

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 1, 2014

IN RE PATRICK J., ET AL.

**Appeal from the Juvenile Court for Montgomery County
No. 132029, 132030 Wayne C. Shelton, Judge**

No. M2014-00728-COA-R3-PT – Filed December 23, 2014

This case involves the termination of Mother's and Father's parental rights. The trial court found multiple statutory grounds for the termination of Mother's and Father's rights. The court also found termination of the parents' rights to be in the children's best interest. The sole issue raised on appeal is whether the trial court erred in finding that Mother and Father abandoned their children by willfully failing to support them. Because the parents appealed fewer than all of the multiple grounds relied upon by the trial court for termination, the trial court's decision as to the other grounds is final. Because a finding of only one statutory ground is necessary for termination, we affirm the decision of the trial court.

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

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

Wayne D. Hibbeler, Clarksville, Tennessee, for the appellant, Patrick C.

Julie M. Reyes, Clarksville, Tennessee, for the appellant, Leslie J.

Robert E. Cooper, Attorney General and Reporter; and Leslie Curry, Assistant Attorney General; for the appellee, Tennessee Department of Children's Services.

OPINION

I. BACKGROUND AND PROCEDURAL HISTORY

This case involves the termination of the parental rights of Patrick C. (“Father”) and Leslie J. (“Mother”) to their children, Patrick J. and Kendall J.¹ The Department of Children’s Services (“DCS”) received a referral in regards to the oldest child, Patrick J., suggesting he might be the victim of environmental abuse and neglect. On March 1, 2012, DCS took Patrick J. into custody because Mother was incarcerated and Father tested positive for marijuana, cocaine, and benzodiazepines. Mother was released from jail on October 23, 2012, and Kendall J. was born a few weeks later. Father was not present for the birth because, by that time, he was incarcerated.

Just two days after her birth, Kendall J. was also taken into DCS custody. The hospital alleged that she was drug-exposed. Mother tested positive for barbiturates, though the positive test could have been the result of medicine administered by the hospital. Patrick J. was adjudicated dependent and neglected on January 17, 2013, and Kendall J. was adjudicated dependent and neglected on April 25, 2013.

A permanency plan was created on December 3, 2012, and Mother and Father signed the plan on January 16, 2013. The plan prohibited Mother and Father from using illegal drugs, using prescription drugs in a non-prescribed manner, or using alcohol while in the presence of the children. Father was ordered to undergo an alcohol and drug assessment and follow the recommendations based on the assessment. Based on her alcohol and drug assessment, Mother had no drug treatment recommendations to follow. Both parents agreed to submit to random drug screens; visit the children in accordance with the visitation plan; pay child support; and complete parenting classes. They further agreed to complete anger management courses because of a past history of domestic violence; provide the children with a stable home environment;² find a legal means of income; and attend therapy sessions.

DCS filed a petition to terminate parental rights on May 3, 2013. At the time the petition was filed, DCS was unable to locate either parent and had to seek an order of publication in order to serve them. The petition alleged numerous grounds for termination, as well as asserting that termination was in the best interest of the children. The grounds for termination included: (1) abandonment for failure to visit the children in the four months preceding the filing of the petition; (2) abandonment for failure to support the children in the four months preceding the filing of the petition; (3)

¹ Father and Mother both testified that Father was the biological father of Kendall J. However, Father did not sign Kendall J.’s birth certificate, and a notice of intent to claim paternity or acknowledgment of paternity of the child had not been filed.

² Mother and Father were required to provide DCS with a copy of their lease, permit DCS to walk through their home, and maintain contact with DCS in order to demonstrate that they could provide a stable home environment.

abandonment by an incarcerated parent who was in jail for all or part of the four months prior to the filing of the petition, and a failure to engage in more than token visitation in the four months prior to being incarcerated; (4) abandonment by an incarcerated parent for failure to provide support in the four months prior to being incarcerated; (5) wanton disregard for the welfare of the children; (6) failure to provide a suitable home; (7) substantial non-compliance with the permanency plan; (8) persistent conditions; and, (9) in regards to Father's relationship with Kendall J., failure to establish or exercise paternity. The Juvenile Court for Montgomery County held a hearing on the petition to terminate on February 12, 2014.

At the hearing, the trial court heard the testimony of Mother and Father, Father's probation officer, and three employees from DCS. Much of the testimony focused on Mother's and Father's compliance with the permanency plan. The testimony revealed that Father had accomplished some of the permanency plan requirements. He had successfully completed the parenting and the anger management classes and was attending therapy sessions. Father had also visited the children every week and brought them snacks. However, Father admitted that he never paid any child support while the children were in DCS custody.

Father had particular difficulty in complying with those permanency plan requirements relating to his illegal drug use and abuse of prescription medications. Although Father successfully completed an alcohol and drug assessment, he did not attend ninety AA/NA meetings in ninety days as recommended. Father tested positive for benzodiazepines on January 14, 2014, during a drug screen. Because he claimed to have a prescription for the medication, DCS requested a pill count when he next came to visit. On January 30, 2014, Father returned with several empty pill bottles, but none of the prescriptions were for benzodiazepines.

The pill bottles also brought to light other concerns. One of the empty bottles Father brought was for 120 pills of oxycodone, a prescription he had filled on January 24, 2014. Based on the recommended dosage of four pills a day, ninety-six pills were unaccounted for. Father claimed he had transferred the missing pills to another bottle, which he had left at home. The pill bottles further indicated purchases from three different pharmacies, leading to suspicions that Father might be pharmacy shopping. As a result of these inconsistencies, DCS asked Father to return with the unaccounted for oxycodone pills and a pharmacy list for the last six months detailing where he filled his prescriptions. Father agreed, but he failed to return with the requested items.

The day before the hearing, DCS attempted to screen Father for drugs. Father claimed he could not produce a urine sample. After waiting for an hour, Father left so

that he could keep an appointment with his attorney to prepare for the termination hearing. Father knew that leaving would be considered a refusal because he was told so.

When questioned about the incident, Father stated that he had offered to return to DCS's offices following the meeting with his attorney, but the offer was declined by DCS. Father also said he remained willing to submit to a drug screen. The trial court elected to take Father up on his offer. The resulting screen indicated the presence of cocaine and marijuana in Father's system.

The positive drug screen highlighted another concern about Father. Father had been sentenced to ten years of community corrections³ in October 2008 stemming from theft under \$500 and aggravated assault charges. Following an arrest for the sale of Schedule II drugs, Father was incarcerated from July 30, 2012, until February 24, 2013. At the time of the termination hearing, Father was at risk of being incarcerated again for failing to comply with the terms of the community corrections program, primarily for failing to report weekly to his community corrections officer.

Like Father, Mother complied with some, but not all, of her permanency plan requirements. Mother completed parenting classes and engaged in individual therapy sessions. When not incarcerated, she also visited her children weekly and brought them snacks, diapers, clothing, and toys. However, Mother admitted that she paid no child support during the time her children were in DCS custody.

Also like Father, Mother had been sentenced to community corrections, in her case stemming from an identity theft charge. Although the record is unclear, Mother had violated either the terms of the community corrections program or probation, resulting in her being incarcerated on July 7, 2013. She remained incarcerated at the time of the termination hearing.

Mother testified that she hoped to be furloughed to attend an in-patient drug treatment program following her next criminal court hearing in March 2014. She admitted to a drug problem and that she had not been honest when completing the alcohol and drug assessment used to formulate the permanency plan. Mother estimated the treatment program would take between three to six months. She also thought she might have to reside in a halfway house following completion of the program. When asked about care of her children pending her completion of the drug treatment program, Mother hoped Father might be able to care for them in her absence.

³ Community corrections is an alternative to "incarceration in state penal institutions or local jails and workhouses" that can "include noncustodial community corrections options, short-term community residential treatment options and individualized evaluation and treatment services." Tenn. Code Ann. § 40-36-102(5) (2014).

The children's DCS case worker, Althea Bradshaw, confirmed that both parents visited the children but only when the parents were not incarcerated and the visits were being supervised by the children's resource parents. She also stated that Mother and Father failed to cooperate with DCS by not showing up for drug screens or responding to her attempts to contact them. Ms. Bradshaw testified that neither parent had established a suitable home. Prior to her incarceration, Mother lived with a friend, but the friend was unwilling to go through the necessary screening process to allow the children to be placed in the home. Father was also staying in the home of a friend, but Father's name was not on the lease. Ms. Bradshaw also felt the home where Father was staying was too small to accommodate the children.

Childcare presented another problem for Father. He told Ms. Bradshaw that he would have family members take care of the children while he worked, but these same family members were unable to pass a background check when DCS was seeking a placement for the children.

In an order filed March 24, 2014, the trial court ordered the termination of both parents' rights. The first three grounds for termination relied upon by the trial court rested on a finding that Mother and Father had abandoned the children. The trial court also found that Mother and Father had failed to substantially comply with the terms of the permanency plan and that the conditions that led to the children's removal persisted. The trial court found an additional ground for termination of Father's parental rights to Kendall. Specifically, the trial court found that Father was the putative father and that he had failed, without good cause or excuse, to make reasonable and consistent payments for Kendall's support. Finally, the court made detailed findings that termination of Mother's and Father's parental rights would be in the children's best interest. On appeal, Mother and Father argue that the trial court erred in finding that their failure to support the children was willful.

II. STANDARD OF REVIEW

Our review of the trial court's findings of fact in a termination proceeding is conducted de novo on the record with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010); *In re Angela E.*, 303 S.W.3d 240, 246 (Tenn. 2010). "In light of the heightened burden of proof in [termination] proceedings . . . the reviewing court must then make its own determination regarding whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, provide clear and convincing evidence that supports all the elements of the termination claim." *In re Bernard T.*, 319 S.W.3d at 596-97 (citing *State, Dep't of Children's Servs. v. Mims*, 285 S.W.3d 435, 447-

48 (Tenn. Ct. App. 2008); *see also In re Giorgianna H.*, 205 S.W.3d 508, 516 (Tenn. Ct. App. 2006); *In re S.M.*, 149 S.W.3d 632, 640 n.13 (Tenn. Ct. App. 2004)). Considerable deference is afforded to the trial court's findings in regard to witness credibility. *In re M.L.P.*, 228 S.W.3d 139, 143 (Tenn. Ct. App. 2007). Therefore, we will not reverse on an issue which hinges on witness credibility unless there is clear and convincing evidence "other than the oral testimony of witnesses which contradict the trial court's findings." *Id.* (quoting *Galbreath v. Harris*, 811 S.W.2d 88, 91 (Tenn. Ct. App. 1990)). The trial court's conclusions of law are reviewed de novo with no presumption of correctness. *Id.* at 144.

III. ANALYSIS

Parents have a fundamental right to the care, custody, and control of their children founded in the federal and State constitutions. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Angela E.*, 303 S.W.3d at 250; *In re D.A.H.*, 142 S.W.3d 267, 274 (Tenn. 2004); *Doe v. Sundquist*, 2 S.W.3d 919, 926 (Tenn. 1999). Although fundamental, this right is not absolute; the State may terminate a parent's parental rights under certain circumstances. *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982); *In re Angela E.*, 303 S.W.3d at 250. Once parental rights are terminated, all of the parent's legal rights and obligations to the child are severed. Tenn. Code Ann. § 36-1-113(l)(1) (2010).

In Tennessee, termination of parental rights proceedings are governed by statute. Tenn. Code Ann. § 36-1-113; *In re Angela E.*, 303 S.W.3d at 250; *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004). Termination proceedings follow a two-step process in which the petitioner must demonstrate, by clear and convincing evidence: (1) at least one statutory ground for termination; and (2) that termination is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). So long as one statutory ground is proved by clear and convincing evidence the trial court may proceed to consider the best interests of the child and, ultimately, the termination of parental rights. *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003).

Parental termination requires the trial court to find clear and convincing evidence of both the grounds for termination and best interest of the child determination in order to safeguard the parent's fundamental rights. *In re Jacobe M.J.*, 434 S.W.3d 565, 568-69 (Tenn. Ct. App. 2013); *In re Dakota C.R.*, 404 S.W.3d 484, 496 (Tenn. Ct. App. 2012); *see also Santosky*, 455 U.S. at 769. The purpose of this requirement "is to minimize the possibility of erroneous decisions that result in an unwarranted termination of or interference with these rights." *In re Bernard T.*, 319 S.W.3d at 596; *see also In re Angela E.*, 303 S.W.3d at 250; *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). "Clear and convincing evidence enables the fact-finder to form a firm belief or conviction regarding the truth of the facts, and eliminates any serious or substantial doubt

about the correctness of these factual findings.” *In re Bernard T.*, 319 S.W.3d at 596 (citations omitted). Unlike the preponderance of the evidence standard, “[c]lear and convincing evidence establishes that the truth of the facts asserted is highly probable.” *In re Dakota C.R.*, 404 S.W.3d at 496 (internal quotations omitted).

In this case, Mother and Father do not contest the trial court’s best interest determination. Rather, the sole issue they raise on appeal is whether the trial court erred in determining that their failure to support the children was willful. Mother and Father do not challenge the other grounds for terminating parental rights.

So long as a single statutory ground is present, the trial court is justified in proceeding to a best interest determination and terminating parental rights. *See In re D.L.B.*, 118 S.W.3d at 367. Furthermore, because Mother and Father do not raise the trial court’s best interest determination as an issue, they present no grounds for reversal, even if we were to accept their argument.⁴ Therefore, we affirm the trial court’s order terminating Mother’s and Father’s parental rights.

Our conclusion is grounded in basic principles of appellate procedure. Generally speaking, we will only address the issues raised by the parties. *Tenn. R. App. P. 13(b); Hodge v. Craig*, 382 S.W.3d 325, 334 (Tenn. 2012). This rule arises from our recognition that party control over issue presentation is a defining characteristic of the American legal system. *See United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., dissenting); *see also Hodge*, 382 S.W.3d at 334 (noting that an effectively crafted issue statement helps to define the questions to be considered by the court). Therefore, where a party fails to raise an issue on appeal, that issue is generally waived, and the trial court’s determination is final. *In re Alexis L.*, No. M2013-01814-COA-R3-PT, 2014 WL 1778261, at *2 (Tenn. Ct. App. Apr. 30, 2014) (citing *Forbess v. Forbess*, 370 S.W.3d 347, 355 (Tenn. Ct. App. 2011)).

There are, however, a limited number of situations where we will address an issue that is not properly raised by either party on appeal. For example, our courts will consider issues of justiciability even where the parties have not presented them for review. *See, e.g., Hooker v. Haslam*, 437 S.W.3d 409, 433 (Tenn. 2014) (mootness); *Osborn v. Marr*, 127 S.W.3d 737, 740 (Tenn. 2004) (standing); *Scales v. Winston*, 760

⁴ “An issue may be deemed waived, even when it has been specifically raised as an issue, when the brief fails to include an argument satisfying the requirements of *Tenn. R. App. P. 27(a)(7)* . . . [b]y the same token, an issue may be deemed waived when it is argued in the brief but is not designated as an issue in accordance with *Tenn. R. App. P. 27(a)(7)*.” *Hodge v. Craig*, 382 S.W.3d 325, 335 (Tenn. 2012) (internal citations omitted); *see also Tenn. R. App. P. 27*. Here, while Mother and Father do discuss the statutory requirements for making a best interest determination in their brief, they neither specifically raise it as an issue, nor do they argue that the trial court erred in making its best interest determination.

S.W.2d 952, 953 (Tenn. Ct. App. 1988) (jurisdiction). In addition to questions of justiciability, Tennessee Rule of Appellate Procedure 13(b) recognizes that appellate courts may review issues not raised by the parties in certain circumstances:

Review generally will extend only to those issues presented for review. The appellate court shall also consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review, and may in its discretion consider other issues in order, among other reasons: (1) to prevent needless litigation; (2) to prevent injury to the interests of the public; and (3) to prevent prejudice to the judicial process.

Tenn. R. App. P. 13(b). While this rule grants us discretion in reviewing an issue not raised by the parties on appeal, “this discretion [should] be sparingly exercised.” Tenn. R. App. P. 13(b) cmt.

We are also mindful of our Supreme Court’s instruction to review every ground relied upon by the trial court in parental terminations cases in order to prevent “unnecessary remands of cases.” *In re Angela E.*, 303 S.W.3d at 251 n.14. However, this instruction does not necessitate review of every ground for termination in every case. *See, e.g., In re Kyla P.*, No. M2013-02205-COA-R3-PT, 2014 WL 4217412, at *3 (Tenn. Ct. App. Aug. 26, 2014) (addressing only whether termination was in the child’s best interest where the statutory grounds were not raised as an issue); *In re A.T.S.*, No. M2004-01904-COA-R3-PT, 2005 WL 229905, at *3 (Tenn Ct. App. Jan. 28, 2005) (same). The danger of “unnecessary remand” is largely eliminated⁵ where the issue cannot be raised by the parties in a future appeal. *See State v. West*, 19 S.W.3d 753, 756-57 (Tenn. 2000) (declining to examine a claim because it was not raised on direct appeal).

We were faced with a similar issue in *In re Alexis L.*, No. M2013-01814-COA-R3-PT, 2014 WL 1778261, (Tenn. Ct. App. Apr. 30, 2014), where the mother appealed only four of the five grounds for termination found by the trial court. 2014 WL 1778261, at *2. We found that the mother’s failure to address the fifth ground for termination constituted a waiver, making the trial court’s decision final as to that ground. *Id.* We then declined to review issues the mother raised regarding other grounds for termination because it would not affect the outcome of the case. *Id.*

Mother and Father have not appealed all of the multiple grounds that the trial court found by clear and convincing evidence justified the termination of their parental rights. As a result, they have waived their arguments as to the remainder of the grounds for termination, and the trial court’s decision as to the grounds not raised on appeal is final.

⁵ It cannot be completely eliminated because the Supreme Court also possesses the discretion to consider issues not raised on appeal. Tenn. R. App. P. 1, 13(b).

Mother and Father also failed to raise the trial court's best interest determination as an issue on appeal and so that determination is also final. Therefore, both elements required for the termination of parental rights are satisfied, and we affirm the decision of the trial court.

IV. CONCLUSION

For the foregoing reasons, the trial court's judgment is affirmed. Costs of this appeal shall be taxed to Mother and Father equally, for which execution shall issue, if necessary.

W. NEAL McBRAYER, JUDGE