IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs January 3, 2023

IN RE KHLOE B.[1]

Appeal from the Chancery Court for Warren County
No. 781-A Larry B. Stanley, Chancellor

No. M2022-01013-COA-R3-PT

This is the second appeal involving the termination of a mother's parental rights to this child. Following a bench trial, the court found that clear and convincing evidence existed to support termination but failed to identify any specific statutory section in support of its decision. We vacated the trial court's decision and remanded for sufficient findings of fact and conclusions of law. Upon remand, the court offered additional findings of fact and conclusions of law before ultimately holding that the evidence presented established the following statutory grounds of termination: (1) abandonment and (2) failure to manifest an ability and willingness to care for the child. The court also found that termination of the mother's rights was in the best interest of the child. We now affirm the court's ultimate termination decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part, Reversed in Part; Case Remanded

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which W. NEAL MCBRAYER and KENNY W. ARMSTRONG, JJ., joined.

Sheila F. Younglove, Dunlap, Tennessee, for the appellant, Summer K.

Robert W. Newman, McMinnville, Tennessee, for the appellees, Heather and Michael B.

Christine S. Stanford, McMinnville, Tennessee, guardian ad litem for the minor child.

[1] This court has a policy of protecting the identity of children in parental rights termination cases by initializing the last name of the parties. The record reflects that the child's last name was changed to that of her adoptive parents during the pendency of the second appeal of this termination proceeding.

OPINION

I. BACKGROUND

Khloe B. ("the Child") was born to Summer K. ("Mother") and Christopher O.[2] ("Father") in November 2016. In June 2018, the Tennessee Department of Children's Services ("DCS") received a referral alleging environmental neglect, drug exposure, and lack of supervision. At that time, the Child was living with her maternal grandparents, whose home was described as "deplorable" and unsafe. The Child was malnourished, underweight, jaundiced, and had not regularly attended her recommended pediatrician appointments. She also could not walk and had been diagnosed with an epilepsy disorder and delays in speech and learning.

The Child was placed with the maternal great aunt and uncle (collectively "Petitioners") upon removal. She was later adjudicated as dependent and neglected. Mother was granted supervised visitation. DCS requested closure of the case in July 2019, citing Mother's failure to address the issues that led to removal. The court closed the case, allowing the Child to remain with Petitioners as her guardians, effective August 2019.

Petitioners moved to terminate Mother's parental rights on September 17, 2020, alleging abandonment for failure to visit and to remit child support. Mother responded by stating that Petitioners had thwarted her efforts to visit and that she was attempting to secure employment to assist in her payment of child support. The case proceeded to a hearing on July 12, 2021.[3]

The record reflects that, in the four months prior to the termination petition, Mother paid $20 in child support. However, her $1,200 stimulus check was also automatically applied to her child support arrearage. Mother attended two visits with the Child during the pertinent time period, each lasting approximately two hours. Petitioners alleged that Mother was distracted by two cellphones during these visits and that she spent more time on her phones than with the Child. Petitioners expressed a desire to adopt the Child, with whom they alleged to have established a loving relationship as mother and father.

Mother testified that Petitioners often cancelled her visits at the last minute or failed to respond to her efforts to schedule a visit. She confirmed that she secured employment on a number of occasions but that she was unable to maintain a position for longer than a few days. She stated that she lives with her parents and that her current residence did not have running water.

[2] Father voluntarily surrendered his parental rights and is not a party to this appeal.

[3] A statement of proceedings was provided in lieu of a transcript.

Following the hearing, the court entered an order listing its findings of fact. Thereafter, the court entered its final order, granting the termination petition and adopting its previously entered findings of fact. The court also stated that it found by clear and convincing evidence that Mother failed to manifest an ability and willingness to parent the Child, a ground not alleged in the termination petition. The final order did not include any citation to any particular statutory ground of termination. Mother appealed.

A panel of this court vacated the decision and remanded for the preparation of findings of fact and conclusions of law. *In re Khloe O.*, No. M2021-01125-COA-R3-PT, 2022 WL 2164288, at *5-6 (Tenn. Ct. App. June 16, 2022). Upon remand, the parties entered an agreed order to conform the pleadings to the evidence, adding the statutory ground of failure to manifest an ability and willingness to assume custody of the Child to the termination petition. The court then issued a new final order in which it found that the evidence presented established the statutory grounds of (1) abandonment and (2) failure to manifest an ability and willingness to care for the Child. The court also found that termination of Mother's rights was in the best interest of the Child. This appeal followed.

II. ISSUES

We consolidate and restate the issues pertinent to this appeal as follows:

A. Whether clear and convincing evidence supports the trial court's finding of statutory grounds for termination.

B. Whether clear and convincing evidence supports the trial court's finding that termination of was in the best interest of the Child.

III. STANDARD OF REVIEW

Parents have a fundamental right to the care, custody, and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988). This right "is among the oldest of the judicially recognized liberty interests protected by the Due Process Clauses of the federal and state constitutions." *In re M.J.B.*, 140 S.W.3d 643, 652-53 (Tenn. Ct. App. 2004). "Termination of a person's rights as a parent is a grave and final decision, irrevocably altering the lives of the parent and child involved and 'severing forever all legal rights and obligations' of the parent." *Means v. Ashby*, 130 S.W.3d 48, 54 (Tenn. Ct. App. 2003) (quoting Tenn. Code Ann. § 36-1-113(I)(1)). "'[F]ew consequences of judicial action are so grave as the severance of natural family ties.'" *M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996) (quoting *Santosky v. Kramer*, 455 U.S. 745, 787 (1982)).

Although parental rights are superior to the claims of other persons and the government, they are not absolute and may be terminated upon appropriate statutory grounds. *See In Re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010); *Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002). Due process requires clear and convincing evidence of the existence of the grounds for termination. *In re Drinnon*, 776 S.W.2d at 97. A parent's rights may be terminated only 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) [t]hat termination of the parent's or guardian's rights is in the best interest[ ] of the child.

Tenn. Code Ann. § 36-1-113(c). "[A] court must determine that clear and convincing evidence proves not only that statutory grounds exist [for the termination] but also that termination is in the child's best interest." *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). The existence of at least one statutory basis for termination of parental rights will support the trial court's decision to terminate those rights. *In re C.W.W.*, 37 S.W.3d 467, 473 (Tenn. Ct. App. 2000), *abrogated on other grounds by In re Audrey S.*, 182 S.W.3d 838 (Tenn. Ct. App. 2005).

The heightened burden of proof in parental termination cases minimizes the risk of erroneous decisions. *In re C.W.W.*, 37 S.W.3d at 474; *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). "Evidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *In re Audrey S.*, 182 S.W.3d at 861 (citations omitted). It produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established. *In re A.D.A.*, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002); *Ray v. Ray*, 83 S.W.3d 726, 733 (Tenn. Ct. App. 2001); *In re C.W.W.*, 37 S.W.3d at 474.

In 2016, the Tennessee Supreme Court provided guidance to this court in reviewing cases involving the termination of parental rights:

> 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). 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 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. 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. 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 Carrington H., 483 S.W.3d 507, 523-24 (Tenn. 2016) (citations omitted); *see also In re Gabriella D.*, 531 S.W.3d 662, 680 (Tenn. 2017).

Lastly, in the event that the "resolution of an issue in a case depends upon the truthfulness of witnesses, the trial judge, who has had the opportunity to observe the witnesses and their manner and demeanor while testifying, is in a far better position than this Court to decide those issues." *In re Navada N.*, 498 S.W.3d 579, 591 (Tenn. Ct. App. 2016) (citing *McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn. 1995); *Whitaker v. Whitaker*, 957 S.W.2d 834, 837 (Tenn. Ct. App. 1997)). "Thus, this court gives great weight to the credibility accorded to a particular witness by the trial court." *In re Christopher J.*, No. W2016-02149-COA-R3-PT, 2017 WL 5992359 at *3 (Tenn. Ct. App. Dec. 4, 2017) (citing *Whitaker*, 957 S.W.2d at 837).

IV. DISCUSSION

A.

As indicated above, the court granted the termination petition based upon the following statutory grounds: (1) abandonment and (2) failure to manifest an ability and willingness to care for the Child. Mother does not offer any argument disputing the statutory grounds of termination. Nevertheless, we will consider each ground as required by our Supreme Court. *In re Carrington H.*, 483 S.W.3d at 525-26 ("[T]he 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.").

1. Abandonment

Failure to Visit

Parental rights may be terminated for abandonment when a parent fails to visit a child for a period of four consecutive months immediately before the filing of a petition to terminate parental rights. Tenn. Code Ann. § 36-1-102(1)(A)(i). A failure to visit "means the failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation." Tenn. Code Ann. § 36-1-102(1)(E). The statute requires that parents offer their children more than "token visitation," defined as visitation that "under the circumstances of the individual case, constitutes nothing more than perfunctory visitation

or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child." Tenn. Code Ann. § 36-1-102(1)(C).

A parent may assert as an affirmative defense pursuant to Tennessee Rule of Civil Procedure 8.03 that his or her failure to visit was not "willful." Tenn. Code Ann. § 36-1-102(1)(I). The burden is on the parent asserting the affirmative defense to prove by a preponderance of the evidence that his or her failure to visit the child was not willful. *Id.*; *In re Kolton C.*, No. E2019-00736-COA-R3-PT, 2019 WL 6341042 at *5 (Tenn. Ct. App. Nov. 26, 2019).

Here, Petitioners filed their petition on September 17, 2020, so the relevant four-month period is May 17, 2020, to September 16, 2020. *See In re Jacob C.H.*, No. E2013-00587-COA-R3-PT, 2014 WL 689085 at *6 (Tenn. Ct. App. Feb. 20, 2014) (statutory four-month period covers four months preceding the day the termination petition was filed and does not include the day petition was filed). Mother raised a lack of willfulness as an affirmative defense in her answer to the petition. Mother claimed at the hearing that Petitioners thwarted her efforts at visitation. The trial court found that her testimony on this issue was not credible and that Mother did not engage in meaningful visitation in the two visitations she attended. The record reflects that Mother visited twice during the relevant time period but that she was distracted by two telephones during the visits. With these considerations in mind, we affirm the trial court's determination that the evidence clearly and convincingly established that Mother abandoned the Child by failure to visit.

Failure to Remit Support

Abandonment can occur when a parent has "failed to support or [] failed to make reasonable payments toward the support of the child" for a period of four consecutive months immediately before the filing of a petition to terminate parental rights. Tenn. Code Ann. § 36-1-102(1)(A)(i). The statute defines failure to support as a parent's 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(1)(D). By statute, parents are expected to offer more than "token support," which "means that the support, under the circumstances of the individual case, is insignificant given the parent's means." Tenn. Code Ann. § 36-1-102(1)(B). Furthermore, "[e]very parent who is eighteen (18) years of age or older is presumed to have knowledge of a parent's legal obligation to support such parent's child or children." Tenn. Code Ann. § 36-1-102(1)(H).

A lack of willfulness can constitute an affirmative defense to the ground of failure to support. Tenn. Code Ann. § 36-1-102(1)(I). A parent "shall bear the burden of proof that the failure to . . . support was not willful" and must establish the lack of willfulness by a preponderance of evidence. *Id.* Efforts to frustrate or impede a parent's visitation do not

justify a parent's failure to financially support a child. *In re Audrey S.*, 182 S.W.

There is no dispute that Mother remitted $1,220 in child support during the pertinent time period. However, $1,200 of the support rendered was taken from Mother's stimulus check without her consent. Mother remitted the remaining $20 from her own funds. The trial court found that Mother's payments via the stimulus check and the $20 of her own funds were token in nature given her inability to consent to the application of her stimulus check to her support arrearage and her overall ability to work. The record reflects that Mother was largely unemployed throughout the custodial episode and that her own residence did not have running water. Without further information concerning Mother's ability to remit payment, we cannot say that her support payments were token in nature. We reverse this ground of termination. This conclusion does not end our inquiry as only one ground of termination is required to support a trial court's termination decision. Tenn. Code Ann. § 36-1-113(g).

2. Failure to manifest an ability and willingness to assume custody

The trial court found that Petitioners had proven by clear and convincing evidence that Mother's parental rights should be terminated pursuant to Tennessee Code Annotated section 36-1-113(g)(14), which provides as follows:

> A legal parent or guardian has failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility of the child, and placing the child in the person's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child.

Tenn. Code Ann. § 36-1-113(g)(14). This ground requires the petitioner to prove two elements by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c)(1), (g)(14). First, a petitioner must prove that the parent failed to manifest "an ability and willingness to personally assume legal and physical custody or financial responsibility of the child." Tenn. Code Ann. § 36-1-113(g)(14). Second, a petitioner must prove that placing the child in the parent's "legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child." *Id.*

As to the first element, our Supreme Court instructed as follows:

> [S]ection 36-1-113(g)(14) places a conjunctive obligation on a parent or guardian to manifest both an ability and willingness to personally assume legal and physical custody or financial responsibility for the child. If a person seeking to terminate parental rights proves by clear and convincing proof that a parent or guardian has failed to manifest *either* ability or willingness, then the first prong of the statute is satisfied.

In re Neveah M., 614 S.W.3d 659, 677 (Tenn. 2020) (citation omitted) (resolving the split in authority regarding whether parental rights can be terminated if a parent has manifested a willingness, but not an ability to personally assume legal and physical custody or financial responsibility for the child).

As to the second element, whether placing the child in the parent's custody "would pose a risk of substantial harm to the physical or psychological welfare of the child," we have explained:

> The courts have not undertaken to define the circumstances that pose a risk of substantial harm to a child. These circumstances are not amenable to precise definition because of the variability of human conduct. However, the use of the modifier "substantial" indicates two things. First, it connotes a real hazard or danger that is not minor, trivial, or insignificant. Second, it indicates that the harm must be more than a theoretical possibility. While the harm need not be inevitable, it must be sufficiently probable to prompt a reasonable person to believe that the harm will occur more likely than not.

In re Virgil W., No. E2018-00091-COA-R3-PT, 2018 WL 4931470, at *8 (Tenn. Ct. App. Oct. 11, 2018) (quoting *Ray*, 83 S.W.3d at 732).

The trial court offered the following findings in support of its application of this statutory ground:

> The [C]hild was malnourished, dirty, unbathed, underweight, underdeveloped, jaundiced, and suffering from squalid living conditions while in [Mother's] care. [Mother] has been unable to maintain gainful employment for longer than a few days at a time. [Mother] has not fulfilled her child support obligations. [She] has been distracted by and more interested in her cellphones at visitation than the [C]hild. [She] has not taken action to create a meaningful relationship with the [C]hild. [She] is not able to take care of herself, much less the [Child]. Moreover, [the Child] suffers from epilepsy and other developmental and learning disorders that require additional attention and care.

From these facts, we agree with the trial court that Mother displayed an overall lack of willingness and ability to assume legal and physical custody of the Child. The record further supports a finding that placing the Child with Mother would pose a risk of substantial physical harm to the Child's welfare given the evidence of neglect exhibited toward the Child prior to removal and Mother's failure to establish her ability to remedy these concerns of neglect by evidencing her ability to care for the Child. We affirm the court's finding on this issue.

B.

Having concluded that there was clear and convincing evidence supporting at least one statutory ground of termination, we must consider whether termination was in the best interest of the Child. Effective April 22, 2021, the General Assembly amended Tennessee Code Annotated § 36-1-113(i) by deleting the previous subsection in its entirety and substituting a new subsection providing, inter alia, twenty factors to be considered in determining whether termination is in the best interest of the child. *See* 2021 Tenn. Pub. Acts, Ch. 190 § 1 (S.B. 205). The amended statute does not apply to this action, filed before April 22, 2021. *In re Riley S.*, No. M2020-01602-COA-R3-PT, 2022 WL 128482, at *14 n.10 (Tenn. Ct. App. Jan. 14, 2022) *perm. app. denied* (Tenn. Mar. 17, 2022). The record reflects that the trial court erroneously applied the amended statute with the newly expanded best interest factors. However, such error was harmless when the old factors are included within the amended statute. *See generally In re Da'Moni J.*, No. E2021-00477-COA-R3-PT, 2022 WL 214712, at *23 (Tenn. Ct. App. Jan. 25, 2022) *perm. app. denied* (Tenn. Apr. 1, 2022).

The following non-exhaustive list of factors are applicable to this action:

> (i) In determining whether termination of parental or guardianship rights is in the best interest of the child . . . the court shall consider, but is not limited to, the following:
>
> > (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
> >
> > (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;[4]
> >
> > (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
> >
> > (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;

[4] *In re Kaliyah S.*, 455 S.W.3d at 555 ("[I]n a termination proceeding, the extent of DCS's efforts to reunify the family is weighed in the court's best-interest analysis, but proof of reasonable efforts is not a precondition to termination of the parental rights of the respondent parent.").

> (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
>
> (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
>
> (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
>
> (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
>
> (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to [section] 36-5-101.

Tenn. Code Ann. § 36-1-113(i). "This list is not exhaustive, and the statute does not require a trial court to find the existence of each enumerated factor before it may conclude that terminating a parent's parental rights is in the best interest of a child." *In re M.A.R.*, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005). The General Assembly has also stated that "when the best interest[] of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interest[] of the child, which interests are hereby recognized as constitutionally protected." Tenn. Code Ann. § 36-1-101(d); *see also White v. Moody*, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004) (holding that when considering a child's best interest, the court must take the child's perspective, rather than the parent's).

Mother has failed to ready herself for the Child's return. Tenn. Code Ann. § 36-1-113(i)(1). She further failed to regularly visit or otherwise maintain a meaningful relationship with the Child. Tenn. Code Ann. § 36-1-113(i)(3), (4). Meanwhile, the Child is now in a foster home with parents who wish to adopt her as their own and who have taken care of her medical needs. A change of caretakers at this point would be detrimental to her medical condition. Tenn. Code Ann. § 36-1-113(i)(5). Questions remain as to Mother's ability to provide a safe and stable home for the Child given her past instance of neglect and failure to address the concerns that led to neglect. Tenn. Code Ann. § 36-1-113(i)(6), (7). With all of the above considerations in mind, we conclude that there was

clear and convincing evidence to establish that termination of Mother's parental rights was in the best interest of the Child. We affirm the trial court.

V. CONCLUSION

The judgment of the trial court is affirmed, in part, and reversed, as to the trial court's finding that Mother abandoned the Child by failure to remit child support. The case is remanded for such further proceedings as may be necessary. Costs of the appeal are taxed to the appellant, Summer K.

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JOHN W. McCLARTY, JUDGE