

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 7, 2007 Session

**STATE OF TENNESSEE, DEPARTMENT OF CHILDREN'S SERVICES, v.
JEREMY BLACKETER and CHARLES CLIFT, IN THE MATTER OF: JB
(dob 06/17/98) and AC (dob 11/07/03)**

**Direct Appeal from the Circuit Court for Bradley County
No. V-05-543 Hon. John B. Hagler, Jr., Circuit Judge**

No. E2006-01302-COA-R3-CV - FILED APRIL 2, 2007

The Trial Court held there was clear and convincing evidence of statutory grounds to terminate the parental rights of Jeremy Blacketer, as well as clear and convincing evidence that termination was in the child's best interest. We find the State failed to prove statutory grounds for termination.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and SHARON G. LEE, J., joined.

Philip M. Jacobs, Cleveland, Tennessee, for appellant.

Robert E. Cooper, Jr., Attorney General and Reporter, and
Amy T. McConnell, Assistant Attorney General, Nashville, Tennessee, for appellee.

OPINION

In this action to terminate the parental rights of Jeremy Blacketer to his daughter, JB, the Department alleged that he was listed on the birth certificate of JB as the child's father, that Blacketer had a lengthy sentence to complete, that he had not legitimated the child; that he had failed to manifest a willingness and ability to take custody of her, and that he had no meaningful

relationship with the child.

The issues were subsequently tried before the Trial Court, and Blacketer testified by deposition. In his deposition, Blacketer testified that he was 25 years old and met the child's mother in high school in Missouri. He testified that he and the mother were never married and that the mother moved to Tennessee after the child was born, but he raised the child for the first year of her life, while living with his mother. He testified that he was in jail for four months, and when he got out, he called the mother, advising he would fight for custody of the child. He testified that he came to Tennessee three times to see the child, but could not come more because his probation officer would not allow him. He testified that he had to return to jail for violating probation by going to Tennessee, and that he had been convicted of forgery and burglary multiple times.

He further testified that he got out of jail on bond, but went back to jail in early 2002, and was later convicted of possession of drugs while in jail. He testified he was scheduled to be released in September 2006, and that he had not seen the child since 2001.

He testified that he had not paid child support because he was "waiting to hear" about it, but he did purchase things for the child when he came to Tennessee to visit. Other witnesses testified, and following the evidentiary hearing, the Court entered an Order terminating the parental rights of Blacketer. The Order states that DCS counsel and the case manager were present, as well as the guardian ad litem and counsel for Blacketer, that Blacketer was incarcerated in Missouri, and could not be transported to Tennessee for the trial, and that the Court had before it the permanency plans and the Juvenile Court record.¹

The Order states that Blacketer was listed on JB's birth certificate as her father, and that he acknowledged paternity in his trial testimony. The Court found that grounds existed to terminate his parental rights pursuant to Tenn. Code Ann. §36-1-113(g)(3), because the child had been removed from the home for more than six months and the conditions leading to removal still persisted. The Court found that Blacketer was "unavailable" for his daughter and that he had a lengthy criminal record that gave the Court no indication that he would soon change. The Court also found further grounds existed pursuant to Tenn. Code Ann. §36-1-113(g)(9) and 36-1-117(c) because Blacketer had not legitimated the child and had failed to file a petition for paternity or custody, "even though he admitted she was his child and even though he claims that he cared for her during the first year after her birth." The Court observed that "there is nothing except an accident of biology to make him a father" and that he had not exercised his right to rear the child since she was a baby. Further, the Court found that it was in the child's best interests to terminate Blacketer's parental rights, as JB had no meaningful relationship with her father. The Court found that the foster parents wanted to adopt the child, and that it would be detrimental to separate her from her sister.

¹Although permanency plans for both children were admitted into evidence, none of them address Blacketer's parenting skills. Rather, they list mother and Mr. Clift, even though Mr. Clift was not JB's biological father.

These issues are raised on appeal:

1. Did the trial court err in terminating father's parental rights pursuant to Tenn. Code Ann. §36-1-113(g)(3)?
2. Did the trial court err in terminating father's parental rights pursuant to Tenn. Code Ann. §36-1-113(g)(9) and 36-1-117(c)?
3. Did the trial court err in terminating father's parental rights pursuant to the best interest standard of Tenn. Code Ann. §36-1-113(I)?

The Trial Court relied upon the ground of persistence of conditions found at Tenn. Code Ann. §36-1-113(g)(3) in terminating father's parental rights. In its brief, however, DCS stated that since the child was not removed from Blacketer's home, it would waive this ground on appeal.

The Trial Court also relied on Tenn. Code Ann. §36-1-113(g)(9)(A) as grounds for termination of father's parental rights. That section provides:

(g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds: . . .

(9)(A) The parental rights of any person who, at the time of the filing of a petition to terminate the parental rights of such person or, if no such petition is filed, at the time of the filing of a petition to adopt a child, is not the legal parent or guardian of such child or who is described in § 36-1-117(b) or (c) may also be terminated based upon any one (1) or more of the following additional grounds:

(I) The person has failed, without good cause or excuse, to pay a reasonable share of prenatal, natal, and postnatal expenses involving the birth of the child in accordance with the person's financial means promptly upon the person's receipt of notice of the child's impending birth;

(ii) The person has failed, without good cause or excuse, to make reasonable and consistent payments for the support of the child in accordance with the child support guidelines promulgated by the department pursuant to § 36-5-101;

(iii) The person has failed to seek reasonable visitation with the child, and if visitation has been granted, has failed to visit altogether, or has engaged in only token visitation, as defined in § 36-1-102(1)(c);

(iv) The person has failed to manifest an ability and willingness to assume legal and physical custody of the child;

(v) Placing custody of the child in the person's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child; or

(vi) The person has failed to file a petition to establish paternity of the child within thirty (30) days after notice of alleged paternity by the child's mother, or as required in § 36-2-318(j), or after making a claim of paternity pursuant to §36-1-117(c)(3).

A legal parent is defined as:

- (A) The biological mother of a child;
- (B) A man who is or has been married to the biological mother of the child if the child was born during the marriage or within three hundred (300) days after the marriage was terminated for any reason, or if the child was born after a decree of separation was entered by a court;
- (C) A man who attempted to marry the biological mother of the child before the child's birth by a marriage apparently in compliance with the law, even if the marriage is declared invalid, if the child was born during the attempted marriage or within three hundred (300) days after the termination of the attempted marriage for any reason;
- (D) A man who has been adjudicated to be the legal father of the child by any court or administrative body of this state or any other state or territory or foreign country or who has signed, pursuant to §§ 24-7-113, 68-3-203(g), 68-3-302 or 68-3-305(b), an unrevoked and sworn acknowledgment of paternity under the provisions of Tennessee law, or who has signed such a sworn acknowledgment pursuant to the law of any other state, territory, or foreign country; or
- (E) An adoptive parent of a child or adult.

Tenn. Code Ann. §36-1-102(28).

DCS argued (and the Trial Court implicitly agreed) that Mr. Blacketer was not the legal father of JB. The definition of “legal parent” includes “[a] man who has been adjudicated to be the legal father of the child by any court or administrative body of this state or any other state or territory or foreign country or who has signed, pursuant to §§ 24-7-113, 68-3-203(g), 68-3-302 or 68-3-305(b), an unrevoked and sworn acknowledgment of paternity under the provisions of Tennessee law, or who has signed such a sworn acknowledgment pursuant to the law of any other state, territory, or foreign country. . . .” Tenn. Code Ann. § 36-1-102(28)(D).

JB was born in Missouri in 1998, where both Mr. Blacketer and JB’s mother lived at the time. Mr. Blacketer was listed as JB’s father on her birth certificate. Under the laws of Missouri which were in effect in 1998, in order for Mr. Blacketer to be identified on JB’s birth certificate, Mr. Blacketer would have been required to sign an acknowledgment of paternity. Missouri law provides:

Notwithstanding any other law to the contrary, if a child is born to unmarried parents, the name of the father and other required information shall be entered on the

certificate of birth only if an acknowledgment of paternity pursuant to section 193.215 is completed, or if paternity is determined by a court of competent jurisdiction or by an administrative order of the division of child support enforcement.

Missouri Ann. Stat. § 193.085(7) (West 1998).

Since Mr. Blacketer would have been required to sign an acknowledgment of paternity in order to be listed as JB's father on her birth certificate, Mr. Blacketer meets the definition of a "legal parent" under Tennessee law. Tenn. Code Ann. § 36-1-102(28)(D). Neither the Department nor Mr. Blacketer precisely raised this issue in the Trial Court, nor was it raised in the briefs on appeal. But since we are dealing with Blacketer's fundamental constitutional rights, *see, O'Daniel v. Messier*, 905 S.W.2d 182 (Tenn. Ct. App. 1995), we raise the issue *sua sponte*. This Court has recognized:

Tenn. R. App. P. 13(b)² and 36(a)³ give appellate courts considerable discretion to consider issues that have not been properly presented in order to achieve fairness and justice. *Aaron v. Aaron*, 909 S.W.2d 408, 412 (Tenn. 1995). Taken together, these rules permit appellate courts to grant complete relief to the parties as long as they have been given fair notice and an opportunity to be heard on the dispositive issues. *Realty Shop, Inc., v. RR Westminster Holding, Inc.*, 7 S.W.3d 581, 608 (Tenn. Ct. App. 1999).

Heatherly v. Merimack Mut. Fire Ins., Co., 43 S.W.3d 911, 916 (Tenn. Ct. App. 2000).

In this case, the State raised the issue of whether Blacketer's parental rights could be terminated pursuant to Tenn. Code Ann. § 36-1-113(g)(9) by relying on same in its Petition. The State raised the issue of whether Blacketer was the child's legal father, or whether his rights could be terminated using the less stringent standard found in the statute. As such, the State clearly had notice and an opportunity to be heard on the issue.

We hold that the State has not provided clear and convincing evidence to rebut the

²Tenn. R. App. P. 13(b) states: "Review generally will extend only to those issues presented for review. The appellate court shall also consider whether the trial and appellate court[s] have jurisdiction over the subject matter, whether or not presented for review, and may in its discretion consider other issues in order, among other reasons: (1) to prevent needless litigation, (2) to prevent injury to the interests of the public, and (3) to prevent prejudice to the judicial process."

³Tenn. R. App. P. 36(a) states that the appellate courts "shall grant the relief on the law and facts to which the party is entitled or the proceeding otherwise requires and may grant any relief...provided, however, relief may not be granted in contravention of the province of the trier of fact."

presumption of Mr. Blacketer's legal paternity. As such, his parental rights may not be terminated for any of the grounds listed in Tenn. Code Ann. § 36-1-113(g)(9), and since DCS has already conceded that Mr. Blacketer's rights cannot be terminated pursuant to Tenn. Code Ann. § 36-1-113(g)(3), or proved any other grounds, we reverse the Trial Court's Judgment and dismiss the action.

The cost of the cause is assessed to The State of Tennessee, Department of Children's Services.

HERSCHEL PICKENS FRANKS, P.J.