

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs March 26, 2002

**STATE OF TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES v.  
T.K.**

**Appeal from the Juvenile Court for Hamilton County  
No. 164,585 Suzanne Bailey, Judge**

**FILED MAY 30, 2002**

**No. E2001-01963-COA-R3-JV**

The trial court terminated the parental rights of T.K. (“Mother”) with respect to her minor child, S.A.M. (DOB: April 12, 1999). Mother appeals, contending that the evidence preponderates against the trial court’s determination that there is clear and convincing evidence to terminate her parental rights. We affirm.

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

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and D. MICHAEL SWINEY, J., joined.

John A. Shoaf, Chattanooga, Tennessee, for the appellant, T.K.

Paul G. Summers, Attorney General and Reporter, and Elizabeth C. Driver, Assistant Attorney General, for the appellee, State of Tennessee Department of Children's Services.

**OPINION**

I.

On August 10, 1999, the Tennessee Department of Children’s Services (“DCS”) filed a petition for temporary custody of five-month-old S.A.M. When the petition was filed, both Mother and the child’s biological father, R.M. (“Father”), were incarcerated.<sup>1</sup> The petition alleges, among other things, that “[d]uring the week prior to their incarceration [Mother and Father] had left the child with a casual acquaintance, and did not seem to want to take the child back when the acquaintance requested that they do so.” Upon the filing of the petition, an order was entered placing

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<sup>1</sup> Father is not a party to this appeal.

temporary care and custody of the child with DCS. On October 16, 1999, following a hearing, the juvenile court awarded the child's legal custody to DCS. The child has remained in foster care since the temporary placement of August 10, 1999.

On November 6, 2000, DCS filed a petition to terminate the parental rights of Mother and Father. As Father did not appear for the hearing, even though he had been properly served with process, the court entered a default judgment against him, terminating all of his parental rights to the child. After a full hearing, the trial court terminated the parental rights of Mother as well. In the final judgment, entered September 6, 2001, the court below found, by clear and convincing evidence, as follows:

That the petition filed by [DCS], is well taken and should be sustained and relief granted thereunder for the causes as therein stated in that the subject child has been in the custody of [DCS] for at least six (6) months; that the conditions which led to said child's removal still persist; that there is little likelihood that said conditions will be remedied at an early date so that the child can be returned to [Mother] in the near future; that the continuation of the legal parent and child relationship greatly diminishes the child's chances of early integration into a stable and permanent home; that [Mother has] failed to comply in a substantial manner on the reasonable responsibilities of the Foster Care Plan; that [Mother has] willfully abandoned the child for more than four (4) consecutive months next preceding the filing of the petition in this cause and it is, therefore, for the best interest of the said child and the public that all of the parental rights of [Mother] to the said child be forever terminated ....

## II.

In this non-jury case, our review is *de novo* upon the record of the proceedings below; but the record comes to us with a presumption of correctness as to the trial court's factual determinations that we must honor unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); **Wright v. City of Knoxville**, 898 S.W.2d 177, 181 (Tenn. 1995); **Union Carbide Corp. v. Huddleston**, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law, however, are accorded no such presumption. **Campbell v. Florida Steel Corp.**, 919 S.W.2d 26, 35 (Tenn. 1996); **Presley v. Bennett**, 860 S.W.2d 857, 859 (Tenn. 1993).

## III.

It is well-settled that "parents have a fundamental right to the care, custody, and control of their children." **In re Drinnon**, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing **Stanley v. Illinois**, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)). However, this right is not absolute and may be terminated if there is clear and convincing evidence justifying termination under the pertinent

statute. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Clear and convincing evidence is evidence which “eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence.” *O’Daniel v. Messier*, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995).

The issues raised in the pleadings, and the trial court’s findings, bring into focus the following statutory provisions:

T.C.A. § 37-1-147 (2001)

(a) The juvenile court shall be authorized to terminate the rights of a parent or guardian to a child upon the grounds and pursuant to the procedures set forth in title 36, chapter 1, part 1.

\* \* \*

T.C.A. § 36-1-113 (2001)

(a) The chancery and circuit courts shall have concurrent jurisdiction with the juvenile court to terminate parental or guardianship rights to a child in a separate proceeding, or as a part of the adoption proceeding by utilizing any grounds for termination of parental or guardianship rights permitted in this part or in title 37, chapter 1, part 1 and title 37, chapter 2, part 4.

\* \* \*

(c) Termination of parental or guardianship rights must be based upon:

(1) A finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and

(2) That termination of the parent’s or guardian’s rights is in the best interests of the child.

\* \* \*

(g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:

(1) Abandonment by the parent or guardian, as defined in [T.C.A.] § 36-1-102, has occurred;

(2) There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care pursuant to the provisions of title 37, chapter 2, part 4;

(3)(A) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(i) The conditions which led to the child's removal or other conditions which in all reasonable probability would cause the child to be subjected to further abuse or neglect and which, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;

(ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

\* \* \*

T.C.A. § 36-1-102 (2001)

As used in this part, unless the context otherwise requires:

(1)(A) "Abandonment" means, for purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, that:

(i) 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 make reasonable payments toward the support of the child;

\* \* \*

T.C.A. § 37-2-403 (2001)

(a)(1) Within thirty (30) days of the date of foster care placement, an agency shall prepare a plan for each child in its foster care....

\* \* \*

(2)(A) The permanency plan for any child in foster care shall include a statement of responsibilities between the parents, the agency and the caseworker of such agency....

\* \* \*

(C) Substantial noncompliance by the parent with the statement of responsibilities provides grounds for the termination of parental rights, notwithstanding other statutory provisions for termination of parental rights, ....

IV.

Mother raises three issues for our consideration: (1) whether there is clear and convincing evidence that warrants the termination of Mother's parental rights under T.C.A. § 37-2-403(a)(2) "for failure to substantially comply with reasonable responsibilities of the Foster Care Plan"; (2) in general, whether there is clear and convincing evidence justifying the termination of parental rights pursuant to T.C.A. § 37-1-147; and (3) whether DCS failed to make reasonable efforts to reunify the family as is required by T.C.A. § 37-1-166 (2001).

The trial court found that Mother "failed to comply in a substantial manner on the reasonable responsibilities of the Foster Care Plan." *See* T.C.A. § 36-1-113(g)(2). The plan of care set forth in the record required Mother to do the following: (1) remain in contact with Section 8 housing personnel and to obtain suitable housing; (2) attend parenting classes in order to understand the responsibilities involved in parenting, protecting, and providing for her child; (3) demonstrate that she has appropriate and responsible care providers when she has to be away; (4) remain out of jail and gain no new charges; (5) obtain an alcohol and drug assessment and cooperate with the findings of the assessment; (6) participate in necessary treatment including detox, and individual, group, and family counseling; (7) submit to random drug screens; and (8) sign releases to enable DCS to monitor her progress with other professionals. The plan was filed with the court on September 1, 1999.

The evidence is clear and convincing that Mother failed to substantially comply with the responsibilities set forth in the plan of care. For more than eighteen months after the plan went into effect, Mother continued to live in a motel, and she did not obtain suitable housing until approximately two months before the trial below. As of the date of trial, Mother had yet to attend

her first parenting class, and she had attended only a few counseling sessions, which she waited until February, 2001 to begin. There was no proof introduced at trial that Mother had located any appropriate and responsible providers to care for the child when Mother was away; in fact, Mother testified that the reason for her sporadic attendance of counseling sessions was due to the fact that she could not find anyone to care for her *new* baby while she was away.<sup>2</sup>

Mother did obtain an alcohol and drug assessment a few months before trial, and she did manage to refrain from criminal activities; and there is no mention in the record of Mother's failure to submit to random drug screens or failure to sign the appropriate releases. However, it is clear that the rest of the objectives, which are arguably the most important of the objectives, were not satisfied. Therefore, we find that the evidence does not preponderate against the trial court's finding by clear and convincing evidence that Mother did not substantially comply with the plan of care.

In Mother's second issue, she argues that, generally, there was no clear and convincing evidence justifying the termination of her parental rights. We will construe this argument to encompass the other grounds for termination found by the trial court, namely abandonment and failure to remedy the conditions preventing the return of the child.

In the final judgment, the trial court held that Mother had "willfully abandoned the child for more than four (4) consecutive months next preceding the filing of the petition in this cause." Extrapolating from the pleadings and trial testimony, we conclude that the court based its abandonment ruling on Mother's willful failure to support the child, and we find that the evidence in the record supports the trial court's ruling.

The statutory definition of "willfully failed to support" and "willfully failed to make reasonable payments toward such child's support," as defined in T.C.A. § 36-1-102(1)(D), was held to be unconstitutional by the Tennessee Supreme Court in *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999). The court in *Swanson* stated that, in actions to terminate parental rights that are filed in juvenile court, the statutory definition of abandonment that was enacted by the General Assembly in 1970 is to be applied. That definition, codified at T.C.A. § 37-202(7) (Supp. 1970), stated that an abandoned child is one "whose parents or other persons lawfully charged with his care and custody willfully fail to visit or willfully fail to support or make payments toward his support for a period of four (4) consecutive months." See *Pack v. Rogers*, 538 S.W.2d 607, 609, 610 (Tenn. Ct. App. 1976).

By Mother's own testimony, she paid no monetary support during the entire time her child was in the custody of DCS, which, at the time of trial, amounted to nearly two years. Mother acknowledged, however, that she was employed for the majority of that time period. Mother argues that she was under no court order to pay child support and that she therefore was unaware that she needed to pay such support. In response to such an assertion in a previous case, this Court has stated that "the support of one's children should not be conditioned upon whether one has been placed

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<sup>2</sup> Mother gave birth to another child in March, 2001.

under a court order to do so.” *State v. Manier*, C/A No. 01A01-9703-JV-00116, 1997 Tenn. App. LEXIS 755, at \*16 (Tenn. Ct. App. W.S., filed October 31, 1997), *perm. app. denied*, March 2, 1998. The evidence, therefore, does not preponderate against the trial court’s finding that there was clear and convincing evidence to support Mother’s abandonment of the child.

In addressing the issue of failure to remedy the conditions preventing the return of the child, the court found by clear and convincing evidence that the child had been in the custody of DCS for at least six months and further held that “the conditions which led to said child’s removal still persist; that there is little likelihood that said conditions will be remedied at an early date so that the child can be returned to [Mother] in the near future” and “that the continuation of the legal parent and child relationship greatly diminishes the child’s chances of early integration into a stable and permanent home.” We cannot say that the evidence preponderates against these findings.

When the child was taken into the custody of CDS, Mother was living in a motel room with Father, who Mother testified “controlled” her and physically abused her. Mother further testified that Father was a drug-user and that Mother had supported Father and his drug habit throughout the majority of the time that the child was in DCS custody. While Mother stated that she had “cut everything totally off” with Father in the early part of 2001, she later admitted that Father had been in her house in late March to see Mother’s new baby.<sup>3</sup> As for her employment history, Mother had obtained a job with Waffle House shortly after her release from jail in September, 1999, but she was fired twice. Following her second dismissal, in January, 2001, she decided that she could survive on unemployment benefits and she did not seek another job. At the time of trial, Mother was still unemployed.

There is ample evidence to support the trial court’s holding that these conditions are unlikely to be remedied in the near future, and that the continuation of Mother’s legal relationship with the child will greatly diminish the child’s chances of an early integration into a stable home environment.

In Mother’s third issue, she argues that DCS failed to make reasonable efforts to reunify Mother with her child, pursuant to the mandate of T.C.A. § 37-1-166. However, our thorough review of the record reveals that this issue was never raised in the trial court, neither in pleadings filed with the court nor during the trial itself. It is well-settled that issues not raised at trial may not be raised for the first time on appeal. *Simpson v. Frontier Community Credit Union*, 810 S.W.2d 147, 153 (Tenn.1991); *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983). Further, we are unable to construe the flavor of the trial testimony in such a way as would support a finding that this issue was tried by the implied consent of the parties. *See Zack Cheek Builders, Inc. v. McLeod*, 597 S.W.2d 888, 890 (Tenn. 1980). Accordingly, we decline to address Mother’s third issue.

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<sup>3</sup> Father is the biological father of this child as well.



Finally, we conclude that the evidence contained in the record supports the trial court's finding that the termination of Mother's parental rights is in the best interests of the child. The trial court succinctly summarized the factors pertaining to the child's best interests:

That further, it is clearly in the best interest of this child that your rights be terminated because of your abandonment of this child, by failure to make it possible to regain custody, by failing to get your parenting classes, by failing to do everything else required of you until a few weeks prior to this hearing. Months after the petition was filed, but a few short weeks prior to this hearing have you made any steps at all and those steps are not enough to overcome what this child has had to do in terms of waiting on you for two long years. The child has a chance for permanency and I hope, for her sake, that she will be able to find it through the guardianship of the State and potential adoption.

The evidence does not preponderate against these findings.

V.

The judgment of the trial court is affirmed. This case is remanded for enforcement of the trial court's judgment and for collection of costs assessed below, pursuant to applicable law. Costs on appeal are taxed to the appellant, T.K.

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CHARLES D. SUSANO, JR., JUDGE