IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 3, 2014

IN RE CAIRA D. ET AL.

Appeal from the Juvenile Court for White County
No. JV513 Sammie E. Benningfield, Jr., Judge

No. M2014-01229-COA-R3-PT - Filed November 25, 2014

Department of Children's Services filed petition to terminate mother and father's parental rights to two minor children. Mother subsequently surrendered her parental rights, and the trial court found father abandoned the minor children by willful failure to support and willful failure to visit. The trial court also found termination of father's parental rights was in the best interests of the children. Father appeals. We affirm the trial court's finding that father abandoned his children by willfully failing to support them; however, we have concluded that the evidence is insufficient to clearly and convincingly establish that father's visitation with his children was merely token and that he willfully failed to visit his children. We affirm the trial court's finding that termination of father's parental rights is in the best interests of the children. Therefore, we affirm the termination of father's parental rights.

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, JJ., joined.

Daniel James Barnes, McMinnville, Tennessee, for the appellant, Joshua D.[1]

Robert E. Cooper, Jr., Attorney General and Reporter, and Ryan L. McGehee, Assistant Attorney General, Nashville, Tennessee, for the appellee, Tennessee Department of Children's Services.

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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.

OPINION

Janetta J. ("Mother") and Joshua D. ("Father") had two children out of wedlock, Cheyenne D., born April 2007, and Caira D., born November 2008. Both children were born in Warsaw, Indiana, but Mother and the children eventually moved back to her hometown in Cookeville, Tennessee, after her separation from Father. Father continues to live in Warsaw, Indiana.

On July 19, 2012, the Tennessee Department of Children's Services ("DCS") became involved with Mother due to environmental concerns with her home. At that time, Mother was living with her boyfriend in Cookeville. During a home visit, Mother reported that her boyfriend was physically abusive with her, that she had used drugs, and that she was developmentally delayed and had trouble remembering how to care for her children. The children were subsequently placed in DCS custody on July 25, 2012, and adjudicated dependent and neglected on September 25, 2012.

Mother and Father attended several child and family team meetings with DCS during which both parents' responsibilities under the permanency plan were discussed and the criteria for termination of parental rights were explained. The first permanency plan was prepared on August 14, 2012, with goals of "return to parent" and "exit custody with relative." A second plan prepared on March 12, 2013, had the same goals.

In March 2013, the children were placed with Father for a ninety-day trial home visit in Indiana. The children lived with Father and his girlfriend in her home along with her infant son. Father was not working at this time, and he stayed at home to care for the children while his girlfriend was at work. Father was then arrested for physically abusing his girlfriend's infant son, and the trial home visit was terminated on May 2, 2013. Father was charged and pleaded guilty to battery, a Class D felony. The children were then returned to their foster parents in Tennessee and have continuously remained in their care since May 2, 2013.

The third permanency plan, dated September 12, 2013, provided alternate goals of either "return to parent" or "adoption." Father participated in this meeting by phone. The plan required Father to provide proof of income and show financial stability for no less than six months. Father received copies of the permanency plan and criteria for termination of parental rights by mail.

Three months later, on December 27, 2013, DCS filed a Petition for Termination of Parental Rights. Mother subsequently surrendered her rights on April 1, 2014. Thus, the termination hearing concerned only Father's parental rights. The court appointed Father legal counsel based on his Affidavit of Indigency.

Trial was held on June 25, 2014; witnesses who testified included Father, Jordan Eastom, the children's foster care counselor, Christine B., the foster mother, and Rachael Conrad, the DCS case manager.

Father testified that he lives in Warsaw, Indiana, and that, since he lives approximately seven hours away, he can only visit when he comes to court because he does not have money to travel. From July 2012 until the trial home visit in March 2013, Father testified that he visited one time in September 2012, when he had a court date. The next time he visited the children was in January 2014 for one hour when he came to court. Despite his failure to visit, he testified that he had supervised phone calls with his children every week, for approximately twenty minutes.

Next, Father testified as to his past employment. In 2012, he worked at R.R. Donnelly's for a few weeks in August, but was then laid off. In 2013, he testified that he worked at K-Mart for a while and then was laid off, but did not testify as to specific dates. At the time of trial, he testified he had been working for approximately one month at Tri-Lakes Containers. He testified that he never paid child support until May 2014, when a court order was entered and he began paying support by garnishment. He admitted that he knew he had to support his children or his rights would be terminated. He also admitted that he has never provided any clothes, food, school supplies, or toys to his children.

Father also testified that he and his children lived with his girlfriend and her infant son during the home trial. At that time, he testified that he did not have a job and stayed home to watch his children and his girlfriend's infant son while she worked. He testified that he did not financially support his girlfriend's child, but simply watched her child while she was at work. Father also admitted that, during the home trial, he was charged with battery with serious bodily injury and, in November 2013, pleaded guilty to battery with one year probation.

Ms. Jordan Eastom, a treatment foster care counselor with Youth Villages, testified that she had been working with the children since October 2013, and she provided the children with individual counseling twice a month. Ms. Eastom testified that Cheyenne reported seeing Caira being thrown against a wall by Father. She further testified that Caira reported that Father threw her against a wall and that Father is mean to her. She also stated both children reported that they do not want to return to their Father's home and are scared to go home.

Ms. Eastom testified that she supervised some of the phone calls between Father and the children. She testified that it was very hard to get the children to engage with him and pay attention to Father on the phone.

Christine B., the children's current foster mother, testified that the children have been in her and her husband's home since August 2012, and she has had them continuously in her care except for the six weeks they left for the home visit with Father in March 2013. She testified the children were doing well in school and had no problems with their progression in school. She testified that she has a sixteen-year-old daughter and a nineteen-year-old daughter, and that they get along very well with the minor children. She further testified that the children call her and her husband "Mommy" and "Daddy," and she and her husband are willing to adopt them.

The foster mother also testified the children were very scared and negatively affected by the trial home visit with Father. She testified that the children did not want to leave the house because they were afraid they would have to return to their Father's home. She stated that Caira reported Father had thrown her into a wall and that Father made her go to the refrigerator and bring Father beers when he was drinking. She testified that Cheyenne reported she was scared to sleep upstairs again because Father had slept in the bed with her and had urinated on her. She testified that the children were traumatized after the visit and if anyone raised their voice just a little bit they would run and hide under a table or cover their ears and run away. She further testified that they are currently doing very well and do not exhibit these behaviors anymore.

The last witness, Rachel Conrad, testified that she was the case manager for the children from February 2013 until two weeks before trial. She testified that she read and explained the criteria and procedure for the termination of parental rights to Father at the meetings in March 2013 and again in September 2013. She also testified that she discussed the importance of visiting and supporting the children with Father on several occasions. Moreover, she testified that Father kept in close contact with her and was always aware of what was going on with the children. She testified that Father sent her text messages or told her over the phone that he had employment, but she never received documentation of his employment.

Ms. Conrad testified that, from the time the home trial was terminated until the Petition was filed in December 2013, Father did not visit or attempt to visit the children. She testified that she supervised weekly phone calls between Father and the children, and that these calls went "O.K." She further testified that Cheyenne is more willing to talk to Father than Caira, and Caira sometimes refuses to come to the phone. She also testified that she was not aware of any child support payments made by Father. Ms. Conrad also testified that the

current foster parents are more than willing to adopt the children and intend to do so if the children become available.

On June 26, 2014, the trial court entered its order terminating Father's parental rights. The court stated in the Final Decree that it found all of the state's witnesses to be credible but the court specifically stated that it "did not find [Father] to be credible." The trial court found Father willfully failed to support his children in the four months preceding the filing of the petition, and that Father has not contributed to the support of his children since at least May 2, 2013. The trial court also found Father willfully failed to visit his children in the requisite four-month period and that Father has not visited his children since May 2, 2013, except for a one-hour visit on January 14, 2014, when he attended court. The court further stated that any phone calls to the children have been token, and he has provided no justifiable excuse for failing to visit the children. The court also found that it was in the best interests of the children to terminate Father's parental rights. Father filed a timely 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

I. ABANDONMENT

Abandonment is defined as the willful failure to visit, to support, or to make reasonable payments toward the support of the child during the four-month period preceding the filing of the petition to terminate parental rights. Tenn. Code Ann. § 36-1-102(1)(A)(i). To prove the ground of abandonment, a petitioner must establish by clear and convincing

evidence that a parent who failed to visit or support had the capacity to do so, made no attempt to do so, and had no justifiable excuse for not doing so. *In re Adoption of Angela E.*, 402 S.W.3d at 639 (citing *In re Audrey S.*, 182 S.W.3d 838, 864 (Tenn. Ct. App. 2005)). Whether a parent failed to visit or support a child is a question of fact. Whether a parent's failure to visit or support constitutes willful abandonment, however, is a question of law. *Id.* (citing *In re Adoption of A.M.H.*, 215 S.W.3d 793, 810 (Tenn. 2007)). We review questions of law de novo with no presumption of correctness. *Id.* (citing *In re Adoption of A.M.H.*, 215 S.W.3d at 810).

A. Failure to Support

To find that Father abandoned his children by failing to support them financially, it must be established that the failure to support was "willful." *In re R.L.F.*, 278 S.W.3d 305, 320 (Tenn. Ct. App. 2008). Failure to pay support is "willful" if the parent "is aware of his or her duty to support, has the capacity to provide the support, makes no attempt to provide support, and has no justifiable excuse for not providing the support ." *In Re J.J.C.*, 148 S.W.3d 919, 926 (Tenn. Ct. App. 2004) (quoting *In re Adoption of Muir*, No. M2002-02963-COA-R3-CV, 2003 WL 22794524, at *5 (Tenn. Ct. App. Nov. 25, 2003)).

It is undisputed that Father did not pay any child support or provide any clothes, food, school supplies or toys for the children during the relevant four-month period. Moreover, the record reveals Father did not pay any support or contribute to the children's needs since the termination of the home trial visit on May 2, 2013. Father contends, however, that his failure to pay support was not willful because he was found to be indigent by the trial court; he also contends he was unable to provide child support because he was employed only briefly during the relevant period. Father further contends that DCS did not present any evidence as to his ability to work or to obtain a job, or any evidence that he had sufficient income to pay child support.

The element of "willfulness" of a parent's actions hinges on his or her intent, which is usually incapable of direct proof. *In re B.P.C.*, No. M2006-02084-COAR3-PT, 2007 WL 1159199, at *10 (Tenn. Ct. App. April 18, 2007) (citing *In re Audrey S.*, 182 S.W.3d at 864). Thus, intent must often be inferred from circumstantial evidence drawn from the parent's actions or conduct. *Id.*

The trial court made the following findings from the bench relative to the willfulness of Father's failure to pay support:

> [A]s far as the department's allegations regarding abandonment, the court has observed the defendant, his presence, and as he testified from the witness stand

> would appear to the court to be an able-bodied individual, someone capable of employment. He has had some jobs. He never testified that he was unable to find a job, only that he just didn't have one . . . . Considering the fact that he never would testify that he was injured or disabled or otherwise unable to obtain employment, or that there were not opportunities; he didn't list for the court the number of ways he tried to find a job so he could support his children. It was just that he didn't work, and because he didn't work he didn't support his children.

Furthermore, the trial court held in its Memorandum and Order:

> [Father] willfully failed to support said children for four (4) months immediately preceding the filing of this petition or the support paid in the four months immediately preceding the filing of this petition was token support. [Father] has not contributed to the support of the children since at least [May 2, 2013]. The father testified that he was served with a child support order and began paying support in June 2014 by garnishment. There was no proof presented regarding his June 2014 support payments. [Father] is able-bodied and capable of working and supporting the children and has been since the children were placed into custody. [Father] claims he is employed. [Father] testified that he was aware of his duty to support the children. [Father] has made no attempt to support the children and has provided no justifiable excuse for failing to support the children.

In support of the trial court's determination, Father admitted he was aware of the grounds for termination of his parental rights. In fact, Ms. Conrad testified that she read and explained the criteria for parental termination to Father on several occasions. In regards to his past employment, Father testified that he worked at K-mart in 2013, but never testified as to how long before being laid off. At the time of trial, he testified that he had been working at Tri-Lakes Containers for a little over one month and was paying court-ordered child support by garnishment.

In addition, according to Ms. Conrad's affidavit regarding DCS' reasonable efforts, which was admitted into evidence, she stated that on September 4, 2013, during the relevant four-month period, she asked if Father was still employed at K-Mart, and he replied yes. She also requested verification of his employment and Father stated that he would have to get online to get a copy of his check; however, he never provided Ms. Conrad with the information she requested. Later on, Father sent Ms. Conrad a text claiming he had been laid off but that he "would have another job soon." Ms. Conrad also stated she received another

text from Father, around November 15, 2013, in which he stated that he had been hired seasonally and was working Monday through Saturday from 7 a.m. to 6 p.m.

Father never reported to DCS that he was unable to work. Moreover, he informed Ms. Conrad that he had jobs during the relevant period and yet he never paid child support. The record clearly established that Father had the ability to work because he was employed prior to and during the relevant period, although not continuously. Although he states he was laid off from his job at K-Mart sometime after September 4, 2013, he told Ms. Conrad that he had been hired sometime before November 15, 2013, and that he was working six days a week, yet no support payments were remitted. The trial court expressly found that Father was able-bodied and that he had managed to find several jobs since the children had been placed in foster care and yet Father failed to pay any amount of child support, and failed to provide any food, clothing, school supplies or toys, despite knowing that failure to pay support could result in termination of his parental rights.

We also find it significant that Father admitted to helping support the children of his current girlfriend and his previous girlfriend while they lived together during the relevant period. Although Father testified that he did not provide them with financial support, only babysitting while the mother was at work, he admitted earning income and yet none of his paycheck went to support his children. Moreover, the trial court found Father was not a credible witness; thus, his testimony on this fact may be disregarded.

Based upon the foregoing and other evidence in the record, it has been established by clear and convincing evidence that Father's failure to pay any support during the relevant period was willful. Accordingly, we affirm the trial court's finding that Father abandoned his children by failing to support them.

B. Failure to Visit

It is undisputed that Father, who lived in Warsaw, Indiana,[2] did not visit his children, who lived in Cookeville, Tennessee, during the relevant four-month period; Father contends, however, that his failure to visit the children in person was not willful. Although he did not visit them in person during the relevant period, Father insists he visited with his children on a weekly basis by phone during the relevant period.

Father contends he was unable to make the approximate four-hundred mile, seven-hour one-way trip from his home in northern Indiana to Cookeville, Tennessee, for two primary reasons. One, he did not have a driver's license. Two, he could not afford the cost

[2]Warsaw, Indiana, is in northern Indiana not far from South Bend, Indiana, and Chicago, Illinois.

of traveling. In lieu of traveling, however, Father insists he "visited" with his children at least every other week during the relevant four-month period by speaking with them at length by phone. Ms. Conrad, the DCS case worker, testified that she supervised the phone calls between Father and children, and she acknowledged that he called his children at least once every other week during the four-month period, and that each phone call lasted approximately twenty minutes.

The trial court found that the phone calls were merely token visitation, and, therefore, the phone calls did not constitute visitation. Based on this finding and the undisputed fact that Father did not visit the children in person during the relevant period, the trial court concluded that he abandoned his children by willfully failing to visit.

Based on the trial court's findings, the issue before us is whether, under the circumstances of this case, Father's telephone calls amounted to no more than token visitation. For purposes of terminating a parent's rights on the ground of abandonment for failing to visit under Tenn. Code Ann. § 36-1-102, "token visitation" means "visitation, *under the circumstances of the individual case*, [which] constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child." Tenn. Code Ann. § 36-1-102(1)(C) (emphasis added). The *circumstances of this individual case* are that Father resided in northern Indiana, which was a seven-hour one-way trip from Cookeville, Tennessee, and that he had no driver's license. Moreover, there is no evidence in the record to suggest that Father had a vehicle or that another person was willing to drive him to Cookeville, Tennessee, for visitation, and DCS made no efforts to assist Father with any means of transportation to visit his children in Tennessee.[3]

Although a reasonable person may find that Father had the financial means to travel on one or more occasions to Cookeville to visit his children, we are unable to conclude from this record that this fact has been proven pursuant to the rigorous clear and convincing standard.[4] Stated another way, the evidence in this record has not completely eliminated all "serious or substantial doubt" about the correctness of the conclusion that Father's failure to

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[3]In her affidavit of reasonable efforts to assist Father, there is no mention of any attempts to assist him to travel to see his children, and no one testified at trial that any transportation assistance was offered.

[4]Earlier, we concluded that Father willfully failed to support his children; however, we made no finding as to the extent he could have financially supported his children during the relevant four-month period. The evidence in this record does not clearly and convincingly establish that Father could have financially supported his children and, at the same time, incurred the cost to travel to and from Cookeville, Tennessee. Furthermore, DCS provided no evidence concerning the cost for Father to travel to and from Cookeville.

visit with the children in person was willful. *See In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002) (eliminating any serious or substantial doubt about the correctness of the conclusions drawn from the evidence is the underpinning of the clear and convincing standard).

Additionally, it is undisputed that Father visited by phone with his children every other week during the relevant four-month period for approximately twenty minutes. Thus, considering the circumstances of this case, including Father's modest financial means, lack of a driver's license, the fact that it would be a seven-hour one-way trip to visit his children, and the lack of evidence that anyone was willing to provide transportation assistance or drive him to Cookeville for visitation, we are unable to conclude that twenty-minute phone calls with his children every other week during the relevant four-month period constitutes token visits. *See In re B.D.*, No. M2008-01174-COA-R3-PT, 2009 WL 528922, at *9 (Tenn. Ct. App. Mar. 2, 2009) (stating that although the mother only visited the children three or four times during the relevant four-month period, the court found that her distance from the children made visitations difficult and that the mother maintained regular contact with the children by telephone and letters, circumstances which did not support a finding that the mother abandoned her children by willfully failing to visit them).[5] Thus, even though Father did not visit with the children in person during the relevant four-month period, we find the evidence fails to establish by clear and convincing evidence that his telephone visits constituted mere token visitation. Accordingly, we respectfully disagree with the trial court's finding that Father abandoned his children by failing to visit.

We have affirmed the trial court's finding that Father abandoned his children by wilfully failing to support them, and parental rights may be terminated when only one statutorily defined ground is established. *See* Tenn. Code Ann. § 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.

[5]During the relevant four-month period in January and early February 2007, the mother in *In re B.D.* maintained visitation with her children, but she left Tennessee and moved to Illinois in late February 2007 in order to have family support; thereafter, her visits with her children dropped significantly. *Id.* at *9. The petition to terminate the parental rights of the mother was filed on May 11, 2007, on four grounds including abandonment for failure to visit. *Id.* at *1. The juvenile court found the mother only had token visits with her children during the four months preceding the filing of the petition and, thus, she had abandoned her children by willfully failing to visit them. *Id*. at *9. We reversed this finding on appeal reasoning that "[e]ven when unable to visit, [the mother's] actions fall short of 'willful' abandonment." *Id*. We also noted that after the mother moved to Illinois she "stayed in regular contact with the children by telephone and letters," and that she "made efforts to maintain a relationship with her children and have meaningful visits with them." *Id*. Moreover, not unlike Father's circumstances here, "[e]ven though the caseworker knew that [the mother] did not have transportation and could not financially afford to travel to Tennessee," the state did not offer transportation or lodging to the mother until after the petition for termination was filed. *Id*.

App. 1998). Therefore, we shall address whether termination of Father's parental rights is in the best interests of the children.

II. 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 id.* 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 trial court found that termination of Father's parental rights was in the best interests of the children. Specifically, the court noted that Father has not made an adjustment of circumstances, conduct, or conditions as to make it safe and in the children's best interest to be in the home of the parent, and that a change of caretaker is likely to have a negative effect on the children's emotional and psychological condition. The court noted that, "[t]he children are in counseling and have a history of being exposed to domestic violence to the children by their father as testified to by the foster mother and the Youth Villages Case Manager." In addition, Father testified that he pleaded guilty to battery in Indiana involving his previous girlfriend's infant child that he was the caretaker for, during the time the child's mother was at work. Father testified that his children were on a home trial visit and were present when he was accused of battery. Moreover, the court found that Father has not paid any child support and has not paid any portion of the children's substitute physical care and maintenance when financially able to do so. Specifically, the court found that, "[s]ince the children were removed from his custody, he has not provided any food, clothing, toiletries, school supplies, books, toys, or any other things the children need on a daily basis." Lastly, the trial court found that the children are in a foster home that wishes to adopt them, and the children have established a strong bond with the foster parents and their family.

Considering these factors from the perspective of the child, the evidence clearly and convincingly established that it is in the children's best interests that Father's parental rights be terminated.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Father.

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FRANK G. CLEMENT, JR., JUDGE