Father exercised his even less. For example, the court examined a juvenile court order of February 11, 2013 in which Mother was granted visitation rights every Friday for two hours and every other Sunday for two hours. The court expressly found:

> [T]here have been sixty-six opportunities for visits since that order, and the Mother has missed twenty-seven of those visits. The Mother did not admit missing as many as twenty-seven but admitted she missed many of the Sundays because she had trouble getting up in the morning. Obviously, she would not be able to be the sole parent of this two-year old child now or in the foreseeable future, if keeping 8:00 a.m. appointments is difficult or impossible.[1]

The court went on to specifically find:

> [T]he Petitioners have proven by clear and convincing evidence that the Mother willfully failed to visit or otherwise maintain any relationship with this child for a minimum of four consecutive months immediately preceding the filing of the Petition for termination. Her failure clearly and convincingly proves a lack of interest or effort in having any relationship with the child and constitutes abandonment under Tenn. Code Ann. § 36-1-102.

While the court made no specific mention of testimony or evidence in conjunction with this finding, the record supports it. Teresa B. testified that Mother had not visited the child between February 15, 2012 and the filing of the termination petition, which was on September 6, 2012. Mother testified she had no visits between March and September 2012. Either time period satisfies the four-month requirement of Tenn. Code Ann. § 36-1-113(g)(1).

Mother maintains that the failure to visit was not willful because of resistance from

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[1] Admittedly, this is a post-petition fact which the trial court used to illustrate Mother's indifference to visitation.

John B. and Teresa B. She testified that "[John B. and Teresa B.] were not cooperating with me, and I did not feel like I was wanted." All parties agree that in July of 2012 Mother called John B. and Teresa B. requesting to visit the child. John B. did not allow the visit because "it had been so long that I felt like she needed to contact [DCS]." This was the only time, according to Teresa B., that Mother was ever denied a visit. Mother says DCS did not help her and she eventually filed a motion for visitation in the juvenile court. At this point, it is appropriate to note that cooperation with DCS is a "two-way street." *In re R.L.F.*, 278 S.W.3d 305, 313 (Tenn. Ct. App. 2008) ("The affirmative duty to make reasonable efforts, however, is not solely on the Department."). The juvenile court's order of February 11, 2013 finds that DCS made reasonable efforts to assist Mother in completing action steps to address her problems, but Mother had not done so. The order also indicates that Mother had disappeared for three months and could not be reached by DCS or anyone else involved in this matter. The court stated Mother had been "stonewalling" DCS regarding her drug treatment and "was not diligent at all in exercising visitation with the children."

We concur with the trial court's finding of clear and convincing evidence of Mother's willful failure to visit.

Father's visitation was exercised much less frequently, and the trial court found that he had abandoned the child by not visiting her "for well over four months" preceding the filing of the petition. Although Father testified at trial that he had been incarcerated 80% of Serenity's life, he does not claim he was incarcerated in the four months before the termination petition was filed. Rather, he, like Mother, claims the lack of visitation was not willful, but a result of the dislike John B. and Teresa B. had for him. He testified:

> [I]t was understood that they don't like me, so I didn't want to contact them and have a confrontation, beings as I'm on probation and all that stuff. It makes me feel uncomfortable like they might get me for harassing them or coming or [sic] there for trespassing if I wanted to see her, so I tried to avoid it.

He also testified that he asked Mother to ask for visitation on his behalf. Her replies were comments like, "'You know they don't want you to see her,' or 'They don't like you.'"

Teresa B. testified that they never denied a request from Father to visit Serenity and that he never communicated with them seeking a visit. Father stated that he never called them to arrange a visit and never contacted a DCS case worker or the court about having problems with visits.

We concur with the trial court's finding of clear and convincing evidence of Father's

willful failure to visit.

Failure to Support (Father only)

The definition of abandonment includes willful failure to support or willful failure to make reasonable payments toward support for four months immediately preceding the filing of the petition to terminate. Tenn. Code Ann. § 36-1-102(1)(A)(i). There is no dispute that no support was paid by either parent during the applicable period. However, the trial court only found that clear and convincing evidence existed that Father abandoned the child by failing to provide any support for her during the four months preceding the filing of the petition.

As with visitation, the key is willfulness. A parent's failure to support a child is "willful" when the parent is aware of his duty to support, "has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so." *In re Audrey S.*, 182 S.W.3d at 864.

Father's brief suggests his incarceration precluded him from seeking employment, but there is no proof that he was incarcerated during the four months prior to the filing of the termination petition. While there is proof the Father held jobs from time to time, there is no proof that Father had a job or the ability to pay support during the pertinent four months leading up to the filing of the petition.[2]

Consequently, we must reverse the trial court's finding that clear and convincing evidence existed that Father abandoned the child by failing to provide any support for her during the four months preceding the filing of the petition.

Best Interest (Mother only)

Only Mother challenges the trial court's best interest determination. Besides finding that clear and convincing evidence establishes that grounds for termination of parental rights exist, the court must find that clear and convincing evidence shows that the termination of the parents' rights is in the best interest of the child.[3] Tenn. Code Ann. § 36-1-113(c)(2); *In*

[2]There was testimony that Father worked part-time between December 7, 2012 and March 22, 2013 for $8.00 an hour and did not pay any support. This time period, however, is not the period the statute requires the court to examine.

[3] The trial court stated that the Petitioners had "the burden of proving by a preponderance of the evidence that such termination is in the best interest of the child." Actually, the Supreme Court has held that:

re S.H., E2013-02007-COA-R3-PT, 2014 WL 1713769, at *3 (Tenn. Ct. App. Apr. 29, 2014). The trial court considered the factors listed in Tenn. Code Ann. § 36-1-113(i) in determining whether termination of parental rights was in the best interest of Serenity:

> (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.

The trial court determined that Mother "has not made an adjustment of circumstance, conduct, or conditions to make it safe or in the child's best interest for the child to be in the home . . . , even for a limited visitation, especially compared to the stable home and life of the Petitioners." In its opinion, the trial court stated that neither parent had "been able to hold any meaningful employment for more than a few weeks and that neither had a stable residence or phone number for more than a few months at a time.

Mother's brief argues just the opposite:

> To the contrary, the proof at trial showed that [Mother] has been in a stable home for over a year, has a bedroom furnished for the child at the home, has completed sixteen weeks of drug classes, has obtained employment, has obtained a vehicle that would be safe for the child, and has overcome her prior opiate addiction.

Mother's employment record was spotty. At the time of Serenity's birth, Mother was employed at Cracker Barrel. A month after the birth she returned to work. Around March 2012, Mother was fired. Next she was employed from October 2012 to April 2013, when she "got laid off" from a business called Integrity. She remained unemployed until early November 2013, a week before the trial, when she was hired by Legends. Mother testified

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> [W]e review findings of fact by a trial court in civil actions de novo on the record, with a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d). When a trial court has made no finding of fact, however, we conduct a de novo review to determine where the preponderance of evidence lies. *See In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). Following our evaluation of the facts, we review the trial court's order to determine whether the facts amount to clear and convincing evidence that the termination of parental rights is in the best interests of the children. *See In re Bernard T.*, 319 S.W.3d at 596-97.

In re Taylor B.W., 397 S.W.3d 105, 112 (Tenn. 2013). Thus, on appeal, the appellate court determines whether the evidence is clear and convincing.

that she felt like she had recovered from her drug addiction, but she was still taking methadone pursuant to a doctor's prescription as part of her treatment for addiction. Mother's vehicle was a gift from her mother, who pays for her gas.

At the time of trial, Mother had yet to complete her probation for two criminal offenses she committed before Serenity was born. Mother lived with her grandmother. Mother testified she had lived there for "almost a year now." Her grandmother testified it was not continuous; she had kicked Mother out[4] in January of 2013 "because of [Father]," and Mother "was gone a couple of months."[5] During that time, her grandmother was "not sure where she was."

> (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.

The trial court found that Mother had "failed to effect a lasting adjustment to the extent such factor is appropriate in this case." The same facts applicable to factor (1) would appear to be applicable here.

> (3) Whether the parent or guardian has maintained regular visitation or other contact with the child.

The trial court found that Mother did not maintain regular visitation with Serenity and had no adequate excuse. This finding has been established in the discussion of Mother's visitation, above.

> (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child.

The trial court found no meaningful relationship between Mother and Serenity. The court also said that Mother's lack of efforts to visit Serenity "is evidence to the Court that she had little interest in assuming parental responsibility." Mother testified that Serenity knows her and calls her "Mama." This does not, however, mean that a relationship exists.

> (5) The effect a change of caretakers and physical environment is likely to

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[4]Mother testified that she was never kicked out, rather she left her grandmother's house voluntarily.

[5]Mother testified that the domestic assault occurred in March of 2013 and that she and Father were sharing a residence at the time.

have on the child's emotional, psychological and medical condition.

The trial court found that a change of caretaker and physical environment would likely have a detrimental effect upon the child's emotional well being. The testimony indicated that Serenity was a happy, well-adjusted child. Mother admitted that John B. and Teresa B. took good care of Serenity and provided a good home.

While the court found that the evidence established that the child had bonded with John B. and Teresa B., there was no testimony, expert or otherwise, that a change of caretaker and physical environment would be detrimental to Serenity.

> (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.

The record indicates that Mother stipulated to a finding of dependency and neglect in the juvenile court.

> (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.

The trial court was concerned about the use of prescription doses of methadone by Mother. The judge found that "continued use of controlled substances by each parent prevents them from consistently caring for the child in a safe and stable manner." Pursuant to questioning by the judge, Mother testified that the doses of methadone had no effect upon her mental or physical capacity and did not dull her senses.

> (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.

There was no testimony about the Mother's mental or emotional status other than the judge's questions about Mother's use of methadone mentioned above.

> (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 trial court found that neither parent paid child support. As with Father, as discussed above, Mother's ability to pay was not explored in the trial.

The list of factors in Tenn. Code Ann. § 36-1-113(i) is not exhaustive, and the statute does not require the court to find the existence of every factor before concluding that termination is in a child's best interest. *In re Audrey S.*, 182 S.W.3d at 878 ("The relevancy and weight to be given each factor depends on the unique facts of each case."). We conclude that there is clear and convincing evidence showing that the termination of the Mother's parental rights is in the best interest of Serenity.

Before concluding, we feel compelled to discuss one more point. Even though it was not pled in the petition for termination, counsel suggested to the court that it could find the ground of wanton disregard existed as well.[6] "[C]ourts must strictly apply the procedural requirements in cases involving the termination of parental rights." *Weidman v. Chambers*, No. M2007-02106-COA-R3-PT, 2008 WL 2331037, at *6 (Tenn. Ct. App. June 3, 2008) (citing *In re W.B.*, 2005 WL 1021618, at *10 and *In re M.J.B.*, 140 S.W.3d at 651). Thus, a court may terminate a parent's rights to his child based only upon the statutory ground(s) alleged in the petition because otherwise the parent would be "disadvantage[d] in preparing a defense." *In re W.B.*, 2005 WL 1021618, at *10 (reversing an order that terminated parental rights based on grounds not alleged in the petition). When a petition fails to identify the grounds for termination, it can sometimes be argued that a ground for termination was tried by implied consent of the parties. *See In re S.M.N.*, No. E2005-01974-COA-R3-PT, 2006 WL 1814852, at *6 (Tenn. Ct. App. June 30, 2006). Based on the record before us, we cannot conclude that Mother or Father impliedly consented to try the ground of abandonment by wanton disregard.

CONCLUSION

We affirm the trial court's determination that clear and convincing evidence exists that both Mother and Father abandoned the child by failure to visit. We reverse the trial court's determination that clear and convincing evidence exists that Father willfully failed to support the child. We also affirm the trial court's determination that there is clear and convincing evidence showing that the termination of the Mother's parental rights is in the best interest of Serenity. The one reversal in this case does not affect the trial court's termination of

[6]In closing argument, counsel discussed the ground of wanton disregard, beginning the discussion with the statement, "Now as to un-pled grounds that Your Honor can take judicial notice of, one is under the heading of wanton disregard."

Father's rights because another ground for termination was upheld. Consequently, we affirm the trial court's decision to terminate the parental rights of both parents.

Costs of appeal are assessed against both Mother and Father equally, and execution may issue if necessary.

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ANDY D. BENNETT, JUDGE