

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs December 2, 2016

IN RE: CHEYANNA B.

Appeal from the Juvenile Court for Jefferson County
No. 16-00113 Dennis “Will” Roach, II, Judge

No. E2016-01503-COA-R3-PT

John B. (“Father”) appeals the order of the Juvenile Court for Jefferson County (“the Juvenile Court”) terminating his parental rights to the minor child Cheyanna B. (“the Child”) after finding and holding that grounds for termination for abandonment by wanton disregard pursuant to Tenn. Code Ann. § 36-1-113(g)(1) and Tenn. Code Ann. § 36-1-102(1)(A)(iv) were proven by clear and convincing evidence and that it was proven by clear and convincing evidence that termination was in the Child’s best interest. We find and hold that the evidence does not preponderate against the Juvenile Court’s findings made by clear and convincing evidence, and we affirm.

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

D. MICHAEL SWINEY, C.J., delivered the opinion of the court, in which W. NEAL MCBRAYER and BRANDON O. GIBSON, JJ., joined.

Daniel Hellman, Knoxville, Tennessee, for the appellant, John B.

Herbert H. Slatery, III, Attorney General and Reporter; and M. Cameron Himes, Assistant Attorney General for the appellee, State of Tennessee Department of Children’s Services.

OPINION

Background

In February of 2016, the State of Tennessee Department of Children's Services ("DCS") filed a petition seeking to terminate the parental rights of Father and Sheila B. ("Mother")¹ to the Child. The case proceeded to trial in June of 2016.

Father testified that at the time of trial he was incarcerated at Carter County Work Camp at Northeast where he has been since November of 2014. Father testified: "I made bond and I was out about two weeks and they picked me up on my parole violation." Father admitted that his arrest in November of 2014 was for kidnapping. He pled guilty to the kidnapping charge in April of 2015, and received a three year sentence to run concurrent with time he already was serving. Father testified that he had six months more to serve because he would "flatten out."

Father admitted that the Child was in the vehicle with him when Father kidnapped his girlfriend. Father is aware that news of the kidnapping and the fact that the Child was with him when he committed the crime was on the news. Father stated: "I had full custody of her. What was I supposed to do with her?"

Father admitted that he has prior felony convictions. He also admitted that he is aware that his engaging in criminal behavior could result in his incarceration. Father, however, continued to engage in criminal behavior after the Child's birth. In 2005, Father was convicted of theft over one thousand dollars, multiple counts of theft over five hundred dollars, identity theft, false reports, and joyriding. He was sentenced to two years served and eight years of probation for a total of ten years with the Tennessee Department of Correction ("TDOC"). In February of 2010, Father was convicted for failure to appear and aggravated assault. Those charges added four years to his TDOC sentence. In March of 2010, Father was convicted of three counts of forgery, two counts of fraudulent use of credit cards, and identify theft and received a four year sentence.

In January of 2015, Father posted bond after the kidnapping. Father was asked if at that time he pled guilty to domestic assault, and he stated:

I posted bond like two hours after I got to the jail. . . . When I, when I posted bond down there on the twenty thousand dollar bond, I made bond. And Jefferson County had a hold on me. But Knox County released me without letting them know. And as soon as I got to my residence, Jefferson

¹ The Juvenile Court also terminated Mother's parental rights to the Child. Mother, however, is not involved in this appeal.

County was sitting there. And I already knew. And I surrendered to them and they brought me for the domestic because the domestic occurred in Jefferson County. That's when it started is the domestic. And then she got in the vehicle with me and we went to Knoxville. And then she dialed 911 and they, and they pulled me over for kidnapping.

Father pled guilty to two counts of domestic assault. In November of 2015, Father pled guilty to another charge of theft over a thousand. When Father was asked if he believed that his repeated incarceration had a negative effect on the Child, Father stated: "Yes, I do." Father admitted that despite believing this he continued to engage in criminal activity.

Father admitted that he has used drugs. He stated: "That's what I'm in prison for. Or, you know, that's what's caused me to go to prison. . . . Because, you know, taking medication, over - - overdoing the taking medication." Father admitted to using Oxymorphone and Oxycontin. He stated that he had obtained them from a pain clinic.

The Child is Father's only child. Father admitted that he has been involved with DCS in the past. Father admitted that he never paid child support for the Child when he did not have custody of the child. Father stated: "I draw disability on the street." Father testified that the Child was in Father's mother's custody from 2008 to 2014. The Child was returned to Father's custody in June of 2014, and again removed from his custody in November of 2014.

Father testified that he expects to live with friends when he is released from prison. When asked, if his rights were not terminated, how long it would be until he would be ready to take full care of the Child, Father stated:

Probably a year. . . . You know, I'd like to see her before then. . . . But as far as if she needed to come and stay with me or anything, it needs to be at least be a year, unless it's an emergency. You know, if it's an emergency or something, I'd do everything in my power to let her come there. But it's going to take me a little bit to get my - - you know, get it together. Like I said, I'm getting out in February. That's, that's really right at the end of winter into summer. And, you know, it's going to be a little bit, you know. But, yeah, if it come to an emergency, she could stay with me at any time.

Father testified that he has some money set aside for when he is released from prison. Father testified that he receives SSI for his learning disability. He stated that he needs only to go to the Social Security Board and show his release papers and his checks will

start again. Father also testified that his driver's license still is good and is valid until 2021. Father was asked if he worked, and he stated: "No, I do not."

Caitlin Sneed is a Case Manager 2 with DCS who has been assigned to the Child's case since the Child came into foster care. Ms. Sneed testified that she checked on the morning of trial and found that Father was due to be released in 2021, not next February as he testified. Ms. Sneed testified that the Child is in the SORT Program, which Ms. Sneed described as "a very high, intense facility in Memphis, Sex Offender, Sex Offender Residential Treatment Program."

Ms. Sneed testified that the Child has told Ms. Sneed that the Child suffered physical abuse by Father and that she was afraid of Father. The Child told Ms. Sneed that Father "had smacked her in the face a couple of times or something." The Child did not want to have any contact with Father.

After trial, the Juvenile Court entered its order on July 12, 2016 terminating Father's parental rights to the Child after finding and holding, *inter alia*:

Father is currently incarcerated in the Northeast Correctional Facility. His release date is disputed, but will fall roughly between 2017 and 2021. Father and Mother are no longer married, and the child has been in an intensive residential program in Memphis, Tennessee since September 24, 2015.

The family has had an extensive history with the Court, and the minor child was last taken into custody of the Department of Children's Services ("DCS") on June 30, 2015. The child was subsequently adjudicated dependent and neglected, and the Petition to Terminate Parental Rights ("Petition") was filed on February 19, 2016.

* * *

a. Abandonment by Incarcerated Parent, Wanton Disregard, Applies to [Father]. [Father] was in jail for all of the four months preceding the filing of the Petition to Terminate Parental Rights. [Father] has been incarcerated since November 2014, and remains incarcerated today. [Father] has pled guilty to a long string of criminal charges dating back to 2005 These convictions include thefts, joyriding, forgery, fraudulent use of credit cards, identity theft, violation of parole, and domestic assaults against Mother. Most recently, [Father] pled guilty to kidnapping, and the child was with the Father during the commission of the

crime. It is the conclusion of this Court that [Father] has exhibited a pattern of conduct constituting a wanton disregard for the welfare of the minor child. By clear and convincing evidence, the requirements of Tenn. Code §§ 36-1-113(g)(1) and 36-1-102(1)(A)(iv) have been met for Abandonment by Incarcerated Parent for Wanton Disregard.

b. Best Interest. The Court finds by clear and convincing evidence that it is in the best interest of the minor child for the parental rights of [Father] to be terminated. [Father] is serving a prison sentence for kidnapping, and the child was present during the kidnapping. Prior to the current incarceration, he had established a pattern of criminal behavior. The child has been in and out of DCS custody since 2008, with the child residing in the custody of the maternal grandmother the great majority of that time. The child stated that the Father smacked her on more than one occasion, and the child wants no contact with the Father. [Father] has not made a lasting adjustment of his life, and does not have a meaningful relationship with the child. [Father] will be imprisoned until at least 2017. By clear and convincing evidence, and pursuant to Tenn. Code Ann. § 36-1-113(i), the Court finds that it is in the best interest of the child to terminate the parental rights of [Father].

Father appeals the termination of his parental rights to the Child.

Discussion

Although not stated exactly as such, Father raises one issue on appeal: whether the Juvenile Court erred in finding that it had been proven by clear and convincing evidence that the termination of Father's parental rights was in the Child's best interest.

With regard to the termination of parental rights, our Supreme Court has instructed:

A parent's right to the care and custody of her child is among the oldest of the judicially recognized fundamental liberty interests protected by the Due Process Clauses of the federal and state constitutions.² *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed.2d 49 (2000); *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed.2d 551

² U.S. Const. amend. XIV § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”). Similarly, article 1, section 8 of the Tennessee Constitution states “[t]hat no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.”

(1972); *In re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010); *In re Adoption of Female Child*, 896 S.W.2d 546, 547-48 (Tenn. 1995); *Hawk v. Hawk*, 855 S.W.2d 573, 578-79 (Tenn. 1993). But parental rights, although fundamental and constitutionally protected, are not absolute. *In re Angela E.*, 303 S.W.3d at 250. “[T]he [S]tate as *parens patriae* has a special duty to protect minors’ Tennessee law, thus, upholds the [S]tate’s authority as *parens patriae* when interference with parenting is necessary to prevent serious harm to a child.” *Hawk*, 855 S.W.2d at 580 (quoting *In re Hamilton*, 657 S.W.2d 425, 429 (Tenn. Ct. App. 1983)); see also *Santosky v. Kramer*, 455 U.S. 745, 747, 102 S. Ct. 1388, 71 L. Ed.2d 599 (1982); *In re Angela E.*, 303 S.W.3d at 250. “When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it.” *Santosky*, 455 U.S. at 759, 102 S. Ct. 1388. “Few consequences of judicial action are so grave as the severance of natural family ties.” *Id.* at 787, 102 S. Ct. 1388; see also *M.L.B. v. S.L.J.*, 519 U.S. 102, 119, 117 S. Ct. 555, 136 L. Ed.2d 473 (1996). The parental rights at stake are “[f]ar more precious than any property right.” *Santosky*, 455 U.S. at 758-59 102 S. Ct. 1388. Termination of parental rights has the legal effect of reducing the parent to the role of a complete stranger and of “[s]evering forever all legal rights and obligations of the parent or guardian of the child.” Tenn. Code Ann. § 36-1-113(1)(1); see also *Santosky*, 455 U.S. at 759, 102 S. Ct. 1388 (recognizing that a decision terminating parental rights is “[f]inal and irrevocable”). In light of the interests and consequences at stake, parents are constitutionally entitled to “[f]undamentally fair procedures” in termination proceedings. *Santosky*, 455 U.S. at 754, 102 S. Ct. 1388; see also *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 27, 101 S. Ct. 2153, 68 L. Ed.2d 640 (1981) (discussing the due process right of parents to fundamentally fair procedures).

Among the constitutionally mandated “[f]undamentally fair procedures” is a heightened standard of proof – clear and convincing evidence. *Santosky*, 455 U.S. at 769, 102 S. Ct. 1388. This standard minimizes the risk of unnecessary or erroneous governmental interference with fundamental parental rights. *Id.*; *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010). “[C]lear and convincing evidence enables the fact-finder to form a firm belief or conviction regarding the truth of the facts, and eliminates any serious or substantial doubt about the correctness of these factual findings.” *In re Bernard T.*, 319 S.W.3d at 596 (citations omitted). The clear-and-convincing-evidence standard ensures that the facts are established as highly probable, rather than as simply more probable than

not. *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005); *In re M.A.R.*, 183 S.W.3d 652, 660 (Tenn. Ct. App. 2005).

Tennessee statutes governing parental termination proceedings incorporate this constitutionally mandated standard of proof. Tennessee Code Annotated section 36-1-1113[sic](c) provides:

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.

This statute requires the State to establish by clear and convincing proof that at least one of the enumerated statutory grounds³ for termination exists and that termination is in the child's best interests. *In re Angela E.*, 303 S.W.3d at 250; *In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). "The best interests analysis is separate from and subsequent to the determination that there is clear and convincing evidence of grounds for termination." *In re Angela E.*, 303 S.W.3d at 254. Although several factors relevant to the best interests analysis are statutorily enumerated,⁴ the list is illustrative, not exclusive. The parties are free to offer proof of other relevant factors. *In re Audrey S.*, 182 S.W.3d at 878. The trial court must then determine whether the combined weight of the facts "amount[s] to clear and convincing evidence that termination is in the child's best interest." *In re Kaliyah S.*, 455 S.W.3d 533, 555 (Tenn. 2015). These requirements ensure that each parent receives the constitutionally required "individualized determination that a parent is either unfit or will cause substantial harm to his or her child before the fundamental right to the care and custody of the child can be taken away." *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999).

Furthermore, other statutes impose certain requirements upon trial courts hearing termination petitions. A trial court must "ensure that the hearing on the petition takes place within six (6) months of the date that the

³ Tenn. Code Ann. § 36-1-113(g)(1)-(13).

⁴ Tenn. Code Ann. § 36-1-113(i).

petition is filed, unless the court determines an extension is in the best interests of the child.” Tenn. Code Ann. § 36-1-113(k). A trial court must “enter an order that makes specific findings of fact and conclusions of law within thirty (30) days of the conclusion of the hearing.” *Id.* This portion of the statute requires a trial court to make “findings of fact and conclusions of law as to whether clear and convincing evidence establishes the existence of each of the grounds asserted for terminating [parental] rights.” *In re Angela E.*, 303 S.W.3d at 255. “Should the trial court conclude that clear and convincing evidence of ground(s) for termination does exist, then the trial court must also make a written finding whether clear and convincing evidence establishes that termination of [parental] rights is in the [child’s] best interests.” *Id.* If the trial court’s best interests analysis “is based on additional factual findings besides the ones made in conjunction with the grounds for termination, the trial court must also include these findings in the written order.” *Id.* Appellate courts “may not conduct de novo review of the termination decision in the absence of such findings.” *Id.* (citing *Adoption Place, Inc. v. Doe*, 273 S.W.3d 142, 151 & n.15 (Tenn. Ct. App. 2007)).

B. Standards of Appellate Review

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 at 596; *In re Angela E.*, 303 S.W.3d at 246. 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, 521-24 (Tenn. 2016) (footnotes in original but renumbered).

Father does not contest that clear and convincing evidence was shown supporting grounds for terminating Father's parental rights to the Child pursuant to Tenn. Code Ann. § 36-1-113(g)(1). Our Supreme Court, however, has instructed "that in an appeal from an order terminating parental rights the Court of Appeals must review the trial court's findings as to each ground for termination and as to whether termination is in the child's best interests, regardless of whether the parent challenges these findings on appeal." *Id.* at 525 (footnote omitted).

The Juvenile Court terminated Father's parental rights for abandonment by wanton disregard. The evidence in the record on appeal does not preponderate against the Juvenile Court's finding that Father was incarcerated at the time that DCS filed its petition seeking to terminate his parental rights. Nor does the evidence in the record on appeal preponderate against the Juvenile Court's finding that Father engaged in conduct prior to his incarceration that exhibited a wanton disregard for the welfare of the Child. This conduct included, in part, Father's kidnapping his girlfriend with the Child in the car. The Juvenile Court correctly found that grounds to terminate Father's parental rights for abandonment by wanton disregard had been proven by clear and convincing evidence.

As grounds for termination were proven by clear and convincing evidence, we next consider the issue raised by Father regarding whether the Juvenile Court erred in finding that it had been proven by clear and convincing evidence that the termination of Father's parental rights was in the Child's best interest. When making a determination regarding best interest, a trial court is to consider the list of non-exclusive factors contained in Tenn. Code Ann. § 36-1-113(i). As this Court explained in *In re Jaceton B.*:

Once a ground for termination has been established, the ultimate goal of the proceeding is to ascertain and promote the child's best interests, and to achieve that end courts must consider all relevant factors. *See In re Audrey S.*, 182 S.W.3d at 877; *In re M.A.R.*, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005). The child's best interest must be viewed from the child's, rather than the parent's, perspective. *White v. Moody*, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004). Ultimately, the relevancy and weight given to each factor depends on the unique facts of each case. *In Audrey S.*, 182 S.W.3d at 878. Depending on the circumstances of the particular parent and particular child in question, the consideration of one factor may determine the outcome of the analysis. *Id.* (citing *White*, 171 S.W.3d at 194).

The General Assembly has provided a list of factors for courts to consider when determining the best interests of a child. *See* Tenn. Code Ann. § 36–1–113(i). This list is not exhaustive, and a trial court is not required to find the existence of each enumerated factor before it determines that terminating a party’s parental rights is in the best interest of the child. *In re M.A.R.*, 183 S.W.3d at 667. Instead, a court is required to weigh both the factors listed in Tenn. Code Ann. § 36–1–113(i) and any other relevant factors to determine whether terminating a parent’s rights is in the child’s best interest. *Id.*

Other relevant factors may include the grounds for termination themselves, especially when those grounds involve a long prison sentence. *See In re Dominique L.H.*, 393 S.W.3d at 717 (citing 43 C.J.S. Infants § 22 (2012)). Incarceration creates a lengthy delay in a parent’s ability to take custody of his child, and such a delay is a strong indication that termination is in the child’s best interests. *See id.* at 718, 720.

In re Jaceton B., No. M2014-01580-COA-R3-PT, 2015 WL 1517779, at **3-4 (Tenn. Ct. App. March 30, 2015), *no appl. perm. appeal filed.*

In his brief on appeal, Father argues that the Child is in a treatment facility and is not ready for placement into a foster home at this time, and because of this fact, there would be no harm to the Child or delay to her permanency if Father were allowed time to be released from prison, re-establish his disability checks, and establish a residence. While it may be true that failing to terminate Father’s parental rights at this time would not delay permanency for the Child, Father has missed the point. The point is to consider the best interest of the Child in light of all of the relevant factors.

The evidence in the record on appeal shows that Father has established a pattern of criminal behavior even going so far as to commit crimes while the Child was with him. The evidence further shows that the Child has been in and out of DCS custody since 2008, and currently requires “very high, intense” residential treatment. The evidence further shows that Father has physically abused the Child in the past and that the Child fears Father. Furthermore, Father testified that although he has some money set aside for when he is released from prison, he never paid any support for the Child when the Child was not in his custody. The Juvenile Court carefully considered all of the relevant factors contained in Tenn. Code Ann. § 36-1-113(i) when making its determination that clear and convincing evidence was proven that it was in the Child’s best interest for Father’s parental rights to be terminated. The evidence in the record on appeal does not preponderate against this finding.

Grounds for the termination of Father's parental rights to the Child were proven by clear and convincing evidence. It also was proven by clear and convincing evidence that it is in the Child's best interest for Father's parental rights to be terminated. We, therefore, find no error in the Juvenile Court's July 12, 2016 order terminating Father's parental rights to the Child.

Conclusion

The judgment of the Juvenile Court is affirmed, and this cause is remanded to the Juvenile Court for collection of the costs below. The costs on appeal are assessed against the appellant, John B.

D. MICHAEL SWINEY, CHIEF JUDGE