IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs October 30, 2008

IN RE MADISON A.

Appeal from the Juvenile Court for Washington County
No. J11606 James A. Nidiffer, Judge

No. E2008-01261-COA-R3-PT - FILED DECEMBER 30, 2008

The trial court terminated the parental rights of Christina A. ("Mother") to her daughter, Madison A. (the "Child"), who currently is two. The trial court found, by clear and convincing evidence, that grounds had been proven to terminate Mother's parental rights pursuant to T.C.A. § 36-1-113(g)(8). More specifically, the trial court found that Mother was mentally incompetent to care for the Child, and that her mental impairment was likely to remain making it unlikely that she would be able to care for the Child in the near future. The trial court also found clear and convincing evidence that termination of Mother's parental rights is in the Child's best interest. Mother appeals, claiming that she was denied constitutionally-protected due process rights because the trial court terminated her parental rights when her mental impairment was so significant that she was unable to assist in the defense of her case. We affirm.

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

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

Casey A. Sears, II, Johnson City, Tennessee, for the appellant, Christina A.

Janie Lindamood, Johnson City, Tennessee, appellee, Guardian Ad Litem for Madison A.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, and Preston Shipp, Assistant Attorney General, General Civil Division, Nashville, Tennessee, for the appellee, State of Tennessee, Department of Children's Services.

OPINION

I.

The Child was removed from Mother's custody in November 2006 because Mother was mentally incompetent and her incompetency threatened the Child. DCS was awarded temporary custody and the Child was placed with Mother's parents, who have been the foster parents throughout these proceedings. Due to Mother's mental incompetence, she was appointed an attorney as well as a guardian ad litem. A guardian ad litem also was appointed to act on the Child's behalf. The petition to terminate Mother's parental rights was filed in July 2007 by the Child's guardian ad litem.[1] The petition alleged numerous grounds for terminating Mother's parental rights, but the case proceeded to trial on only one ground, to wit, mental incompetence pursuant to T.C.A. § 36-1-113(g)(8).

A trial was conducted and there were several lay and expert witnesses who testified live or by deposition. Ordinarily, this Court will undertake to discuss the trial testimony and then the trial court's final judgment in order to assess the correctness of that judgment. In the present case, however, none of the parties on appeal challenge the trial court's factual findings. In short, all parties agree with the trial court's ultimate factual finding that Mother is mentally incompetent and altogether unable to care for the Child. The proof at trial supporting the trial court's conclusion on this point is overwhelming, to say the least. In fact, not a single person testified at trial that Mother was even remotely able to properly care for the Child or would be able to do so in the near future. We have reviewed the proof offered at trial against the extensive and thorough final judgment entered by the trial court. We conclude that the final judgment fully, fairly and accurately sets forth the pertinent proof offered at trial. Instead of unnecessarily discussing this extensive proof twice by summarizing the trial testimony and then setting forth the conclusions of the trial court, we will discuss the proof only once by quoting from the pertinent orders entered by the trial court.

After the trial, but before the order terminating Mother's parental rights was entered, the trial court entered an order in May 2008, which, among other things, sets forth the reasons for the appointment of a guardian ad litem for Mother.[2] This order also summarizes some of the proof at trial. According to the order:

> It appearing to the Court that the child . . . has been in DCS custody since November of 2006 because of the mother's . . . mental instability and potential harm by the mother to the child; that in February of 2007, Elizabeth A. Jones, M.A., Frontier Health, completed a psychological evaluation of the mother with a diagnoses of schizophrenia, disorganized type, episodic with prominent negative

[1] The petition also sought to terminate the parental rights of the Child's biological father. In June 2008, the trial court entered an order terminating his rights after he voluntarily surrendered those rights. No appeal was taken from that order.

[2] The first guardian ad litem was appointed in November 2007. Mr. Blackwell became the guardian ad litem in January 2008.

> symptoms and paranoid features; that on April 9, 2007, Jorge F. Fuchs, M.A., Frontier Health, completed a competency evaluation of the mother and found she was not competent to make legal decisions and participate in the legal process; that on July 17, 2007, the guardian ad litem . . . for the child filed a Petition to Terminate Parental Rights against the mother . . . ; that on October 8, 2007, Mr. Fuchs was deposed for proof and stated the mother was not presently competent; that on January 23, 2008, Guy W. Blackwell, Esq., (an attorney) was appointed by the Court as guardian ad litem for the mother; that the appointment was pursuant to T.C.A. 37-1-149, which provides the court shall appoint a guardian ad litem "in any case in which the interests of the child require a guardian"; that on February 29, 2008, Mr. Fuchs was again deposed for proof and stated the mother was not presently competent . . . .

The order also summarized the efforts made by the guardian ad litem on Mother's behalf which included, among other things, participation in the trial. The trial court then concluded that the guardian ad litem was entitled to compensation for those efforts.

The final judgment terminating Mother's parental rights was entered on June 3, 2008. The final judgment begins by listing who was present at trial, including Mother's attorney and her guardian ad litem. The judgment then provides, in relevant part, as follows[3]:

> That the minor child has been before this Court since November 2006, due to the Mother's mental instability and threat of harm to the minor child. On December 13, 2006 an Order was entered in this cause finding probable cause that the child was dependent or neglected and awarding temporary custody of the minor to the State of Tennessee. Physical custody was placed in a relative placement [with the maternal grandparents]. . . . A dependency and neglect adjudication remained pending through out [sic] these proceedings due to the incompetency of the Mother.
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> The history of this case and today's testimony shows that the minor was removed from the Mother's care shortly after the child's birth. That after the birth of the child, the Mother became very possessive of the minor child. The Mother would keep the child in her room, not allow others to see or help with the child, [and Mother] was not rational in her care for the child. Testimony is that [Mother's] mental

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[3] In the final judgment, the initials of Mother and the Child occasionally were entered after they were mentioned in the judgment. We have deleted the initials.

health condition worsened after she became 17 years of age and after the birth of the child there was evidence of further decline in that her perceptions were unrealistic and delusional. That the hospital would not let the mother leave the hospital with the child after an incident involving the mother, unless she had somewhere to take [the Child]. The Mother and child were released from the hospital to the home of [the maternal grandparents]. That while at the home of [the maternal grandparents], the Mother would lock herself and the baby in the bathroom all day. That she would not let [her parents] or other family members hold, touch or see [the child]. Just before the child was taken into custody [Mother] would lock the child in the bedroom by herself for hours. [Mother] used racial slurs for the child, as the child is bi-racial, referring to her as a "______". [Mother] at one point notified DCS that she and [the Child] had been kidnaped, taken to the home of [Mother's parents who forced Mother] to wear white gloves and dance to get money. That the Mother continued to exclude the child and would not bond with the child; when she held the child, she held her between her legs and would not embrace or cuddle her. She would allow the child to cry for hours, until told to take care of the child, failing to perform simple tasks such as feeding and changing the child. On one occasion, the Mother let the child cry and go un-fed, because the nipple for the [baby] bottle was not on the bottle. Between the time the child was born and the removal of the child, at age three months, the mother was demonstrating significant signs of further mental deterioration. [Mother's] behavior included violent acts during random mood swings. [Mother's] mental health problems started around the age of seventeen. [Mother] experienced a traumatic marriage and was involved in an automobile accident in which she suffered a severe closed head injury. . . .

Two depositions for evidence at trial were taken of Dr. Fuchs. Upon the stipulation of the parties, the depositions and the Assessment and Forensic Report were entered into evidence, and by agreement of the parties the depositions and reports were read by the Judge in chambers.

[Mother] is currently a resident at the Moore House where she is assisted with her everyday needs and tasks. [Mother] is currently compliant with her medications and has not gotten worse, in fact the acts of violence have decreased due to medication. However, [Mother's] mental state is such that she can not take care of herself, nor the minor child. [Mother] needs someone to keep her focused and to remind her to do normal tasks. [Mother's] thinking process is not rational; she has said that she believes that if she buys herself

land, she will be given a trailer free; she also wants to go to New York and work in a brothel, then at alternative times, she wants to join a convent. [Mother] lacks the mental stability to make good decisions.

[Mother] has failed to establish a close bond with the child. Though [Mother] verbally expresses a deep love for the minor, after 10-15 minutes of visitation, [Mother] becomes distracted and agitated with [the Child]. On one occasion, when [the Child] was less than a year old, [Mother] believed that [the Child] was trying to harm [Mother]. [The Child] does recognize [Mother] as her mother and calls her Mama. The child has more of a relationship with [the Mother] than the Mother does with [the Child]. [The Child] will attempt to show affection to Mother, but does not receive a correlating response from her Mother.[4]

* * *

Testimony of Paula Higgins, the first DCS case manager, was that after removal, the Mother's actions continued to be inconsistent and irrational and demonstrated the Mother's inability to provide care for herself or the minor. Ms. Higgins has supervised visits and observed both the Mother and child. She acknowledged that currently the Mother ha[s] made some progress at the Moore House, but without the assisted living, she would not be able to meet her daily needs, make her appointments[,] be compliant with her medications or stay focused enough to care for herself or the minor, placing the minor at a substantial risk of harm if returned to the mother.

Bethany Parr, the DCS Foster Care case manager in this case . . . testified that there was no probability that the mother would improve within the next six months to a year and be able to provide for the minor. Ms. Parr testified that [the Child] was 20 months old; she is very intelligent; has a great personality; has met or surpassed her milestones, and was developmentally on target. In fact, [the Child] can spell her name, which is phenomenal for her age. [The Child] loves and relies on the grandparents.

Cicely Brooks . . . is employed by Compass Care Alliance, who contracts with the Department of Children['s] Services to provide

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[4] At this point in the opinion, the trial court detailed a significant list of efforts made by DCS on Mother's behalf. Because this is not an issue on appeal, we have omitted this portion of the opinion. Having said that, we would point out that the efforts made by DCS on Mother's behalf were substantial.

therapeutic visitation for the minor and mother and to help with the mother's parenting skills, expressed concerns about the Mother's lack of emotional expression and outward expression. Brooks ha[s] observed the [Mother's] inability to stay focused on her surroundings. Mother was unable to stay focused and read to the child, play with the child, had trouble feeding the child, and changing the child's diaper. Recently, the minor almost rolled off the bed while mother was trying to change her diaper. That the mother tries, but cannot stay focused more than about 20 minutes. [Mother] does try, but lacks the ability to retain the parenting skills. Brooks does not believe, based on her education, experience and observations, that the mother is able to provide a safe and stable [environment] for the child.

Frieda Wilson, the director of Moore House has observed both mother and child. Wilson testified that currently the mother could not constantly meet her own (mother's) daily needs, due to her inability to stay focused. She has observed that the Mother does play with the child, but does not show the child warmth one would give their own child. [Mother] doesn't hold [the Child] or cuddle her, it is like holding an object. [Mother] lacks the ability . . . and skills to care for herself. The program [Mother] is in is a voluntary program and [Mother] could leave if she chose to do so. If [Mother] moved out on her own, she would be a significant danger to herself. [Mother] lacks the ability to keep the minor safe or to provide for supervision of the minor. [Mother] has been at the Moore House for almost a year and has made little improvement. . . . [Mother's] lack of focus would [definitely] place an active two-year old child at a risk of harm if not supervised. [Mother's] irrational behaviors are a result of her mental disease. [Mother's] thoughts are irrational; she has a lot of goals and ideals that can change from day to day. [Mother] has talked about moving to Hawaii to work in a brothel. [Mother] wants to move to New York and live in a group home and be a hooker there. [Mother] wants to become a nun. At the moment [Mother] is talking about these things, she believes them. One time [Mother] decided that she wanted to have liposuction and called a doctor, but then changed her mind in a couple of days. . . .

From the testimony of the witnesses, the exhibits entered into evidence and the record as a whole, the Court finds that the Guardian ad Litem for the child has proven by clear and convincing evidence that the parental rights of [Mother] to [the Child] should be terminated pursuant to T.C.A. § 36-1-113(g)(8)(A) and (B). . . . The Court is of the opinion and so holds that the evidence is clear and convincing that termination should take place in this matter. This

> matter is a difficult one for the Court. Not that the proof doesn't [rise] to the level necessary. It's just that it's a sad case. The Court finds that in this case the only grounds for termination are due to the mother's mental challenges pursuant to TCA 36-1-113(g)(8)(A) and (B). The Court finds beyond clear and convincing evidence that [Mother] is incompetent presently and she is so impaired and is likely to remain so; that it's unlikely that she will ever be able to assume or resume to the care of the child in the near future. It may get to the point where she gets better, but the Court finds that the termination due to her mental incompetence is in the best interest of the child.

(Footnote added).

The trial court then reiterated the medical proof that was entered at trial. The trial court explained that in 2007, Lucas A Jones, NA, performed a psychological evaluation and Mother's Axis I diagnosis was "schizophrenia, disorganized type, episodic with prominent negative symptoms and paranoid features." The trial court also discussed the various evaluations conducted by Jorge Fuchs, NA, who consistently concluded that Mother did not have the mental capacity to make legal decisions and participate in the legal process. Other difficulties he noted included paranoia, depressed mood, marked mood shifts, significant difficulties with disorganized behavior and thought processes, and memory difficulties. According to Dr. Fuchs' testimony, Mother was aggressive and exhibited erratic behaviors, although this subsided a little when she consistently took medication. Mother even expressed concern to Dr. Fuchs about her ability to properly care for the Child. Dr. Fuchs concluded that Mother was suffering from significant mental illness which would require long-term treatment. The trial court also noted that all of Dr. Fuchs' reports indicate that Mother had violent behaviors and bizarre conduct toward her family and the Child. After discussing the reports made by Dr. Fuchs, the trial court found that Mother will require long-term treatment, intervention, and medical maintenance and that she likely suffered from schizophrenia. The trial court then stated:

> [Mother is] not focused on her daughter, and to her credit, it's not her fault in . . . regards to her mental challenges which the Court has delineated, and the Court finds specifically that she has severe mental health challenges where she could not take care of this child and because of the same, it is necessary to terminate her parental rights. . . .
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> The Court is, therefore, of the opinion and so holds that the Guardian ad Litem has established, by clear and convincing evidence, that the parental rights of [Mother] to the child . . . should be terminated pursuant to the statutory ground set out in T.C.A. § 36-1-113(g)(8)(A) and (B), that the mother . . . is incompetent to adequately provide for the further care and supervision of the child because the mother's mental condition is so impaired and is likely to remain so that it is

> unlikely that the mother will be able to assume or resume the care and responsibility for the child in the near future.
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> The Court finds that the rights should be terminated solely on that ground. . . .

The trial court then undertook a best interest analysis. After discussing the pertinent statutory factors, the trial court concluded that the guardian ad litem had proven, clearly and convincingly, that termination of Mother's parental rights was in the Child's best interest.

II.

Mother has appealed the trial court's final judgment. As noted previously, Mother does not claim that the trial court erred when it found, by clear and convincing evidence, that she was mentally incompetent and unable to care for the Child and that she likely would remain unable to do so. In fact, at the beginning of the trial, all of the parties conceded that Mother was so mentally incompetent that she would be unable to assist in her own defense at trial. Based on this universal concession, the parties and the trial court agreed that it would be in Mother's best interest if she not attend the trial. Mother's appeal is premised on the assertion that her due process rights were not violated when the trial court terminated her parental rights when the facts clearly established that she was so mentally incompetent that she was unable to assist in her own defense.[5]

III.

In cases involving the termination of parental rights, our duty on factual matters is to "determine whether the trial court's findings, made under a clear and convincing standard, are supported by a preponderance of the evidence." ***In re F.R.R., III***, 193 S.W.3d 528, 530 (Tenn.

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[5] At the beginning of the trial, Mother's guardian ad litem requested that Mother not be present at the trial. According to the guardian:

> The concern . . . [is] that . . . by sitting in here and listening to the clear and convincing evidence that's going to be put on that will result in the termination of her parental rights could cause her to regress. . . . I went back to see [Mother] Tuesday this week. And Tuesday she told me she preferred not being in here. She understands to some extent what is going on. She now believes that terminating her parental rights is a good thing because she believes it's in the best interest of her daughter that her mother and father raise her daughter. She understands that she'll [still] be able to be part of her daughter's life. She also understands, most importantly, that she has a chronic, significant mental illness that she may have the rest of her life. But at the same time . . . for her to sit in here and hear negatives about what's happened in the past, everybody is concerned and I'm concerned that that's going to have a detrimental effect on her future . . . .

Thereafter, Mother's attorney waived Mother's right to be at trial, stating that due to her mental condition, it would not "do any good for her to be in here . . . ." Based on the foregoing, all parties and the trial court agreed that it would be best for the trial to proceed without Mother's presence.

2006). The trial court's findings of fact are reviewed *de novo* upon the record accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. ***Id.***; Tenn. R. App. P. 13(d). Questions of law are reviewed *de novo* with no presumption of correctness. ***Langschmidt v. Langschmidt***, 81 S.W.3d 741, 744-45 (Tenn. 2002).

Trial courts, unlike appellate courts, are able to observe witnesses as they testify and to assess their demeanor. Thus, trial courts are in a unique position to evaluate witness credibility. *See* ***State v. Pruett***, 788 S.W.2d 559, 561 (Tenn. 1990). Accordingly, appellate courts will not re-evaluate a trial court's assessment of witness credibility absent clear and convincing evidence to the contrary. *See* ***Wells v. Tennessee Bd. of Regents***, 9 S.W.3d 779, 783 (Tenn. 1999), ***Humphrey v. David Witherspoon, Inc.***, 734 S.W.2d 315, 315-16 (Tenn. 1987).

Parents have a fundamental right to the care, custody, and control of their children. ***Stanley v. Illinois***, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); ***O'Daniel v. Messier***, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995) *rev'd on other grounds*, ***In re Swanson***, 2 S.W.3d 180 (Tenn. 1999); ***In re Drinnon***, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988). This right "is among the oldest of the judicially recognized liberty interests protected by the Due Process Clauses of the federal and state constitutions." ***In re M.J.B.***, 140 S.W.3d 643, 652-53 (Tenn. Ct. App. 2004). "Termination of a person's rights as a parent is a grave and final decision, irrevocably altering the lives of the parent and child involved and 'severing forever all legal rights and obligations' of the parent." ***Means v. Ashby***, 130 S.W.3d 48, 54 (Tenn. Ct. App. 2003)(quoting T.C.A. § 36-1-113(l)(l)). "Few consequences of judicial action are so grave as the severance of natural family ties." ***M.L.B. v. S.L.J.***, 519 U.S. 102, 119, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996) (quoting ***Santosky v. Kramer***, 455 U.S. 745, 787, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)).

While parental rights are superior to the claims of other persons and the government, they are not absolute, and they may be terminated upon appropriate statutory grounds. *See* ***Blair v. Badenhope***, 77 S.W.3d 137, 141 (Tenn. 2002). Due process requires clear and convincing evidence of the existence of the grounds for termination of the parent-child relationship. ***In re Drinnon***, 776 S.W.2d at 97. T.C.A. § 36-1-113 (Supp. 2008) governs termination of parental rights in this state. A parent's rights may be terminated only upon "(1) [a] finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and (2) [t]hat termination of the parent's or guardian's rights is in the best interest[] of the child." T.C.A. § 36-1-113(c); ***In re F.R.R., III***, 193 S.W.3d at 530. Both of these elements must be established by clear and convincing evidence. *See* T.C.A. § 36-1-113(c)(1); ***In re Valentine***, 79 S.W.3d 539, 546 (Tenn. 2002). The existence of at least one statutory basis for termination of parental rights will support the trial court's decision to terminate those rights. ***In re C.W.W.***, 37 S.W.3d 467, 473 (Tenn. Ct. App. 2000), *abrogated on other grounds,* ***In re Audrey S.***, 182 S.W.3d 838 (Tenn. Ct. App. 2005).

The heightened burden of proof in parental termination cases minimizes the risk of erroneous decisions. ***In re C.W.W.***, 37 S.W.3d at 474; ***In re M.W.A., Jr.***, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Evidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable, ***State v. Demarr***, No. M2002-02603-COA-R3-JV, 2003 WL

21946726, at *9 (Tenn. Ct. App. M.S., filed August 13, 2003), and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence. ***In re Valentine***, 79 S.W.3d at 546; ***In re S.M.***, 149 S.W.3d 632, 639 (Tenn. Ct. App. 2004); ***In re J.J.C.***, 148 S.W.3d 919, 925 (Tenn. Ct. App. 2004). It produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established. ***In re A.D.A.***, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002); ***Ray v. Ray***, 83 S.W.3d 726, 733 (Tenn. Ct. App. 2001); ***In re C.W.W.***, 37 S.W.3d at 474.

IV.

Mother's parental rights were terminated pursuant to T.C.A. § 36-1-113(g)(8) (2005).[6] This statutory provision provide as follows:

> (g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:
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> (8)(A) The chancery and circuit courts shall have jurisdiction in an adoption proceeding, and the chancery, circuit, and juvenile courts shall have jurisdiction in a separate, independent proceeding conducted prior to an adoption proceeding to determine if the parent or guardian is mentally incompetent to provide for the further care and supervision of the child, and to terminate that parent's or guardian's rights to the child;
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> (B) The court may terminate the parental or guardianship rights of that person if it determines on the basis of clear and convincing evidence that:
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> (i) The parent or guardian of the child is incompetent to adequately provide for the further care and supervision of the child because the parent's or guardian's mental condition is presently so impaired and is so likely to remain so that it is unlikely that the parent or guardian will be able to assume or resume the care of and responsibility for the child in the near future; and
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> (ii) That termination of parental or guardian rights is in the best interest of the child;

[6] T.C.A. § 36-1-113(g) has been amended effective January 1, 2009. The amendment has no impact on the present case. We will cite to the version of the statute in effect at the time of trial.

> (C) In the circumstances described under subdivisions (8)(A) and (8)(B), no willfulness in the failure of the parent or guardian to establish the parent's or guardian's ability to care for the child need be shown to establish that the parental or guardianship rights should be terminated[.]

In her brief on appeal, Mother points out that she is not claiming that T.C.A. § 36-1-113(g)(8) is facially unconstitutional. Instead,

> [w]hat is being argued is that termination of parental rights under Tenn. Code Ann. § 36-1-113(g)(8)(A) and (B) violates a parent's rights to due process, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, section 8 of the Tennessee Constitution, when the parent is so mentally ill that the parent is mentally incompetent and because of this mental incompetence the parent is incapable of assisting counsel in the defense of her parental rights.

The guardian ad litem and DCS disagree with Mother's assertion, pointing out that there are numerous procedural protections for parents facing a petition to terminate parental rights, and these protections fully satisfy federal and state constitutional due process requirements.

We find the Supreme Court opinion in ***Dep't of Children's Servs. v. Smith***, 785 S.W.2d 336 (Tenn. 1990), to be very instructive in this case. In ***Smith***, the Supreme Court granted review of this Court's opinion holding that parental rights could not be terminated solely on the basis of mental incompetency when there was no willful conduct on the part of the parent. ***Id***. at 336. The facts in ***Smith*** showed that:

> On being evaluated, Mrs. Smith was diagnosed as having a schizophrenic disorder, paranoid type. Medication was prescribed for Mrs. Smith, but she consistently refused to take it. Mr. Smith never accepted the fact that his wife suffers from a mental disorder, or that she is in need of counselling and medication. He believed, and still believes, that she is just "high-tempered" and that any problems she has can be attributed to DHS's removal of Toney from the Smith home. The clinical psychologist who evaluated Mr. Smith testified that Mr. Smith is not capable of protecting Toney from Mrs. Smith if any problems were to arise, that Mrs. Smith is the dominant figure in the household.

Id. at 337. The Supreme Court ultimately reversed our decision. According to the High Court:

> In providing for the removal of custody and for the termination of parental rights the legislature has acknowledged competing interests

- the child's need for a permanent, stable and safe environment and the parents' (and the child's) interest in the parent-child relationship - and have decided in favor of the former. In fact, the foster care sections of the statutes, which include termination provisions, are prefaced with a statement of purpose and construction which concludes, "if an early return to the care of their parents is not possible, [the child] will be placed in a permanent home at an early date." T.C.A. § 37-2-401(a). And, "[w]hen the interests of a child and those of an adult are in conflict, such conflict is to be resolved in favor of a child, . . ."[7] Id. (c). The first preference is to reunite the family by returning the child to his parents or placing the child with relatives; the second is permanent placement through adoption. T.C.A. § 37-2-403(a)(1).

The holding of the Court of Appeals in this case - that "mental disability" cannot be the basis of termination of parental rights since the acts of the mentally disabled parent are not willful - would nullify a significant part of the legislative plan for the welfare of dependent and neglected children. An obvious result of the holding is to condemn a child, whose parents are unfit to properly care for the child because of mental illness, to a life in serial foster homes without any possibility of a stable, permanent home.

Further, the holding of the Court of Appeals is not in accord with prior decisions of that court in *State Department of Human Services*

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[7] The provisions of T.C.A. § 37-2-401(a) & (c) (2005) remain essentially unchanged. In relevant part, these statutory subdivisions currently provide:

> (a) The primary purpose of this part is to protect children from unnecessary separation from parents who will give them good homes and loving care, to protect them from needless prolonged placement in foster care and the uncertainty it provides, *and to provide them a reasonable assurance that, if an early return to the care of their parents is not possible, they will be placed in a permanent home at an early date.*
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> * * *
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> (c) When a parent by such parent's actions or failure to act fails to fulfill such parent's responsibilities as a parent, the court shall consider such conduct in determining whether to terminate parental rights, regardless of whether the parent intended such parent's conduct to constitute a relinquishment or forfeiture of such parent's parental rights. *When the interests of a child and those of an adult are in conflict, such conflict is to be resolved in favor of a child, and to these ends this part shall be liberally construed.*

(Emphasis added).

v. Ogle, 617 S.W.2d 652 (Tenn. App. 1980), and in *Tennessee Department of Human Services v. Riley*, 689 S.W.2d 164 (Tenn. App. 1984). In the *Ogle* case, the court approved appointment of a guardian for a mentally incapacitated mother to consent to the adoption of her child, finding that the statutes afforded due process to the parent and the action was in the best interest of the child. In *Riley*, while not dealing with a mentally ill parent, the court again affirmed termination of parental rights under the statutes now in question. The decisions in *Ogle* and *Riley* were approved by this Court by denial of applications for permission to appeal, and are in accord with decisions in other states where they have statutes providing for termination of parental rights similar to those in this state. *See* Annot. 22 A.L.R. 4th 774 §§ 3 and 9 (1983 and Supp. 1988). *See also Matter of Jason Y.*, 106 N.M. 406, 744 P.2d 181 (App. 1987), wherein the court rejected an "insanity defense" urged by a schizophrenic mother in termination proceedings. Recognizing that the loss of parental rights may be as serious as imprisonment, the court emphasized the differing competing interests. Although discussing only "custody" risks, the thrust of the decision is that there is an immediacy about healthy placement of a child that does not exist in criminal cases. Also, *Thompson v. Arkansas Social Services*, 282 Ark. 369, 669 S.W.2d 878 (1984), *appeal dismissed for want of a federal question*, 469 U.S. 926, 105 S.Ct. 316, 83 L.Ed.2d 254 (1984), wherein the Court held there was no violation of due process rights in terminating the parental rights of a mentally ill parent, where the compelling state interest in the protection of minor children was advanced by such termination and the state provided the least restrictive method available to carry out the state's interest.

As heretofore noted, the legislature of this state has provided a detailed procedure for the removal of a dependent and neglected child from the custody of its parents, for the correction where possible of the conditions that forced the removal of the child, and where not possible to correct the conditions, a procedure for the termination of parental rights. These procedures place the child's welfare first by requiring state agencies to make every effort to restore the child to the home of its natural parents. Due process is provided the parents for it is only on proof by clear and convincing evidence that the conditions that led to the removal of the child from the custody of his parents persist after the passage of several months and are not likely to ever change, that the court can terminate parental rights on petition by the custodial agency. In this case, the trial court repeatedly tried to get the parents of Toney Smith to accept treatment for Mrs. Smith's mental disability, but to no avail. Without treatment, the

> conditions in the Smith home that led to the court determination that Toney Smith was a "dependent and neglected" child can not change, and Toney cannot be returned to the custody of his natural parents. Further, there was clear and convincing evidence that Toney needs a stable, permanent home. Under these circumstances, the trial court concluded that it is in the best interest of Toney Smith that the parental rights of the Smiths be terminated. We concur in that finding.

Smith, 785 S.W.2d at 338-39 (footnote added).

As observed in ***Smith***, there are several procedural protections in place to assure that a mentally incompetent parent is afforded due process. In the present case, Mother was afforded all of these protections. To begin with, the Child's guardian ad litem was required to prove grounds for termination under the clear and convincing evidentiary standard. Likewise, the guardian had the burden of proving, clearly and convincingly, that termination of Mother's parental rights is in the Child's best interest. In addition, Mother was appointed both an attorney and a guardian ad litem to protect her interests. The record reflects that both Mother's attorney and her guardian ad litem performed their duties well. The Supreme Court in ***Smith*** held that a parent's parental rights can be terminated solely on the basis of mental incompetency. This, of course, assumes that all of the procedural protections have been met. If a parent is so mentally incompetent that his or her parental rights have been terminated even with the substantial procedural protections afforded that parent, then it is certainly possible, if not probable, that the parent will have difficulty or be unable to assist in his or her own defense. This is an unfortunate consequence of mental illness. If we were to hold that a mentally incompetent parent's rights cannot be terminated if that parent is so mentally unstable that he or she cannot adequately participate in his or her defense, then we would effectively be undoing what was done in ***Smith***. We also would be placing the interests of the parent before the interests of the child and would be condemning these children to foster care until they reach the age of 18. Such a result would be in direct contravention of the clearly expressed intent of the Tennessee General Assembly. *See* T.C.A. § 37-2-401 (a) & (c), *supra* at footnote 7, and T.C.A. § 36-1-101(d) (2005) which states:

> In all cases, when the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child, which interests are hereby recognized as constitutionally protected and, to that end, this part shall be liberally construed.

We hold that in cases where all of the constitutionally-mandated procedural protections have otherwise been afforded to a parent, that parent's parental rights can be terminated for mental incompetency even when that parent's mental incompetency is such that he or she cannot assist in his or her own defense. Because Mother was afforded all of the constitutionally-mandated procedural protections in this case, her due process rights were not violated when her parental rights were terminated even though she could not assist in her own defense.

Mother does not raise as an issue whether there was sufficient proof to terminate her parental rights. We will, nevertheless, examine this issue. The proof offered at trial can lead to only one rational conclusion. There was substantial proof offered at trial that Mother was altogether unable to care for the Child and that she would not be able to care for the Child in the near future, and perhaps never at all. As stated previously, not one witness testified at trial that Mother presently was able to competently or safely care for the Child. Unfortunately, she cannot even take of herself without assistance. We agree with the trial court that this is a sad case and that Mother has done nothing wrong. However, when terminating parental rights under T.C.A. § 36-1-113(g)(8), the statute expressly provides that willfulness need not be shown. *See* T.C.A. § 36-1-113(g)(8)(C). Accordingly, we affirm the trial court's judgment finding that the Child's guardian ad litem has proven, clearly and convincingly, that grounds exist to terminate Mother's parental rights pursuant to T.C.A. § 36-1-113(g)(8).

Although Mother does not raise in her statement of the issues a direct challenge to the trial court's finding that it is in the best interest of the Child to terminate her parental rights, she does claim in her brief that the best interest of everyone involved would be better served by creating a permanent guardianship, as opposed to terminating Mother's parental rights.

When undertaking a best interest analysis, a trial court is required to evaluate the various factors set forth in T.C.A. § 36-1-113(i) (2005). This statute provides as follows:

> (i) 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.

T.C.A. § 36-1-113(i). When considering the child's best interest, the court must take the child's, rather than the parent's, perspective. ***White v. Moody***, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004).

The facts establish that even with treatment, Mother's mental condition has improved very little and it is not safe for the Child to be returned to her care. DCS and the health care providers have made substantial efforts on Mother's behalf, but it highly unlikely that her condition will improve in the near future, if at all. Mother's mental status unquestionably would be detrimental to the Child should Mother regain custody. In addition, due to Mother's mental condition, she has not bonded with the Child. Given the Child's need for permanency, we fail to see how creating a permanent guardianship would be consistent with the Child's best interest. While this is an unfortunate case, allowing the Child to be adopted and, therefore, have the permanency that she needs and deserves is what is in her best interest. This is even more apparent given that the maternal grandparents have been raising the Child since she was three months old and the Child has adjusted quite well in their care. We conclude that the trial court did not err when it concluded that the Child's guardian ad litem has proven, clearly, and convincingly, that termination of Mother's parental rights was in the Child's best interest.

V.

The judgment of the trial court terminating Mother's parental rights is affirmed. Costs on appeal are taxed to the appellant, Christina A., and her surety, if any, for which execution may issue. This case is remanded to the trial court for enforcement of the court's judgment and for the collection of costs assessed below, all pursuant to applicable law.

CHARLES D. SUSANO, JR., JUDGE