IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 02, 2014

# IN RE TIARA T., ET AL.[1]

**Appeal from the Chancery Court for Robertson County**
**No. CH12CV358 Laurence M. McMillan, Jr., Chancellor**

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**No. M2014-00904-COA-R3-PT - Filed September 29, 2014**

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The trial court terminated Father's parental rights to two children on the ground of abandonment by wilful failure to support and wilful failure to visit. Father appeals the termination of his parental rights stating that the evidence of wilful abandonment is not clear and convincing. Finding no error, the judgment of the trial court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery 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.

Russell E. Edwards, Hendersonville, Tennessee, for the appellant, Wand T.

Joseph T. Zanger, White House, Tennessee, for the appellee, David A. and Kaseylynn H.

## OPINION

This case involves the termination of the parental rights of Wand T. ("Father") to Tiara T. and Ariel T., who were born out of wedlock to Father and Deana H. ("Mother"); it comes before this court for the second time. The salient facts leading to the initiation of the proceeding and its procedural history are set out in *David A. and Kasey H. v. Wand T.*, M2013-01327-COA-R3-PT, 2014 WL 644721 (Tenn. Ct. App. Feb. 18, 2014).

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

In the first appeal, we determined that the court had failed to set forth sufficient findings of fact and conclusions of law to accommodate our review; consequently, we vacated the judgment terminating Father's parental rights and remanded the case for the court to enter an order in that regard. On remand, the court entered an Amended Order for Termination of Parental Rights and Final Decree of Adoption, terminating Father's parental rights on the grounds of abandonment by failure to visit and failure to support, and holding that termination was in the best interest of the children.

Father appeals, stating the following issue:

> Whether the trial court erred in terminating the parental rights of the father to his children and allowing the adoptive parents to adopt them.

## I. STANDARD OF REVIEW

Because of the fundamental nature of the parent's rights and the grave consequences of the termination of those rights, courts 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. ABANDONMENT

Tenn. Code Ann. § 36-1-113(g)(1) designates abandonment, as defined at Tenn. Code Ann. § 36-1-102, as a ground for terminating parental rights. Tenn. Code Ann. § 36-1-102 (1)(A)(i) defines "abandonment" for this purpose as follows:

> 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.

Father contends that his failure to visit was not wilful because his calls to the children were "thwarted" by the adoptive parents and because he was financially unable to visit the children in Tennessee; similarly, he asserts that his failure to support was not wilful because of his inability to pay. In *In re Audrey S.*, 182 S.W.3d 838 (Tenn. Ct. App. 2005), the court discussed wilfulness in the context of termination cases:

> The concept of "willfulness" is at the core of the statutory definition of abandonment. A parent cannot be found to have abandoned a child under Tenn. Code Ann. § 36–1–102(1)(A)(i) unless the parent has either "willfully" failed to visit or "willfully" failed to support the child for a period of four consecutive months. . . . 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 has no justifiable excuse for not doing so. Failure to visit or to 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 of or interference with the parent's efforts to support or develop a relationship with the child. The parental duty of visitation is separate and distinct from the parental duty of support. Thus, attempts by others to frustrate or impede a parent's visitation do not provide justification for the parent's failure to support the child financially.
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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.

*Id.* at 863–64 (citations and footnotes omitted).

We shall discuss each ground separately.

**A. FAILURE TO VISIT**

In the final order, the court made the following findings relative to Father's failure to visit the children:

> n. The Defendant [Father] brought a Motion to the Juvenile Court to set this case for trial before the Juvenile Magistrate on March 13th, 2012, which was denied; he brought a second Motion to Set on June 20, 2012. Despite being represented by Counsel throughout these proceedings both in the Juvenile and Chancery Courts of Robertson County, the Defendant never made a request to establish a time to visit the Minor Children. The Court finds that decision to have been a willful decision on his part.
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> o. The Defendant testified that he did not travel to Tennessee to visit the Minor Children after they moved to Robertson County because he could not afford the airplane fare. The Defendant testified that he was saving his funds to travel to Tennessee to contest custody of the children. It was established through documentary evidence and by testimony of the Defendant that he was employed during the time the children moved to Tennessee, and during the immediate four-month period prior to the filing of the Petition to Terminate. The Court finds that the decision by the Defendant, [Father], not to travel to Tennessee to visit the Minor Children was a deliberate decision made by the Defendant to save money and that the decision not to travel to Tennessee to visit the children was willful.
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> p. The Defendant and the Petitioners all testified that the Defendant never made a request to visit with the Minor Children, by arranging a trip to Tennessee to visit the Minor Children, or by requesting that the Petitioners travel to Minnesota with the Children to visit with him there. The Defendant and the Petitioners all testified that the Defendant never suggested or asked that they meet halfway between Minnesota and Tennessee for the Defendant to take the children for a visit. The Court finds that the Defendant's failure to even request visitation on an informal basis with the Minor Children was a willful decision by the Defendant.
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> q. The Court finds the testimony of the Petitioners on the issue of telephone calls from the Defendant to the Minor Children to be more credible than that of the Defendant or the [p]aternal grandmother, Wanda T. Specifically, the

court finds that the Defendant spoke only one time to either of the Minor Children during the four months prior to the filing of the Petition to Terminate. That was a brief phone call to Ariel T. on her birthday in April of 2012. The Defendant himself testified that he made only 3 attempts to contact the children by phone after the brief conversation with Ariel in April of 2012. The Court finds the failure to attempt to contact the children by phone more than three times was a conscious decision on his part and that these three attempts do not rise to the statutory requirement to visit with the children. The Court, therefore, finds that the Defendant's actions in failing to contact the children by telephone was willful. The Court further finds that there is no credible evidence that the Petitioners interfered in any way with the Defendant's efforts to contact the Minor Children by telephone.

r. The Court, therefore, finds that it has been established by clear and convincing evidence that Defendant [Father] willfully failed to visit Tiara T. or Ariel T. during the time the children have lived in Tennessee, and specifically in the months of April, 2012; May, 2012; June 2012; July, 2012; and August, 2012, the months immediately preceding the filing of the Petition to Terminate his Parental Rights.

Father does not contest that he did not visit the children in person during the relevant time period; he contends that his failure to visit was not wilful because his calls to the children were "thwarted" by the adoptive parents and because he was financially unable to visit the children.

Father, his mother, the adoptive parents, and James H., the children's maternal uncle, testified relative to Father's phone calls to the children; the testimony relating to the phone calls was at times confusing and conflicting.

Father's mother, Wanda T., testified as follows:

Q. Now, I think the main time frame the Court and everybody's concerned with is from April 2012 through August of 2012. Can you tell us how often you witnessed [Father] speaking with his daughters Tiara and Ariel?

A. I can't give a specific number, but I think they had – maybe a couple of times. I think they may have – but they wouldn't let [Father] speak to the girls, so - -

Q. Who wouldn't?

A. David.

* * *

Q. Okay. Did [adoptive parents] ever initiate any calls to you or [Father] or [Father] for [Father] to speak to his children?

A. Never.

Father testified as follows:

Q. The main time frame that we're concerned with is April through - - the beginning of April through the beginning of August 2012. How often, if you can remember, did you speak with your children on the phone during that period of time?

* * *

A. Probably during those periods of time probably about three times or four. But we called more, but they didn't call back or actually answer the phone.

Q. Okay. How often did you try to call them during that period of time? You or your mother.

A. I can say myself at least three times. But, you know, my mother was doing it more on a regular basis because normally I would say the last conversation - - and I don't know if it was [adoptive father] or [adoptive mother], but I spoke with them on Ariel's birthday and they were kind of short. So instead of me initiating the phone calls, because I knew they were allowing my mom to speak with them, so I did it that way.

* * *

Q. When was the last time you actually spoke with your children?

A. I want to say it had to have been in the beginning of September or beginning of November, beginning of December.

Q. Of 2012?

A. Correct.

Adoptive mother testified as follows:

Q. Since your sister died has [father] had any telephone . . . contact with the children at all?

A. He has called them one time in the entirety that they've been in my home. And I believe when they spoke with their grandmother that they did speak with him one time as well.

* * *

Q. Have the children spoken with [Wanda T.] - - their grandmother - - since the death of your sister?

A. Their grandmother, yes.

* * *

Q. And how often did she call?

A. In the beginning, about once a month. And after that - - she hasn't called in a couple of months.

For the first six months there she would call once a month and check on them.

* * *

Adoptive Father testified as follows:

Q. So these children have lived in your household since December of 2011?

A. That's correct.

Q. To your knowledge has [Father] attempted to contact the children by telephone during that time?

A. One time. Yes.

* * *

During the months of April, May, June, July, and August of 2012 did [Father] contact you at all?

A. No.

Did he contact your wife to you knowledge?

A. No.

Q. Did he contact any of your children to your knowledge?

A. Yes.

Q. How? How many times did he contact them?

A. He contacted Ariel on her birthday.

Q. . . . Is that the only time that you know that he contacted her?

A. Yes. That was the only time he contacted them, yes.

The children's maternal uncle testified that on one occasion the children were at his home and, in the course of their visit, spoke with Wanda T.

The trial court found the adoptive parents to be more credible on this issue. Because the trial court observes the witnesses as they testify, it is in the best position to assess witness credibility. *Frazier v. Frazier*, No. W2007-00039-COA-R3-CV, 2007 WL 2416098, *2 (Tenn. Ct. App. Aug. 27, 2007) (citing *Wells v. Tenn. Bd. Of Regents*, 9 S.W.3d 779,783 (Tenn. 1999)). Therefore, we give great deference to the court's determinations on matters of witness credibility. *Id*. Taken as a whole the evidence does not preponderate against the finding that Father spoke with one of the children on only one occasion in the four month period preceding the filing of the petition and that the adoptive parents did not thwart his or his mother's efforts to speak with the children.

With respect to finances, Father testified that at the time of the death of the children's mother in January 2012 he was current in his monthly child support obligation of $350.00 and that he had worked at a part-time job until September 2012 earning $7.00 per hour; he testified further that he had not made a support payment since February 2012, or sent funds to the adoptive parents since the children had been staying with them. Thus, the evidence shows that during four month period prior to the filing of the petition, Father had the means to visit the children. Particularly compelling is the fact that, as a result of the mother's death, he was not paying support; it is apparent that he chose not to use the funds he was no longer paying in support to visit the children.

The record clearly and convincingly supports the court's decision that Father's failure to visit was wilful within the meaning of Tenn. Code Ann. § 36-1-102 (1)(A)(i).

**B. FAILURE TO SUPPORT**

The trial court made the following findings with regard to abandonment by wilful failure to support:

> j. The Father entered into evidence a report indicating that he had paid his child support for the Minor Children through February 28th, 2012, which was deducted from his paycheck by the State of Minnesota Child Support Services. The Father went to the Child Support Services office following the death of the Mother, with a copy of the Mother's obituary, to have his child support obligation to Tiara T[.] and Ariel T[.] stopped. The Child Support Office was aware at the time the Child Support Obligation was stopped that [Father] did not have custody or possession of the children. The Court finds it was established by clear and convincing evidence that Defendant [Father] voluntarily ended his scheduled payments in support of the children by contacting the Minnesota Child Support Office in late February, 2012. The Defendant knew at the time he asked the Minnesota Child Support Office to end his payments in support of the Minor Children that he did not have custody of the Minor Children in the State of Tennessee; and he was aware that he had continuing responsibility to support the Minor Children financially. The Defendant failed to maintain this support obligation and the Court finds, by clear and convincing evidence, that the decision to end his child support payments was done willfully and with full knowledge that he had continuing obligation to support the Minor Children. The Court finds the actions taken by the defendant in ending his child support payments to the Minor Children were willful.

k. The Court finds, by clear and convincing evidence that the Defendant, [Father], did not participate in any meaningful way in a care package sent to the Minor Children by their Paternal Grandmother in December, 2012. This so-called care package was sent after the Petition was filed, and is irrelevant, in any case, to this matter. . . . The Court finds the testimony of the Petitioners that they did not receive any care packages from either the Defendant or the Paternal Grandmother, to be more credible on this issue than that of the Defendant or [Paternal Grandmother]. The Court finds, further, that the Defendant did not establish facts that would convince this Court that had care packages been sent, that he actively participated in their creation; or that he made any significant financial contribution to the contents.

l. The Petitioners and the Defendant all testified that the Defendant did not send any direct monetary contribution to the Petitioners, or to anyone in Tennessee who had contact with the Minor Children, after he caused his child support obligation to be terminated by the State of Minnesota. The Court finds, by clear and convincing evidence, that the Defendant never sent any direct monetary contribution to the Petitioners on behalf of the Minor Children, and that such failure to send any direct monetary contribution was willful.

m. The Court, therefore, finds that it has been established by clear and convincing evidence that Defendant [Father] willfully failed to support Tiara T[.] or Ariel T[.] financially during the time the children have lived in Tennessee, and specifically in the months of April, 2012; May, 2012; June, 2012; July, 2012; and August 2012, the months immediately preceding the filing of the Petition to Terminate his Parental Rights.

Father sets forth several arguments in support of his contention that his failure to support was not wilful. First, he argues that the presumption at Tenn. Code Ann. § 36-1-102(1)(H) that "[e]very parent who is eighteen (18) years of age or older is presumed to have knowledge of a parent's legal obligation to support such parent's child or children" should not apply to him because he is not a resident of Tennessee; he also contends that, even if the statute does apply, he has overcome the presumption. Second, Father argues that the court failed to find that he had the ability to pay support. Third, he contends that the evidence preponderates against the court's finding that he did not participate in any meaningful way in the preparation of the "care package" sent to the children by Wanda T. in December 2012 or that he actively participated or financially contributed to the contents of any such packages that were sent at any other time.

We reject Father's argument that, because he is not a resident of Tennessee, the statutory presumption that he is aware that he has a legal obligation to support his children does not apply. Until February 2012 Father was under an order in the State of Minnesota, where the children were born, to pay support and, in fact, paid support; thus, the statute merely affirmed what Father already knew – that he had a legal duty to support his children. This legal duty is owed to the children and is the same whether the Father resided in Tennessee or Minnesota.

The record shows that Father made support payments through February 2012 and none since that date. He testified that, after the mother's death, he went to the child support agency in Minnesota to get the children's birth certificates and proof of parentage and, after learning that the children's mother had passed, his case worker "stopped the payments." Father testified that he was working until September 2012 at the same job he held when he was paying support of $350.00 per month.

As held in the first appeal, the absence of an order to pay support and the failure of the adoptive parents to request support does not relieve Father of the obligation to pay support. There is no evidence militating against the conclusion that his failure to pay support after February 2012 was a voluntary, wilful decision; to the contrary, the evidence is clear that he had the ability to pay support and that he chose not to contribute to the children's support.

Father contends that the evidence preponderates against the court's findings relative to the "care packages" that Father and Wanda T. testified they sent to the children. We have reviewed the testimony cited by Father to show that the "in-kind support" represented by the packages "replaced monetary support and ameliorates any wilfulness on the father's part."[2]

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[2] Wanda T. testified as follow relative the "care packages":

Q. Okay. And have you or Wand Tucker sent any kind of packages to the children?
A. Yes.
Q. Who did you send those packages to?
A. We were sending the packages to Dave and Kasey and we never know whether they got them or not. Because when I would talk to the girls I would say did get your package, did you get your underwear, your school supplies, did you get the shoes or whatever, and they wouldn't - - they wouldn't answer. It was like how come they don't know what they got or didn't get.
Q. And who would prepare these packages? Was it you and Wand or - -
A. Yes.
Q. And how often did you send these I guess care packages?
A. We sent packages every holiday, birthdays, and a few in between.
Q. And when was the last package you and Wand Tucker sent to the children?

The evidence does not preponderate against the court's findings that Father did not participate in a meaningful way in the December 2012 package or that he participated in, or contributed to, any packages which his mother may have sent.

## 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.[3] The list of factors is not exhaustive, and the

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A. Tiara's birthday?
Q. And was that January 11th?
A. Yes. We ended up sending Christmas and January's to James's house because we found out that they had - - he had gotten visitation rights. And James would let us know that they had received the package.
Q. Okay. And did you ever ask - - you or Wand ever ask the children what they needed and that would be included in the care package?
A. Yes. That would be included. And a lot of times just random calls we would ask what they needed. And once or twice I think they said that they needed shoes, and we sent them shoes.

Father testified:

Q. These care packages, did you pay for those items in the care packages?
A. Yes. Just about half of it.
Q. Okay. How much did you spend on those?
A. To tell you the truth, I wouldn't be able to tell you. But we do have the receipts.

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

(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

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 *State of 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)).

Many of the court's findings as to Father's failure to visit and failure to support which we have quoted above also address various statutory factors used in determining whether termination of Father's rights is in the children's best interest. In addition, the court made the following findings relative to the best interest of the children:

> s. Testimony from Petitioner established that the Minor Children are thriving at school, and each has been named Student of the Month at least once. The Court finds that the Minor Children are thriving in their Tennessee schools.
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> t. Testimony from Petitioner established that Tiara T. began receiving medication for ADHD shortly after the Petitioners were granted custody of the Minor Children by the Juvenile Court. The Defendant testified he had not been notified of the decision to medicate Tiara T. in this way. The Court finds the testimony from [Adoptive Mother] that the medication significantly assisted Tiara T. with her schoolwork to be credible.
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> u. Testimony established the Father lives with his parents; pays rent only sporadically; and contributes to the household expenses only occasionally. The Court finds that the Defendant's living arrangements and financial prospects are not conducive to providing a long-term and stable home for the Minor Children and the best interests of the Minor Children are not best served by sending them to live in a home where the Parent contributes financially only occasionally.

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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 or controlled substances or controlled substances 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.

> v. The Minor Children have two younger siblings who have been previously adopted by the Petitioners and clear and convincing evidence was offered, and the Court finds as a matter of fact, that these four children have lived together in the home of the Petitioners since December, 2011. The Defendant did not address the issue of the younger siblings of the Minor Children in his testimony at all and the Court finds that the Defendant would make no effort to maintain a relationship between the Minor Children at the heart of this case and their younger siblings. The Court makes a specific finding that such would not be in the best interests of the Minor Children.

Father does not contend that the findings are not supported by the evidence. He argues that there was no proof "that the father is unfit to care for his children or that he would cause them substantial harm" and that "[t]he environment in the adoptive parents' home is certainly far from stellar."

As with the issues of failure to visit and failure to support, the evidence does not preponderate against the court's findings relative to the children's best interest. It is not necessary that Father be determined to be unfit to raise the children for termination of his rights to be in their best interest. The court heard the testimony relative to the environment in the adoptive parents' home and determined that it provided the stability and support the children need and that the statutory factors weighed against Father. The record clearly and convincingly supports the holding that termination of Father's parental rights was in the children's best interest.

## CONCLUSION

For the foregoing reasons, we affirm the order terminating Father's parental rights.

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RICHARD H. DINKINS, JUDGE