

This is a termination of parental rights case. Calvin Douglas Williams and his wife, Sharon Saucier Williams (collectively "the Williams"), filed a petition seeking to adopt Amanda Faith McCoy (Amanda), who was born on November 12, 1982. As a part of the adoption petition, they also sought to terminate the parental rights of Amanda's natural father¹, Ricky Lynn McCoy (Father). After finding that Father had abandoned Amanda, the trial court terminated his parental rights and awarded legal custody of Amanda to the Williams.² Father appeals, raising three issues that present the following questions:

1. Did the trial court properly terminate Father's parental rights and award custody of Amanda to the Williams?
2. Was Father denied procedural and substantive due process?
3. Did the trial court properly assess all costs, including the fees of the guardian ad litem, against Father?

I

Amanda has not lived with Father since some unspecified time prior to September 20, 1988, the date of the McCoy's'

¹The petition also sought a termination of the parental rights of Amanda's natural mother, Debbie McCoy. Ms. McCoy's parental rights were terminated by the trial court's order of December 6, 1995. That decree is not before us on this appeal.

²The adoption petition is apparently still pending. Because of the exigency of the circumstances, we are reviewing this case as an interlocutory appeal.

divorce. He did not seek custody of Amanda or her siblings³ at the time of the divorce. Ms. McCoy was initially awarded their custody; however, due to her physical abuse of the children, the Department of Human Services (DHS) removed them from her custody in May, 1989. The children were then found to be dependent and neglected; Father also chose not to seek their custody at that time. Temporary custody of the children, including Amanda, was awarded to their maternal grandparents, without objection by Father, who was granted visitation rights.

In January, 1990, the Juvenile Court directed that Father was not to have visitation with the children until he complied with a foster care plan prepared by DHS. Father met with Susan Bowers of DHS in April, 1990, and inquired as to what he had to do to regain custody of his children. She informed him that he needed to establish a permanent home and attend counseling for alcoholism

Following a hearing on April 20, 1990, which Father did not attend, Amanda was returned to the custody of DHS and placed in the home of the Williams. Mrs. Williams was Amanda's first grade teacher at the time. At another hearing the next month, Father voiced no objection to Amanda remaining in the care of the Williams. A second DHS case worker, Deidra Anderson, testified that in August, 1990, she gave Father a copy of a foster care

³Amanda is the youngest of four children born to Mr. and Mrs. McCoy. The other children, Ashley, Travis and Ricky, Jr., were not the subject of the proceedings below.

plan and explained its requirements to him. Ms. Anderson testified that he did not complete the requirements of that plan. The third DHS worker on the case, David Mann, also sent Father a copy of the foster care plan, but received no response. In addition, the transfer summary prepared by Ms. Anderson on January 2, 1991, refers to an earlier plan, stating that Father "also has had a foster care plan since 1987 and has yet to complete any tasks."

The Williams filed their petition for termination of parental rights and adoption on April 30, 1991. In his answer, Father sought custody of Amanda, asserting that he had been prevented from seeing her and that he had never received a foster care plan; however, the testimony of the DHS employees clearly indicates that Father did receive one or more foster care plans. Ms. Anderson stated that parents always receive a copy of the plan, and that in this case, she personally gave Father a copy and explained its contents.

A hearing on the Williams' petition was held in September, 1992. As of that time, Father had not visited the Williams' house, and had only called once to talk to Amanda. He had sent Amanda cards for her birthday, Christmas, Valentine's Day and Easter. Father had requested and received one visit with Amanda, at the office of her guardian ad litem. Following this visit, Father requested more visitation, but that request was denied by the trial court because the prior visit had not gone

well. Meanwhile, Father had signed yet another foster care plan, which was prepared by the next DHS employee on this case, Gary Kidd. Mr. Kidd testified that Father cooperated in implementing the plan, by completing six weeks of parenting classes and by maintaining the same job and home for over a year. The trial court recessed the September, 1992, hearing, finding that, due to the failure of DHS to properly handle Father's case, there was no clear and convincing proof to warrant a termination of Father's parental rights at that time. However, the court did grant full custody of Amanda to the Williams, apparently so they could obtain medical insurance for her.

The parties then submitted competing visitation plans to the court. No further action was taken on the case, however, for approximately one year. During this time, Father's only contact with Amanda consisted of two cards. The first card was sent to Amanda after her birthday in November, 1992; the second card, which arrived in December, 1992, was signed "Daddy" in what appeared to be a woman's handwriting. The next hearing was held in October, 1993. Father failed to attend this hearing, allegedly due to car trouble on the way to court. Following that hearing, the trial court confirmed the removal of Amanda from the custody of DHS and the award of her custody to the Williams. However, the court still declined to terminate Father's parental rights or to grant the adoption, once again due to a lack of clear and convincing evidence of abandonment resulting from the failure of DHS to properly handle Father's case. The court also

refused to award any visitation to Father because of his failure to appear.

After explaining his absence and moving for visitation, Father made it back into court on April 11, 1994. He had had no contact whatsoever with Amanda for over a year. Father contended that he had been waiting for the entry of an order regarding visitation, since, according to him, he was under the impression there was to be no contact until such an order was entered. He testified that he had attended parenting classes, had maintained steady employment, and had lived in the same place for over three years. On the other hand, Father had not tried to call Amanda since before the October, 1992, hearing, and had failed to send her a birthday card in November. The court nevertheless granted Father visitation on the third Saturday of each month, as well as one phone call each Thursday between 8:15 and 8:30 p.m. He was also allowed to write letters and send cards to Amanda.

Father's monthly visitation with Amanda began in May, 1994, and continued until August, 1994, when he canceled a visit, allegedly due to the birth of his son by his current wife. In September, according to Father, he called the Williams to set up a visit and left a message on their answering machine, but received no response. He did not try to call again, and thus did not see Amanda that month. He claims that the same thing happened in October, and again no visit took place. Father then filed contempt charges against the Williams, and he did visit

Amanda in November and December of 1994; however, he then stopped making the visits and had not visited Amanda since December of 1994 as of the final hearing. According to Father, the visits had not gone particularly well. He testified that, because of the Williams' presence during the visits and limitations that he complained were placed on the visits, he felt that they were not worthwhile. In short, because, again according to him, he thought that the visits caused more harm than good, he gave up on them

A similar pattern emerged with regard to the telephone visitation. Father initially called as scheduled, but Amanda consistently refused to talk to him and hung up the phone. The record indicates that Father's subsequent calls were not always on the appointed day or at the designated time. On some occasions, he did not call at all. This sporadic calling continued until February, 1995, when Father simply gave up. He stated that this was because Amanda would never talk to him and, in his words, "after several months of that... what was the point?"

The final hearing in the trial court commenced on November 13, 1995. Father offered the aforementioned explanations for his failure to visit and call Amanda, and also testified that he was behind in child support payments, but that he intended to pay his arrearage. Following this hearing, the trial court terminated Father's parental rights and awarded

permanent custody of Amanda to the Williams. The court acknowledged that Father was not always kept informed or provided with documentation about what was required to improve his parenting skills or to regain custody of his children; however, the court also found that Father had not aggressively sought custody of his children, and had done nothing on his own initiative to establish a home for them. The court found that he had instead waited for the court or DHS to do things for him or tell him what to do. Noting an absence of testimony demonstrating Father's love and care for Amanda, the court found clear and convincing evidence of abandonment. The court went on to note that Father's child support was delinquent, that there were many reasons why Amanda should remain with the Williams, and that any change in custody would cause substantial harm to Amanda, who is now almost 14 years old. There is testimony in the record that clearly reflects that Amanda recognizes only the Williams as her parents.

II

Our review is *de novo* upon the record with a presumption of correctness as to the trial court's findings, unless the preponderance of the evidence is otherwise. Rule 13(d), T. R. A. P.

When an adoption petition alleges that a biological parent has abandoned a child, the test of abandonment⁴ is whether

any conduct on the part of the parent ... evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child.

Ex Parte Wölfenden, 349 S.W2d 713, 714 (Tenn. App. 1959). See also *Adoption of Bowling v. Bowling*, 631 S.W2d 386, 389 (Tenn. 1982); *Koivu v. Irwin*, 721 S.W2d 803, 807 (Tenn. App. 1986); *Fancher v. Munn*, 432 S.W2d 63, 66 (Tenn. App. 1968). In making this determination,

we do not necessarily look to the protestations of affections and intentions expressed by the natural parent but must look at the past course of conduct. The evidence must clearly show a conscious disregard or indifference to the parental obligations for a court to forfeit the parental rights and obligations.

⁴This case was decided before the effective date of the new adoption statutes. See Chapter 532, Public Acts of 1995. "Abandonment" is now defined at T. C. A. § 36-1-102(1)(A).

Fancher, 432 S.W2d at 65. See also *Koivu*, 721 S.W2d at 807.

The courts consider many factors in determining whether an abandonment has taken place:

(1) the parent's ability to support the child; (2) the amount of support the parent has provided to the child; (3) the extent and nature of the contact between the parent and the child; (4) the frequency of gifts on special occasions; (5) whether the parent voluntarily relinquished custody of the child; (6) the length of time the child has been separated from the parent; and (7) the home environment and conduct of the parent prior to the removal of the child. [citations omitted]. No single factor is controlling. Abandonment inquiries are heavily fact-oriented, so the courts may consider any fact that assists in deciding whether the parent's conduct demonstrates a conscious or willful disregard of all of his or her parental duties. [citation omitted].

O'Daniel v. Messier, 905 S.W2d 182, 187 (Tenn. App. 1995).

Abandonment must be shown by clear and convincing evidence. *Id.*; *Koivu*, 721 S.W2d at 807. The concept of clear and convincing evidence has been described as follows:

While it is more exacting than the preponderance of the evidence standard, it does not require such certainty as the beyond a reasonable doubt standard. Clear and convincing evidence eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence. It should produce in the fact-finder's mind a firm belief or conviction with regard to the truth of the allegations

sought to be established. [citations omitted].

O' Daniel, 905 S.W2d at 188. Thus, we must determine whether the evidence preponderates against the trial court's finding that there was clear and convincing evidence to support the termination of Father's parental rights.

III

As noted earlier, Amanda has not lived with Father since before 1988. His contact with Amanda since that time can only be characterized as sporadic. It is true that certain limitations were placed by the trial court on his relationship with Amanda; however, Father's minimal contact with his daughter has been primarily due to his own lack of initiative. Father did not seek custody of Amanda in his divorce, or even when she was removed from his ex-wife's custody due to physical abuse. He also did not seek custody when Amanda was placed with her grandparents, or when she was initially placed with the Williams.

When Father was given an opportunity to visit his daughter, he failed to take advantage of it. Since Amanda began living with the Williams, Father has visited her approximately seven times. He continued the monthly visitation granted by the court until he decided that the visits were no longer worthwhile. At that point, Father voluntarily terminated the visitation. He

acknowledged that some visitation was better than none; but admitted that he quit visiting nevertheless. Father likewise gave up on his weekly telephone visitation with Amanda. He often called at the wrong time, and in some cases did not call at all. When he did call at the appointed time, Amanda did not want to talk to him, and he therefore stopped calling altogether after February, 1995.

There is evidence in the record to indicate that Father was aware of what he needed to do to regain custody of Amanda, and that he has seen and discussed various foster care plans with DHS employees. There are few instances of his attempted compliance with any of these plans. In addition, there is evidence that he also failed to comply in any way with an earlier foster care plan that had been developed in 1987. Father acknowledges that the court encouraged him to write letters and send cards to Amanda, yet in the five and one-half years that Amanda lived in the Williams' home, he sent her only a handful of cards, and no letters. Furthermore, at the time of the hearing in November, 1995, Father had not called the Williams to find out anything about Amanda's school, her activities, or general well-being. For example, he was unaware that she had been diagnosed with a learning disability in the first grade. In addition to his somewhat random efforts at contacting Amanda, or at finding out information about her, Father has fallen over six months behind in child support payments.

In defense of his erratic pattern of contact with Amanda, Father offers various excuses that place the blame alternatively upon the trial court, DHS, and the Williams. Our review of the record, however, persuades us that the vast majority of the blame must fall upon Father himself. The trial court found that Father

on his own initiative has done nothing to establish or to improve his parenting skills or to establish a home for [Amanda], but has instead waited for the courts or social workers or others to do it for him or to tell him what to do.

In summary, Father failed to do that which could reasonably be expected of a responsible, caring parent. From the time that Amanda was placed in the Williams' home, on April 20, 1990, to the hearing in the trial court on April 11, 1994, Father visited his daughter only one time. Between the April 11, 1994 hearing, and the final hearing on November 13, 1995, Father had the opportunity to exercise his court-ordered monthly visitation at least eighteen times. During that time, he visited Amanda only six times. Furthermore, Father rarely even telephoned Amanda or the Williams to find out how she was doing. The record indicates that at the time of the April 11, 1994, hearing, he had called the Williams only once in the four years that she had resided there. After weekly telephone calls were allowed by the court, Father did not exercise that visitation consistently either and eventually gave up trying to call. In short, Father

has not taken advantage of many available opportunities for contact with Amanda, as would be expected of a parent who wished to reestablish a relationship with his child.

The trial court was in the best position to judge the credibility of the witnesses. We cannot say that the evidence preponderates against his finding that there is clear and convincing evidence of abandonment sufficient to terminate Father's parental rights and to grant full custody of Amanda to the Williams. The burden was on Father to do more than send a few cards and call from time to time. His asserted reliance upon the trial court and DHS to do everything for him is no excuse for failing to make contact with Amanda or to stay informed about her life. Father's voluntary termination of the in-person visitation with his daughter is especially difficult to understand, because it seems to us that a parent wishing to reestablish a relationship with his child would pursue every available opportunity to visit that child, regardless of any limitations placed upon the visits. Therefore, given these considerations, we find that Father's conduct clearly and convincingly manifests a "settled purpose to forego all parental duties and relinquish all parental claims" to Amanda, in accordance with *Ex Parte Wolfenden* and its progeny. Father's deeds, or, more appropriately, his lack of deeds, speak louder than his words.

IV

Father's second issue raises the question of whether he was denied procedural and substantive due process in these proceedings. Father asserts that he received no notice of the Williams' petition for custody of Amanda. However, the evidence indicates that he was aware of the hearing on the petition, which was held on April 20, 1990. Susan Bowers of DHS spoke with him the day before the hearing and reminded him about it. Father did not attend the hearing, and Amanda was sent home with the Williams that day. On this and other occasions, Father had sufficient notice of pending proceedings in the trial court. He alone is responsible for his erratic attendance.

Father also appears to contend that the delays in this case and the failures of DHS to follow standard procedure have resulted in a denial of his due process rights. It is true that this case was continued several times and was not always handled in the usual manner by DHS. Despite these obstacles, Father has had ample opportunity throughout the course of these proceedings to reestablish his parental relationship with Amanda; yet, as previously noted, he has failed to do so. Father also argues that this case should have ended when the trial court originally found that the Williams had failed to prove abandonment by clear and convincing evidence. The trial court, however, had the authority to continue custody in the Williams, and to continue

the matter for further review without returning custody to Father pending that review.

Our analysis of the procedural history of this case reveals that Father was afforded protection of his fundamental rights. Furthermore, the heightened standard of proof provided additional due process to Father by requiring that clear and convincing evidence of abandonment be shown before his parental rights could be terminated. *See State, Dept. Of Human Services v. Smith*, 785 S.W2d 336, 339 (Tenn. 1990). As explained in the preceding section, the trial court's termination of Father's parental rights was properly based on clear and convincing evidence of abandonment. Thus, we find that Father's second issue is without merit.

V

In his third issue, Father contends that the trial court erred by adjudging all costs against him. He suggests that he should have been considered a "prevailing party", under Rule 54.04(1), Tenn. R. Civ. P., following the trial court's earlier determination that the Williams had failed to carry their burden of proof, and that the costs included in the bill of costs to that point therefore should not have been assessed against him. However, the Williams ultimately were the prevailing parties in this matter, and the trial court thus acted properly in adjudging those costs against Father.

Father also argues that this was not a proper case for the assessment of the guardian ad litem fees against him. Rule 54.04(2), Tenn. R. Civ. P., specifically includes guardian ad litem fees in the class of allowable discretionary costs. *Id.* Furthermore, the assessment of such costs falls within the reasonable discretion of the trial court, which may allocate the costs between the parties as it feels the equities require. *Perdue v. Green Branch Mn. Co., Inc.*, 837 S.W2d 56, 60 (Tenn. 1992). Appellate courts will generally not interfere with the trial court's assessment of costs, absent a clear abuse of discretion. *Id.* We find no abuse of discretion in this case. Therefore, we uphold the trial court's assessment of all costs, including the guardian ad litem fees, against Father.

The judgment of the trial court is affirmed. Costs on appeal are assessed to the appellant and his surety. This case is remanded to the trial court for collection of costs assessed there, pursuant to applicable law.

Charles D. Susano, Jr., J.

CONCUR:

Houston M Goddard, P. J.

Don T. Mc Murray, J.