

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 9, 2000 Session

TRACI SORRELLS v. DONALD LEE SORRELLS

**Direct Appeal from the Juvenile Court for Bradley County
No. J-7822 C. Van Deacon, Jr., Judge**

FILED OCTOBER 5, 2000

No. E1999-01658-COA-R3-CV

This is a suit by Traci Sorrells to terminate the parental rights of her former husband, Donald Lee Sorrells, as to their son, Justin Thomas Sorrells, who was born on November 15, 1991. After an evidentiary hearing, where only the parents testified, the Trial Court found that Mr. Sorrells had abandoned his child and entered an order of termination. We reverse and dismiss.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court
Reversed; Cause Dismissed and Remanded**

HOUSTON M. GODDARD, P.J., delivered the opinion of the court, in which Herschel P. Franks, J., joined. Charles D. Susano, Jr., J., filed a separate concurring opinion.

D. Mitchell Bryant, Cleveland, Tennessee, for the Appellant, Donald Lee Sorrells

Jimmy W. Bilbo, Cleveland, Tennessee, for the Appellee, Traci Sorrells

OPINION

This is a suit by Traci Sorrells to terminate the parental rights of her former husband, Donald Lee Sorrells, as to their son, Justin Thomas Sorrells, who was born on November 15, 1991. After an evidentiary hearing, where only the parents testified, the Trial Court found that Mr. Sorrells had abandoned his child and entered an order of termination. We vacate the judgment of the Trial Court and remand.

Our review of the Trial Court's action is governed by Tenn. R. App. P. 13, which accords presumption of correctness as to the Trial Court's findings of fact, unless the evidence preponderates to the contrary.

The parties were divorced in Gwinnett County, Georgia, on December 20, 1995. Although the divorce decree is not a part of the record, Ms. Sorrells was awarded custody and Mr. Sorrells visitation privileges. He was also ordered to pay \$75 per week as child support for Justin. Sometime after the divorce Ms. Sorrells moved to Bradley County and Mr. Sorrells twice visited Justin prior to the petition being filed in this cause, in March 1996. It was undisputed that he furnished no support for the child until ordered to by a Georgia Court by order dated September 10, 1998. During the period from March 1996 until July 1998, Ms. Sorrells had diligently tried to locate Mr. Sorrells, including phone calls to his mother, who promised she would tell her son, as well as employing what was originally known as "Faces in the Nation," which we presume attempts to locate various individuals.

In any event, after the petition was filed on July 24, 1998, Mr. Sorrells, on December 10, 1998, filed an answer and then a motion to enforce visitation. The Trial Court awarded visitation over the Christmas Holidays of that year. Later, on January 26, 1999, an evidentiary hearing was held as to the petition and Mr. Sorrell's parental rights were terminated. In his opinion delivered from the Bench, the Trial Court made the following findings of fact and conclusions of law:

THE COURT: All right. You know, it's not often that I get a case that's so open and closed. In this case there is absolutely no doubt beyond a moral certainty, beyond any doubt there had been an abandonment in this case.

Fortunately, the law provides recourse in those situations where children's fathers desert them and there is an opportunity once again to at least develop a relationship with an appropriate father figure. And that's what's happened in this case.

Whatever the reasons -- the one witness that I really would liked to have heard was your mother, sir.

MR. SORRELLS: Sir, the only reason she wasn't here, she just had a complete knee operation.

THE COURT: Well, I'm just saying -- you know, she would have told the lie if there had been one. And maybe that's the reason she's not here. There is no

doubt in this case that the criteria of the law with regard to terminating parental rights has been met.

And it's unfortunate because whether or not your feelings of wanting to develop a relationship are true or not, sir, you won't have that opportunity until that child is 18 years of age or older. Until he's emancipated. Up until that time he is a child of Traci Sorrells. And he is fatherless because I'm terminating your parental rights pursuant to Tennessee Code Annotated 36-1-111.

MR. BRYANT: On which ground?

THE COURT: There are five criteria. Any one of which will constitute abandonment under the law of the State of Tennessee. Willful failure to visit or pay support for four months. Failure of the parent to make a reasonable effort to provide a suitable home for the child after the removal following a dependent and neglect proceeding. And a demonstrated lack of concern for the child indicating that he or she cannot provide a suitable home for the child.

I'm talking about abandonment only in that definition. The willful failure of a legal or biological father to provide support for the child's mother during the last four months preceding the child's birth. The willful failure of an incarcerated parent to visit or provide support during four months immediately preceding incarceration. And conduct by an incarcerated parent prior to incarceration exhibiting wanton disregard for the child's welfare.

Those go to the definitions of abandonment. The law further states that parental rights may be terminated in an involuntary procedure for the following reasons. No. 1) Abandonment of the child. No. 2) Substantial noncompliance with the foster care plan.

And then the rest of them deal with either child abuse or incarceration or where there is custody that would pose a substantial risk of harm to the child.

I find in this case that there is overwhelming proof of abandonment. The evidence is not only clear and convincing but to a moral certainty you abandoned this child. You had no interest in this child for at least two and a half years immediately preceding the filing of this --

MR. SORRELLS: Your Honor, with all due respect to you --

THE COURT: -- in July of 1998. And this record shows overwhelming proof of Traci Sorrells' rights -- activities towards trying to at least provide some modicum of communication to you through your mother.

MR. BRYANT: I want to make sure it's real clear. I understand the abandonment, and I know it can be on failure to pay support or failure to visit. Are you making a finding on both of those grounds?

THE COURT: Absolutely. Now, when we read the case law and we talk about all of those attributes of a parent; willful failure to make a reasonable effort, demonstrated lack of concern. We've got proof that you, unilaterally, sir, quite obviously, unilaterally had health protection for the child. The testimony was -- it was -- my question was, "Did you know anything about this?" And the answer was no. She never received a card or received any of this information.

MR. SORRELLS: Sir, the only time she didn't have a card was --

THE COURT: From and after the period of abandonment which I find was at least two and a half years immediately prior to July the 24th, 1998. And for that reason, the rest of it will deal with the child support arrearage.

With regard to the lack of testimony of Mr. Sorrell's mother, we join the Trial Judge in questioning why she did not testify, at least by deposition. It seems to us that she could have shed considerable light on whether she had told her son of his former wife's inquiries and, if so, account for his failure to contact her.

A recent opinion of the Supreme Court, Tennessee Baptist Children's Home, Inc., v. Swanson, 2 S.W.3d 180 (Tenn. 1999), is instructive. That case holds that T.C.A. 36-1-102, defining the terms "willfully failed to support" and "willfully failed to make reasonable payments toward such child support" was unconstitutional because it did not include intent, as distinguished from the definition of "willfully failed to visit," which did:

(D) For purposes of this subdivision (1), "willfully failed to support" or "willfully failed to make reasonable payments toward such child's support" means that, for a period of four (4) consecutive months, no monetary support was paid or that the amount of support paid is token support;

(E) For purposes of this subdivision (1), “willfully failed to visit” means the willful failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation. (Emphasis supplied.)

While the foregoing case would be significant if the only ground for termination was failure to support, there is in this case the additional ground as to visitation, and we find the evidence as to willfully failing to visit to be clear and convincing. Thus, the evidence does not preponderate against this determination by the Trial Court.

We do have one other concern relative to the disposition of this case. Although no point was made in Mr. Sorrells brief, the above-quoted findings of the Trial Court from the Bench at the conclusion of the trial did not include a specific finding that termination of parental rights was in the best interest of the child as required by T.C.A. 36-1-113(c)(2).

Because we conclude the Trial Court could not have validly terminated Mr. Sorrells’ parental rights without finding that such action was in the best interest of the child as required by the statute, the determination that parental rights should be terminated must be reversed and the cause dismissed.

For the foregoing reasons the judgment of the Trial Court is reversed, the cause dismissed, and the case remanded for collection of costs below, which are, as are costs of appeal, adjudged against Ms. Sorrells.

HOUSTON M. GODDARD, PRESIDING JUDGE