

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 24, 2015

IN RE WILLIAM B.

**Appeal from the Juvenile Court for Putnam County
No. 1283TPR John P. Hudson, Judge**

No. M2014-01762-COA-R3-PT – Filed June 11, 2015

In this termination of parental rights case, the father appeals the trial court’s termination of his parental rights to his son on the grounds of wanton disregard for the welfare of the child prior to father’s incarceration. The father also asserts the court erred in finding that termination was in the child’s best interest. We find that clear and convincing evidence supports the decision of the trial court and affirm the judgment in all respects.

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.

Brandon S. Griffin, Sparta, Tennessee, for the appellant, Donnie Wayne B.

Herbert H. Slatery, III, Attorney General and Reporter, and Mary Byrd Ferrara, Assistant Attorney General, for the appellee, Tennessee Department of Children’s Services.

Sheila L. O’Regan, Granville, Tennessee, Guardian Ad Litem.

OPINION

FACTUAL AND PROCEDURAL HISTORY

William B. (“William” or the “child”) was born in December 2007. His mother, Julie F. (“Mother”), was married to Benjamin F. at the time of his birth; however, Donnie Wayne B. (“Father”) is William’s biological father. Mother and Benjamin F. surrendered their parental rights to William on August 15, 2013, and are not parties in this appeal.

The Department of Children’s Services (“DCS”) became involved with William in November 2012 when DCS filed a Petition to Declare Children Dependent and Neglected and for Emergency Temporary Legal Custody in Kin. The petition alleged that William and his older half-brother Matthew F.¹ had been exposed to drug-related activity while in the custody of their mother and her paramour. The petition further stated that “William’s father . . . lost custody of his other child, Emalee [D.], on August 1, 2012 due to illegal drug use and activity and, therefore, was not considered for placement of his child, William.” On November 5, 2012, an order was entered placing William and Matthew F. in the custody of their maternal grandmother (“Grandmother”).²

In January 2013, Father pled guilty to two class C felonies (selling a Schedule II controlled substance in November 2010 and January 2011) and was imprisoned on a three-year sentence. On February 27, 2013, Father stipulated to a finding that William was dependent and neglected.

On January 29, 2014, DCS filed a petition to terminate Father’s parental rights alleging, as grounds for termination, abandonment by willful failure to visit or support and that Father had exhibited a wanton disregard for William’s welfare prior to incarceration. On April 30, 2014, Father filed a Motion for Finding of Failure to Make Reasonable Efforts Pursuant to T.C.A. § 37-1-166.

The trial court held a hearing on both Father’s and DCS’s motions on July 31, 2014, at which Matthew F. (who was fourteen at the time of the hearing); Sarah Tungate, William’s DCS case manager; Grandmother; and Father testified. By order entered September 10, 2014, the court found that DCS did not make reasonable efforts to assist Father in completing his permanency plan. However, the court terminated Father’s parental rights based on a finding that he exhibited a wanton disregard for the welfare of the child prior to his incarceration. The court further found that termination of Father’s parental rights was in William’s best interest. Specifically, the court held:

[Father] has been convicted on 1-3-12 of 2 counts of sale of oxycodone on 11-23-10 and 1-6-11. He has also been convicted of aggravated criminal trespass on 1-2-08. [Father’s] conduct in wanton disregard for the welfare of the child was to be involved in serious felony criminal activity, have repeated episodes of incarceration throughout this child’s life, and extensive drug abuse.

¹ Matthew F. is the son of Mother and Benjamin F. Matthew F. is not the subject of this appeal.

² In April 2013, Grandmother requested financial assistance to continue to care for William and Matthew. William and Matthew F. came into the custody of DCS and were placed with Grandmother as their foster parent in April 2013.

[Father] had previously lost custody of another child on August 1, 2012. That child was adjudicated to be dependent and neglected on December 13, 2012 by the Juvenile Court of Putnam County. The Court made findings in that case that include, but are not limited to, the father admitted to using methamphetamine in January and June of 2012, that he had purchased valium off the street, and that the father had made fifteen (15) purchases of pseudoephedrine in the first six (6) months of 2012 totaling 35.52 grams of pseudoephedrine.

The court found termination of Father's parental rights was in the best interest of the Child. Father appeals.

ANALYSIS

Parents have a fundamental right, based in both the federal and state constitutions, to the care, custody, and control of their own children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174-75 (Tenn. 1996); *In re Adoption of Female Child*, 896 S.W.2d 546, 547-48 (Tenn. 1995). While this right is fundamental, it is not absolute. The State may interfere with parental rights in certain circumstances. *In re Angela E.*, 303 S.W.3d at 250.

Our legislature has listed the grounds upon which termination proceedings may be brought. Tenn. Code Ann. § 36-1-113(g). Termination proceedings are statutory, *In re Angela E.*, 303 S.W.3d at 250; *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004), and a parent's rights may be terminated only where a statutory basis exists. *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002); *In the Matter of M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998).

To terminate parental rights, a court must determine by clear and convincing evidence the existence of at least 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 Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). "Clear and convincing evidence enables the fact-finder to form a firm belief or conviction regarding the truth of the facts, and eliminates any serious or substantial doubt about the correctness of these factual findings." *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010) (citations omitted). Unlike the preponderance of the evidence standard, "[e]vidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable." *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005).

Appellate courts review the trial court's findings of fact in termination proceedings de novo on the record and accord these findings a presumption of correctness unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *In re*

Bernard T., 319 S.W.3d at 596; *In re Angela E.*, 303 S.W.3d at 246. “In light of the heightened burden of proof in [termination] proceedings . . . the reviewing court must then make its own determination regarding whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, provide clear and convincing evidence that supports all the elements of the termination claim.” *In re Bernard T.*, 319 S.W.3d at 596-97. Proof of only one statutory ground is necessary to support a court’s termination of a parent’s rights. *In re Adoption of Angela E.*, 402 S.W.3d 636, 641 (Tenn. 2013); *In re Valentine*, 79 S.W.3d at 546.

A. Grounds for Termination: Abandonment by Wanton Disregard

A court may terminate parental rights when “[a]bandonment by the parent or guardian, as defined in § 36-1-102, has occurred.” Tenn. Code Ann. § 36-1-113(g)(1). Tennessee Code Annotated Section § 36-1-102(1)(A)(iv) defines abandonment as follows:

A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and either has willfully failed to visit or has willfully failed to support or has willfully failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent’s or guardian’s incarceration, or the parent or guardian has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child.

“[P]arental conduct exhibiting wanton disregard for a child’s welfare may occur at any time prior to incarceration and is not limited to acts occurring during the four-month period immediately preceding the parent’s incarceration.” *State of Tenn. Dep’t of Children’s Servs. v. Hood*, 338 S.W.3d 917, 926 (Tenn. Ct. App. 2009); *see also In re Audrey S.*, 182 S.W.3d at 871; *In re B.P.C.*, No. M2006-02084-COA-R3-PT, 2007 WL 1159199, at *9 (Tenn. Ct. App. Apr. 18, 2007) (“no specified time frame limits which pre-incarceration acts or omissions are subject to review” when determining whether the parent engaged in wanton disregard for child’s welfare).

Although Tenn. Code Ann. § 36-1-102(1)(A)(iv) does not specifically define “wanton disregard,” Tennessee courts have held that “probation violations, repeated incarceration, criminal behavior, substance abuse, and the failure to provide adequate support or supervision for a child can, alone or in combination, constitute conduct that exhibits a wanton disregard for the welfare of a child.” *In re Audrey S.*, 182 S.W.3d at 867-68; *see also In re S.L.A.*, 223 S.W.3d 295, 299 (Tenn. Ct. App. 2006) (“Wanton disregard for the welfare of the child can be established by the parent’s previous criminal

conduct along with a history of drug abuse.”). Simply stated, “a parent’s poor judgment and bad acts that affect the children constitute a wanton disregard for the welfare of the children.” *Hood*, 338 S.W.3d at 926.

Here, Father was incarcerated from January 10, 2013, until the hearing in July 2014. The petition to terminate was filed on January 29, 2014. Thus, Father was incarcerated during the four consecutive months prior to the filing of the petition to terminate. The trial court stated that, “[Father’s] conduct in disregard for the welfare of the child was to be involved in serious felony criminal activity, have repeated episodes of incarceration throughout the child’s life, and extensive drug abuse.” The court further illustrated Father’s wanton disregard by noting that “[Father] admitted to using methamphetamine in January and June of 2012, that he had purchased valium off the street, and that [he] had made fifteen (15) purchases of pseudoephedrine in the first six (6) months of 2012”

Father asserts that we should reverse the holding of the trial court due to the “strong bond” that exists between him and William and that we should credit his efforts at rehabilitation while incarcerated. These arguments, however, are best reserved for a consideration of whether termination of parental rights is in the best interest of William, for neither of these assertions has any bearing on whether there was clear and convincing evidence that Father exhibited a wanton disregard for William prior to his incarceration.

We have reviewed the record and have found the evidence clearly and convincingly supports the trial court’s holding with respect to wanton disregard. Matthew F., William’s half-brother, testified that when he and William lived with Father he witnessed Father “snorting pills,” purchasing and selling drugs, and trading food stamps for pills even though there was often very little food for him and his brother to eat. Matthew F. also described episodes of domestic violence in the home, stating that Father “beat my mom up” and that his mother would beat him in front of Father while Father did nothing to stop the beating. DCS case manager, Sarah Tungate, testified to the number of times Father has been charged with a criminal offense and incarcerated since William was born in 2007. Father was incarcerated from: January 17, 2008 to January 18, 2008; November 1, 2008 to November 3, 2008; June 17, 2009 to June 19, 2009; November 13, 2009 to November 16, 2009; June 8, 2010; November 13, 2010; July 17, 2012 to July 30, 2012; and January 10, 2013 until the hearing in July 2014. We find Father’s history of criminal conduct, including drug charges and one charge of aggravated criminal trespass, coupled with his abuse of prescription and non-prescription drugs, constitutes a wanton disregard for the welfare of William. *See In re S.L.A.*, 223 S.W.3d at 299. We affirm the trial court’s determination that Father abandoned William by exhibiting a wanton disregard for his welfare.

B. Best Interests

Tennessee Code Annotated section 36-1-113(i) sets forth the following non-exclusive list of factors relevant to determining whether termination of a parent's rights 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.

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 at 878. Rather, "[t]he relevancy and weight to be given each factor depends on the unique facts of each case."

Id. “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” Tenn. Code Ann. § 36-1-101(d).

In this case, the court found by clear and convincing evidence that termination of Father’s rights was in William’s best interest and made the following findings in that regard:

1. [Father] has not made an adjustment of circumstances, conduct or conditions as to make it safe and in the child’s best interest to be in the home of the parent.

2. A change of caretaker and physical environment is likely to have a negative effect on the child’s emotional condition. He is very bonded to his maternal grandmother and she has provided the only stability in his life.

3. [Father] has committed brutality, physical, sexual, emotional or psychological abuse or neglect toward [an]other child in the family or household. The Department removed an older child from his custody due to dependency and neglect. That child was placed in the custody of a relative.

4. [Father’s] use of controlled substances renders him consistently unable to care for the child in a safe and stable manner.

5. [Father’s] mental and emotional status would be detrimental to the child and prevent him from effectively providing safe and stable care and supervision for the child.

6. [Father] continues to make lifestyle choices that prevent him from being able to parent the child or to provide a home for the child.

7. The child is placed in a relative foster home that wishes to adopt the child.

8. The child has established a strong bond with the relative foster parent.

9. The child is placed in the same relative foster home as his half-brother with whom he has a strong bond. The relative foster parent intends to adopt the half-brother as well.

10. The child needs to be released from the stigma of being a foster child.

Father asserts that the trial court focused too heavily on William’s need for continuity and on Father’s previous drug abuse, while failing to consider the strong bond that Father has with William. Father also cites the following statement made by the trial court at the close of the trial:

I wish it were in my power to order that the grandmother allow [Father] to have contact with the child. I hope she will. I think he needs to have

contact with his father. But I - - I don't think that's a basis on which this court cannot find and not grant the petition of the Department.

Although there is evidence that a relationship exists between Father and William, we have reviewed the record and find that the evidence clearly and convincingly supports the trial court's finding that termination of Father's rights is in William's best interest. Father ingested drugs, sold drugs, and purchased drugs while in the presence of William. *See* Tenn. Code Ann. § 36-1-113(i)(7). Matthew F. testified that Father committed acts of domestic violence in the home while he and William were present. *See* Tenn. Code Ann. § 36-1-113(i)(6). Father stipulated to a finding that William was dependent and neglected, and there was evidence introduced establishing that another of Father's children had been adjudicated dependent and neglected. *See id.* When William lived with Father, Grandmother testified that they lived in a home with "open holes" in the floor and that on several occasions she had to provide food for the children. Father testified that he is bipolar and is currently in a mental health program at the prison. *See* Tenn. Code Ann. § 36-1-113(i)(8). Grandmother testified that William was "nervous," and "frail," and often had seizures when he first came into her custody. She explained that, since coming into her care, William was growing well and has not experienced any seizures. *See* Tenn. Code Ann. § 36-1-113(i)(5). In light of Father's substance abuse, criminal history, incarceration, and the trial court's determination that a change of caretakers and physical environment is likely to have a negative impact on William's emotional, psychological and medical condition, we affirm the trial court's determination that termination of Father's parental rights is in William's best interest.

CONCLUSION

We affirm the judgment of the trial court in all respects. Costs of appeal are assessed against the appellant, Father, for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE