

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 19, 2013 Session

IN RE: WILLIAM T. H.

**Appeal from the Circuit Court for Sumner County
No. 83CC12011CV416 C. L. Rogers, Judge**

No. M2013-00448-COA-R3-PT - Filed February 18, 2014

Mother and Stepfather filed petition seeking to terminate biological Father's parental rights and to permit Stepfather to adopt Child. Trial court found Father had abandoned Child by failing to visit or support Child in the four months preceding the petition's filing and that it was in Child's best interest to terminate Father's rights. Father appealed. We reverse the trial court's judgment terminating Father's rights because the evidence was not clear and convincing that it is in Child's best interest that Father's rights be terminated.

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

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Nancy Krider Corley, Nashville, Tennessee, for the appellant, W.F.A., Jr.

Joseph Y. Longmire, Jr., Hendersonville, Tennessee, for the appellees, L.H.M., and S.W.M.

OPINION

I. BACKGROUND

This is a parental termination and stepparent adoption case brought by the biological mother, L.H.M. ("Mother"), and her husband, S.W.M. ("Stepfather"), against the biological father, W.F.A., Jr. ("Father") with regard to William T. H. ("Child"). Mother and Father were teenagers and in high school when Child was born in April 2005. Mother continued living with her parents after Child was born, and Father continued living with his parents.

Father was at Child's birth and spent time with Mother and with Child nearly every day for the first year of Child's life. In the fall of 2006, Father went to college in Murfreesboro. He came home on weekends to see Child. Father contributed to Child's baby-sitting expenses and diaper expenses, but Mother and Father had no formal support arrangement.

Father withdrew from college during the spring of 2007 and moved back home to be closer to Child and Mother. Father testified he spent as much time as he could with Child in 2007 and 2008. Father brought Child to his house on occasion to spend the night.

Father testified, and Mother agreed, that Mother was in charge of Child's schedule, and Mother decided whether Father could spend time with Child or not. If Father wanted to see Child, but Mother said "no," then Father accepted Mother's decision and waited until another time to try to see Child. The court asked Father what he did when Mother refused his requests to see Child, and Father responded:

I would persist. But I didn't want to continue to prod and just not be able to see him at all. So I would just say okay. I was still getting to see him during the day regularly, so I didn't want to interrupt that.

Mother and Father never sought a court's assistance with regard to setting child support or visitation. The only time they appeared in court prior to the instant case was in 2007, when the State of Tennessee initiated a proceeding in the Juvenile Court. Child was receiving medical coverage through TennCare, and the State sought, and obtained, an Order requiring Father to provide Child with medical insurance. The Juvenile Court did not order any child support to be paid or decide any issues with regard to visitation during this proceeding in 2007.

Beginning in the spring and summer of 2009, Mother began restricting Father's access to Child. Father testified that when he phoned to speak with Child, Mother would tell Father Child did not want to speak with him. When Father asked for Child to come to stay with him at his house, Mother would refuse Father's requests.

Mother began dating Stepfather around May 2009, and Mother and Stepfather were married in March 2011. From the time Mother began dating Stepfather, Father was able to spend less and less time with Child. Father testified that he suggested to Mother putting together a parenting plan so that Father would be able to have regular visitation with Child. Mother, however, refused to discuss a parenting plan with Father.

Father testified that in 2010, the only way Father was able to see Child was at Child's soccer games. Father testified he asked Mother for a schedule of his games, but that Mother refused to give him any information. The last time Father spoke with Child was in April or May of 2010, at the soccer field.

Testimony and documents were introduced with regard to Father's contributions of financial support for Child. Father testified that he has continuously provided medical insurance for Child from the time he was ordered to provide this coverage in 2007 through the date of trial.¹

There was also evidence that Father contributed to Child's childcare expenses beginning in the summer of 2005. Once Child was old enough to attend school, Father contributed to Child's school expenses. The last check Father gave Mother was for \$200 and was dated April 15, 2010.²

Mother and Stepfather were married in March 2011 and filed their petition for termination and adoption the following month, in April. The sole ground for terminating Father's parental rights was abandonment: Father's willful failure to visit or pay financial support in the four months immediately preceding the petition's filing. Father filed an Answer and Counter-Petition in which he sought shared custody of Child and asked the court to enter an order setting child support and a reasonable residential schedule.

II. TRIAL COURT ORDERS

The trial took place in December 2012, and the trial court issued a final judgment terminating Father's parental rights in January 2013. The trial court concurrently approved the petition for adoption of Child by Stepfather. The grounds for the court's ruling that Father's rights should be terminated were that Father had abandoned Child by willfully failing to pay support and willfully failing to visit Child in the four months preceding the date the petition was filed. Regarding Child's best interest, the court wrote:

¹Mother testified that in 2009 she checked on Father's coverage of Child and was informed that Father's insurance for Child had lapsed. Documentary evidence was presented indicating Father had insurance for 2011 and 2012, and Mother presented no evidence disputing Father's testimony that Child was covered under his plan for these two years.

²Mother testified that this check bounced, but there was no evidence this check was ever deposited. Father testified that after Mother contacted him about the check, he phoned the bank on which it was drawn and was told there were sufficient funds to cover the check.

Termination of [Father's] parental and legal rights to [Child] is in the best interest of said child; the Court finding that by terminating the parental rights the child has an opportunity to be prepared to become a caring and productive adult. Further the stable environment that the child is currently in and consistency of same supports this finding and constitutes clear and convincing evidence of grounds and determination of the child's best interest.

III. STANDARD OF REVIEW

Proceedings to terminate parental rights are statutory. *In re Angela E.*, 303 S.W.3d at 250; *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004). Persons seeking to terminate another's parental rights must prove two things. Tennessee Code Annotated § 36-1-113(c) requires that termination of parental rights must be based upon: (1) A finding by the court that the grounds for termination of parental rights have been established; and (2) that termination of the parent's rights is in the best interests of the child.

Both grounds and best interests must be proved by clear and convincing evidence. *In re Angela E.*, 303 S.W.3d at 250 ; *In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006); *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, *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); *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, *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005), and eliminates any serious or substantial doubt about the correctness of these factual findings. *In re Valentine*, 79 S.W.3d at 546; *State, Dep't of Children's Servs. v. Mims (In re N.B.)*, 285 S.W.3d 435, 447 (Tenn. Ct. App. 2008).

In re Bernard T., 319 S.W.3d at 596. In contrast to the preponderance of the evidence standard, clear and convincing evidence should demonstrate that the truth of the facts asserted is "highly probable" as opposed to merely "more probable" than not. *In re M.A.R.*, 183 S.W.3d 652, 660 (Tenn. Ct. App. 2005).

Appellate courts review the trial court's findings of fact in termination proceedings using the standard of review in 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. Thus, reviewing courts will review the trial court's findings of fact *de novo* on the record and accord these findings a presumption of correctness

unless the evidence preponderates otherwise. *In the Matter of M.L.P.*, 281 S.W.3d 387, 393 (Tenn. 2009); *In re A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007). In light of the heightened burden of proof in termination proceedings, the reviewing court must make its own determination as to whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, provide clear and convincing evidence that supports all the elements necessary to terminate a parent's rights. *In re Bernard T.*, 319 S.W.3d at 597.

IV. GROUNDS AND BEST INTERESTS

The existence of only one statutory ground must be proved to support a termination. *In re Angela E.*, 303 S.W.3d at 251; *In re Valentine*, 79 S.W.3d at 546. The trial court herein found that there was clear and convincing evidence that Father had abandoned Child by willfully failing to visit and willfully failing to support during the requisite four month period. Tenn. Code Ann. § 36-1-102(1)(A)(I).

Father acknowledges that he did not visit Child in the four months preceding Mother and Stepfather's filing of their petition. He asserts, however, that Mother thwarted his attempts to visit with Child, and that his lack of visitation was, therefore, not "willful." With regard to the trial court's finding that Father had failed to provide support for Child within the four months preceding the petition's filing, Father points out that he was providing medical insurance for Child throughout this period and that no court has ever ordered child support to be paid in any particular amount.

"The concept of 'willfulness' is at the core of the statutory definition of abandonment." *In re Adoption of Muir*, 2003 WL 22794524, at *4 (Tenn. Ct. App. Nov. 25, 2003); see *In re A.D.A.*, 84 S.W.3d 592, 598 (Tenn. 2002) (constitutionally sound finding of abandonment requires finding that parent acted intentionally in failing to support or visit his or her child). Stepfather, of course, argues that the evidence supports the trial court's finding of willfull failures to visit and support.

We need not decide whether the evidence of Father's willfulness met the clear and convincing standard. We have concluded that, whether or not a ground was proved, the appeal can be decided on the basis of the best interests analysis. Father argues that even if his conduct satisfied the statutory definition of "abandonment," the trial court erred in finding that it is in Child's best interest for Father's parental rights to be terminated. We agree.

It is clear that "[t]he best interests analysis is separate from and subsequent to the determination that there is clear and convincing evidence of grounds for termination." *In re Angela E.*, 303 S.W.3d at 254. As we have stated before, the existence of a ground does not inexorably lead to the conclusion that termination of a parent's rights is in the best interest

of the child. *In re C.B.W.*, 2006 WL 1749534, at *6 (Tenn. Ct. App. June 26, 2006). It is a separate analysis.

In conducting a best interest analysis, the focus is on what is best for the child, not what is best for either parent. *In re Marr*, 194 S.W.3d at 499; *White v. Moody*, 171 S.W.3d 187, 193-94 (Tenn. Ct. App. 2004). 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 statutory factor is not necessarily applicable to a particular situation. The relevance and weight to be given each factor depends on the unique facts of each case. *In re Marr*, 194 S.W.3d at 499; *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*, 1995 WL 422470, at *4 (Tenn. Ct. App. July 19, 1995)).

A number of the statutory factors, by their language, were intended to apply in situations where a child has been removed from the home, is in the custody of the state, and is in foster care. In those situations, the preference is for the child to remain in foster care the least amount of time possible. If the parent does not make adjustments that would allow the return home of the child, termination of parental rights is the only way the child can obtain the stability of adoption. Consequently, many of the statutory factors focus on conditions in the home of the parent. Examples include:

- (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;
- (5) The effect a change of caretakers and physical environment is likely to have on the child’s emotional, psychological and medical condition;

Tenn. Code Ann. § 36-1-113(i).

In the case before us, Child has never been in foster care and has two biological parents who apparently have homes suitable for Child. The factors that presume a change of physical custody (as when a child is returned home from foster care) do not apply to the situation before us. Denial of a petition for termination of parental rights does not affect custody. *In re Valentine*, 79 S.W.3d at 550; *State v. R. S.*, 2003 WL 22098035, at *18 (Tenn. Ct. App. Sept. 11, 2003).

In ruling on Child's best interests, the trial court stated:

Now, moving on to what's in the child's best interests. I tried, in doing that, it's my opinion that the Court is looking for this young man's best interests and in substance by terminating the rights of this man, the young man has the opportunity for a, to be prepared to become a caring and productive adult. I've heard testimony about the environment that he would be in, the stability that he'll have, the support that he'll have and has had, the consistency of that, the care and the concern. And I've also heard such things as first grade teacher not even recognizing who the father is. I don't need to go through all the other litany of the child's best interests that I have in answering the other questions of abandonment.

You don't get but one chance to be a father and you can choose how you want to go about it, and the wrong choice was made here voluntarily. And I can't go back and I can't stop time for the child. I've got to move forward. My only interest now is the child's best interests. I don't have time to let somebody try to see if they can do it, practice to see if they can do it, hope they can do it. I've got to have more likely than not the right that I see is best for my little boy.

So the father's rights are terminated. And it is also clear and convincing evidence that there was just no evidence to the contrary, really, when he said I just quit. But it's certainly in the child's best interests for the termination and also for the stepparent's adoption.

Thus, in reaching its holding on best interests, the trial court relied on the facts supporting its ruling that Father had "abandoned" Child, as statutorily defined, *i.e.*, failure to support or visit. In addition, the trial court focused on the positive environment Child would have living with Stepfather. However, as discussed earlier, the Child's environment living with Stepfather would not change if Father's rights were not terminated.

No evidence was introduced that Father's home is unsafe or detrimental to Child in any way, or that Father or his lifestyle presents any danger to Child. However, the test here is not which residential placement would be better for Child. As our Supreme Court has written, a father's constitutional right to parent his child "may not be forfeited in a balancing test or to another man who may appear to be a more ideal father." *In re T.K.Y.*, 205 S.W.3d 343, 352 (Tenn. 2006).

This is not a comparison between living with Mother and Stepfather, on one hand, and living with Father, on the other. Instead, the question is whether Child's best interests are served by termination of Father's parental rights, thereby reducing Father to the role of a complete stranger and "severing forever all legal rights and obligations" of Father. Tenn. Code Ann. § 36-1-113(l)(1). We find no evidence that having Father involved in Child's life, in addition to Stepfather, would be contrary to Child's best interests.

In support of their petition, Mother and Stepfather offered the testimony and report of a licensed psychologist who had met with Mother, Stepfather, and Child. He did not meet with Father and knows only what Mother and Stepfather told him about Father. The psychologist testified about Child's emotional health, Child's relationship with Stepfather, and Child's relationship with Father. The psychologist testified that Child was unable to remember spending time with Father. No testimony was offered, however, regarding the effect of Father being totally removed from Child's life or that of Father developing a relationship with Child.

Father acknowledges that Child is happy and thriving in Mother and Stepfather's home. Father just wants the opportunity to spend time with his son and develop a relationship with him.³ We also recognize that Stepfather has provided Child with love, support, and a stable environment. We assume that will continue, whether Father is involved in Child's life or not.

In reviewing the evidence introduced at trial, we find that Stepfather has failed to carry his burden of proving by clear and convincing evidence that terminating Father's parental rights is in the best interest of Child. We, therefore, reverse the trial court's judgment terminating Father's parental rights and vacate its order granting Mother and

³Father testified he does not want to interfere with Child's relationship with Stepfather:

There's no reason [Child] can't love [step-Father] and do things with [Stepfather], but do things with me as well. There's no reason that he can't spend time with both of us. He can't have two people that love him too much. I have no problem with [Stepfather.] I just want [Child] to be happy and have the ability to have the love and support that I can give him along with the family that he currently has.

Stepfather's petition for adoption.

V. CONCLUSION

The trial court's judgment terminating Father's parental rights is reversed and the Order of Adoption is vacated. We direct the trial court, upon Father's application, to set a reasonable parenting plan or visitation schedule to allow Father to become reacquainted with Child and to set child support. Costs shall be taxed to appellees, L.H.M. and S.W.M., for which execution shall issue if necessary.

PATRICIA J. COTTRELL, JUDGE