IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 2, 2014

IN RE ANDREW O.

Appeal from the Chancery Court for Lincoln County
No. AD328 J. B. Cox, Judge

No. M2014-00114-COA-R3-PT - Filed October 28, 2014

Grandparents filed this petition to terminate Mother and Father's parental rights and to adopt the child. Mother surrendered her parental rights, and the trial court found that Father abandoned the child by willful failure to visit and failure to support. The trial court also found termination of Father's parental rights was in the child's best interest. The evidence supports the trial court's finding that Father abandoned the child by willful failure to visit, but the record does not clearly and convincingly establish that Father's failure to support the child was willful. We also find that termination is in the child's best interests; therefore, we affirm the termination of Father's parental rights.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Jonathan C. Brown, Fayetteville, Tennessee, for the appellant, Richard K. O.[1]

Megan A. Kingree, Shelbyville, Tennessee, for the appellees, Joe D. Q. and Mary J. Q.

OPINION

Chantele O. ("Mother") and Richard O. ("Father") are the parents of Andrew O., born December 2007. Andrew has been in the care of his maternal grandparents, Joe David Q. and wife Mary Jane Q. ("Grandparents") since his birth. Even during Mother's pregnancy, she

---

[1]This court has a policy of protecting the identity of children in parental termination cases by initializing the last names of the parties.

and Father lived with Grandparents in their home in Lincoln County, Tennessee. Father moved out of the home when Mother was seven months pregnant to live with his father in Boaz, Alabama, while Mother remained with Grandparents.

On July 21, 2009, when Andrew was nineteen months old, an Agreed Order and Permanent Parenting Plan was entered which appointed Grandparents the Primary Residential Parents of Andrew. At the time, Mother was still residing in Grandparents' home but Father was not; thus, Father was granted visitation every other weekend, and each parent was ordered to pay child support to Grandparents of $45 per week.

Mother moved out of the home in December 2010, while Andrew remained in the custody of Grandparents. Two years later, on November 21, 2012, Grandparents filed a Petition for Termination of Parental Rights and Adoption, seeking to terminate Mother and Father's parental rights on grounds of abandonment for willful failure to visit and failure to support. Two weeks later, on December 4, 2012, Grandparents filed an Amended Petition with Mother joining in the petition consenting to the termination of her rights; a consent order was entered that same day terminating Mother's parental rights.

The trial court found Father to be indigent and appointed counsel to represent him on December 27, 2012; the court also appointed a guardian ad litem.

On January 24, 2013, Father filed a Motion to Enforce Court Order and for Contempt requesting the court to hold Grandparents in contempt for failure to abide by the previous Agreed Order and Permanent Parenting Plan granting Father visitation. On March 19, 2013, an agreed order was entered granting Father supervised visitation every other Saturday.

The petition was tried on October 1, 2013; Father and Grandmother testified in person and Dr. Aleisha B. Chaffin, Andrew's counselor, testified by deposition. Dr. Chaffin testified that she began counseling sessions with Andrew in January 2013, when he presented with acting-out behaviors, negative behaviors, and communication issues including hyperactivity, inattention, lack of focus, and physical and verbal aggression. Following testing, Dr. Chaffin determined that Andrew's IQ was far below average, and that he is in the bottom five percentile of intellectual functioning. She has been counseling Andrew continuously on a weekly or bi-weekly basis, yet Father has never attended any of Andrew's sessions or called to discuss Andrew. In fact, she stated that Andrew does not talk about Father unless specifically asked to do so; when responding to such questions, Andrew redirects the conversation to Grandfather.

Dr. Chaffin further testified that Andrew needs consistent structure and discipline, noting that it is important for children like Andrew who have ADHD and disruptive behavior

disorders to have structure and discipline in their life in order to respond appropriately and learn how to communicate and function in daily life. In her opinion, continuing visitation with Father would be harmful because Andrew regresses after the visits. She stated it would be in Andrew's best interest to have continuous care by Grandparents with the same discipline and structure; she further explained that terminating Father's rights would not hurt Andrew in an emotional or psychological way because Andrew does not have a meaningful connection with Father. She stated that she works with children who have been adopted, and she notices improvements in children once negative parental contact has been removed.

In his testimony, Father acknowledged that Grandparents are good people, that he is grateful for what they have done for his child, and that Grandparents are the best choice for Andrew, but he wants to be involved in Andrew's life. Nevertheless, Father admitted that he did not visit Andrew during the four months preceding the filing of the Petition, although he blamed this circumstance on Grandparents' changing their cell phone numbers without notifying him. He previously resided in Grandparents' home prior to Andrew's birth, and although their home phone number had not changed, he insisted that he was not aware of their home phone number. He also blamed his failure to visit on Grandparents' request that he not visit Andrew for six weeks while his medication was being regulated starting in May 2012.

Father admitted that he had not paid child support since 2010, but insisted it was not willful because he could not maintain a steady job due to his diabetes and other health conditions. He testified that he has been trying to obtain a job "to make better of myself," and stated, when questioned on how he is going to support Andrew, "If push comes to shove, I will get a job and I will work myself 'til-even if I can't go no more." He also stated that he had applied to two jobs in the month before trial. He testified that, in December 2012, he was living with his father in a trailer that did not have a door; a sheet was hanging in its place. However, at trial he was living in a house with his father, although he stayed with his aunt at nights because he suffers from diabetic seizures. He testified that his father pays for his $45 a month cell phone bill, and although he barely has enough money to pay his medical bills when he works, he admitted that he has several recent tattoos which were paid for by family members. He also testified that he was in the process of applying for disability benefits.

Grandmother testified that she and her husband have taken care of Andrew his entire life, and Andrew has lived in their home since his birth in 2007. She discussed Andrew's medical condition, noting that he suffers from seizures, asthma, severe ADHD, and poor impulse control, and he takes several medications throughout the day and uses an inhaler. She stated that Father has never attended any of Andrew's medical appointments or therapy sessions, and that Father never visited Andrew's school and does not know his teachers.

Despite having visitation rights according to the 2009 Agreed Order, she said Father failed to exercise his visitation rights in the four months prior to the filing of the Petition. She admitted they changed their cell phone numbers in August 2012, but they had the same home phone number for thirteen years, which was the same number when Father resided with them. She further stated that Father knew the number because he had given it to a previous employer as his contact number. She also testified that Father communicated with her through Facebook messaging and by email.

She acknowledged that she requested Father suspend his visitation from May 2012 to July 2012 in order to regulate Andrew's medication, but during this time Father contacted her through Facebook. On June 9, 2012, he sent her a Facebook message writing, "Sorry I ain't called, and I ain't been to see him. . . ." She testified that Father sent Andrew a card in October 2012 and a Christmas card in 2012, but he had no other contact with Andrew or Grandparents between August and November 2012. After Father began visiting Andrew in March 2013 pursuant to the agreed order, Andrew exhibited regressive behavior after each visit, and it was harder to discipline him after these visits.

Grandmother also testified that Father had failed to pay any support since January 2010, and she and her husband fully supported Andrew.

Following the conclusion of the trial, the trial court entered its final order on December 10, 2013, in which it found clear and convincing evidence to support the grounds of abandonment for failure to visit and failure to support. The trial court also found that termination of Father's parental rights was in the best interests of the child. Father filed a timely appeal.

STANDARD OF REVIEW

To terminate parental rights, a court must determine by clear and convincing evidence the existence of at least one of the statutory grounds for termination and that termination is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c) (2013); *In re Adoption of Angela E.*, 402 S.W.3d 636, 639 (Tenn. 2013) (citing *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002)). When a trial court has made findings of fact, we review the findings de novo on the record with a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *In re Adoption of Angela E.*, 402 S.W.3d at 639 (citing *In re Taylor B. W.*, 397 S.W.3d 105, 112 (Tenn. 2013)). We next review the trial court's order de novo to determine whether the facts amount to clear and convincing evidence that one of the statutory grounds for termination exists, and if so, whether the termination of parental rights is in the best interests of the child. *In re Adoption of Angela E.*, 402 S.W.3d at 639-640 (citing *Taylor B. W.*, 397 S.W.3d at 112). 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*. at 640 (internal citations omitted).

ANALYSIS

I. ABANDONMENT

Tenn. Code Ann. § 36-1-102(1)(A)(i) defines abandonment as follows:

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

A parent's willful conduct is an essential element of the statutory definition of abandonment. *In re C.T.B.*, No. M2009-00316-COA-R3-PT, 2009 WL 1939826, at *4 (Tenn. Ct. App. July 6, 2009); *In re Audrey S.*, 182 S.W.3d 838, 863 (Tenn. Ct. App. 2005). "Willful" conduct, as used in the statute, consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent. *Audrey S.*, 182 S.W.3d at 863 (citations omitted). "Conduct is 'willful' if it is the product of free will rather than coercion." *Id*. A parent's failure to visit or support a child is "willful" when a parent "is aware of his or her duty to visit or support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so." *Id*. at 864 (citing *In re M.J.B.*, 140 S.W.3d 643, 654 (Tenn. Ct. App. 2004)).

Whether a parent failed to visit or support a child is a question of fact. Whether a parent's failure to visit or support constitutes willful abandonment, however, is a question of law. *In re Adoption of Angela E.*, 402 S.W.3d at 640 (citing *In re Adoption of A.M.H.*, 215 S.W.3d 793, 810 (Tenn. 2007)). We review questions of law de novo with no presumption of correctness. *Id*. (citing *In re Adoption of A.M.H.*, 215 S.W.3d at 810).

A. FAILURE TO VISIT

The trial court found that Father willfully failed to visit the child during the four-month period preceding the filing of the petition. Father does not dispute the finding that he failed to visit the child during the relevant time period; however, he contends it was not willful, stating he regularly visited the child until Grandparents requested that he suspend visitation for six weeks beginning May 2012 while Andrew's medications were being

regulated. He also contends his attempts to visit were thwarted when Grandparents changed their cell phone numbers in July 2012.

Grandmother admitted that she and her husband changed their cell phone numbers without notifying Father, but she noted that Father had several alternative means to contact them. Specifically, she testified that Father had lived in Grandparents' home for three months before Andrew's birth and that he knew their home phone number, which had not changed. While Father testified that he did not have or recall their home phone number, he admitted that his sister looked up their home phone number on the internet white pages and that he communicated with Grandparents via Facebook messaging in June 2012. The message Father sent Grandmother on June 9, 2012, stated: "Sorry I ain't called, and I ain't been to see him. I know I can't help what's going on, but I do feel like a lot of what's going on with him is my fault. Hope they figure out what's going on with him." He also stated that his sister sometimes communicated with Grandparents via email, and that he emailed Grandparents in December 2012, thanking them for what they have done for his child.

The record contains evidence that clearly and convincingly supports the trial court's determination that Father willfully failed to visit the child during the relevant period. While Grandmother admitted they did not notify Father of their new cell phone numbers, he had numerous ways to communicate with Grandparents as revealed by the fact Father used Facebook to message Grandparents, their home phone number was published, and he knew where they lived. Moreover, Father also emailed Grandmother in December 2012. Although Grandparents requested that visitation be suspended during Andrew's medication regulation, they did not prohibit Father from visiting the child during the relevant four-month period. We, therefore, affirm the finding that Father willfully failed to visit Andrew during the relevant four-month period.

B. Failure to Support

The trial court found that Grandparents also proved the ground of abandonment for failure to support the child. Specifically, the trial court found that Father admitted in court that he has not paid child support in over three years and that he "is able-bodied and capable of working and supporting the child and has provided no excuse for failing to support the child." Furthermore, the trial court noted that, "[i]nstead of paying support, he paid to tattoo his body rather than provide food for the minor child."

In order to prove that failure to pay support was willful, petitioners must prove that the parent "is aware of his or her duty to support, has the capacity to provide the support, makes no attempt to provide support, and has no justifiable excuse for not providing the support ." *In Re J.J.C.*, 148 S.W.3d 919, 926 (Tenn. Ct. App. 2004) (quoting *In re Adoption*

of Muir, No. M2002-02963-COA-R3-CV, 2003 WL 22794524, at *5 (Tenn. Ct. App. Nov. 25, 2003)). "A parent who fails to support a child because he or she is financially unable to do so is not willfully failing to support the child." *In re M.B.*, No. M2005-02120-COA-R3-PT, 2006 WL 1082827, at *5 (Tenn. Ct. App. Apr. 25, 2006) (quoting *In re Adoption of Muir*, No. M2002-2963-COA-R3-CV, 2003 WL 22794524, at *5 n.7 (Tenn. Ct. App. Nov. 25, 2003)).

Father admits not paying child support during the relevant time period; however, he insists his failure to provide support was not willful because he was unable to pay child support due to his health. He testified that he suffers from juvenile diabetes, seizures, neuropathy in his legs, and lack of sensitivity to hot or cold, which went uncontested. He also stated that these conditions prevented him from maintaining a job, and, when he did work, he barely made enough money to pay his medical bills.

Grandparents established that Father knew he had a duty to provide support based on the January 2010 court order that directed him to pay them $45 a week to support Andrew, and they challenge his claim that he could not pay support by noting he had enough money to have a cell phone, internet service, and numerous tattoos. Father, however, rebutted this testimony by stating that his father pays for his cell phone bill and that friends and other family members paid for the tattoos. But for the expenses of his cell phone, internet and tattoos, no countervailing evidence was offered to contradict Father's testimony that he could not maintain a job due to his health.

As noted earlier, a ground upon which a parent's rights may be terminated must be proven by clear and convincing evidence, which requires that the finder of fact have "no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *In re Adoption of Angela E.*, 402 S.W.3d at 640 (citations omitted). Based upon our review of the record, we find the evidence does not clearly and convincingly establish that Father's failure to support the child was willful. Accordingly, this statutory ground was not established based on the requisite standard of proof.

Nevertheless, parental rights may be terminated when only one statutorily defined ground is established. *See* Tenn. Code Ann. § 36-1-113(c)(1); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002); *In re M. W.A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). We have affirmed the trial court's finding of abandonment for willful failure to visit; therefore, we shall address whether termination of Father's parental rights is in the best interest of the child.

II. BEST INTEREST OF THE CHILD

Statutory factors are set out for the best interests analysis that the court "shall consider," but that analysis "is not limited to" the factors enumerated in the statute. Tenn. Code Ann. § 36-1-113(i); *In re Angela E.*, 303 S.W.3d at 251; *In re Audrey S.*, 182 S.W.3d at 878. Every factor need not be applicable in order for the trial court to determine that it is in the best interest of the child for a parent's right to be terminated. The relevance and weight to be given to each factor depends on the unique facts of each case. In some cases, one factor alone may be sufficient to determine the outcome. *In re Marr*, 194 S.W.3d 490, 499 (Tenn. Ct. App. 2005); *In Re Audrey S.*, 182 S.W.3d at 878. Conducting a best interests analysis is "broad and subjective" and does not include hard and fast rules. *In re Audrey S.*, 182 S.W.3d at 878 n.53 (citing *Yeager v. Yeager*, No. 01A01-9502-CV-00029, 1995 WL 422470, at *4 (Tenn. Ct. App. July 19, 1995)).

The factors a court is directed to consider include 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;
>
> (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;
>
> (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, controlled substances or controlled substance analogues 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 § 36-5-101.

Tenn. Code Ann. § 36-1-113(i).

The trial court considered each of the enumerated factors other than (2), which the court found inapplicable. The trial court articulated the following that contributed to its decision: Father did not finalize his claim for disability benefits, he failed to find full-time employment, his home is unsafe for a child, he failed to maintain regular visitation, he failed to establish a meaningful relationship, moving the child from Grandparents' home would be detrimental to the child, Father neglected the child by failing to provide food, shelter, and care, and Father's mental and emotional status would be detrimental to the child and prevent him from providing safe and stable supervision.

Father challenges the above findings, but not in the typical fashion. Instead of contending the evidence preponderates against these findings, Father contends the trial court considered the above factors in the wrong context, noting that the trial court frequently discussed the factors in the context of "custody" of the child. As Father correctly notes, this is not a custody dispute; moreover, Father has not asserted a claim for custody of Andrew. Thus, regardless of the outcome of this appeal, Grandparents would retain custody of Andrew.[2]

Father relies on *In re Trinity M.H.*, No. M2013-00810-COA-R3-PT, 2013 WL 6451158 (Tenn. Ct. App. Dec. 5, 2013), to assert that the trial court's best interest finding must be reversed due to the trial court's attention to custody of Andrew. In that case, the

[2] "While some of the factors are written in terms of a change of custody to the parent, our courts have held that denying termination of parental rights does not affect custody." *In re Trinity M.H.*, No. M2013-00810-COA-R3PT, 2013 WL 6451158, at *7 (Tenn. Ct. App. Dec. 5, 2013) (citing *In re Valentine*, 79 S.W.3d 539, 550 (Tenn. 2002); *State v. R. S.*, No. M2002-00919-COA-R3-CV, 2003 WL 22098035, at *18 (Tenn. Ct. App. Sept. 11, 2003)).

grandparents filed a petition to terminate the mother's parental rights and to adopt the child, and the trial court terminated mother's parental rights. *In re Trinity M.H.*, 2013 WL 6451158, at *1. In making the best interest analysis in *Trinity*, the trial court addressed each factor as if it was making a decision concerning whether the mother should be granted custody of her daughter when, like here, custody was not at issue. Also like here, the mother acknowledged that the grandparents were doing a fine job raising her child; she merely wanted the opportunity to develop a relationship with her daughter. *Id*. at *7.

In *Trinity*, we determined the majority of statutory factors the trial court relied on in its best interest analysis were erroneously based on the court's concerns that the mother would regain custody unless her parental rights were terminated. *Id*. at *7. As we explained, "In addressing each factor, the court assumed it was making a decision about whether Mother should be granted custody of Trinity." *Id*. We further noted that "the majority of the factors the court considered are not applicable because change of custody is not at issue." *Id*. We reversed the trial court's ruling in *Trinity* based on our determination that the evidence preponderated against the trial court's findings of fact regarding the child's best interests. *Id*. at *7-8. We have reached a different conclusion in this case because the facts are distinguishable.

Unlike the mother's diligent efforts to improve her circumstances in *Trinity*, *id*. at *8, Father has made no such efforts. He has neither obtained disability benefits nor has he obtained full-time employment; moreover, his recent efforts to obtain employment were minimal. Significantly, he failed to maintain regular visitation prior to the petition being filed and, although he has exercised visitation since the agreed upon order in March 2013, the visits caused Andrew much stress. Further, Father never contacted Andrew's teachers, he did not visit Andrew's school, and he showed no interest in the child's mental health for, as Dr. Chaffin stated, Father never contacted her to discuss Andrew and never attended any counseling sessions. In fact, Father's only communication with Grandparents prior to the petition being filed was on Facebook when he apologized for not calling or checking up on Andrew.

The trial court found that Father had no meaningful relationship with Andrew, and Dr. Chaffin told the court that Andrew does not talk about Father or mention their visits unless he is asked about Father. Furthermore, the guardian ad litem stated that Father has no idea what Andrew needs, that he has made no effort in being a parent in Andrew's life, and that it was in Andrew's best interest that Father's parental rights be terminated.

Although some of the trial court's findings were erroneously couched in terms of who should have custody of Andrew, we have examined the trial court's findings in the context of a parental termination analysis and find the record contains more than sufficient evidence

to clearly and convincingly establish that termination of Father's parental rights is in the best interest of Andrew. Therefore, we affirm the trial court's finding that termination is in the child's best interest.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Father.

_____
FRANK G. CLEMENT, JR., JUDGE