

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned On Briefs June 12, 2009

IN THE MATTER OF M.C.

**Direct Appeal from the Juvenile Court for Montgomery County
No. 140-64 Craig Hargrow, Special Judge**

No. M2009-00603-COA-R3-PT - Filed July 1, 2009

This is a termination of parental rights case. Mother appeals the trial court's termination of her parental rights on grounds of abandonment for willful failure to visit and failure to provide suitable housing, failure to substantially comply with the requirements of the permanency plans, and persistence of conditions. Finding that the grounds for termination of Mothers's parental rights are established by clear and convincing evidence, and that termination is in the best interest of the minor child, we affirm.

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

J. STEVEN STAFFORD, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J. and ANDY D. BENNETT, J., joined.

Eric J. Yow, Clarksville, TN, for the Appellant, L.B.

Robert E. Cooper, Jr., Attorney General and Reporter, and Michael E. Moore, Solicitor General, Lindsey O. Appiah, Nashville, Tennessee, for Appellee, State of Tennessee, Department of Children's Services.

OPINION

M.C. was born to L. B. ("Mother") on April 18, 1996.¹ On January 4, 2007, the State of Tennessee Department of Children's Services ("DCS") received a referral alleging lack of supervision for M.C. Upon investigation, DCS discovered that the Mother had been admitted to the hospital for psychological problems, and that she had left M.C. in the care of a neighbor who was no longer able to look after him. During its initial investigation, DCS also discovered that the

¹ No father is listed on the birth certificate.

Mother had tested positive for opiates and cocaine when she was screened upon admission to the hospital.

On February 5, 2007, DCS and Mother engaged in an initial child and family team meeting. Mother was asked to submit to another drug test, and she again tested positive for opiates and cocaine. At the meeting, Mother informed DCS of her plan to move to New York within the next few days. She also stated that she had no relatives or friends in Tennessee. On February 7, 2007, DCS filed a petition to adjudicate dependency and neglect and for temporary custody of M.C., along with an affidavit of reasonable efforts. Because there was no suitable friend or relative placement, the trial court entered a protective custody order on February 7, 2007. At that time, M.C. was placed in the care of the foster parents, in whose home he has remained.² By order of February 15, 2007, M.C. was adjudicated dependent and neglected.

DCS entered into two permanency plans with Mother. The first of these plans is dated February 23, 2007, and states Mother's responsibilities as follows: (1) provide documentation of income sufficient to support M.C.; (2) provide documentation of stable residence for the previous three months; (3) cooperate with a home study evaluating her circumstances; (4) maintain a residence large enough to accommodate M.C.; (5) maintain contact with DCS and update the case worker of her progress; (6) submit to drug and alcohol assessment, remain drug free, and submit to random drug screens; (7) comply with all of the recommendations of her psychological assessment; and (8) support M.C. while he is in foster care. The goal of the first plan was "reunification/exit custody to live with relatives." The second plan, dated November 27, 2007 contains the same requirements and a notation that Mother "has made little progress on her permanency plan;" however, the goal on the second plan is changed to "reunification/adoption."

On April 2, 2007, Mother moved the court for visitation with M.C. This motion states that Mother is living in New York. By order of April 17, 2007, the court granted Mother "reasonable supervised visitation," and "reasonable telephonic contact" with M.C.

On June 16, 2008, DCS filed a petition to terminate the parental rights of Mother, D.C. (M.C.'s putative father), and the unknown father of M.C.³ In its petition, DCS alleges that Mother has abandoned M.C. in that she has "made only token visitation in the four months preceding the filing of th[e] petition." Specifically, DCS alleges that Mother's last visit with M.C. occurred on February 19, 2008, and since that time, she has failed to contact the child by phone or letter. DCS also alleges that Mother abandoned M.C. in failing to provide a suitable home. As further grounds for termination, DCS alleges substantial noncompliance with the permanency plans, and persistence of conditions. In support of its petition, DCS filed an affidavit of reasonable efforts. An order of

² An attorney was appointed for Mother, and a guardian ad litem was appointed for M.C.

³ Although the parental rights of D.C. and the unknown father were also terminated, Mother is the sole appellant.

publication was filed on October 16, 2008, indicating that diligent efforts had been made to locate Mother, and authorizing notification by publication.

The petition was heard on February 3, 2009. Mother failed to appear at the hearing; however, her court-appointed attorney was present. Mother's attorney informed the court that he had just heard from her immediately before the start of the hearing. He further stated that he had not "heard from her in quite a while" prior to that phone call. The trial court denied an oral motion to continue, and the hearing proceeded. By Order of February 10, 2009, the trial court terminated Mothers's parental rights to M.C. on grounds of abandonment for willful failure to visit and failure to provide suitable housing, failure to substantially comply with the requirements of the permanency plans, and persistence of conditions. The court also found that DCS had made reasonable efforts in assisting Mother with her requirements under the permanency plans, and that termination of her parental rights was in the best interest of M.C. Mother appeals and raises four issues for review as stated in her brief:

I. Whether clear and convincing evidence supports the trial court's decision to terminate parental rights on the ground of abandonment for willful failure to visit for four months preceding the filing of the petition?

II. Whether the trial court erred in finding that the Department of Children's Services provided reasonable efforts to reunite the minor child with [his] mother?

III. Whether clear and convincing evidence supports the trial court's decision to terminate parental rights for substantial noncompliance with the permanency plan obligations?

IV. Whether clear and convincing evidence supports the trial court's determination that termination of parental rights is in the best interest of the minor child?

A parent has a fundamental right to the care, custody, and control of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174 (Tenn.1996). Thus, the state may interfere with parental rights only if there is a compelling state interest. *Nash-Putnam*, 921 S.W.2d at 174-75 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)). Our termination statutes identify "those situations in which the state's interest in the welfare of a child justifies interference with a parent's constitutional rights by setting forth grounds on which termination proceedings can be brought." *In re W.B.*, Nos. M2004-00999-COA-R3-PT, M2004-01572-COA-R3-PT, 2005 WL 1021618, at *7 (April 29, 2005) (citing Tenn.Code Ann. § 36-1-113(g)). A person seeking to terminate parental rights must prove both the existence of one of the statutory grounds for termination and that termination is in the child's best interest. *In re D.L.B.*,

118 S.W.3d 360, 367 (Tenn.2003); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn.2002); Tenn.Code Ann. § 36-1-113(c).

Because of the fundamental nature of the parent's rights and the grave consequences of the termination of those rights, courts must require a higher standard of proof in deciding termination cases. *Santosky*, 455 U.S. at 769. Consequently, 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)(1); *In re Valentine*, 79 S.W.3d at 546. Clear and convincing evidence “establishes that the truth of the facts asserted is highly probable ... and eliminates any serious or substantial doubt about correctness of the conclusions drawn from the evidence.” *In re M.J.B.*, 140 S.W.3d 643, 653 (Tenn.Ct.App.2004). Such evidence “produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established.” *Id.* at 653.

In light of the heightened standard of proof in these cases, a reviewing court must adopt the customary standard of review set forth by Tenn. R. App. P. 13(d). 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.*

The trial court terminated Mother’s parental rights to M.C. on three grounds, abandonment under Tenn.Code Ann. § 36-1-113(g)(1), failure to substantially comply with the responsibilities set out in the permanency plans under Tenn.Code Ann. § 36-1-113(g)(2), and persistence of conditions under Tenn.Code Ann. § 36-1-113(g)(3). We will address each of these grounds to determine whether DCS proved each by clear and convincing evidence.

Abandonment

Tenn. Code Ann. §36-1-102(1)(A) defines abandonment, in relevant part, as follows:

(1)(A) 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;

(ii) The child has been removed from the home of the parent(s) or guardian(s) as the result of a petition filed in the juvenile court in which the child was found to be a dependent and neglected child, as defined in § 37-1-102, and the child was placed in the custody of the department or a licensed child-placing agency, that the juvenile court found, or the court where the termination of parental rights petition is filed finds, that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child's situation prevented reasonable efforts from being made prior to the child's removal; and for a period of four (4) months following the removal, the department or agency has made reasonable efforts to assist the parent(s) or guardian(s) to establish a suitable home for the child, but that the parent(s) or guardian(s) have made no reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date;

“For purposes of this subdivision (1), willfully failed to visit means the willful failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation.” Tenn. Code Ann. §36-1-102(1)(E). Token visitation “means that the visitation, under the circumstances of the individual case, 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).

Donna Vaughn, Family Services Worker with DCS, testified that Mother’s last visit with M.C. was on February 19, 2008, but that there had been no contact since that time. Prior to the February 19, 2008 visit, the record indicates that Mother’s contact with M.C. and with DCS was sporadic at best. As noted above, shortly after M.C. came into custody, Mother moved out of state. Concerning DCS’s efforts to facilitate visitation between Mother and the child, Ms. Vaughn testified that DCS had actually paid for Mother’s travel to allow her to visit with M.C. However, despite DCS’s efforts, when Mother actually came to Tennessee, she was often seen outside the building smoking during her visitation time. From the record, we conclude that there is clear and convincing evidence to support the trial court’s finding that Mother abandoned M.C. by her failure to participate in more than token visitation during the four months preceding the filing of the petition to terminate her parental rights.

Regarding stable housing, the record indicates that, since leaving Tennessee, Mother has been transient. Ms. Vaughn testified that, in March 2008, DCS knew that Mother was living in Connecticut; however, shortly after March 2008, Mother abandoned that address. Since that time, Mother has made no effort to inform DCS of her whereabouts. Consequently, DCS searched for Mother in Massachusetts, Connecticut, and New York, but was unable to locate her. From the

record, there is no indication that Mother has been able to maintain stable housing sufficient to accommodate M.C. Additionally, it appears that Mother has failed to maintain employment so as to be able to provide necessary housing for herself and the child. The evidence in the record is undisputed and it clearly and convincingly supports the trial court's finding that Mother has abandoned the child in failing to procure suitable housing.

Substantial Noncompliance with the Requirements of the Permanency Plans

We previously noted that two parenting plans were entered in this case. Both plans contained the same eight requirements with only the goals being different. The record reveals that Mother was an active participant in the development of the permanency plans and that she was informed of the consequences of her failure to comply.

Ms. Vaughn's testimony indicates that Mother failed to meet any of the requirements, with the exception that she did submit to a psychological evaluation (however, she failed to follow through with the recommendations). As discussed above, Mother has failed to provide a stable residence. The fact that Mother chose to move out of state after her child was taken into DCS custody significantly limited the ability of DCS to provide help to Mother concerning her housing. However, the record indicates that DCS did assist Mother to the best of its ability and within the limitations created by Mother's decision to leave the state.

Mother also failed numerous drug screens since the inception of this case. The record reveals that, during the entire pendency of this case, Mother tested positive for drug use on all but one random screening. The only screening on which she had a negative test occurred on February 19, 2008. Mother also failed to submit to random drug screens on numerous occasions, despite the fact that DCS arranged for Phoenix Home to act as the liaison with out-of-state testing facilities in order to make it feasible for Mother to take the required drug screens. Despite the efforts of DCS, Mother has failed to take any significant steps towards compliance with the permanency plans.

Persistence of Conditions

Tenn. Code Ann. §36-1-113(g)(3) provides:

(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;

From a review of the record, it is clear that Mother has failed to effect significant changes in her life in order to properly care for M.C. The itinerant lifestyle she has chosen and her on-going drug use have resulted in her inability to provide suitable housing, and to maintain stable employment. In fact, from the record, it appears that Mother's instability may have increased since M.C. was removed from her custody. From the totality of the circumstances, we conclude that there is little likelihood that Mother will be able to remedy these conditions at an early date so that M.C. can be safely returned to her. Consequently, this ground for termination of her parental rights is supported by clear and convincing evidence in the record.

Best Interest

Having determined that the grounds for termination of Mother's parental rights have been established by clear and convincing evidence, we now address whether clear and convincing evidence established that termination is in M.C.'s best interest. The Legislature has given guidance in making this determination:

(i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

(1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;

(2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;

(3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

(4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;

(5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances 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.

Tenn. Code Ann. §36-1-113(i).

The record indicates that Mother has failed to maintain housing, has failed to provide even token financial support, has continued to use illegal drugs, and has failed to maintain regular visitation or contact with M.C.. M.C.'s foster mother testified that M.C. has no meaningful relationship with Mother, and, in fact, does not even ask about her anymore.

The record reveals that M.C. is well-adjusted in his foster home, that he thinks of the foster parent's other children as his siblings, that he is involved in extracurricular activities, and is generally happy and well-adjusted in this environment. Conversely, there is no indication that Mother, in her current situation, would be able to take care of M.C. emotionally, physically, or otherwise. From the record as a whole, we conclude that there is clear and convincing evidence that it is in M.C.'s best interest for Mother's parental rights to be terminated.

For the foregoing reasons, we affirm the trial court's order terminating parental rights. Costs of this appeal are assessed against the Appellant, L.B., and her surety.

J. STEVEN STAFFORD, J.