

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 9, 2015

IN RE CLARICE R.¹

**Appeal from the Juvenile Court for Marshall County
No. 2013JV97 Lee Bussart, Judge**

No. M2014-01018-COA-R3-PT – Filed March 12, 2015

Father appeals the trial court’s determination that it was in the best interest of the child to terminate father’s parental rights. We find that clear and convincing evidence supports the decision of the trial court.

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

ANDY D. BENNETT, J., delivered the opinion of the court, in which RICHARD H. DINKINS, and W. NEAL MCBRAYER, JJ., joined.

Debbie Zimmerle, Lewisburg, Tennessee, for the appellant, Gabriel R.

Herbert H. Slatery, III, Attorney General and Reporter, and Kathryn A. Baker, Assistant Attorney General, for the appellee, Tennessee Department of Children’s Services.

OPINION

FACTUAL & PROCEDURAL BACKGROUND

Gabriel R. (“Father”) is the biological father of Clarice R. In October 2013, the Department of Children’s Services (“DCS”) filed a petition to terminate parental rights against Father and Erika L. (“Mother”).² Mother’s whereabouts were unknown. Father was incarcerated in the Marshall County jail. The petition alleged that Clarice had been

¹This court has a policy of protecting the identity of children in parental termination cases by initializing the last names of the parties.

² The rights of Mother are not at issue in this appeal.

in DCS custody since February 2013. As grounds for termination against Father, the petition alleged severe child abuse pursuant to Tenn. Code Ann. § 36-1-113(g)(4) and Tenn. Code Ann. § 37-1-102(b)(23)(A)³; abandonment by behavior exhibiting wanton disregard for the child’s welfare prior to his incarceration pursuant to Tenn. Code Ann. § 36-1-113(g)(1) and §§ 36-1-102(1)(A)(iv), (1)(C), and (1)(E); and, in the event Father received a sentence of more than two years for aggravated child abuse (to which he had already pled guilty), termination pursuant to Tenn. Code Ann. § 36-1-113(g)(5).

On November 1, 2013, Father was sentenced to six years for a Class D felony child abuse pursuant to Tenn. Code Ann. §§ 39-15-401–402.

The juvenile court of Marshall County held a hearing on March 12, 2014, on a separate amended petition brought by DCS against Father and Mother for temporary custody and to adjudicate dependency and neglect and severe abuse. As to the allegations of severe child abuse against Father, the court determined, by clear and convincing evidence, that Clarice was “a victim of severe child abuse pursuant to T.C.A. 37-1-102(b)(23)(A),^[4] T.C.A. 39-15-402(a)(1), for the serious bodily injury suffered by the child due to [Father’s] conduct, and pursuant to T.C.A. 39-15-402(d), wherein the court finds that the child suffered serious bodily injury, specifically severe bruising, due to [Father’s] conduct.” In its decree, the court also provided that DCS was “relieved of making reasonable efforts with respect to the father . . . pursuant to T.C.A. 37-1-166(g)(4)(A).” Clarice was to remain in the custody of DCS pending further orders.

In April 2014, the parties entered into an agreed order stipulating to grounds for termination and providing that the trial would be limited to the issue of the child’s best interest. The parties further agreed that the issue of the termination of Mother’s rights would be reserved. In accordance with the stipulation of the parties, the court decreed that grounds one and three alleged in the petition had been proven by clear and convincing evidence: Tenn. Code Ann. § 36-1-113(g)(4) for severe child abuse and Tenn. Code Ann. § 36-1-113(g)(5) for a sentence of more than two years for aggravated child abuse against Clarice.

The hearing

The trial was held on April 23, 2014. Father acknowledged that he pled guilty to a Class D felony child abuse in November 2013 and that Clarice was the victim of that abuse. He admitted beating Clarice with a cord or belt causing bruising from her shoulders all the way down to her lower legs on both sides of her body. He

³ Tennessee Code Annotated section 37-1-102(b)(23)(A), is part of the definition of an “unruly child.” It appears that the petitioners intended to cite Tenn. Code Ann. §37-1-102(b)(21)(A)(ii), part of the definition of “severe child abuse” that addresses “serious bodily injury.”

⁴ As stated above, the proper subsection is Tenn. Code Ann. § 37-1-102(b)(21)(A).

acknowledged that, while he was hitting Clarice, she was screaming and trying to get away from him, but he continued to beat her. When she hid underneath some furniture, he pulled her out and continued to beat her.

At the time of the hearing, Father was incarcerated due to his deportation status. The United States government was in the process of deporting him because he did not have a green card. Once he was back in Mexico, Father intended to apply to return to the United States, but he could not predict how long that process would take. Father acknowledged that he had not lived with Clarice since February 2013. He had not had any visitation or spoken with her since that time due to the incident of abuse that resulted in her removal from his home.

When questioned by his attorney, Father stated that he had completed the parenting and anger management classes required by the DCS permanency plan. He expressed his willingness to do anything else necessary to work toward being reunited with Clarice. Father testified that he was released for the child abuse charges in March 2014, and then the immigration authorities picked him up from the jail; he was now being held in a prison in Louisiana. If able to reenter the United States, Father intended to return to the house he owned in Tennessee, the house where he, his brother, and Clarice had lived for eight years.

Father testified that he understood that the abuse incident that led to Clarice's removal was unacceptable and that he intended to continue to learn better techniques for handling discipline. Asked why he believed it was in Clarice's best interests for his rights not to be terminated, Father stated that he was the only parent she had ever known. According to him, her mother had abandoned her.

Nancy McCrary, DCS case manager, was the next witness. Ms. McCrary took charge of Clarice's case in July 2013; she began having regular contact with Clarice, seeing her at least twice a month. At the time of the hearing, Clarice was eight years old. In July 2013, Clarice was having trouble with anger, with almost daily notes from school; she would hit herself, hit walls, hit other children. Ms. McCrary decided that she needed to take action. Clarice was already receiving counseling every two weeks at a mental health center; Ms. McCrary set up more intensive in-home therapy. Ultimately, Ms. McCrary determined that the current foster parents did not have the training needed to deal with a child like Clarice with significant behavioral and trauma issues. Clarice was transferred to a level two foster home where she could receive case management as well as ongoing therapy. At the time of trial, Clarice had been in that placement since August 26, 2013. Since moving to her new foster home, Clarice had begun receiving trauma-focused therapy. In Clarice's case, the trauma is the physical abuse by Father. This therapy began in December 2013. Ms. McCrary observed that, since Clarice began the trauma-focused therapy, she seemed calmer and happier.

On cross-examination, Ms. McCrary acknowledged that, when she visited Father in his home, it appeared appropriate. She did not see the bedrooms, but the living room and other areas seemed clean and safe.

Mother testified through an interpreter. She stated that she was married to Father for three years. During that time, she testified, Father physically and verbally abused her many times. On about six occasions, Father caused injuries, such as bruises on her arm, reddish cheeks; the last time, Mother had a black eye. After Father hit Mother and gave her a black eye, Mother took her one-year-old daughter and left. Father took Mother to court and convinced her to sign a paper, telling her that it would prevent the government from taking their daughter. Later, Mother learned that the document limited her to seeing her daughter on Sundays. Mother testified that she visited on Sundays for about three years and then went to Mexico because her father had suffered a stroke. Father would not allow Clarice to go with Mother. Father would not allow Mother to speak to Clarice over the telephone from Mexico. When she returned to the United States two years later, Mother tried to see Clarice, but Father would not come to the door or would chase her away.

Mother further testified that, when she called from Mexico, Father would threaten her and say that she would never see Clarice again, that Clarice “was going to hate me for the rest of my life, and that he wasn’t ever going to allow me to see her.” Father allegedly used Mother’s immigration status as a way to threaten and scare her and prevent her from seeing Clarice. Mother did not learn until November 2013 that Clarice was not living with Father and was in DCS custody.

The next DCS witness was Amy Hawkins, Clarice’s TFCBT (trauma-focused cognitive behavioral therapy) counselor. Clarice scored high on the TFCBT assessment administered to all children who come into DCS custody for abuse and neglect. Her score was high enough for a diagnosis of PTSD (post-traumatic stress disorder). The assessment begins with a list of possible traumas. When asked if she had been hit by anyone in her family, Clarice said “yes.” She stated that it was her father, that she believed this began when she was around five years old, “that it happened pretty much daily, and one of the worst incidents was when he choked her.” In answering questions about symptoms she had experienced in the past 30 days, Clarice stated that she was having trouble sleeping, she was constantly looking out for things she was afraid of, she had flashbacks and memories, and she had a lot of avoidant symptoms (especially avoiding thoughts). On the fifth session, they began to work on relaxation and coping skills to help Clarice reduce her symptoms and start learning to deal with them.

After about eight relaxation sessions, Clarice continued to report having a hard time going to sleep, having bad dreams, and “always being on edge.” Clarice stated that she was “always looking out for things that might happen to her.” Ms. Hawkins testified that Clarice also exhibited “restricted affect,” meaning that she “has a pretty limited

ability to identify feelings.” This would be the focus of the next phase of the TFCBT therapy. Ms. Hawkins’s direct involvement with Clarice had ended by the time of the hearing. Another TFCBT-trained therapist took over at a natural break in the process, and Ms. Hawkins took on a supervisory role.

Ms. Hawkins gave the following summary of Clarice’s description of the abuse that Father perpetrated on her:

A. She told me that he had hit her many times, but one of the ones she told me quite a bit about was the time that he hit her with a power cord and that she had marks across her chest. And that was the incident that brought her into custody.

Q. All right. But she had made reference to other times that her father had physically harmed her, other than this time with the power cord, correct?

A. Yes.

Q. Were you able to -- were you able to see any other documents or pictures or anything else to -- to verify the injuries that she reported to you on this last incident?

A. Yes. We had a CFTM⁵] to develop a -- wait. We had a CFTM when Clarice’s mom came back into the picture, and at that time I was able to look through her chart at the DCS office at the pictures of the -- of her when she was brought into custody. The marks that were on her body were the same as the ones that she reported to me.

The final witness for DCS was Joann Carol, Clarice’s foster mother since August 2013. Ms. Carol gave the following summary of what Clarice told her concerning Father’s abuse:

[S]he went into how her father had been hitting her with a cord. And she said the only place -- she had places that she could run and try to get away. She would go under the table. It was a glass top table. She would hide under the table. And she said, But he just pulls the chairs away and then he gets me. And so then she runs to a chair. She described a reclining chair, and she would go under the foot of the recliner. And she said that once he was so mad he picked up the recliner and threw it by the foot and kind of tossed it back and got her out and continued, you know, hitting her with the cord.

And she said that he has tied her hands behind her back so that he could hit her in the front, and that he had laid her on the floor and put his foot on her back and hit her on the legs and the bottom. . . .

⁵Child family team meeting

Q. Did she make any statements about what would happen if she told anybody that she had been abused?

A. Yeah. She said that she -- she said she always had bruises on her body, and that a lot of people -- people would ask her how she got the bruises. And she always just said she fell down or fell down the stairs. And she said that her father had said if she ever told anybody how she really got the bruises that he would beat her to death.

So she didn't tell anybody until one of her teachers asked her at one point, you know, what happened to her. And she said, I finally just told the truth and told them what happened.

...

Q. Did she ever make mention of her father choking her?

A. She did. She said in this same time she was telling me, she said that he took a cord and wrapped it around her neck and pulled it real tight

...

Q. Did she report an incident to you that occurred back when she was in kindergarten?

A. She did. She told me that when she was in kindergarten, about five, she said that she had to go to the bathroom, number two, and she was afraid that she was going to miss the bus because -- so she didn't want to go back into the bathroom because she thought she would miss the bus. So she went ahead and got on the bus, and she said, I couldn't hold it. I tried and I tried, but I couldn't hold it. And so she went in her pants, and when she got home and he found out, you know, that she had done that, he started hitting her with the cord. And she said, I tried and tried to tell him that I couldn't help it and that I didn't want to miss the bus, but he just kept hitting me.

Asked about symptoms of trauma exhibited by Clarice, Ms. Carol stated that Clarice had some accidents "in her pants" during her first few months with them. She was also uncomfortable around Mr. Carol at first; Ms. Carol had observed that Clarice was shy around men in general. Ms. Carol testified that Clarice "still kind of is nervous if [Mr. Carol] raises his voice," for example, to get someone's attention. Ms. Carol stated that Clarice had "quite a few fears." She was afraid to go upstairs in the Carol home by herself; she was afraid to go to the restroom (for example, in a restaurant) by herself. She had trouble going to sleep; she would think about things, such as what her father did to her, and she would have bad dreams.

Father's proof consisted of his testimony. According to Father, Mother understood, when they went to court, that she was giving him full custody of Clarice and that she would have parenting time on Sundays. He stated that Mother was drunk when she came to see Clarice on Sundays. A few times, she came at one o'clock in the morning. He stated that the last time Mother attempted to see Clarice in his home was in 2006. Father denied additional beatings with a belt or cord other than the February 2013

incident that resulted in Clarice's removal from his home. He stated that otherwise he had only disciplined the child once or twice with her sandal.

Trial court's decision

After noting the stipulated grounds for termination, the court found by clear and convincing evidence that it was in the child's best interest that Father's parental rights be terminated. The court's findings included the following:

- i. [Father] admitted to other incidents of abuse: one with a belt and one with a sandal.
- ii. Mother . . . alleges [Father] was abusive in their relationship.
- iii. Amy Hawkins, Youth Villages' therapist, corroborates the trauma to the child due to the abuse of [Father].
- iv. [Father] complied in part with the Permanency Plan by completing Anger Management and Parenting Classes.
- v. The Court finds both [Father] and [Mother] credible witnesses. The substantive differences in their testimony reflect their perspectives, not a malicious intent to mislead the Court.
- vi. The Court cannot ascertain the immigration status for [Father]. He is currently detained at LaSalle Detention Facility. The prospects of his return to Mexico and re-entry to the United States are speculative. Therefore, the immigration status cannot be a factor in the court's consideration.

The court then proceeded to analyze each of the statutory factors set forth in Tenn. Code Ann. § 36-1-113(i) for determining the child's best interest. (We will consider the court's analysis below.) After determining that termination of Father's parental rights was in Clarice's best interest, the court ordered a home study of Mother and paternal grandmother's home. Custody was awarded to DCS.

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 (1972); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174 (Tenn. 1996). Thus, the state may interfere with parental rights only if there is a compelling state interest. *Nash-Putnam*, 921 S.W.2d at 174-75 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)). Pursuant to Tenn. Code Ann. § 36-1-113(l)(1), "[a]n order terminating parental rights shall have the effect of severing forever all legal rights and obligations of the parent or guardian of the child against whom the order of termination is entered and of the child who is the subject of the petition to that parent or guardian."

Our termination statutes identify “those situations in which the state’s interest in the welfare of a child justifies interference with a parent’s constitutional rights by setting forth grounds on which termination proceedings can be brought.” *In re W.B., IV*, M2004-00999-COA-R3-PT, 2005 WL 1021618, at *7 (Tenn. Ct. App. Apr. 29, 2005) (citing Tenn. Code Ann. § 36-1-113(g)). To support the termination of parental rights, petitioners must prove both the existence of one of the statutory grounds for termination and that termination is in the child’s best interest. Tenn. Code Ann. § 36-1-113(c); *In re D.L.B.*, 118 S.W.3d 360, 368 (Tenn. 2003); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

Because of the fundamental nature of a parent’s rights and the grave consequences of the termination of those rights, courts must require a higher standard of proof in deciding termination cases. *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Thus, both the grounds for termination and the best interest inquiry must be established by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c)(1); *In re Valentine*, 79 S.W.3d at 546. Clear and convincing evidence “establishes that the truth of the facts asserted is highly probable, and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *In re M.J.B.*, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004) (citations omitted). Such evidence “produces in a fact-finder’s mind a firm belief or conviction regarding the truth of the facts sought to be established.” *Id.*

In light of the heightened standard of proof in these cases, a reviewing court must adapt the customary standard of review set forth in Tenn. R. App. P. 13(d). *Id.* at 654. As to the trial court’s findings of fact, our review is de novo with a presumption of correctness unless the evidence preponderates otherwise, in accordance with Tenn. R. App. P. 13(d). *Id.* We must then determine whether the facts, “as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements” necessary to terminate parental rights. *Id.*

ANALYSIS

The only issue on appeal is whether the trial court erred in finding that termination of Father’s parental rights was in the best interests of the child.

Tennessee Code Annotated section 36-1-113(i) sets forth the following non-exclusive list of factors relevant to determining whether termination is in a child’s 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, controlled substances or controlled substance analogues as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Before we consider the statutory factors, it is important to note that ascertaining whether termination is in a child's best interest is necessarily a fact-intensive inquiry. *In re Giorgianna H.*, 205 S.W.3d 508, 523 (Tenn. Ct. App. 2006). The best interest analysis "does not call for a rote examination of each of Tenn. Code Ann. § 36-1-113(i)'s nine factors and then a determination of whether the sum of the factors tips in favor of or against the parent." *In re Audrey S.*, 182 S.W.3d 838, 878 (Tenn. Ct. App. 2005). Rather, "[t]he relevancy and weight to be given each factor depends on the unique facts of each case." *Id.*

As to factor one (Tenn. Code Ann. § 36-1-113(i)(1))—whether the parent has made an adjustment of circumstances to make it safe for the child to be in his home—the court determined that Father had "made reasonable attempts to adjust his situation" but that "his circumstances are not safe at this time, as he is currently held in the LaSalle Detention Facility." Father argues that he owns a home in Tennessee and intends to return to the United States as soon as possible once he is deported. He emphasizes that

DCS did not put on proof that there would be barriers to his reentry into the United States and asserts that “the possibility of reunification with his child was real.” The evidence does not preponderate against the trial court’s finding that Father was being held in LaSalle Detention Facility awaiting deportation and that the prospects of his return to the United States were “speculative.” In light of Father’s circumstances, there is little “likelihood that the child will be able to leave foster care and return to the parent’s home in the near future.” *In re C.B.W.*, No. M2005-01817-COA-R3-PT, 2006 WL 1749534, at *8 (Tenn. Ct. App. June 26, 2006).

The court found factor two not applicable. Factor three, Tenn. Code Ann. § 36-1-113(i)(3), concerns maintaining regular visitation or contact with the child. Father testified that he had not had any contact with Clarice since February 2013. The court determined that Father had been unable to visit due to his incarceration and had not been able to contact the child due to a no contact order. The court found that Father’s failure to visit was not willful. As Father admitted on cross-examination, however, his lack of contact with Clarice resulted from the episode of severe abuse. Factor three favors neither party.

Because Father was Clarice’s primary caregiver for the majority of her life, the court found the father-daughter relationship to be meaningful, thus finding factor four to weigh in favor of Father. Tenn. Code Ann. § 36-1-113(i)(4). We respectfully find that the evidence preponderates against this finding. Other than the amount of time that Clarice spent in Father’s household, there is nothing in the record to evidence a meaningful relationship between the child and Father. Rather, Clarice had nightmares about the abuse perpetrated against her by Father and suffered from post-traumatic symptoms.

Factor five, Tenn. Code Ann. § 36-1-113(i)(5), concerns the effect of a change in caregivers and environment. The court found that the current foster placement was successful and that “[a] change in placement prior to the completion of the trauma focused therapy could be detrimental to the child.” Ms. Hawkins testified that, with the trauma focused therapy, Clarice was happier, calmer, and better able to listen. She further stated that Ms. Carol provided good support in helping the child heal from the trauma of the abuse by Father. Father takes the position that the court should have taken a more long term view, asserting that “[t]he child could have continued her trauma focused therapy in the home of the foster family,” and “[s]he and father could have worked toward reunification together with the help of a therapeutic provider.” Even if we were to accept Father’s interpretation of factor five (concerning a long term view), he was not, at the time of the hearing, in a position to participate in efforts toward reunification with a therapeutic provider because he was about to be deported. The evidence does not preponderate against the trial court’s finding that factor five favors DCS.

Factor six, Tenn. Code Ann. § 36-1-113(i)(6), concerns whether a parent has shown brutality or physical abuse toward the child or other persons in the household. The trial court found: “The record clearly demonstrates that [Father] has shown brutality and physical abuse toward the child. The record also supports a physically abusive relationship toward Mother.” Although Father asserts that the incident that led to the child’s removal was an isolated event, there is ample evidence in the record to support the conclusion that there was a pattern of abuse. The evidence does not preponderate against the trial court’s implicit finding that factor six weighs in favor of DCS.

Factor seven, Tenn. Code Ann. § 36-1-113(i)(7), concerns the safety of the physical environment of the parent’s home. The trial court found that, “[o]ther than abuse, the home environment of Father is appropriate.” The evidence does not preponderate against this finding.

Factors eight and nine, Tenn. Code Ann. §§ 36-1-113(i)(8),(9), were determined by the trial court not to be applicable in this case.

Considering all of these factors, we must conclude that clear and convincing evidence supports the trial court’s determination that it is in the best interest of the child for Father’s parental rights to be terminated.

CONCLUSION

We affirm the judgment of the trial court. Costs of appeal are assessed against the appellant, Father, and execution may issue if necessary.

ANDY D. BENNETT, JUDGE