

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 5, 2014

IN RE: SAMUEL P. ET AL.

**Appeal from the Circuit Court for Pickett County
No. 2013CV13 John J. Maddux, Jr., Judge**

No. M2013-02234-COA-R3-PT - Filed June 24, 2014

Appellants are the parents of three children who were initially placed in foster care due to evidence of drug use in the parents' home. In the Juvenile Court, the Tennessee Department of Children's Services ("DCS") petitioned to declare the children dependent and neglected and for emergency temporary custody. Following entry of a protective custody order, DCS filed an amended petition to declare the children dependent and neglected based upon additional allegations of severe child abuse. The Juvenile Court found severe abuse and the children to be dependent and neglected. Parents appealed to the Circuit Court, and DCS filed a petition to terminate parental rights. Following a trial, during which neither parent testified or presented evidence, the Circuit Court terminated parental rights as to each of the children. Both parents appeal the Circuit Court's judgment. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit 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.

Andrea Ayers, Livingston, Tennessee, for the appellant, J.L.F.

Chasity Hancock, Livingston, Tennessee, for the appellant, R.L.P.

Robert E. Cooper, Jr., Attorney General and Reporter, and Alexander S. Rieger, Assistant Attorney General, for the appellee, Tennessee Department of Children's Services.

OPINION

I. BACKGROUND AND PROCEDURAL HISTORY

DCS filed this parental termination case against the biological parents, J.L.F.

(“Mother”) and R.L.P. (“Father”), with regard to Samuel P., Sara P., and Scotty P. (collectively, “the Children”). The Children were removed from Mother and Father’s home on September 14, 2012, and placed in foster care. At the time, Samuel, Sara, and Scotty were respectively eight, seven, and four years old.

A. Juvenile Court Proceedings

DCS filed a Petition to Declare Children Dependent and Neglected and for Emergency Temporary Legal Custody to the State on September 18, 2012. In the petition, DCS alleged abuse of prescription medications, including opiates, by both parents. DCS also asserted that Father’s brother, who lived with the family and shared a room with Mother and youngest son, abused drugs.

The Juvenile Court entered a Protective Custody Order that same day. The court ordered that the Children be placed in the temporary care and custody of the State and that future visitation between the Children and Mother and Father be supervised by DCS. The Juvenile Court scheduled a preliminary hearing to be held the following day, which Mother and Father waived. The court then issued a Preliminary Hearing Order in which it set an adjudicatory hearing to be held in November. The court ordered the Children to have therapeutic visits with Mother and Father for a minimum of four hours per month as well as supervised phone contact twice each week.

Before the adjudicatory hearing was held, DCS filed an Amended Petition to Declare Children Dependent and Neglected and for Emergency Temporary Legal Custody to the State. In its amended petition, DCS repeated its earlier allegations, but in addition, DCS alleged the Children “ha[d] been sexually abused, or seen inappropriate sexual acts performed in their presence, or both.” According to DCS:

On November 13, [a DCS employee] received a phone call from [the Children’s foster mother] in regards to the [Children]. . . . [The foster mother] stated that during play time, Sara was caught trying to “massage” her two brothers['] private area[s]. [The foster mother] said she pulled [Sara] away into her office and talked to her about everyone’s body is private and to not touch others. [The foster mother] was trying not to make a big deal about it. When they were coming back into the room, Sammy was on top of Scotty humping him. [The foster mother] had to address this with the two boys also. [The foster mother] said based on what she saw and where Sara was going, that Sara knows exactly what to do, how to do it and has a desire to do it. [The foster mother] said Sara has had to have seen something for what she knows. [The foster mother] asked Sara about what she was doing and Sara told [the

foster mother] her “boyfriend” taught her. [The foster mother] could not understand the name she gave because of [Sara’s] speech impediment, but that he was daddy and Uncle Eddie’s friend. Sammy said also their cousin does this to them. [The foster mother] said Sammy will not talk about it and will cry.

The Juvenile Court issued an Adjudicatory and Dispositional Hearing Order on February 19, 2013, in which it found the Children were dependent and neglected. The court also found that the Children were victims of severe child abuse based upon “sex abuse perpetrated by the [F]ather” and the failure of Mother to protect the Children from the abuse. The court ordered the Children to remain in DCS custody, terminated the visits between the Children and Mother and Father, and relieved DCS from further efforts to reunite the Children with Mother and Father.

Mother and Father each appealed the Adjudicatory and Dispositional Hearing Order to the Circuit Court. Once the case was in Circuit Court, DCS filed a Petition for Termination of Parental Rights. DCS alleged a single ground to support termination of parental rights, severe child abuse by both Mother and Father against the Children.

B. Circuit Court Proceedings

The Circuit Court held a trial on August 15, 2013.¹ Only DCS presented proof, which included the testimony of two individuals with DCS, the Children’s foster mother, and John Crody, a mental health counselor who testified as an expert witness. Mr. Crody worked with the children for several months following their removal from Mother and Father’s home. Mother and Father attended the trial, but neither parent testified.

The Circuit Court issued a Final Decree of Guardianship on August 27, 2013, in which it terminated Mother’s and Father’s parental rights to Samuel, Sara, and Scotty. The court found DCS proved by clear and convincing evidence grounds for termination of Mother’s and Father’s parental rights based on the following findings of fact:

11. [J.L.F.] and [R.L.P.] have committed severe child abuse as defined by Tenn. Code Ann. § 37-1-102(23) against Samuel [P.], Sara [P.], and Scotty [P.], who are the children who are the subject of this Petition. The Respondents’ actions that constitute severe child abuse were sexual abuse by [R.L.P.] while [J.L.F.] watched and sexual acts between the children observed

¹ Mother’s and Father’s appeals of the Juvenile Court’s decision were heard concurrently with DCS’s Petition to Terminate Parental Rights.

by the Respondents. The severe abuse also includes physical abuse and exposure to domestic violence that caused psychological harm. Therefore, their parental rights should be terminated pursuant to Tenn. Code Ann. § 36-1-113(g)(4).

The Court then found DCS proved by clear and convincing evidence that termination of Mother's and Father's parental rights was in the best interest of the Children based on the following findings of fact:

1. [R.L.P.] and [J.L.F.] have not made an adjustment of circumstances, conduct or conditions as to make it safe and in the children's best interest to be in the home of the parents. Tenn. Code Ann. § 36-1-113(i)(1) requires the court to consider this factor in determining whether termination of parental rights is in the best interest of the children.
2. [R.L.P.] and [J.L.F.] have committed brutality, physical, sexual, emotional or psychological abuse or neglect toward other children in the family or household. . . . Tenn. Code Ann. § 36-1-113(i)(6) requires the court to consider this factor in determining whether termination of parental rights is in the best interest of the children.
3. [R.L.P.'s] and [J.L.F.'s] emotional status would be detrimental to the Children and/or prevent them from effectively providing safe and stable care and supervision for the Children. Tenn. Code Ann. § 36-1-113(i)(8) requires the court to consider this factor in determining whether termination of parental rights is in the best interest of the children.
4. [R.L.P.] and [J.L.F.] continue to make lifestyle choices that prevent them from being able to parent the Children or to provide a home for the Children.
5. The Children need to be released from the stigma of being foster children.

Thus, the Court finds that the Tennessee Department of Children's Services has proven by clear and convincing evidence that grounds for termination of parental rights exist and has proven by clear and convincing evidence that it is in the best interest of the Children that all the parental rights of said Respondents to said Children be forever terminated; and therefore the complete custody, control, and guardianship of said Children be awarded to the State of Tennessee, Department of Children's Services, with the right to place said Children for adoption and to consent to said adoption *in loco parentis*.

Mother and Father appeal from the Circuit Court’s judgment terminating their parental rights to Samuel, Sara, and Scotty.

II. ANALYSIS

Termination of parental rights is one of the most serious decisions courts make. As noted by the United States Supreme Court, “[f]ew consequences of judicial action are so grave as the severance of natural family ties.” *Santosky v. Kramer*, 455 U.S. 745, 787 (1982). Terminating parental rights has the legal effect of reducing the parent to the role of a complete stranger, and of “severing forever all legal rights and obligations of the parent or guardian.” Tenn. Code Ann. § 36-1-113(l)(1) (Supp. 2013).

A parent has a fundamental right, based in both the federal and state constitutions, to the care, custody, and control of his or her own child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174-75 (Tenn. 1996); *In re Adoption of a Female Child*, 896 S.W.2d 546, 547-48 (Tenn. 1995). While this right is fundamental, it is not absolute. The State may interfere with parental rights, through judicial action, in some limited circumstances. *Santosky*, 455 U.S. at 747; *In re Angela E.*, 303 S.W.3d at 250.

Our Legislature has identified those situations in which the State’s interest in the welfare of a child justifies interference with a parent’s constitutional rights by setting forth the grounds upon which termination proceedings may be brought. Tenn. Code Ann. § 36-1-113(g). Termination proceedings are statutory, *In re Angela E.*, 303 S.W.3d at 250; *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004), and parental rights may be terminated only where a statutorily defined ground exists. 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).

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); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). This heightened burden of proof is one of the safeguards required by the fundamental rights involved, *see Santosky*, 455 U.S. at 769, and its purpose “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 586, 596 (Tenn. 2010); *see also In re Angela E.*, 303 S.W.3d at 250; *In re M.W.A.*, 980 S.W.2d at 622. “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, “[e]vidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable.” *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005).

Appellate courts review the trial court’s findings of fact in termination proceedings *de novo* on the record and accord these findings a presumption of correctness unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *In re Bernard T.*, 319 S.W.3d at 596; *In re Angela E.*, 303 S.W.3d at 246. “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.

On appeal, Mother and Father raise three issues. First, they argue that the trial court erred in determining that DCS had made reasonable efforts to reunify the Children with Mother and Father and to assist the family in remedying the conditions that led to foster care. Second, Mother and Father contend the trial court erred in finding that the ground for terminating Mother’s and Father’s parental rights was established by clear and convincing evidence. Third, Mother and Father assert the trial court erred in concluding that it was in the Children’s best interest for Mother’s and Father’s parental rights to be terminated. Because the first issue raised is resolved by reference to the second issue, we address the grounds for termination first.

A. Grounds for Termination

The existence of only one statutory ground is sufficient to support a court’s termination of parental rights. *In re Angela E.*, 303 S.W.3d at 251. The commission of “severe child abuse” is identified as a ground supporting the termination of a parent’s rights. Tenn. Code Ann. § 36-1-113(g)(4). “Severe child abuse” is defined to include unlawful sexual contact with a child under thirteen years of age. Tenn. Code Ann. § 39-13-504(a)(4) (2010). It includes both the commission as well as the “knowing failure to protect the child from the commission of any such act towards the child.” Tenn. Code Ann. § 37-1-102(b)(23)(C) (Supp. 2013).

As alleged by DCS, while in foster care, the Children each acted out in an abnormal manner. In her testimony, the foster mother recalled interrupting at least two incidents, one in November 2012 in which one child was manually stimulating the other two, and a second after Christmas of that same year in which one sibling was sodomizing the other while a third watched. Upon questioning by the foster mother, one of the Children related that those acts

and ones of a similar nature were common occurrences in their former home. The Children further indicated to the foster mother that their parents were aware of such activity.

When Mother was apprised of these instances, a DCS worker testified that Mother admitted that the Children had performed similar acts in the home. When asked how she responded, Mother replied, “she would tell them to stop and spank them, and send them to their room.”

Mr. Crody, the mental health counselor, testified concerning his sessions with the Children. During those sessions, one or more of the Children confirmed that Mother watched sexual activities involving the Children and instances of sexual abuse involving different members of the family. When asked about the Children’s veracity, Mr. Crody testified as follows:

Q: Were you able to formulate an opinion based on your treatment of these children, and the disclosures to you by the caregiver of the actual sexual acts that she observed with these children, whether or not these children were victims of sexual abuse?

A: Yes.

Q: Do you have an opinion with a reasonable degree of certainty as a licensed professional counselor whether or not these children were sexually abused?

A: It is my opinion they were sexually abused, all three of them.

Q: Do you have an opinion as to the credibility of the children’s statement that their father was one of the abusers, with a reasonable degree of certainty as a licensed professional counselor?

....

A: I don’t have a doubt.

Q: You don’t have a doubt? Do you believe it was credible?

A: Yes.

Q: . . . Do you have an opinion with a reasonable degree of certainty as a

licensed professional counselor as to the credibility of the children's statements that their mother watched and saw this sexual abuse of the children?

A: I believe that report was credible.

Q: The children's statements of that were credible?

A: Yes.

In addition to the evidence concerning sexual abuse, the record contains evidence of violence in the parents' home. The foster mother testified that the two oldest children related an incident in which Father picked up a table with food and threw it. The Children also told the foster mother of screaming and yelling in the home and "fighting all the time."

A document authored by Mr. Crody entitled "Clinical Opinion" was submitted as an exhibit during the trial. Mr. Crody reported in this document that the Children told him about an incident in which Father put a gun in his mouth and threatened to kill himself. This episode was extremely upsetting to the Children. Mr. Crody also reported in his notes that the Children told him Father pulled Mother's hair and that the Children were fearful that Father would hurt Mother. Sara drew pictures showing Father throwing plates at the Children and slapping them all over. Mr. Crody reported that the Children were fearful that Father would hurt Mother.

Mother and Father were present during the trial. They neither testified nor produced any evidence to dispute Mr. Crody's testimony. Mother and Father contended in their briefs that the foster mother did not observe the Children engaging in any behavior indicative of sexual abuse until three to four months following their removal from the parents' home. "This is important to note," Mother and Father wrote in their briefs, "because this indicates that the children were in [the foster mother's] home for a period of three to four months before any sexual abuse signs arose." However, the record does not support this assertion.

According to the amended petition filed with the Juvenile Court on November 15, 2012, the foster mother witnessed sexual behavior among the Children on November 13, two days before the amended petition was filed. The foster mother witnessed Sara trying to "massage" her two brothers' private parts. She later observed the older boy on top of the younger boy, "humping him." According to the foster mother, Sara knew exactly what to do, how to do it, and had a desire to do it. The Children's foster mother reported these observations to DCS approximately two months after the Children were removed from Mother and Father's home, not three to four months as Mother and Father contend. When

these behaviors were observed, Scotty was four years old, Sara was seven years old, and Samuel had just turned nine years old.

The trial court found that DCS established a basis for terminating Mother's and Father's rights to the Children by clear and convincing evidence. Specifically, the court found that Mother and Father have committed severe child abuse, consisting of Father's sexual abuse against the Children while Mother watched, physical abuse, and exposure to domestic violence that caused psychological harm. We find that the facts, as found by the trial court and as supported by the evidence, provide clear and convincing evidence that Mother and Father committed severe child abuse, as that term is statutorily defined, against each of the Children. Therefore, we affirm the trial court's determination that a statutory ground exists to terminate Mother's and Father's parental rights to Samuel, Sara, and Scotty.

B. Reasonable Efforts

Mother and Father argue the trial court erred in determining that DCS made reasonable efforts to reunify the Children with Mother and Father and remedy the conditions that led to foster care as required by Tennessee Code Annotated section 36-1-166. In most cases where children are removed from their parents' home, DCS has an affirmative duty "to use reasonable efforts to make it 'possible for the child[ren] to return safely to the child[ren's] home.'" *In re R.L.F.*, 278 S.W.3d 305, 315-16 (Tenn. Ct. App. 2008) (quoting Tenn. Code Ann. § 37-1-166(a)(2), (g)(2) (Supp. 2013)). "Reasonable efforts" are defined by the statute as "the exercise of reasonable care and diligence by the department to provide services related to meeting the needs of the child and the family." Tenn. Code Ann. § 37-1-166(g)(1); *see In re R.L.F.*, 278 S.W.3d at 316-17 (including a general discussion of reasonable efforts).

DCS is relieved of its duty to use reasonable efforts to reunite a family when "aggravated circumstances" exist:

Reasonable efforts of the type described in subdivision (g)(2) shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that:

(A) The parent has subjected the child that is the subject of the petition or any sibling or half-sibling of the child who is the subject of the petition or any other child residing temporarily or permanently in the home to aggravated circumstances as defined in § 36-1-102

Tenn. Code Ann. § 37-1-166(g)(4); *see In re R.L.F.*, 278 S.W.3d at 317 n.1 (including a

discussion of aggravating circumstances with regard to reasonable efforts).

Section 36-1-102(9) defines “aggravated circumstances” to include rape, rape of a child, incest, or severe child abuse. As discussed above, “severe child abuse” includes unlawful sexual contact with a child under the age of thirteen years old and includes both the commission as well as the “knowing failure to protect the child from the commission of any such act towards the child.” Tenn. Code Ann. § 37-1-102(b)(23)(C); Tenn. Code Ann. § 39-13-504(a)(4) (2010).

Contrary to Mother and Father’s contention, the trial court did not find that DCS made reasonable efforts to reunify the Children with Mother and Father. DCS was relieved from doing so by the Juvenile Court when the court issued its Adjudicatory and Dispositional Hearing Order. We find that the issue concerning lack of reasonable efforts to reunify the Children with Mother and Father is without merit based primarily on our determination that the evidence presented at trial was clear and convincing that Mother and Father engaged in severe child abuse against each of the Children.

C. Best Interest Analysis

Having found a sufficient basis for terminating Mother’s and Father’s rights, we next consider whether termination is in the Children’s best interest. The Legislature has instructed courts to consider the following factors in making a best interest determination:

- (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).

In conducting a best interest analysis, the focus is on what is best for the children, not what is best for the parents. *In re Marr*, 194 S.W.3d 490, 499 (Tenn. Ct. App. 2005); *White v. Moody*, 171 S.W.3d 187, 193-94 (Tenn. Ct. App. 2004). Not every factor enumerated in the statute applies to every case because the facts of each case can vary widely. *In re William T.H.*, No. M2013-00448-COA-R3-PT, 2014 WL 644730, at *4 (Tenn. Ct. App. Feb. 18, 2014) (stating that every statutory factor is not necessarily applicable to each case of parental termination). For example, in this case, the Juvenile Court terminated all contact between the parents and the Children in February 2013, with the entry of its Adjudicatory and Dispositional Hearing Order. Thus, the factor regarding visitation has no application to the best interest analysis.

In conducting its best interest analysis, the trial court considered factors (1), (6), and (8), and considered the parents' lifestyle choices in determining that it was in the Children's best interest that Mother's and Father's parental rights be terminated.²

² A DCS employee also testified at trial, without objection, that two other children were removed from Mother and Father by the State of Kentucky due to physical abuse and failure to protect from sexual abuse.

During the trial, Mr. Crody testified about the Children's best interest:

Q: Based on your counseling sessions with the children, and the behaviors that [their foster mother] told you that she directly observed with these children, do you have an opinion as to whether or not it is in these children's best interest to terminate parental rights so they can be adopted, with a reasonable degree of certainty as a licensed professional counselor?

A: Yes.

Q: You have an opinion. Tell us what that opinion is.

A: Based on what I observed and assessed with the children at the beginning of treatment, and where they were at the point of prospective adoptive placement, I think if they were to return to their parents that it would be detrimental to their wellbeing. They would regress back to behaviors that we saw.

Q: What are the long term mental health risks to these children if they do regress or do not make progress in dealing with their sexual victimization?

A: Because of the severity of the abuse, these children are always going to have to manage this issue in their lives, but if there is any period of regression their stability as adults would be greatly impaired.

Evidence was presented at trial that the Children's behaviors have improved since they were removed from Mother's and Father's home. At the time of trial, the Children were living with a couple who were considering adopting all three siblings. Mr. Crody testified that he had spoken with the Children at their pre-adoptive home and that they seemed to be doing well in their new environment.³ Thus, factor (5) also favors terminating Mother's and Father's rights.

Based upon our review of the record, we conclude DCS established by clear and convincing evidence that terminating Mother's and Father's rights to the Children is in each child's best interest.

³The Children's foster mother testified the Children "were excited to get a new family that was nice to them."

III. CONCLUSION

The trial court's judgment terminating Mother's and Father's parental rights to Samuel P., Sara P., and Scotty P is affirmed. Costs of this appeal shall be taxed to the appellants, J.L.F. and R.L.P., for which execution shall issue, if necessary.

W. NEAL McBRAYER, JUDGE