

FILED

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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
January 17, 2023 Session

IN RE LYRICAL T. ET AL.

Appeal from the Circuit Court for Bradley County
No. V-21-383 Michael E. Jenne, Judge

No. E2022-00457-COA-R3-PT

This is a termination of parental rights case. The mother and father appeal the trial court's order terminating their parental rights, arguing that there was not clear and convincing evidence to support termination. For the reasons discussed herein, we affirm.

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

ARNOLD B. GOLDIN, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, C.J., and KRISTI M. DAVIS, J., joined.

Charlotte Mattingly, Chattanooga, Tennessee, for the appellant, Ashley T.

Wilton A. Marble, Jr., Cleveland, Tennessee, for the appellant, Anthony T.

Philip M. Jacobs, Cleveland, Tennessee, for the appellees, Jamie C. and Jeremy C.

OPINION

BACKGROUND AND PROCEDURAL HISTORY

Anthony T. ("Father") and Ashley T. ("Mother") are married and share two minor children¹ who are at issue in this case: Lyrical T., born in October 2019, and Nilynn T., born in October 2020 (collectively, "Children").² On February 12, 2021, Jamie C. and Jeremy C.³ (collectively, "Petitioners") filed a "Petition for Ex Parte Relief" in the Bradley

¹ Mother and Father have a third child, born subsequent to Lyrical and Nilynn, who is not at issue in this termination proceeding.

² This Court has a policy of protecting the identities of children involved in parental termination cases and accordingly redacts certain names appearing in the Opinion.

³ Petitioners are the maternal aunt and uncle of the Children.

County Juvenile Court wherein they alleged that the Children were dependent and neglected in Mother and Father's care. As a result of the petition, the juvenile court entered an ex parte order granting the Petitioners temporary custody of the Children and suspended Mother's and Father's parenting time. On February 22, 2021, the juvenile court entered an agreed order wherein the Petitioners and Mother and Father agreed that probable cause existed as to dependency and neglect. Mother and Father were allowed co-parenting time at least two to three hours per week from Monday to Thursday and at least three to four hours on every Saturday or Sunday. This co-parenting time was to be supervised by the Petitioners. Later, because of disagreements between the parties, it was agreed that Mother and Father would have supervised visitation at Solomon Family Solutions, which charged \$20.00 per hour for supervision. Pursuant to the juvenile court's directive, Mother and Father submitted clean hair follicle drug screens in April 2021.

On July 12, 2021, Mother and Father filed a "Motion for Increased and Unsupervised Visitation/Co-Parenting." Before the juvenile court could issue a ruling on the motion, the Petitioners filed a petition on July 26, 2021, in the Bradley County Circuit Court ("trial court") to terminate Mother's and Father's parental rights ("Termination Petition"). In their Termination Petition, the Petitioners pleaded the grounds of abandonment by failure to visit, abandonment by failure to support, and persistent conditions. The case was heard on January 31, 2022, and February 14, 2022. Subsequently, the trial court entered its order finding that the grounds of failure to support and persistent conditions had been proven by clear and convincing evidence, but that the Petitioners had failed to prove the ground of abandonment by failure to visit. The trial court further found that it was in the Children's best interest that Mother's and Father's parental rights be terminated. This appeal followed.

ISSUES PRESENTED⁴

Mother and Father, filing separate briefs, have raised similar issues that we have condensed and restated as follows:

1. Whether there was clear and convincing evidence to find that grounds existed to terminate Mother's and Father's parental rights.

⁴ The Petitioners discuss an additional issue in their brief concerning the trial court's failure to find that they proved the ground of abandonment for failure to visit. However, the Petitioners failed to raise the issue in their statement of the issues as required in Rule 27 of the Tennessee Rules of Appellate Procedure. Accordingly, this issue is waived. *See Watson v. Watson*, 309 S.W.3d 483, 497 (Tenn. Ct. App. 2009) ("The appellate court may treat issues that are not raised on appeal as being waived."); *In re Addalyne S.*, 556 S.W.3d 774, 784 n.6 (Tenn. Ct. App. 2018) (noting that the thorough review required under the Tennessee Supreme Court's decision in *In re Carrington H.* has not been construed to require this Court to also consider grounds not sustained by the trial court and not challenged on appeal by the petitioning non-parent).

2. Whether there was clear and convincing evidence that termination was in the Children's best interest.

STANDARD OF REVIEW

“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.” *In re Carrington H.*, 483 S.W.3d 507, 521 (Tenn. 2016) (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *In re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010)). Although this right is considered to be both fundamental and constitutionally protected, it is not absolute. *In re J.C.D.*, 254 S.W.3d 432, 437 (Tenn. Ct. App. 2007). This right “continues without interruption only as long as a parent has not relinquished it, abandoned it, or engaged in conduct requiring its limitation or termination.” *In re M.J.B.*, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004). “[T]he state as *parens patriae* has a special duty to protect minors,” *Hawk v. Hawk*, 855 S.W.2d 573, 580 (Tenn. 1993) (quoting *Matter of Hamilton*, 657 S.W.2d 425, 429 (Tenn. Ct. App. 1983)), and “Tennessee law . . . thus . . . upholds the state’s authority as *parens patriae* when interference with parenting is necessary to prevent serious harm to a child.” *Id.*

Under Tennessee law there exist “[w]ell-defined circumstances . . . under which a parent’s rights may be terminated.” *In re Roger T.*, No. W2014-02184-COA-R3-PT, 2015 WL 1897696, at *6 (Tenn. Ct. App. Apr. 27, 2015). These circumstances are statutorily defined. *Id.* (citing *In re Audrey S.*, 182 S.W.3d 838, 860 (Tenn. Ct. App. 2005)). “To terminate parental rights, a court must determine that clear and convincing evidence proves not only that statutory grounds exist but also that termination is in the child’s best interest.” *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002) (citing Tenn. Code Ann. § 36-1-113(c)). “‘Clear and convincing evidence’ is ‘evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.’” *Id.* (quoting *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992)). This heightened burden of proof “minimizes the risk of erroneous decisions.” *In re M.L.P.*, 228 S.W.3d 139, 143 (Tenn. Ct. App. 2007).

Due to this heightened burden of proof, we must adapt our customary standard of review:

First, we must review the trial court’s specific findings of fact *de novo* in accordance with Tenn. R. App. P. 13(d). Thus, each of the trial court’s specific factual findings will be presumed to be correct unless the evidence preponderates otherwise. Second, we must determine whether the facts, either as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements required to terminate a biological parent’s parental rights.

In re Audrey S., 182 S.W.3d at 861.

DISCUSSION

Grounds for Termination

Here, the trial court found two grounds to support the termination of Mother's and Father's parental rights. We address each ground in turn.

Abandonment for Failure to Support

The trial court terminated Mother's and Father's parental rights on the ground of abandonment for failure to support pursuant to Tennessee Code Annotated section 36-1-113(g)(1). In determining whether abandonment has occurred, Tennessee Code Annotated section 36-1-113(g)(1) directs us to Tennessee Code Annotated section 36-1-102(1)(A)(i) which provides that, for the purposes of terminating a party's parental rights, "abandonment" means, in pertinent part:

For a period of four (4) consecutive months immediately preceding the filing of a proceeding, pleading, petition, or any amended petition to terminate the parental rights of the parent or parents or the guardian or guardians of the child who is the subject of the petition for termination of parental rights or adoption, that the parent or parents or the guardian or guardians either have failed to visit or have failed to support or have failed to make reasonable payments toward the support of the child.

Tenn. Code Ann. § 36-1-102(1)(A)(i). A failure to support is defined as "the failure, for a period of four (4) consecutive months, to provide monetary support or the failure to provide more than token payments toward the support of the child." Tenn. Code Ann. § 36-1-102(D).

Here, the trial court found that the Petitioners proved, by clear and convincing evidence, that Mother and Father abandoned the Children pursuant to section 36-1-102(1)(A)(i) for failure to support them for four consecutive months preceding the filing of the Termination Petition. We agree. Father admitted at trial that he did not pay any support towards the Children for a period of four consecutive months prior to the filing of the Termination Petition.⁵ Mother, however, contends that she paid \$100.00 in support, which the Petitioners deny. Mother failed to provide any proof of this payment, and the trial court credited the Petitioners' testimony that Mother did not pay. The evidence at trial

⁵ In his brief on appeal and at oral argument, however, Father argued that payments he made to Solomon Family Solutions for visits with the Children should qualify as child support. Counsel for Father stated that he can find no case law to support his position, nor are we aware of any.

further reflected that during the time in which the Children were in the Petitioners' custody, Mother and Father received monthly aid from the COVID Relief Program and WIC. They also received a lump sum payment of \$2,000.00 for their 2020 income tax refund. Father, however, used the parties' funds to purchase approximately \$130.00 worth of Delta 8 and Delta 10 CBD products per month and to perform work on his vehicle. Mother and Father also had their rent subsidized for an entire year beginning in February 2021. "That the parent had only the means or ability to make small payments is not a defense to failure to support if *no* payments were made during the relevant four-month period." Tenn. Code Ann. § 36-1-102(1)(D) (emphasis added). As such, despite Mother's and Father's limited funds, it is no defense that they made *no* payments during the relevant four-month period.

In response to the ground of failure to support, Mother and Father pleaded an affirmative defense that any such failure to support was not willful pursuant to Tennessee Code Annotated section 36-1-102(1)(I), which states that, "it shall be a defense to abandonment for failure to visit or failure to support that a parent or guardian's failure to visit or support was not willful." Tenn. Code Ann. § 36-1-102(1)(I). However, Mother and Father had the burden of proof to show that the failure to support was not willful, by a preponderance of the evidence. *Id.* In support of their contention, Mother and Father maintain that there had never been an order entered in the juvenile court which ordered payment of child support. However, "[t]he fact that a parent may not be under an order to pay support is not dispositive of the question of whether the failure is willful, as the obligation to pay support exists in the absence of a specific order." *In re M.F.O.*, No. M2008-01322-COA-R3-PT, 2009 WL 1456319, at *3 (Tenn. Ct. App. May 21, 2009) (citing *In re J.J.C.*, 148 S.W.3d 919, 926 (Tenn. Ct. App. 2004)). Here, the record reflects that Mother and Father failed to pay any support for the benefit of the Children, despite having set monthly income and the ability to spend money on Delta 8 and Delta 10 CBD products and on car repairs.

We find that there is clear and convincing evidence to support the trial court's finding of abandonment by Mother's and Father's failure to support the Children.

Persistent Conditions

The trial court also terminated Mother's and Father's parental rights on the ground of "persistent conditions." This ground applies when:

(3)(A) The child has been removed from the home or the physical or legal custody of a parent or guardian for a period of six (6) months by a court order entered at any stage of the proceedings in which a petition has been filed in the juvenile court alleging that a child is a dependent and neglected child, and:

(i) The conditions that led to the child's removal still persist,

preventing the child's safe return to the care of the parent or guardian, or other conditions exist that, in all reasonable probability, would cause the child to be subjected to further abuse or neglect, preventing the child's safe return to the care of the parent or guardian;

(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 or guardian 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.

Tenn. Code Ann. § 36-1-113(g)(3).

Here, the Petitioners filed their "Petition for Ex Parte Relief," alleging dependency and neglect of the Children by Mother and Father. Subsequent to this petition, the juvenile court entered an order granting the Petitioners temporary custody of the Children. Moreover, the Children have been removed from Mother's and Father's home for well over six months, having been in the Petitioners' care continuously since the juvenile court granted them temporary custody. Accordingly, we find the initial element of this ground to be satisfied.

Regarding the conditions that led to the Children's removal, we observe that in the Petitioners' petition for ex parte relief, the Petitioners alleged that Mother and Father had failed to maintain consistent employment or housing and that the Children were not being properly cared for. Subsequent to the juvenile court's finding of dependency and neglect, the record reflects that Mother and Father continued to exhibit instability. Mother remained unemployed, other than a very brief stint working at a fast food restaurant, and Father, while employed at the time of trial, had only been employed on the same job continuously for one month and had previously been unable to maintain steady employment. The trial court also noted that Mother's and Father's parenting skills have not improved, specifically citing Father's repeated spending of his limited income on Delta 8 and Delta 10 CBD products instead of paying child support or paying the necessary expenses to visit the Children at Solomon Family Solutions. Moreover, although Mother and Father had obtained subsidized housing, it was set to end in February 2022, and Mother and Father would then be responsible for paying the full amount of the monthly rent.

In light of these facts, the trial court found that the conditions that led to the Children's removal still persisted, which prevented their safe return to Mother and Father; that these conditions would not be remedied at such an early date so that the Children could be returned; and that the continuation of the parent-children relationship would "greatly diminish[] the [C]hildren's chances of early integration in a safe, stable, and permanent

home.” Having reviewed the record before us, we agree. Mother and Father continue to exhibit instability and have not made strides to show that the conditions at issue have been remedied, nor is there any indication that Mother and Father have the ability to properly provide for the Children. Accordingly, we find that the evidence clearly and convincingly supports the trial court’s findings and conclusions as to the ground of persistent conditions.

Best Interests

Once it is determined that a ground exists for terminating a party’s parental rights, the focus then shifts to whether termination is in the child’s best interest. *In re Audrey S.*, 182 S.W.3d at 877. Tennessee Code Annotated section 36-1-113(i) provides a non-exhaustive list of factors for the courts to consider in the best interest analysis. Making a determination concerning a child’s best interest “does not call for a rote examination of each of Tenn. Code Ann. § 36-1-113(i)’s . . . factors and then a determination of whether the sum of the factors tips in favor of or against the parent.” *Id* at 878. Rather, “[t]he relevancy and weight to be given each factor depends on the unique facts of each case.” *Id*.

In its order, the trial court made specific findings as to each of the best interest factors espoused in section 36-1-113(i) and determined that the majority of these factors supported the termination of Mother’s and Father’s parental rights. In relevant part, the trial court determined that the Petitioners have provided the Children with the “most consistent emotional, psychological, and medical support” since their birth and that they offer the Children more stability and continuity through their minority than Mother and Father; that Mother and Father have “failed to demonstrate an ability to consistently provide for” the Children’s basic needs; that Mother and Father “do not have a healthy parental attachment to the [C]hildren” in light of the lack of visitation; that the Children and the Petitioners have developed a “loving and healthy bond”; that Mother and Father have “shown no positive adjustment of circumstances, conduct, or conditions” such that it would be safe or beneficial for the Children to return to their home; that Mother and Father have failed to “demonstrate[] the ability or understanding on how to provide for [the Children’s] basic needs and specific needs,” nor have they demonstrated a commitment to creating a stable home to meet those needs; that Mother and Father have provided no support to the Children; and finally, that Mother and Father “lack maturity and parental fitness” to care for the Children in an effective manner.

Having reviewed the record, we agree with the trial court’s disposition regarding the best interest factors. Of particular importance, we note Mother’s and Father’s continuous lack of stability. Father has failed to exhibit long-term and stable employment, and Mother has not had *any* employment other than working at a fast food restaurant for about a month during part of the four months preceding the filing of the Termination Petition. This lack of long-term employment by Mother and Father indicates a troubling

lack of stability and an inability to meet the Children's most basic needs.⁶ In addition to the issues concerning their ability to care for the Children and provide a stable environment, Mother and Father have had minimal contact with the Children since their removal. Although Mother and Father point to the costs of visits as a barrier, we find this unconvincing in light of the fact that money was spent on Delta 8 and Delta 10 CBD products in the amount of \$130.00 a month, which certainly could have gone toward visits with the Children. In stark contrast, the Petitioners have provided a stable environment and appropriate care under which the Children are now thriving. The Children have been in the Petitioners' care from a very young age, and the Petitioners have provided them with the appropriate medical, emotional, and psychological support. As such, the Children have formed a very strong bond with the Petitioners and their extended family.

Accordingly, upon reviewing the record, we conclude that there is clear and convincing evidence in the record to support the trial court's determination that it was in the Children's best interest that Mother's and Father's parental rights be terminated.

CONCLUSION

Based on the foregoing, the trial court's judgment is affirmed.

s/ Arnold B. Goldin
ARNOLD B. GOLDIN, JUDGE

⁶ Furthermore, another cause for concern is Mother's criminal activity, as she still had pending felony theft charges at the time of trial.