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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 3, 2023

IN RE CHARLEE N. ET AL.

Appeal from the Juvenile Court for Overton County
No. 22-JV-73 Daryl A. Colson, Judge

No. M2022-01686-COA-R3-PT

This is a termination of parental rights case. The trial court terminated the parental rights of the parents to two children, finding that there was clear and convincing evidence as to both parents regarding the ground of severe child abuse and that termination of the parents' rights was in the children's best interest. Having carefully reviewed the record, we affirm.

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

ARNOLD B. GOLDIN, J., delivered the opinion of the Court, in which ANDY D. BENNETT and KRISTI M. DAVIS, JJ., joined.

Kelly R. Williams, Livingston, Tennessee, for the appellant, Samantha Y.

John B. Nisbet, III, Livingston, Tennessee, for the appellant, Jeremy N.

Jonathan Skrmetti, Attorney General and Reporter, and Mara L. Cunningham, Assistant Attorney General, for the appellee, Tennessee Department of Children's Services.

OPINION

BACKGROUND AND PROCEDURAL HISTORY

Samantha Y. ("Mother") and Jeremy N. ("Father") share two minor children, Charlee N., born in April 2018, and Henlee N., born in November 2019 (collectively, "the Children").¹

¹ This Court has a policy of protecting the identities of children involved in parental termination cases.

Facts Leading to the Children's Removal

The Tennessee Department of Children's Services ("DCS") became involved with the family after receiving a referral on June 23, 2021, regarding drug-exposed children, lack of supervision, nutritional neglect, and environmental neglect. According to this referral:

[B]oth parents were using and selling methamphetamine in the presence of the children. The children were being left unattended. There was methamphetamine lying around the home where the children could access it. The father was stealing and selling stolen goods out of the home. The one year old was malnourished and underweight. There was trash, dirty dishes, and rotten food throughout the home. There was domestic violence between the parents.

The matter was initially assigned to case manager Brittany Massey, who attempted an in-person visit with the family on June 25, 2021, but there was no answer at the door. Ms. Massey later made contact with the family on June 28, 2021, at the family home where she observed the Children "to appear dirty, and both of their hair tangled, disheveled, and unwashed." She also noted that the family home was "unorganized and very cluttered" as there "were dirty dishes piled in the kitchen sink and all over the kitchen counters" with "uneaten food left out on the kitchen counters." Ms. Massey found the living conditions as "hazardous" to the Children due to the amount of clutter, including a dining room filled with miscellaneous items such as tools and electronics. Mother and Father admitted to Ms. Massey that they used THC and Subutex and that neither had a prescription for Subutex and bought it "off the street."

The case was later transferred to another case manager, Michelle Gooch, in order to implement certain services and monitor the family's progress. Ms. Gooch made multiple attempts throughout the month of July 2021 to have an in-person visit with the family, but she was initially unable to make contact. Finally, on July 26, Ms. Gooch made contact with the family. After some reluctance on the part of Father, Ms. Gooch was allowed inside the home where she noted that it was "cluttered and in disarray" and that the "kitchen sink and counters were covered in dirty dishes and uneaten food." According to Ms. Gooch, Charlee's speech was "unintelligible," she could not state her name, she did not know how old she was, nor did she know colors. Mother and Father admitted to Ms. Gooch that they were both using THC and Subutex and that, despite previously telling Ms. Massey that they would stop, they had not. Mother and Father refused to submit to a urine drug screen, with Father stating, "We'll just fail." However, they did agree to complete an alcohol and drug assessment and also agreed to submit to future urine drug screens.

Numerous child and family team meetings were scheduled, but there was no success in getting Mother and Father to attend, despite Ms. Gooch's offer of assistance. At one

point, Mother informed Ms. Gooch that neither she nor Father had completed the alcohol and drug assessment. Ms. Gooch provided Mother with two different providers for the alcohol and drug assessment for her and Father to contact the following day. However, before a meeting could take place, on August 26, 2021, DCS received a new referral alleging that Mother and Father had been fighting more frequently and that the fighting had become worse. It was also reported that the Children were being left unsupervised. Further, the referral alleged that the electricity and water had been turned off, that the home was unclean and unsanitary, that the Children had been “caught pulling feces out of their diapers” and Mother and Father did not clean it up, and that Father appeared to be having suicidal ideations and possibly had a gun in the home. The following day, *another* referral was received alleging that Father was posting on Facebook about harming himself and alluding to being able to obtain a firearm if needed. Law enforcement thereafter conducted a welfare check on Father at the family home. Although Father denied he was having suicidal ideations, he admitted that he was depressed. Law enforcement was concerned that Father had the Children with him at the time and was additionally concerned that Mother had potentially abandoned the Children with Father in his condition. According to law enforcement, Father did not look well, as he had facial sores and swollen feet and ankles. Law enforcement was concerned that he had addiction issues. Law enforcement observed the Children to be uncleaned and unbathed and that the home was messy with trash and clothes all over the floors. Later that same day, Ms. Gooch went to the family home in order to address the new referrals. Ms. Gooch noted that Father had sores around his mouth and chin and appeared to be sweaty and disheveled. Ms. Gooch also noticed that Charlee’s hair was matted and knotted and that she appeared to be unclean with dirt under her fingernails and toenails. Ms. Gooch also noted that there was dirt stuck to Charlee’s skin near her privates and on her bottom. Charlee barely acknowledged Ms. Gooch’s presence, her cheeks were red, and she appeared to be unwell. Although the electricity had recently been turned back on at the house, there was still no running water. Father stated that he and Mother had argued and that she had left the home. Father also informed Ms. Gooch that neither he nor Mother had completed their alcohol and drug assessments and that he was still using THC and Subutex.

On September 8, 2021, Kevin Starr, a Child Protective Services case manager, was notified of a referral requesting immediate assistance from DCS. The referral alleged domestic violence and drug paraphernalia in the home. Mr. Starr arrived at the family home and spoke with a deputy of the Overton County Police Department who informed Mr. Starr that it was determined that both Mother and Father were aggressors during a domestic dispute and would be arrested. The deputy further informed Mr. Starr that both parents appeared to have injuries. Charlee was in the living room and present during the altercation while Henlee was asleep in her bedroom. Mother largely corroborated the deputy’s statements and stated that the argument began to escalate with Father grabbing her by her hair and that she had scratched him. Father later admitted to Mr. Starr that he and Mother had used Subutex four days prior. Mr. Starr took photos of the residence and observed the home to be in disarray with dishes and old food left out in the kitchen.

Dependency and Neglect Proceedings

Pursuant to the aforementioned facts, DCS filed a petition on September 13, 2021, to declare the Children dependent and neglected and for emergency temporary custody. That same day, the Children were removed from Mother's and Father's custody and placed into the protective custody of their paternal aunt, Kayla R., and her husband, Nathanael R., pursuant to an order entered by the Juvenile Court of Overton County, Tennessee ("the trial court").

On September 20, 2021, after the filing of its petition, DCS collected hair follicle samples from the Children to perform drug screens. According to the results of the ensuing drug screens, Charlee tested positive for methamphetamines at a level of 1,050 pg/mg and Henlee tested positive for methamphetamines at a level of 3,251 pg/mg. Due to the severity of these results, DCS amended its previous petition to seek a finding of severe child abuse against both Mother and Father due to the Children's methamphetamine exposure. Further, DCS filed an amended protective custody order to place the Children in foster care, with the previous custodians, Kayla R. ("Foster Mother") and Nathanael R. (collectively "Foster Parents"), becoming the Children's foster parents.² On January 19, 2022, subsequent to a hearing on the matter, the trial court adjudicated the Children to be dependent and neglected and victims of severe child abuse perpetrated by Mother and Father pursuant to Tennessee Code Annotated section 37-1-102(b)(27). The Children were ordered to remain in DCS custody. (Exhibit 7) Neither Mother nor Father appealed this order.

Father's Incarceration

Prior to the inception of this matter, Father had a criminal history, as he had been arrested for theft under a thousand dollars in February 2019, and for burglary and theft under a thousand dollars in May 2019. After pleading guilty to these offenses, Father received supervised probation. While on probation and after the Children had been removed, Father was arrested at a Walmart in November 2021. Accordingly, on December 13, 2021, Father's probation was revoked, and he was sentenced to serve four years in the custody of the Tennessee Department of Correction. Father remained incarcerated throughout the remainder of this proceeding following his November 2021 arrest.

The Permanency Plans

An initial permanency plan was created in November 2021 and ratified in January 2022. Mother did not participate in the development of the plan despite DCS inviting her to the meeting. Father also did not participate in the development of the plan. A second

² The trial court granted DCS's amended protective custody order on October 5, 2021, placing the Children into DCS's protective custody with Kayla R. and Nathanael R. acting as the Children's foster parents.

permanency plan was created in May 2022 and ratified in June 2022. Both plans had the dual goals of returning the Children to Mother and Father as well as adoption. Mother participated in the development of this second plan, but she did not agree with the dual goal of adoption. Father did not participate in the development of the plan due to his incarceration in Putman County and also did not agree with the plan due to the dual goal of adoption. During the pendency of this matter, both parents were read, and signed, the criteria and procedures for termination of parental rights.

As to the substance of the permanency plans, both Mother and Father had largely the same tasks in both plans, which included: (1) to submit to an alcohol and drug assessment, follow the recommendations thereof, and submit to random drug screens; (2) maintain appropriate housing and employment; (3) allow DCS to conduct home visits; (4) complete parenting education classes and a psychological evaluation with parenting and domestic violence components; (5) sign a release of information so that their progress can be monitored; (6) complete a domestic violence inventory and follow all recommendations thereof; (7) refrain from others that are known to use illegal drugs and take only medication prescribed to them by their doctors as directed; (8) obtain and deliver an affidavit from their medical provider listing all prescribed medications and dosage; (9) resolve any pending criminal charges and comply with probationary rules and sign a release allowing DCS to talk with probation officer to confirm compliance with court orders; and (10) attend scheduled visitation with the Children.

At the time of trial in November 2022, Mother had still not completed the majority of her permanency plan requirements, as she did not have employment or suitable housing, nor had she completed her alcohol and drug assessment recommendations, her domestic violence education, or the psychological assessment with a parenting and domestic violence component. According to testimony, Mother was difficult to get into contact with regarding scheduling her required services and was generally uncooperative. DCS made several unsuccessful attempts to drug screen Mother, as required by the permanency plans, but it appears that DCS was able to successfully drug screen Mother on December 15, 2021, when she tested positive for methamphetamine, and again on January 19, 2022, when she tested positive for THC. Mother did complete an alcohol and drug assessment on February 4, 2022, and it was recommended that she complete an intensive outpatient program for substance abuse, which was scheduled to begin on February 7, 2022. However, Mother did not start the program until February 14 and was discharged on March 24, 2022, having completed only four sessions. Mother thereafter attended Mirror Lake, a thirty-day treatment program, of her own volition. Pursuant to a recommendation from Mirror Lake, Mother was reenrolled in the intensive outpatient program for substance abuse, but she was discharged again after two consecutive weeks of absences. While at Mirror Lake, Mother discovered that she was pregnant with twins. After completing her program at Mirror Lake, Mother claimed that she had medical restrictions due to her pregnancy and, therefore, could not participate in the intensive outpatient program. Mother, however, provided no documentation to support this claim. As a result of Mother's

continuing noncompliance, DCS scheduled a child and family team meeting in July 2022, where it explained that, if Mother could not provide the requested documentation or otherwise evince compliance, DCS would file a petition to terminate her rights. Mother participated in this meeting and, according to later testimony, stated that she did not have any bed rest orders or other issues and would “happily comply.” Mother, however, never reenrolled in the intensive outpatient program.

Visitation

Although the permanency plans ordered Mother and Father to participate and attend scheduled visitation with the Children, Father was incarcerated for the majority of the custodial period and, therefore, did not have any visitation with the Children. As to Mother, DCS initially had difficulty in contacting her to schedule visits from the time of the Children’s removal in September 2021 through January 2022. Ultimately, Mother was able to complete three visits with the Children: twice in February 2022, and once in March 2022. According to testimony, the Children did not talk about Mother and Father other than after visits with Mother, and they never mentioned Father. According to Foster Mother, Charlee was frustrated after Mother told the Children to call her “mommy” after hearing them refer to Foster Mother as “mommy,” as Charlee did not wish to refer to Mother as such. Foster Mother further testified that the Children were “very clingy, whiney, wanting to be held” after visits with Mother, and she stated that Henlee attempted to run out the door to follow Foster Mother after she attempted to leave during a visit.

Termination Proceedings

On August 8, 2022, DCS filed a petition to terminate both Mother’s and Father’s parental rights as to the Children upon numerous grounds.³ A trial on the matter was held on November 9, 2022. According to a written order entered on November 22, 2022, the trial court determined that there was clear and convincing evidence of the ground of severe child abuse as to both Mother and Father, and that termination of Mother’s and Father’s parental rights was in the Children’s best interest. This appeal followed.

ISSUES PRESENTED

Father and Mother each filed a separate brief. For his part, Father raises two issues, which we restate as follows:

1. Whether there was clear and convincing evidence to determine that Father had committed severe child abuse against the Children.

³ Although DCS alleged numerous grounds in its petition, it pursued only the ground of severe child abuse at trial.

2. Whether the termination of Father’s parental rights is in the Children’s best interest.

Mother raises only one issue⁴ for our review on appeal:

1. Whether the termination of Mother’s parental rights is 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).

⁴ Although Mother does not raise an issue as to the ground of severe child abuse, this Court is obligated to review that ground pursuant to the directive by the Tennessee Supreme Court in *In re Carrington H.*, which states that “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.**” *In re Carrington H.*, 483 S.W.3d 507, 525-26 (Tenn. 2016) (emphasis added).

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

Severe Child Abuse

Pursuant to Tennessee Code Annotated section 36-1-113(g)(4), termination of parental rights may be based upon a determination that “[t]he parent or guardian has been found to have committed severe child abuse, as defined in § 37-1-102, under any prior order of a court or is found by the court hearing the petition to terminate parental rights or the petition for adoption to have committed severe child abuse against any child.” Tenn. Code Ann. § 36-1-113(g)(4). Here, in a prior dependency and neglect action, the trial court entered an order that adjudicated the Children dependent and neglected and severely abused within the meaning of Tennessee Code Annotated section 37-1-102(b)(27), which defines “severe child abuse” in pertinent part as:

Knowingly or with gross negligence allowing a child under eight (8) years of age to ingest an illegal substance or a controlled substance that results in the child testing positive on a drug screen, except as legally prescribed to the child[.]

Tenn. Code Ann. § 37-1-102(b)(27)(E).

Having reviewed the record, we conclude that the trial court's order entered in the previous dependency and neglect proceeding, which found severe child abuse as to the Children perpetrated by Mother and Father and which was not appealed, constitutes *res judicata* on the issue of Mother's and Father's abuse and is not appropriate for our review in this separate proceeding for termination of Mother's and Father's parental rights. “The doctrine of *res judicata* applies when ‘an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.’” *In re Heaven L.F.*, 311

S.W.3d 435, 439 (Tenn. Ct. App. 2010) (quoting *Galbreath v. Harris*, 811 S.W.2d 88, 90 (Tenn. Ct. App. 1990)). Further, “[t]his court has previously applied the doctrine of *res judicata* to prevent a parent from re-litigating whether she committed severe child abuse in a later termination of parental rights proceeding, when such a finding had been made in a previous dependency and neglect action.” *Id.* (citing *State v. Tate*, No. 01-A-01-9409-CV-00444, 1995 WL 138858, at *5 (Tenn. Ct. App. Mar. 31, 1995)). Mother, Father,⁵ and DCS were parties in the dependency and neglect action, and the issue of whether Mother and Father committed severe child abuse was fully litigated in that action with the trial court deciding in the affirmative. Because neither Mother nor Father appealed that decision, it became a final judgment. Therefore, the issue of whether Mother and Father have committed severe child abuse against the Children is *res judicata*, and the trial court properly found by clear and convincing evidence that Mother’s and Father’s parental rights should be terminated pursuant to Tennessee Code Annotated section 36-1-113(g)(4).

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 trial court to consider in its 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

⁵ In his brief on appeal, Father argues that there is no evidence that the order finding that Mother and Father had committed severe child abuse was “accomplished . . . ‘without fraud or collusion’ because the order merely states that . . . Father was not present at the hearing because he was ‘incarcerated in Putnam County’ jail.” According to Father, this belies the requirement of Rule 112(1)(a) of the Tennessee Rules of Juvenile Practice and Procedure that, “[a]t the beginning of each hearing, the court shall ascertain whether all necessary persons are before the court,” and “[i]f a necessary person is not present, the court shall determine whether notice of the hearing was provided to that person and whether the hearing may proceed.” Tenn. R. Juv. P. 112(1)(a). Father argues that there is no indication in the order that the trial court complied with this requirement. We find Father’s argument to be without merit. Although Father himself was not present at the adjudicatory dependency and neglect hearing due to his incarceration, Father’s attorney was present and represented his interests. We have similarly found that such an appearance does not prejudice a parent’s rights. *See In re Jimmy B.*, No. E2015-02070-COA-R3-PT, 2016 WL 2859180, at *6 (Tenn. Ct. App. May 11, 2016) (“Father’s attorney appeared at the hearing on his behalf. Thus, Father’s failure to appear at the hearing, despite being served with notice of it, did not prejudice his rights.”). Furthermore, notwithstanding Father’s argument contained herein, we also note existing case law that clearly holds that a finding of severe child abuse in a dependency and neglect order is *not* subject to a collateral attack in a termination of parental rights appeal. *See id.* (“Moreover, any challenge to the December 10, 2014 order, which was a final judgment in the dependency and neglect proceedings, should have been brought by direct appeal. This appeal was taken from the termination of parental rights proceedings, which was a new and separate proceeding. Accordingly, the juvenile court’s finding of severe child abuse in the December 10, 2014 order is not subject to collateral attack in this appeal.”). As such, Father’s argument as to the propriety of the trial court’s prior finding of severe abuse is not proper on appeal.

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 best interest factor and determined that it was in the Children’s best interest that Mother’s and Father’s parental rights be terminated. Particularly, the trial court emphasized the improvements and strides the Children have made since they have been in the care of Foster Parents. Specifically, previous issues the Children had have now been mostly eradicated and corrected through treatment and care provided by Foster Parents. Moreover, the Children have developed a strong and healthy bond with Foster Parents and Foster Parents’ other children, and they are now provided with stability such that it would be contrary to their best interests to be removed from Foster Parents’ care. As for Mother and Father, the trial court noted that Mother has not taken any steps to correct the issues that ultimately led to the Children’s removal. Specifically, Mother has not demonstrated any continuity or stability with regard to her employment or housing. The trial court noted Mother’s claims that she was on bed rest for a period of time, but it also found that no proof was introduced as to those claims, outside of Mother’s testimony, which the trial court found was impeached by DCS and therefore lacked credibility. The trial court also noted that Mother visited only three times since the inception of the case, and it did not find her reasons for lack of visitation to be credible. The trial court further determined that neither Mother nor Father has shown enough progress to support a finding that they have demonstrated a lasting adjustment of circumstances such as to make it safe and beneficial for the Children to return to their home. Father was incarcerated for the majority of the custodial episode, since November of 2021 when he was arrested at a Walmart. Although Father argues in his brief that the trial court improperly focused on his incarceration when considering the best interest factors, it remains that Father’s actions subsequent to the inception of this custodial episode resulted in his arrest and eventual incarceration. As such, any contention of Father that his incarceration hindered his ability to comply is of his own volition. Moreover, neither Mother nor Father have provided any items or care for the Children or at any time provided any financial support.

Having reviewed the record, we agree with the trial court’s assessment and findings. The Children appear to be doing well in the care of Foster Parents and have created a healthy bond with their foster family. Moreover, there is no indication that either parent has rectified the issues that ultimately led to the Children’s removal. Accordingly, we find that there was 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 termination of Mother's and Father's parental rights is affirmed.

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