

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 10, 2015

IN RE STEVEN C.¹

**Appeal from the Juvenile Court for Davidson County
No. 2012003155, PT180389 Sophia Brown Crawford, Judge**

No. M2014-01944-COA-R3-PT – Filed June 15, 2015

A father's parental rights to his child were terminated on the grounds that the father failed to comply with the requirements of the permanency plans developed when the child went into the custody of the Department of Children's Services and that the conditions which led to the child's removal persisted. Father appeals, contending that the Department did not use reasonable efforts to reunite him with his child and that the court erred in finding that the child had been removed from Father's home. Finding that clear and convincing evidence exists to support the grounds for termination of Father's rights, and that termination of those rights is in the best interest of the child, we affirm the judgment of the trial court.

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

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P. J., M. S., and W. NEAL MCBRAYER, J. joined.

Thomas H. Miller, Nashville, Tennessee, for the appellant, Steven R. C.

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

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

OPINION

Steven C. was born, out of wedlock, on May 15, 2012, to Kesha D. W. (“Mother”) and Steven R. C. (“Father”); at the time of the birth Mother and Steven tested positive for cocaine. A referral was made to the Department of Children’s Services (“DCS”) and an investigation initiated. The DCS case worker determined that Mother and Steven could be admitted to the Rainbow Program, a residential drug treatment program housed at Meharry Medical College, for detoxification and therapy; Mother agreed to enter the program and reported to the program upon her release from the hospital on May 17. At some point prior to June 8 Steven joined Mother at the Rainbow program. On June 8 Mother decided to leave the treatment program before completing it and DCS was notified. Due to Mother’s leaving the program, Steven was placed in temporary DCS custody; on June 12 DCS initiated a proceeding in Davidson County Juvenile Court to have Steven declared dependent and neglected and to remain in DCS custody; an emergency custody order was entered on that date placing Steven in DCS custody. On October 5 a hearing was held to adjudicate the dependent and neglect petition, at which time an agreement was announced wherein Mother and Father consented to a finding of neglect and agreed that Steven would remain in the custody of DCS.²

The first of three permanency plans was developed July 6, 2012, with a goal of return to parent. Father was incarcerated and did not attend the August 17 hearing to ratify the July 6 plan. The second plan was developed on May 20, 2013, with a goal of adoption.³ Father did attend the May 24 ratification hearing, during which the plan and the criteria for termination were explained to him and the plan approved. In the order approving the May 2013 plan, the court held that DCS had been making reasonable efforts to reunify Mother and Father with Steven, identifying specific measures taken. Pertinent to the issues in this appeal, the court noted that Father was not in substantial compliance: “Father is currently incarcerated for [domestic violence] charge against [Mother]. . . . He has participated in therapeutic visitation but has done nothing more. He is reportedly diagnosed as schizophrenic and receives mediation and treatment.”⁴ The court did not relieve DCS of its responsibilities.

² On July 17, 2014, an order was entered memorializing the agreement announced on October 5, 2012; the reason for the delay in entry of the order is not apparent from the record.

³ As the justification for changing the goal from reunification, the May 2013 plan stated: “[Father] and [Mother] have not completed any tasks on the permanency plan that would allow Steven to be reunified with either of them. Both have continuously been in and out of jail since Steven was brought into custody.”

⁴ The court included as an “other finding”:

Father acknowledges in court that he has been homeless, not working regularly due to related back injury. He acknowledges he is paranoid schizophrenic and bipolar and has

The third permanency plan was developed on March 31, 2014, with a goal of adoption; Father did not appear at the April 25 ratification hearing. Counsel for Father was present at each of the ratification hearings. All three permanency plans required Father to submit to random drug screens; schedule, complete, and follow all recommendations from an Alcohol and Drug assessment; participate in services to address the domestic violence issues within the home; complete and follow all recommendations from scheduled parenting assessment; secure and maintain appropriate housing; attend, participate, and follow all recommendations for the mental health assessment; attend all of Steven's medical appointments; show that he is able to financially provide for Steven. The third plan added the action step that parents will "refrain from involvement in illegal activities/behaviors." In the order approving the third plan, the court again noted the reasonable efforts DCS had made to assist in getting Mother and Father to comply with the plan and made a finding that Father was not in substantial compliance.⁵

On October 13, 2013, DCS filed a Petition to Terminate Parental Rights and for Full Guardianship. The grounds alleged as to Father were abandonment by incarcerated parent, willful failure to visit or support, wanton disregard for the welfare of the child, substantial non-compliance with the permanency plans, and persistence of conditions; the petition further alleges that termination would be in the best interest of the child.

The case was heard before the Juvenile Court for Davidson County on July 24, 2014; on September 16 the court entered an order terminating the parental rights of both parents. Father's rights were terminated on the grounds of persistence of conditions and substantial non-compliance with the permanency plans.

Father appeals, stating the following issues:⁶

- I. Whether DCS exercised reasonable efforts to reunite the child with his Father.
- II. Whether the trial court erred in terminating Father's parental rights pursuant to T.C.A. § 36-1-113(g)(3).

not been receiving mental health treatment or taking medication. He further testified that he is an alcoholic.

⁵ The court noted: "Father has not made progress on [the] plan. He has been in and out of jail. He has not visited regularly. He has provided no documentation."

⁶ Mother does not appeal the termination of her parental rights.

I. 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)). 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.*, 2005 WL 1021618, at *7 (citing Tenn. Code Ann. § 36-1-113(g)). A party seeking to terminate the parental rights of a biological parent must prove at least one of the statutory grounds for termination. Tenn. Code Ann. § 36-1-113(c)(1); *In re D.L.B.*, 118 S.W.3d 360, 366-67 (Tenn. 2003); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). Secondly, the party must prove that termination of the parental rights of the biological parent is in the child’s best interest. Tenn. Code Ann. § 36-1-113(c)(2).

Because of the fundamental nature of the 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. *Santosky v. Kramer*, 455 U.S. 745, 766-69 (1982); *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. § 36-3-113(c); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). In light of the heightened standard of proof in these cases, a reviewing court must adapt the customary standard of review set forth by Tenn. R. App. P. 13(d). *In re M.J.B.*, 140 S.W.3d 643, 654 (Tenn. Ct. App. 2004). As to the 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.*

II. SUBSTANTIAL NONCOMPLIANCE WITH THE PERMANENCY PLANS

The trial court held that Father failed to substantially comply with the requirements of the permanency plans and terminated his rights on that ground. Father does not contend that he has substantially completed the permanency plan requirements; rather, he contends that “[b]ecause there is a lack of clear and convincing evidence that [the Department] exercised reasonable efforts to reunify the child and Father, the order terminating his parental rights must be vacated.”

In support of his argument, Father relies the holding in *In re C.M.M.* that “when the termination proceeding involves grounds that implicate the Department’s obligation, establishing that it made reasonable efforts to reunite the child with his or her parents is

an essential ingredient of the Department's case.” *In re C.M.M.*, No. M2003-01122-COA-R3-PT, 2004 WL 438326 at*7 (Tenn. Ct. App. Mar. 9, 2004). Father acknowledges that *In re C.M.M.* was expressly overruled by the Tennessee Supreme Court in *In re Kaliyah S.*, 455 S.W.3d 533 (Tenn. 2015); however, he argues that *In re Kaliyah S.* should not be applied retrospectively, and that because a final order from the trial court was entered in this case before *In re Kaliyah S.* was decided, the rule enunciated in *In re C.M.M.* is still valid and applicable to his case. This argument is without merit.⁷

In re Kaliyah S. addressed the legal significance of the Department’s efforts to assist a parent whose rights are sought to be terminated; the Court expressly considered “whether the State is required to prove that it made reasonable efforts to reunify the parent with the child as a precondition to termination.” 455 S.W.3d at 535. The Court stated:

[I]n a termination proceeding, the extent of DCS’s efforts to reunify the family is weighed in the court’s best-interest analysis, but proof of reasonable efforts is not a precondition to termination of the parental rights of the respondent parent. As with other factual findings made in connection with the best-interest analysis, reasonable efforts must be proven by a preponderance of the evidence, not by clear and convincing evidence. *In re Audrey S.*, 182 S.W.3d at 861. After making the underlying factual findings, the trial court should then consider the combined weight of those facts to determine whether they amount to clear and convincing evidence that termination is in the child’s best interest. *See In re Adoption of Kleshiski*, No. M2004-00986-COA-R3-CV, 2005 WL 1046797, at *17 (Tenn.Ct.App. May 4, 2005)(citing *In re M.J.B.*, 140 S.W.3d 643,654 (Tenn.Ct.App. 2004)); *see also In re Giorgianna H.*,205 S.W.3d 508, 519 (Tenn. Ct. App. 2006); *Tenn Dep’t of Children’s Servs. v. T.M.B.K.*, 197 S.W.3d 282, 288 (Tenn.Ct. App. 2006).

Id. at 556.

In view of the holding in *In re Kaliyah S.*, Father’s argument that termination for substantial noncompliance with the permanency plan was not proper because the Department failed to prove it expended “reasonable efforts” to assist him must fail. We will address the reasonableness of the Department’s actions in the best interest analysis.

⁷ Our holding in this regard is consistent with that in *In re Faith W.*, in which we applied *In re Kaliyah S.* to an appeal of a termination of parental rights case where the order being appealed had been issued prior to the *In re Kaliyah S.* opinion. *In re Faith W.*, No.M2014-01223-COA-R3-PT, 2015 WL 2438297 (Tenn. Ct. App. May 20, 2015).

III. PERSISTENCE OF CONDITIONS

Parental rights may be terminated on the basis of “persistence of conditions” as defined by Tenn. Code Ann. § 36-1-113(g)(3)(A) when:

The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(A) The conditions that led to the child’s removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child’s safe return to the care of the parent(s) or guardian(s), still persist;

(B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(C) The continuation of the parent or guardian and child relationship greatly diminishes the child’s chances of early integration into a safe, stable and permanent home;

A termination proceeding based on this ground requires a finding by clear and convincing evidence of all three factors. *In re Valentine*, 79 S.W.3d at 549.

The trial court found that:

It is undisputed that the child has been removed from the home of the parents by order of a court for a period in excess of six months. The child was placed in the custody of the Department of Children’s Services on June 12, 2012. The uncontroverted testimony is clear that the placement out of the parents’ custody was due to dependent and neglect issues. The conditions that needed to be remedied by the Parents were their drug and alcohol addictions, stable and safe housing, compliance with their mental health treatment and domestic violence issues of both parents. The parents have not addressed any of their issues outlined in the permanency plan. Their failure to address their issues and their most current incarcerations make the return of the child to their care unsafe, impossible and would most likely subject him to further abuse or neglect.

The parents are not likely to remedy these conditions any time in the near future so that the child could be returned to their care. Neither parent had a realistic plan for addressing their issues. The testimony about their

future was mostly centered on their relationship with each other and not with the child.

The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

Father contends that this ground was not sustained by the evidence because, at the time Steven was placed in DCS custody, Father was living by himself and, consequently, Steven was not "removed" from Father's home. This argument is without merit.

There is no reasonable construction of the statute to suggest a requirement that the child be physically present in the home of the parent whose rights are being terminated when the child comes into DCS custody in order for the ground of persistence of conditions to be established; in the clear interpretation and application of the statute, the operative determination is that the child has been removed from the custody of the parents due to certain conditions. This plain sense interpretation of the statute is shown in the circumstances of this case, where Steven was three weeks old when he came into the custody of DCS as a result of his mother leaving the rehabilitation program she had agreed to attend and his father – by his own testimony – being in circumstances which rendered him unable to care for him.

Steven was removed from the custody of both parents due to dependency and neglect, and placed in a foster home at three weeks of age; he has remained with the same family since that time. Father suffers from alcoholism and mental illness and has refused to treat his illnesses. The longest period of time he has gone without alcohol is the five days before the trial. Father testified that he is homeless and not in a position to have Steven with him.

The evidence is clear and convincing that that the requirements of Tenn. Code Ann. § 36-1-113(g)(3)(A) have been satisfied.

IV. BEST INTEREST

Once a ground for termination has been proven by clear and convincing evidence, the trial court must then determine whether it is the best interest of the child for the parent's rights to be terminated, again using the clear and convincing evidence standard. The legislature has set out a list of factors at Tenn. Code Ann. § 36-1-113(i) for the courts to follow in determining the child's best interest.⁸ The list of factors in the statute is not

⁸ The factors at Tenn. Code Ann. § 36-1-113(i) are:

exhaustive, and the statute does not require every factor to appear before a court can find that termination is in a child's best interest. See *In re S.L.A.*, 223 S.W.3d 295, 301 (Tenn. Ct. App. 2006) (citing *Tenn. Dep't of Children's Servs. v. T.S.W.*, No. M2001-01735-COA-R3-CV, 2002 WL 970434, at *3 (Tenn. Ct. App. May 10, 2002); *In re I.C.G.*, No. E2006-00746-COA-R3-PT, 2006 WL 3077510, at *4 (Tenn. Ct. App. Oct. 31, 2006)).

The trial court made findings regarding the pertinent factors in determining that termination of Father's parental rights is Steven's best interest; Father does not appeal this determination. We have reviewed the evidence and concur that it clearly and convincingly establishes that termination of Father's rights is in Steven's best interest.⁹

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, 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.

⁹ With respect to Tenn. Code Ann. § 36-1-113(i)(2), the evidence is clear that DCS assisted Father by providing resources and attempting to work with him to comply with his responsibilities as detailed in the permanency plans. The instability of Father's life, demonstrated by his intermittent homelessness, living in a tent, lack of work, alcoholism and mental health issues, were a consequence of his failure to accept the assistance offered and not an indication of the deficiency of any efforts expended or resources provided by DCS.

V. CONCLUSION

For the foregoing reasons the judgment of the trial court terminating Father's parental rights is affirmed.

RICHARD H. DINKINS, JUDGE