IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 2, 2014

IN RE MACKENZIE N., ET AL.

Appeal from the Chancery Court for Overton County
No. 13CV10 Ronald Thurman, Chancellor

No. M2013-02805-COA-R3-PT - Filed November 26, 2014

Mother appeals the termination of her parental rights on the grounds of abandonment, contending that any failure to support or visit her children was not willful. Mother argues that her failure to support her children was a result of poverty and that her failure to visit was caused by obstruction on the part of the children's grandmother/guardian. We find that the children's grandmother/guardian failed to prove by clear and convincing evidence the existence of at least one of the statutory grounds for termination. We therefore reverse the termination of Mother's parental rights.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed and Remanded

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

Daryl A. Colson, Livingston, Tennessee, for the appellant, Veronika P.

Michael Savage, Livingston, Tennessee, for the appellee, Linda L.

OPINION

I. BACKGROUND AND PROCEDURAL HISTORY

This is a termination of parental rights case brought by a grandparent against a mother. Veronika P. ("Mother") has two children, Mackenzie N. and Christopher N., who were ages seven and nine, respectively, at the time of trial. Linda L. ("Grandmother") is the children's paternal grandmother.

In September 2010, Grandmother, a Tennessee resident, went to visit Mother and the children after the death of the children's biological father. At the time, Mother and the children were living in Orange County, California. During this visit, Grandmother became concerned with the children's "very poor living conditions." According to Grandmother's testimony: (1) Mother had very limited means at the time because she did not work; (2) she was being physically abused by her then-boyfriend in front of the children; (3) she did not have a stable living situation for herself or the children; and (4) she had a history of mental illness requiring medication.[1] Grandmother also claimed that the children might have been abused.

In the Orange County Superior Court, Grandmother filed a petition to be appointed guardian of the children, which was granted on February 7, 2011, and she took up residence with the children in California. Although the full proceedings before the California court are not in the record, Grandmother testified that, as guardian, she had discretion over matters of visitation between Mother and children. According to Grandmother, she discontinued visitation after Mother began to exhibit aggressive behavior, such as screaming and swearing at Grandmother, and generally upsetting the children.

In April 2011, Mother filed a petition for visitation with the children, but the California court dismissed the petition without prejudice due to Mother's failure to appear at a hearing scheduled for July 6, 2011.[2] Notes from the proceeding indicate that Grandmother was to allow visitation in her "discretion given the best interest of the children." The court also permitted Grandmother to condition visitation on the use of a monitor.

Unfortunately, the option of monitored visitation did not resolve the visitation issues. Mother claimed she could not afford to pay a monitor. When Grandmother offered to pay the associated costs, Mother initially refused. Mother testified that she later attempted to accept Grandmother's offer but that the offer was withdrawn. Efforts to arrange for alternatives to compensated monitors also proved unsuccessful. Grandmother claimed that she could not get other family members to supervise visitation and that a proposal for visitation to take place at a highway patrol office was rejected by Mother.

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[1] Mother's precise diagnosis is unclear. She offered contradictory testimony as to whether she has post-traumatic stress disorder and/or is bipolar/manic depressive. A doctor has prescribed Zoloft to treat her illness(es).

[2] A "Minute Order" from the proceeding reflects that Mother was late to the hearing.

Mother last saw Christopher at his kindergarten graduation on May 25, 2011. Mother's last in-person visit with Mackenzie was in mid-March 2011. Ultimately, Grandmother sought and received permission from the California court to return to Tennessee with the children, and she did so on February 15, 2012.

After returning to Tennessee, Grandmother filed a petition to be appointed guardian of the children in the Chancery Court for Overton County, Tennessee. By the time the petition was filed, Mother had moved to the State of Washington. Although Mother sought leave to participate in the hearing on the petition by telephone, the court denied her request. The chancery court appointed Grandmother as the children's guardian by order entered on July 5, 2012.

Mother did not visit her children after they had moved to Tennessee, but she and Grandmother arranged for weekly telephone calls with the children. Mother testified that, other than one half-hour phone conversation with Christopher, these calls usually only lasted about three minutes. Grandmother eventually instructed Mother to stop calling because she felt the calls were upsetting the children.

On March 1, 2013, Grandmother filed her Petition for Adoption of a Related Child and Termination of Parental Rights in the Chancery Court for Overton County. As grounds for termination, the petition lists "[a]bandonment as defined in Tenn. Code Ann. § 36-1-102(1)(A)(i)" and various sub-sections of Tennessee Code Annotated section 36-1-113(g)(9) which do not apply to a legal parent, such as Mother. The petition was also deficient in that it failed to comply with Rule 9A of the Tennessee Rules of Civil Procedure but that deficiency was later corrected by amendment.

The trial court conducted a hearing on November 13, 2013. Mother did not dispute the fact that she had not paid child support in the four months prior to the filing of the petition. However, she stated that she had been unable to do so because of her financial situation. Mother also testified that, although she had not seen or spoken to her children in the four months preceding the filing of the petition, this was a direct result of Grandmother's insistence that she have no contact with her children.

On December 9, 2013, the trial court entered an order terminating Mother's parental rights, finding that she had abandoned her children by willfully failing to support or visit them in the four months preceding the filing of the petition for termination and that termination was in the children's best interests. Mother now appeals, arguing that the trial court erred in finding that she had willfully abandoned her children.

II. ANALYSIS

Termination of parental rights is one of the most serious decisions courts make. As noted by the United States Supreme Court, "[f]ew consequences of judicial action are so grave as the severance of natural family ties." *Santosky v. Kramer*, 455 U.S. 745, 787 (1982). Terminating parental rights has the legal effect of reducing the parent to the role of a complete stranger and of "severing forever all legal rights and obligations of the parent." Tenn. Code Ann. § 36-1-113(*l*)(1) (2010).

A parent has a fundamental right, based in both the federal and state constitutions, to the care, custody, and control of his or her own child. *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 through judicial action in some limited circumstances. *Santosky*, 455 U.S. at 753; *In re Angela E.*, 303 S.W.3d at 250.

Our Legislature has identified 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 the grounds upon which termination of parental rights 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 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).

A termination of parental rights case follows a two-step process, which we have described as follows:

> The threshold issue in every termination case is whether the parent whose rights are at stake has engaged in conduct that constitutes one of the grounds for termination of parental rights in Tenn. Code Ann. § 36-1-113(g). If the answer is "yes," the trial court must then determine whether the child's interests will best be served by terminating the parent's parental rights. If the answer is "no," the court should proceed no further and should dismiss the termination petition.

In re Adoption of Muir, No. M2002-02963-COA-R3-CV, 2003 WL 22794524, at *3 (Tenn. Ct. App. Nov. 25, 2003).

To terminate parental rights, two things must be proved by clear and convincing evidence: (1) the existence of at least one of the statutory grounds for termination, and (2) that termination is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). This heightened burden of proof is one of the safeguards required by the fundamental rights involved, *see Santosky*, 455 U.S. at 769, and its purpose "is to minimize the possibility of erroneous decisions that result in an unwarranted termination of or interference with these rights." *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010); *see also In re Angela E.*, 303 S.W.3d at 250; *In re M.W.A., Jr.*, 980 S.W.2d at 622. "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 at 596 (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).

On appeal, Mother argues that the trial court erred in finding that her failure to support or visit her children in the four months preceding the filing of the petition was willful. Mother does not appeal the trial court's best interest determination. Therefore, our review is focused exclusively on the court's findings relating to the ground of abandonment.

A. Standard of Review

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 (citing *State, Dep't of Children's Servs. v. Mims*, 285 S.W.3d 435, 447-48 (Tenn. Ct. App. 2008); *In re Giorgianna H.*, 205 S.W.3d 508, 516 (Tenn. Ct. App. 2006); *In re S.M.*, 149 S.W.3d 632, 640 n.13 (Tenn. Ct. App. 2004)). The trial court's conclusions of law are reviewed de novo with no presumption of correctness. *Id*. at 144.

B. Statutory Grounds of Abandonment

Mother argues that the trial court erred in finding that she abandoned Mackenzie and Christopher by willfully failing to support or visit them in the four months preceding the filing of the petition for termination. Although Mother does not contend that she provided

support or visited her children in the four months preceding the filing of the petition, she argues that Grandmother failed to prove, by clear and convincing evidence, that she acted "willfully" within the meaning of the statute. "Whether a parent failed to visit or support a child is a question of fact." *In re Adoption of Angela E.*, 402 S.W.3d 636, 640 (Tenn. 2013). Whether such failure was willful, however, is a question of law. *Id*. (citing *In re Adoption of A.M.H.*, 215 S.W.3d 793, 810 (Tenn. 2007)). Therefore, our review of Mother's willfulness in failing to provide support or visit her children within the four months preceding the filing of the petition will proceed de novo, with no presumption of correctness. *Id*.

Tennessee Code Annotated section 36-1-102(1)(A) states, in pertinent part:

> For purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, "abandonment" means that:
>
> (i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) *either* have *willfully* failed to visit *or* have *willfully* failed to support *or* have *willfully* failed to make reasonable payments toward the support of the child . . . .

Tenn. Code Ann. § 36-1-102(1)(A) (2010) (emphasis added).

The plain language of the statute makes clear that a parent's failure to pay support or visit does not lead to termination of parental rights unless the failure is willful. "The element of willfulness has been held to be both a statutory and constitutional requirement." *In re C.T.B.*, No. M2009-00316-COA-R3-PT, 2009 WL 1939826, at *4 (Tenn. Ct. App. July 6, 2009). We have previously addressed, in some detail, the meaning of the term "willfulness" as it applies to parental termination proceedings:

> In the statutes governing the termination of parental rights, "willfulness" does not require the same standard of culpability as is required by the penal code. Nor does it require malevolence or ill will. Willful conduct consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent. Conduct is "willful" if it is the product of free will rather than coercion. Thus, a person acts "willfully" if he or she is a free

> agent, knows what he or she is doing, and intends to do what he or she is doing.
>
> Failure to visit or support a child is "willful" when a person is aware of his or her duty to visit or support, has the capacity to do so, makes no attempt to do so, and had no justifiable excuse for not doing so. Failure to visit or support is not excused by another person's conduct unless the conduct actually prevents the person with the obligation from performing his or her duty, or amounts to a significant restraint or interference with the parent's efforts to support or develop a relationship with the child . . . .
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> The willfulness of particular conduct depends upon the actor's intent. Intent is seldom capable of direct proof, and triers-of-fact lack the ability to peer into a person's mind to assess intentions or motivations. Accordingly, triers-of-fact must infer intent from the circumstantial evidence, including a person's actions or conduct.

In re Audrey S., 182 S.W.3d at 863-64 (internal citations and footnotes omitted).

If failure to support or visit is due to circumstances outside of a parent's control, then he or she cannot be said to have willfully abandoned the child. *In re Adoption of Angela E.*, 402 S.W.3d at 640. On the other hand, a parent cannot cure previous abandonment by attempting to provide support or visitation to a child after "any petition" for termination has been filed. Tenn. Code Ann. § 36-1-102(1)(F); *In re Adoption of Angela E.*, 402 S.W.3d at 640. This is because the relevant time frame for consideration of the grounds of abandonment is the four-month period preceding the filing of the petition. Tenn. Code Ann. § 36-1-102(1)(A)(i). Here, because the petition was filed on March 1, 2013, the relevant period to consider is from November 1, 2012, to February 28, 2013. *See In re Jacob C.H.*, E2013-00587-COA-R3-PT, 2014 WL 689085, at *6 (Tenn. Ct. App. Feb. 20, 2014) (concluding that the day before the petition is filed is the last day in the relevant four-month period).

Under Tennessee Code Annotated section 36-1-102(1)(A)(i), abandonment can be established by either showing that Mother willfully failed to support her children or willfully failed to visit them in the four months preceding the filing of the petition. *In re Audrey S.*, 182 S.W.3d at 864 ("The parental duty of visitation is separate and distinct from the parental duty of support."); *In re Angela T.*, No. W2011-01588-COA-R3-PT, 2012 WL 586864, at *4 (Tenn. Ct. App. Feb. 23, 2012) (citing *In re Adoption of McCrone*, No. W2001-02795-COA-R3-CV, 2003 WL 21729434, at *7 (Tenn. Ct. App. July 21, 2003)). Therefore, we address the issues of support and visitation separately.

1. Failure to Support

The financial ability, or capacity, of a parent to pay support must be considered in determining willfulness. If the failure to pay child support is due to financial inability, then a parent has not willfully failed to support the child. *O'Daniel v. Messier*, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995), *superseded by statute on other grounds*, 1995 Tenn. Pub. Acts, ch. 532, *as recognized in In re Swanson*, 2 S.W.3d 180, 184 (Tenn. 1999) (citing *Pierce v. Bechtold*, 448 S.W.2d 425, 429 (Tenn. Ct. App. 1969)). In making a willfulness determination, the court must review a parent's means, which includes both her income and available resources for purposes of support. *See In re Adoption of Angela E.*, 402 S.W.3d at 641.

While it is undisputed that Mother failed to provide her children with any support during the relevant time period, there was scant evidence introduced regarding her ability to do so during the applicable four month period. Most of the testimony offered concerning financial ability dealt with either Mother's finances during some indeterminate period prior to the children's move to Tennessee or Mother's employment as of the date of the termination hearing, November 13, 2013.

The only testimony relevant to the willfulness determination during the applicable time period was the following exchange between counsel for Grandmother and Mother:

Counsel: Since November 27th, was it 2012 that you've been working?

Mother: Yes.

Counsel: Making $10.00 an hour?

Mother: No. I first started off making I believe it was $9.27. No, $9.17. Sorry. I've gotten three raises since then.

Counsel: So you've been working this job for over a year?

Mother: Yes.

From this proof, we gather little about Mother's income because the record does not reveal how many hours Mother worked. In the case of an hourly worker, lack of information concerning the hours worked prevents the court from considering whether the parent is willfully underemployed, which would create an inference of willful failure to support. *See In re Austin D.*, No. E2012-00579-COA-R3-PT, 2013 WL 357605, at *11-12 (Tenn. Ct. App.

Jan. 30, 2013) (finding that mother's personal choice not to work contributed to the conclusion that she willfully failed to pay child support).

We also know nothing about what other available resources, if any, Mother had for support during the applicable time period. Grandmother elicited testimony that Mother had a live-in boyfriend who received state assistance and that Mother, at one time, had health insurance. However, we can only speculate as to how those facts impacted Mother's capacity to pay support.

In several instances, Mother's testimony suggests a complete lack of capacity to pay support. Although we do not know the relevant time period to which her statements relate, Mother testified that she has no disposable income and that she lives in poverty. She also stated that she had not taken her prescription medicine in the two months preceding the hearing on the petition to terminate her rights because she could not afford the medicine.

On this record, we are unable to conclude that Mother had the capacity to support her children. *See In re Audrey S.*, 182 S.W.3d at 864 ("Failure to . . . support a child is 'willful' when a person is aware of his or her duty to . . . support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so."). Grandmother presented insufficient evidence concerning Mother's income during the relevant time period, and there was no indication that Mother had other available resources to provide support. Given the heavy burden necessary to interfere with a fundamental constitutional right, the proof offered here was simply insufficient to show that Mother's failure to support her children was willful.

2. Failure to Visit

Statutory grounds for termination also exist where a parent willfully fails to visit a child for a period of four consecutive months preceding the filing of the petition for termination. Tenn. Code Ann. § 36-1-102(1)(A)(i); *In re Mark A.L.*, No. M2013-00737-COA-R3-PT, 2013 WL 5536801, at *5 (Tenn. Ct. App. Oct. 4, 2013). As noted above, Mother does not dispute that she had no contact with her children in the four months preceding the filing of the petition. Instead, Mother argues that her failure to visit is excused by Grandmother's obstruction of Mother's efforts at visitation.

Where a parent attempts to visit her child but is obstructed by the acts of another, her failure to visit is not "willful" within the meaning of the statute. *In re M.L.P.*, 281 S.W.3d 387, 392 (Tenn. 2009) (citing *In re Adoption of A.M.H.*, 215 S.W.3d 793, 810 (Tenn. 2007)). A parent's attempts at visitation are obstructed where another person's conduct creates "a significant restraint of or interference with the parent's efforts to support or develop a

relationship with the child." *In re Audrey S.*, 182 S.W.3d at 864. As such, the failure to visit is only willful if it is a "product of free will, rather than coercion." *Id.* at 863.

In support of her claim of obstruction, Mother introduced an e-mail from Grandmother dated March 18, 2013, stating:

> I have asked and asked, please quit calling my number.
>
> As the children and I have told you for a very, very long time they do not wish to talk. If and when they want to phone you, I will email and set that up with you. If you continue to harass and intimidate me through the messages, I will block your number. Email is the best way to reach me.

While this e-mail was sent over two weeks after the petition was filed, it demonstrates that Mother made attempts to contact the children during the relevant four month period and that Grandmother rebuffed those attempts. Another e-mail was introduced into evidence from Mother to Grandmother, dated June 25, 2013, which states, in pertinent part:

> I am attempting to e-mail you again because you are not answering my scheduled phone calls still. It is now four months that you have not answered any phone calls or e-mails. I have e-mailed you plenty of times, asking you why you have stopped allowing me to speak with my children. So here I am attempting another time, to reach out and ask you PLEASE may I PLEASE speak with my children. . . . Yes I did receive your last e-mail telling me to stop calling the children and that they supposedly wish to not speak to me anymore and that if I did not do this you would change your number because you think I am harassing you. I would like more then [sic] anything to reassure you I am not harassing you, I am simply following the arrangement you and I set. That the phone calls would be every Saturday at 10 am my time. . . . So if there is any way we could PLEASE PLEASE talk about this, possibly even come up with a way it's not hard on my babies and fits yours and theirs schedule of course.

This e-mail, while also outside of the relevant time frame, further suggests that Mother believed her attempts to contact the children were being obstructed by Grandmother. Mother claims that she attempted to make contact with her children throughout the relevant time frame.

Although there is some evidence that Grandmother impeded Mother's attempts to speak with her children, we conclude that Grandmother's actions do not rise to the level of

a "significant restraint" on Mother's efforts to visit sufficient to preclude a finding of willfulness. Mother testified that her only attempts to contact Grandmother to arrange visitation included a few phone calls to which Grandmother did not respond. While this may have somewhat impeded Mother's visitation, the few phone calls were apparently her only efforts at arranging visitation with her children. Mother concedes that she made no request to visit in her emails to Grandmother.

Despite our finding that Grandmother's conduct did not represent a "significant restraint" on Mother's efforts to visit her children, we still must examine the record to determine whether there is clear and convincing evidence to support the trial court's finding that Mother acted "willfully" within the meaning of the statute. A failure to visit is willful where a parent is aware of her duty to visit, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so. *In re Audrey S.*, 182 S.W.3d at 864.

Our Supreme Court has concluded "that parents should know that they have a responsibility to visit their children." *In re M.L.P.*, 281 S.W.3d at 392. Therefore, although there was no court order requiring visitation, Mother should have been aware of her duty to visit her children. The question is whether she was able to do so.

As with the failure to support, we find sparse evidence relating to Mother's capacity to visit. In this situation, capacity is affected by the great physical distance between Mother and her children. As noted above, Grandmother presented insufficient evidence concerning Mother's income during the relevant time period, so we cannot determine whether Mother had the financial ability to visit during the four month period preceding the filing of the petition. Grandmother acknowledged the difficulty caused by her move with the children to Tennessee:

> Counsel: When you moved from California to Tennessee you realized that is a significant distance of about 2,500 miles from where she lives to here; does that sound about right?
>
> Grandmother: About that, yes, sir.
>
> Counsel: You knew in California that she was a person of limited financial means, didn't you?
>
> Grandmother: No financial means, yes, sir.

Counsel: So clearly it would be an obstacle, wouldn't you agree ma'am, for moving from California to Tennessee for [Mother] with no financial means to visit her children, wouldn't it?

Grandmother: I believe she lived in Washington at that time, sir. It wasn't California, but either way, certainly.

Although we do not fault Grandmother for moving the children from California to her home in Tennessee, we must nonetheless recognize the impact of the move on Mother's capacity to visit, a capacity that was limited at best.

Again given the heavy burden necessary to interfere with a fundamental constitutional right, the proof offered here was insufficient to show that Mother's failure to visit her children was willful. We, therefore, find Grandmother failed to clearly and convincing prove the existence of at least one of the statutory grounds for termination.

III. CONCLUSION

The judgment of the trial court is reversed, and this matter is remanded with costs of appeal assessed against Appellee, Linda L.

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W. NEAL McBRAYER, JUDGE