

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs September 14, 2009

IN RE: THE ADOPTION OF T. L. H.

**Appeal from the Chancery Court for Wayne County
No. 12105 Jim T. Hamilton, Judge**

No. M2009-01011-COA-R3-PT - Filed November 24, 2009

After remand by Court of Appeals requiring findings of fact and conclusions of law, the trial court issued its second order terminating father's parental rights. Father appeals claiming his abandonment was not willful under Tenn. Code Ann. § 36-1-102(1)(A)(i) and termination was not in the child's best interest. We affirm the trial court.

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

PATRICIA J. COTTRELL, P.J.,M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

James Y. Ross, Sr., Waynesboro, Tennessee, for the appellant, E.H.

Paul A. Bates, Lawrenceburg, Tennessee, for the appellees, C. L. M., and S.L.M.

OPINION

I. PROCEDURAL HISTORY

The basic facts of this matter are not in dispute. T. L. H. was born in May of 2000 while Mother and Father lived together but were not married. The child has continuously lived with Mother since birth. Mother and Father separated in 2004.

In December 2004, Father filed a petition for legitimization and to establish visitation with T. L. H. On May 2, 2005, Mother and Father entered into an Agreed Order naming Father as legal and biological father of T. L. H., establishing child support, and granting Father residential time during the daytime on Saturday and Sunday every other weekend. In June of 2005, Mother married stepfather. Mother and stepfather have had two children, and T. L. H. has lived with them throughout their marriage.

In October of 2007, Mother and stepfather filed a Petition for Adoption seeking to terminate Father's parental rights and allow stepfather to adopt T. L. H. According to the petition, Father had willfully failed to visit or support T. L. H. for the four month period prior to the filing of the petition.

A hearing was conducted by the trial court on June 2, 2008. On June 9, 2008, the trial court entered its first order terminating Father's parental rights to T. L. H. and granting stepfather's adoption petition. On appeal, the trial court's decision was vacated "because the final order does not contain sufficient findings of fact and conclusions of law justifying the trial court's decisions." *In re Adoption of T. L. H.*, M2008-01408-COA-R3-PT, 2009 WL 152475, at *1 (Tenn. Ct. App. Jan. 21, 2009). The Court of Appeals held that a finding of abandonment, alone, is a conclusion of law, and findings of fact are necessary. *Id.*, at *5. Furthermore, the trial court's order had failed to find that termination of Father's parental rights was in the child's best interest. *Id.* The trial court was given the following guidance:

Because of the deficiencies in the termination and adoption order, we must vacate the order and remand the case to the trial court for the preparation of written findings of fact and conclusions of law in accordance with Tennessee Code Annotated section 36-1-113(k). Specifically, the trial court should conduct the statutorily required best interest analysis and enter an order containing specific findings of fact justifying its conclusion. In addition, the order should contain detailed findings of fact as to whether the court finds clear and convincing evidence of a statutory ground for termination.

Id., at *6.

On remand, on April 9, 2009, the trial court issued its second order terminating Father's parental rights and granting the adoption petition. The trial court relied upon the proof introduced at the June 2, 2008 hearing. Father appeals.

II. STANDARD OF REVIEW

A parent has a fundamental right to the care, custody and control of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212-13 (1972); *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); *Nale v. Robertson*, 871 S.W.2d 674, 678 (Tenn. 1994). This right is a fundamental but not absolute right, and the state may interfere with parental rights if there is a compelling state interest in doing so. *Santosky v. Kramer*, 455 U.S. 745, 747, 102 S. Ct. 1388, 1391 (1982); *Nash-Putnam*, 921 S.W.2d at 174-75.

The statutes on termination of parental rights provide the only authority for a court to terminate a parent's rights. *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004). Thus, 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., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998).

To support the termination of parental rights, only one ground need be proved, so long as it is proved by clear and convincing evidence. *In the Matter of D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003); *State Dep't of Children's Services v. A.M.H.*, 198 S.W.3d 757, 764 (Tenn. Ct. App. 2006). In addition, it must also be shown by the clear and convincing evidence that termination of parental rights is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c)(2); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

III. ABANDONMENT

The only ground relied upon by the trial court to terminate Father's parental rights is abandonment. Our legislature has furnished us with a very specific statutory definition of abandonment which we are obligated to follow in termination cases. Tenn. Code Ann. § 36-1-102(1)(A)(i) states that abandonment occurs when a parent who is the subject of a petition for termination of parental rights has either willfully failed to visit or willfully failed to make reasonable payments toward the support of the child who is the subject of the petition for a period of four consecutive months immediately preceding the filing of the termination petition.

The trial court found that Father had not exercised his visitation rights since March 2005 and had not paid child support since April 2005. This finding is not seriously challenged. Consequently, Father had not seen or supported his child for over two and one-half years before Mother petitioned to terminate his rights. The real question presented to the court was whether Father's failure to visit and support were willful. The trial court made the following findings about willfulness in its April 2009 order:

Based on the facts in this case, the Court finds by clear and convincing evidence that [Father] did abandon the minor child by willfully failing to visit and willfully failing to support the minor child for a period of four consecutive months immediately preceding the filing of the Petition to terminate his parental rights to the minor child in question. More specifically, after establishing paternity and visitation in February, 2005, [Father] only exercised three (3) consecutive visits with the minor child, the last of which was in March of that year. When [Father] was asked why he did not call Mother to exercise his visitation, he simply stated that he had lost his cell phone which was the only place he had [Mother's] telephone number recorded. [Father] further stated that the reason he did not try to re-acquire [Mother's] number was that he "...did not want to go over there and start no trouble..". [Father] admitted that he had not seen the minor child since April 2005, but had seen pictures of him in newspapers and kept up with him through his niece and nephew. Accordingly, it is clear that [Father] was aware the child was still in Wayne County, Tennessee, and yet he did not make further attempts to visit or support the minor child. Further, [Father] admitted that he had not sent the minor child a birthday card, given him a

gift or money, nor had he provided the minor child with any necessities such as clothing, food or shelter from April, 2005 through the filing of the adoption petition in October, 2007. [Father] also stated that he did not make any effort to locate the minor child's residence from April, 2005, but stated he was not worried about the child because he knew [Mother and stepfather] would take care of the minor child.

As to his financial ability to pay child support, [Father] admitted that he could have gotten money to pay at least a portion of his child support if he had so desired, but did not do so. Further, [Father] admitted that he had never had a "regular job" and that the only employment he ever had was in his father's masonry business and working two (2) strike jobs. [Father] stated that the reason he could not obtain "regular" employment was because he was blind in one eye, however, no evidence was presented at the hearing of this matter or otherwise, of this purported disability. Likewise, there was no other evidence presented that this "disability" prevented [Father] from obtaining gainful employment. Accordingly, the Court finds [Father's] testimony to be less than credible concerning his inability to work due to his purported disability. Finally, [Father] stated that another reason he did not try to visit the minor child or file anything with the Court to enforce his visitation was that he was afraid he would be incarcerated for failure to pay his child support. Again, the Court finds this fact further evidence of [Father's] willful failure to exercise the visitation rights afforded to him by the Juvenile Court agreed order. Likewise, even if the Court were to find [Father's] testimony credible pertaining to [Mother's] failure to bring the minor child to the designated meeting point in April 2005, this did not amount to a significant restraint or interference with [Father's] visitation rights which would have prevented him from attempting to exercise further visitation. To the contrary, [Father's] failure in this regard makes his testimony less credible in all other aspects.

On appeal, Father argues that if one looks at the totality of the circumstances, the facts do not support the trial court's finding that Father willfully abandoned T. L. H. First, Father relies on alleged contact with the child that occurred significantly prior to the four (4) month period which is the relevant period under Tenn. Code Ann. § 36-1-102(1)(A)(i). Second, Father seems to fault Mother for failing to encourage Father to pay support and see his child. Third, Father cites his testimony about Mother's alleged interference with his visitations and his inability to pay. The trial court found Father was not credible and, in effect, these were proffered excuses for his deliberate conduct that ignored T. L. H. We cannot find that the trial court erred in its findings, and, in any event, Father's proffered excuses do not diminish the proof supporting the court's finding that his failures were willful. Fourth, Father cites stepfather's opinions about him but offered no credible evidence of stepfather's interference. Finally, Father argues he has not endangered the child. The legislature, however, has determined that abandonment alone without further injurious conduct is grounds for termination.

A finding of willful failure to visit or willful failure to support is sufficient to support termination. Father has failed to cite reversible error in the trial court's finding on either ground. Consequently, we do not find the trial court erred in its finding by clear and convincing evidence that Father willfully abandoned T. L. H.

IV. BEST INTERESTS

Once a ground for termination is proved by clear and convincing evidence, the next inquiry for the trial court is whether termination of a parent's rights is in the best interests of the child, which also must be proved by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c)(2). Another section of that statute sets out a list of non-exclusive factors for the court to consider in making its determination of best interest:

- (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.

Tenn. Code Ann. § 36-1-113(I)

Every factor need not be applicable in order for the trial court to determine that it is in the best interest of the child for a parent's right to be terminated. The relevance and weight to be given

each factor depends on the unique facts of each case. *In Re Audrey S.*, 182 S.W.3d 838, 878 (Tenn. Ct. App. 2005).

The trial court made the following findings concerning the statutory factors governing the child's best interest in its April 2009 order:

In light of the facts in this matter, the Court finds by clear and convincing evidence that termination of [Father's] parental rights is in the best interest of the minor child. More specifically, the Court finds that factors (3) and (9) above are applicable to the facts in this case in that the evidence presented at the hearing was undisputed that [Father] did not have any contact with the minor child nor pay any child support for over two (2) years prior to the filing of the Petition. The Court further finds that [Father's] testimony as to his reasons for the aforesaid failures is simply not credible and offers no logical explanation as to why he did not visit or pay child support during this time. The Court further finds that the evidence clearly indicates that after over two (2) years absence, there can be no meaningful relationship established between [Father] and the minor child as pursuant to factor (4). The Court also finds that this lack of relationship is attributable to [Father's] willful failure to be a part of the minor child's life, and not to any actions by [Mother or stepfather] to restrain or restrict [Father's] access to the minor child.

The Court further finds that the criteria enumerated in factors (1) and (7) are relevant to this case. More specifically, there was no clear showing that the physical environment of [Father's] home was either safe or healthy. Also, [Father] testified that he had engaged in illegal activities which included the personal use of marijuana and methamphetamines. Moreover, [Father] testified that he had been incarcerated in a Kentucky jail for sixty (60) days for failing to simply satisfy traffic tickets received on the Natchez Trace, and, he did not have a driver's license for his failure to take care of traffic tickets he received in Arizona.

The Court further finds that termination of [Father's] parental rights is in the best interest of the minor child due to the fact that the Petitioners can more than adequately provide for not only their other two (2) children but for the minor child in question as well. Moreover, it is undisputed that [stepfather's] relationship with the minor child is such that [stepfather] thinks of the minor child as has own son and minor child thinks of [stepfather] as his father, even calling him "Dad", and [stepfather] has established a positive, favorable and meaningful relationship with T. L. H. And equally important, the Petitioners have sufficient income to support their immediate family, including the minor child in question as [stepfather] is employed by Tennessee Valley Authority earning \$29.76 per hour with an income in 2007 in excess of \$84,000.00.

Father argues on appeal that the trial court erred in evaluating these factors and that “[h]ad the Trial Court adequately considered these factors, Father contends none of these factors would be applicable, in a detrimental way, to him.”

Based on the record, we cannot conclude the trial court erred. It is basically admitted that Father had no contact and provided no support for over two and one-half years. The trial court found these failures were willful. During Father’s absence, T. L. H. forged a parent/child relationship with his stepfather. Father allowed his relationship with his child to become non-existent and the stepfather stepped into this void. These decisions were, in effect, made by Father, not the trial court. The trial court’s order made no changes to the situation, as Father allowed it to develop, but simply recognized that Father was no longer a part of T. L. H.’s life and that it was now in T.L.H.’s best interest to recognize this fact. The trial court discussed these factors and concluded by clear and convincing evidence it was in T. L. H.’s best interest to terminate Father’s parental rights. We cannot find that the trial court erred.

The trial court is affirmed. Costs of appeal are assessed against Father, E.H. for which execution may issue if necessary.

PATRICIA J. COTTRELL, P.J., M.S.