

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Submitted on Briefs, October 23, 2006

**IN RE: H.O.K., (DOB 3-5-2004), D.M. v. M.K. and STATE OF
TENNESSEE, DEPARTMENT OF CHILDREN'S SERVICES**

**Direct Appeal from the Chancery Court for Greene County
No. 20040290 Hon. Thomas R. Frierson, II, Chancellor**

No. E2006-01227-COA-R3-PT - FILED DECEMBER 11, 2006

The Trial Court terminated the mother's parental rights on statutory grounds of abandonment and failure to comply with the plan of care. On appeal, we affirm the Trial Court's Order of Termination.

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

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Gerald T. Eidson, Greeneville, Tennessee, for appellant.

N. David Roberts, Jr., Knoxville, Tennessee, for appellee, D.M..

OPINION

A Petition was filed on October 7, 2004, to terminate the parental rights of M.K.

The Petition alleged that H.O.K. had been in petitioner's physical custody since March 17, 2004, and was in the legal custody of the State. The Petition alleged that genetic testing had determined that D.P. was the biological father of the child, and that the mother had abandoned the child by willfully failing to support the child for four consecutive months immediately preceding the filing of the Petition, and also failed to have meaningful contact or visitation. Further, the Petition alleged the mother had failed to comply with her responsibilities under her plan of care, and that custody had been removed from the mother for more than six months, and the conditions which lead to the child's removal still persisted.

Numerous delays occurred, and a hearing was eventually held on November 25, 2005.

At the beginning of the hearing, the petitioner's counsel called the mother as a witness, but the mother refused to testify.¹ Several witnesses then testified.

The Court entered a Memorandum Opinion on May 6, 2006, and found that the mother was 29 years old, and had given birth to six children, but her parental rights had already been terminated with regard to the three eldest children, and that the child at issue is the mother's fourth child who was born on March 5, 2004. DNA testing showed the father to be D.P., who had surrendered his parental rights, and that the mother was married to a man who lived in Yemen.

The Court found that the mother had been diagnosed with bipolar disorder and narcissistic personality disorder. The Court found the mother manifested with Hepatitis C at the child's birth, that she had used cocaine when she was pregnant with the child, and he was removed from the mother 13 days after his birth. The Court found that permanency plan was established by DCS on April 1, 2004.

The Court quoted from the mother's deposition wherein she basically testified she felt she had no duty to support the child while he was in State custody, and the Court concluded that there was clear and convincing evidence that the mother had wilfully failed to support the child during the four months preceding the filing of the Petition.

The Court also found the mother had failed to comply with the permanency plan that required her to remain drug free, and that she would only use medication that was prescribed, and that she would complete an alcohol and drug assessment and follow the recommendations, and would submit to random drug screens.

The Court found the evidence demonstrated that the mother lacked compliance with her plan, that at various times the mother showed no interest in getting the child back, refused increased visitation with the child, refused drug screens, did not take her medication, stopped going to health appointments and did not obtain steady employment. The Court concluded that from the totality of the evidence, there is clear and convincing evidence that the mother had not complied with her plan. Further, that there was clear and convincing evidence that the conditions which led to the child's removal had not been remedied, and there was clear and convincing evidence to show that termination was in the child's best interests, because the mother had failed to make a sufficient change in her circumstances such that it would be safe for the child to be in her home. The Judgment was entered pursuant to Tenn. R. Civ. P. 54.02, and this appeal ensued. The issues raised on appeal are:

1. Whether the mother was in substantial non-compliance with her permanency plan?

¹ Her deposition had been taken prior to the trial, and it was later submitted into evidence.

2. Whether the mother's actions constitute abandonment for failure to support by clear and convincing evidence?
3. Whether the Trial Court erred in dismissing the petitioner's claim of persistence of conditions as an additional ground for termination?

A parent has a fundamental right to the care, custody, and control of her child. *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208 (1972). Such right is not absolute, however, and may be terminated if there is clear and convincing evidence justifying such termination under the applicable statute. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388 (1982); *In re Drinnon*, 776 S.W.2d 96 (Tenn. Ct. App. 1988). Further, the court must find that a termination of parental rights is in the child's best interest. *Tennessee Dept. of Human Services v. Riley*, 689 S.W.2d 164 (Tenn. Ct. App. 1984); Tenn. Code Ann. §36-1-113(c).

In this case, the Trial Court terminated the parental rights of the mother based upon the statutory grounds of abandonment and failure to substantially comply with the plan of care. Additionally, the Court found that terminating the mother's parental rights was in the child's best interest.

The mother argues that her parental rights should not have been terminated, because there was not clear and convincing evidence of the grounds. Regarding compliance with the plan of care, the mother had very discrete responsibilities under the plan, including:

- 1) completing an alcohol/drug treatment assessment and following all recommendation;
- 2) participating in random drug screens;
- 3) refraining from alcohol and drug use;
- 4) getting a job or a steady, legal source of income;
- 5) participating in assessment and treatment of mental health issues, including taking prescribed medications;
- 6) obtaining appropriate housing and maintaining a safe, stable environment; and
- 7) maintaining visitation with Hunter

The mother admitted that she never completed a drug treatment assessment nor program, even though she had the opportunity. The mother admitted that she had not refrained from using alcohol, had refused drug screens for over two months, and had gotten three positive screens earlier. She did not consistently participate in her counseling and other mental health treatment, did not take her medication as prescribed, and did not follow all treatment recommendations. The mother did not visit with the child at every opportunity, and refused to see him for two months during the summer. She had obtained suitable public housing, and had held a job for one month at the time of trial, having not sought employment before that time.

It is clear the mother understood her responsibilities under the Plan, and had agreed, but her efforts at compliance were minimal at best, and she stubbornly refused drug treatment, missed invaluable visitation time with the child because she was "frustrated", refused

drug screens, would not take her medication as prescribed, and chose not to seek employment for many months. Clear and convincing evidence established that the mother failed to comply with the Plan.

As to abandonment, the mother asserts there was no evidence that she had the ability to support the child, such that the failure to support was willful. As the Supreme Court held in *In re Swanson*, 2 S.W.3d 180 (Tenn. 1999), “abandonment imports any conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child.” When determining whether the parent’s conduct “evinces a settled purpose to forego all parental duties and relinquish all parental claims” to a child, courts may look to the following factors:

- (1) the parent's ability to support the child;
- (2) the amount of support provided;
- (3) the extent and nature of the contact between the parent and the child;
- (4) the frequency of gifts;
- (5) whether the parent voluntarily relinquished custody of the child;
- (6) the length of time the child has been separated from the parent; and
- (7) the home environment and conduct of the parent prior to removal.

Id.

There was no proof that the mother had the ability to support the child, as she had no employment or other source of income other than food stamps. The mother did, however, unequivocally testify that she felt she had no duty to support the child while he was in custody, and had no intention to do so. In any event, the record in this case contains clear and convincing evidence of the mother’s failure to comply with the plan, and this ground for the termination of the mother’s rights has been established.

The mother asserts that DCS did not make reasonable efforts to help her, which is required by Tenn. Code Ann. §36-1-113 (i)(2). The statute requires a showing that reasonable efforts were made by DCS to help the parent make a change, and that the parent failed to do so for a duration of time. As this Court has recognized, DCS must make “reasonable” efforts, not “herculean” efforts. *DCS v. Malone*, 1998 WL 46461 (Tenn. Ct. App. Feb. 5. 1998). The requirement of reasonable efforts is contained in Tenn. Code Ann. §36-1-113 (i), which sets forth the criteria the court should use in determining what is in the child’s best interests, and it states as follows:

In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, 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 or controlled substances 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.

In this case, the Trial Court found that DCS had made reasonable efforts to help the mother, and this finding is supported by the proof. The efforts by Youth Villages were shown to be extraordinary in comparison to the effort ordinarily expended in a case being managed by DCS.

Kristen Headley, who was a clinical supervisor for Youth Villages, testified that Youth Villages was contacted by DCS to manage this case. She testified that the mother had refused to do drug screens, either at Indian Path or Holston Valley Hospital, and that she had arranged for the mother to do her drug screens at Pro Care, which was closer to the mother's home. She noted that she tried to do a home visit, but the mother was not at home, but there were a couple of men at the home, drinking beer. The witness testified of the numerous contacts and attempted support of the mother over the months, with no positive results.

The Court found that the child's best interest would be served by terminating the mother's parental rights, and clear and convincing evidence supports this conclusion. For the foregoing reasons, we affirm the Judgment of the Trial Court terminating the mother's parental rights and remand, with the cost of the appeal assessed to M.K.

HERSCHEL PICKENS FRANKS, P.J.