

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 9, 2014

IN RE VICTORIA W. ET AL.

**Appeal from the Juvenile Court for Lincoln County
No. J4512A N. Andy Myrick, Jr., Judge**

No. M2013-02331-COA-R3-PT - Filed May 29, 2014

Mother appeals the termination of her parental rights as to her two children. Father's rights were also terminated, but he does not appeal. The court found the Department of Children's Services established three grounds for termination of mother's parental rights: 1) severe child abuse pursuant to Tennessee Code Annotated § 36-1-113(g)(4); 2) mental incompetence pursuant to Tennessee Code Annotated § 36-1-113(g)(8)(B); and 3) persistence of conditions pursuant to Tennessee Code Annotated § 36-1-113(g)(3). In a previous dependency and neglect proceeding, the Lincoln County Juvenile Court found that Mother committed severe child abuse by failing to protect her minor daughter from sexual abuse by a neighbor. That judgment was not appealed; as a consequence, the severe abuse findings are res judicata. Pursuant to Tennessee Code Annotated § 36-1-113(g)(4), a court may terminate parental rights when the parent was found to have committed severe child abuse under any prior order of a court. The court also found that the Department had proven two additional grounds, mental incompetence and persistent conditions. The juvenile court also found that termination of both parents' rights was in the children's best interest. We therefore affirm.

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

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, J.J., joined.

Emeterio "Terry" R. Hernando, Lewisburg, Tennessee, for the appellant, Marie W.

Robert E. Cooper, Jr., Attorney General and Reporter, Mary Byrd Ferrara, Assistant Attorney General, and Derek C. Jumper, Nashville, Tennessee, for the appellee, State of Tennessee Department of Children's Services.

OPINION

Marie A.W. (“Mother”) and John F.W. (“Father”) are the parents of Victoria W.¹, born December 2005, and Billy W., born October 2008, the children at issue in this appeal. The children were residing with Mother and their maternal grandmother when they were removed from Mother’s custody in March 2012, based upon reports that Victoria was sexually abused by her juvenile cousin who lived in the same neighborhood.

On March 21, 2012, the Department filed a petition against Mother and Father in Lincoln County Juvenile Court for temporary legal custody of the children. The primary allegations were that a neighbor had sexually abused Victoria and that Mother and Father were mentally delayed which affected their ability to care for and to protect the children. Following a preliminary hearing that same day, the Lincoln County Juvenile Court found that there was probable cause to believe the children were dependent and neglected, and the children remained in the custody of the Department.

In April 2012, an initial permanency plan was developed for the parents setting out reasonable responsibilities for them in order to regain the children. The plan required Mother and Father to obtain a psychological evaluation to determine their mental capacity to parent the children and to participate in parenting classes. This plan was ratified on May 9, 2012.

On May 15, 2012, following a final hearing on May 9, 2012, the juvenile court entered a Final Order of Adjudication, finding that Mother’s failure to protect their minor daughter from sexual abuse constituted severe child abuse. Specifically, the court found that Mother knew about the sexual abuse of Victoria for approximately one year and took no action to prevent further instances of abuse or to report the abuse to appropriate authorities, and that the parents were not competent to provide proper care and supervision for the children. Based on these facts, the juvenile court determined the children to be dependent and neglected, and that the children remain in the temporary legal custody of the Department.² None of the parties appealed the Final Order; thus, it is a final, non-appealable judgment.

The Department filed a petition to terminate the parental rights of Mother and Father on January 30, 2013. Following a hearing, the juvenile court entered an Order on September 17, 2013, terminating the parental rights of both Mother and Father. The court terminated

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 court also relieved the Department of any duty to exert reasonable efforts to reunite the children with their parents.

Mother's parental rights on the grounds of severe abuse by failing to prevent the sexual abuse of Victoria, mental incapacity, and persistence of conditions. The juvenile court terminated Father's rights on the grounds of abandonment by failure to visit and mental incompetence. The court also found that it was in the best interest of the children for Mother and Father's parental rights to be terminated. Mother appeals; Father did not appeal.

STANDARD OF REVIEW

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 best interest of the child. Tenn. Code Ann. § 36-1-113(c); *In re Adoption of Angela E.*, 402 S.W.3d 636, 639 (Tenn. 2013) (citing *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002)). When a trial court has made findings of fact, we review the findings de novo on the record with a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *In re Adoption of Angela E.*, 402 S.W.3d at 639 (citing *In re Taylor B.W.*, 397 S.W.3d 105, 112 (Tenn. 2013)). We next review the trial court's order de novo to determine whether the facts amount to clear and convincing evidence that one of the statutory grounds for termination exists and if so whether the termination of parental rights is in the best interests of the children. *Id.* Clear and convincing evidence is "evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Id.* (citing *In re Valentine*, 79 S.W.3d at 546 (quoting *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n. 3 (Tenn. 1992)) (internal quotation marks omitted).

ANALYSIS

Mother asserts the juvenile court erred by relying on severe child abuse as a ground for termination pursuant to Tennessee Code Annotated § 36-1-113(g)(4), and in finding that the Department established the grounds of mental incompetence, pursuant to Tennessee Code Annotated § 36-1-113(g)(8)(B), and persistence of conditions, pursuant to Tennessee Code Annotated § 36-1-113(g)(3). She also asserts the juvenile court erred in finding that termination of her parental rights was in the children's best interests pursuant to Tennessee Code Annotated § 36-1-113(i).

I. SEVERE CHILD ABUSE

Mother challenges the finding of severe child abuse. She vehemently denies that Victoria was ever sexually abused. She further contends the perpetrator was never arrested nor charged for the sexual abuse of Victoria. We find no merit to either contention because the finding that Mother committed severe child abuse is *res judicata*.

Severe child abuse is a ground for termination of parental rights under Tennessee Code Annotated § 36-1-113(g)(4). In the dependency and neglect proceeding, the juvenile court found the Department proved by clear and convincing evidence that Mother failed to protect her daughter, Victoria, from sexual abuse. Based upon that determination the court found Mother committed severe child abuse pursuant to Tennessee Code Annotated § 36-1-113(g)(4). In Tennessee, a court may terminate parental rights when: “The parent . . . has been found to have committed severe child abuse as defined in § 37-1-102, under any prior order of a court . . . against the child who is the subject of the petition[.]” Tenn. Code Ann. § 36-1-113(g)(4).

The order by which Mother was found to have committed severe child abuse in the dependent and neglect action was entered on May 15, 2012. Mother had the right to appeal that ruling; however, she did not. Therefore, the order finding that Mother committed severe child abuse became a final, non-appealable judgment on June 15, 2012.

When there is an existing final judgment upon the merits by a court of competent jurisdiction, that ruling is conclusive of rights, questions and facts in issue as to the parties. *Galbreath v. Harris*, 811 S.W.2d 88, 90 (Tenn. Ct. App. 1990). This is known as the doctrine of *res judicata*, which is “based on the public policy favoring finality in litigation and does not depend upon correctness or fairness, as long as the underlying judgment is valid.” *Lee v. Hall*, 790 S.W.2d 293, 294 (Tenn. Ct. App. 1990) (citing *Moulton v. Ford Motor Co.*, 533 S.W.2d 295, 296 (Tenn. 1976)). As a consequence, the court presiding over the termination action was precluded from reconsidering whether Mother committed severe child abuse based on the doctrine of *res judicata*.

For the foregoing reasons, we affirm the finding that the Department established the ground for termination based on severe child abuse pursuant to Tennessee Code Annotated § 36-1-113(g)(4).

Although parental rights may be terminated when only one statutorily defined ground is established, Tennessee Code Annotated § 36-1-113(c)(1); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002); *In re M.W.A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998), we shall address the other grounds for termination of Mother’s parental rights.

II. MENTAL INCOMPETENCY

Tennessee Code Annotated § 36-1-113(g)(8) provides that the court may terminate the parental rights of a parent if it determines on the basis of clear and convincing evidence that:

(B)(i) The parent . . . of the child is incompetent to adequately provide for the further care and supervision of the child because the parent's . . . mental condition is presently so impaired and is so likely to remain so that it is unlikely that the parent . . . will be able to assume or resume the care of and responsibility for the child in the near future, and . . . ;

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

Tenn. Code Ann. § 36-1-113(g)(8)(B)-(C).

As the statute expressly provides, the Department had the burden to demonstrate by clear and convincing evidence that Mother was presently unable to care for the children and that it was unlikely that Mother would be able to assume the care of and responsibility for the children in the near future. Tenn. Code Ann. § 36-1-113(g)(8). The juvenile court accredited the deposition testimony of Elysse Beasley, an expert in the field of psychology, who conducted a psychological evaluation of Mother on July 11, 2012. Ms. Beasley diagnosed Mother with moderate mental retardation and opined that, as a result, Mother was incapable of parenting her children. In fact, Ms. Beasley testified that Mother presented with the cognitive ability of a child approximately seven or eight years of age and that she was incompetent to adequately provide for the care and supervision of the children. Finding that Mother had an IQ of 57, Ms. Beasley testified that “someone with an IQ of 57 would not be able to drive a car, often cannot count money, would not be able to manage money.” She also opined that Mother’s condition is likely to remain the same and is unlikely to improve with medication, parenting classes, or anything else the Department could provide. Therefore, Ms. Beasley testified that Mother would not be able to resume care of the children in the near future.

Furthermore, the juvenile court discredited the testimony of Mother’s only witness who testified that Mother had the ability to care for her children. To the contrary, the juvenile court acknowledged its opportunity to observe Mother at trial and concurred with the opinion of Ms. Beasley that Mother acted and responded to questioning like a girl approximately seven or eight years of age.

The evidence in the record clearly and convincingly established that Mother was unable to care for the children due to her mental condition, and that it was unlikely that she would be able to care for the children in the near future. Therefore, we affirm the juvenile court’s finding that the Department proved mental incompetency as a ground for termination

of Mother's parental rights by clear and convincing evidence pursuant to Tennessee Code Annotated § 36-1-113(g)(8).

III. PERSISTENCE OF CONDITIONS

Tennessee Code Annotated § 36-1-113(g)(3) specifies the essential elements for the "persistent conditions" ground for termination of parental rights. It provides that grounds for termination exist when:

(3) 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[.]

Tenn. Code Ann. § 36-1-113(g)(3).

As mentioned above, the record clearly established that there is little likelihood that Mother's mental conditions will be remedied so that the children may be safely returned to Mother in the near future, and that the continuation of the parent and child relationship greatly diminishes the children's chances of early integration into a safe, stable, and permanent home. For these reasons, we affirm the juvenile court's finding that the Department proved the "persistent conditions" ground for termination of Mother's parental rights by clear and convincing evidence pursuant to Tennessee Code Annotated § 36-1-113(g)(3).

IV. BEST INTERESTS OF THE CHILDREN

The General Assembly has provided a list of factors for the court to consider when conducting an analysis of the best interests of the children. *See* Tenn. Code Ann. § 36-1-113(i)(1)-(9). The nine statutory factors, which are well known and need not be repeated here, are not exclusive or exhaustive, and other factors may be considered by the court. *In re M.A.R.*, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005). Moreover, not every statutory factor need apply; a finding of but a few significant factors may be sufficient to justify a finding that termination of the parent-child relationship is in the children's best interests. *See In re M.A.R.*, 183 S.W.3d at 667. The children's best interests are to be determined from the perspective of the children rather than the parent. *See State Dep't of Children's Servs. v. L.H.*, No. M2007-00170-COA-R3-PT, 2007 WL 2471500, at *7 (Tenn. Ct. App. Dec. 3, 2007) (citing *White v. Moody*, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004)).

The most grave concern is the substantial risk of harm Victoria would be subject to if returned to the custody of her Mother. Although Mother testified that she would do anything to keep her children safe, her previous actions allowing Victoria to continue to play with the perpetrator coupled with her mental deficiencies create serious concerns that Mother can provide a safe environment.

The juvenile court found that the termination of Mother's rights was in the best interest of the children because Mother had been found to have severely abused Victoria by failing to protect her from abuse and that her mental status prevented her from providing a safe and stable environment for her children. In addition, the juvenile court found that the children have established a strong bond with their foster parents who wish to adopt them.

Considering these and many other relevant factors from the children's perspective, the evidence clearly and convincingly demonstrates that it is in the children's best interests that the parental rights of Mother be terminated. Therefore, we also affirm this finding.

IN CONCLUSION

The judgment of the juvenile court is affirmed. Costs of appeal are assessed against the Department of Children's Services due to Mother's indigency which is due in part to her mental incompetency.

FRANK G. CLEMENT, JR., JUDGE