

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 19, 2015 Session

IN RE ANTHONY R.

**Appeal from the Juvenile Court for Davidson County
No. 178859 Sophia Brown Crawford, Judge**

No. M2014-01753-COA-R3-PT – Filed June 9, 2015

The trial court terminated Father’s parental rights on the statutory ground of wanton disregard for the welfare of the child. Father appealed. We reverse because when Father engaged in the conduct at issue, in fact, Father did not know of his parentage. A father cannot exercise wanton disregard for the welfare of a child if he does not know the child exists.

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

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and RICHARD H. DINKINS, J., joined.

James A. Rose, Madison, Tennessee, for the appellant, Anthony W.

G. Avery Mott, Nashville, Tennessee, Guardian Ad Litem.

OPINION

This is the second appearance of this matter in the Court of Appeals. After the first trial to terminate the parental rights of Anthony M. (“Father”), an appeal was taken in which this Court found that Father’s rights were terminated upon a ground that was not pled. *In re Anthony R.*, No. M2012-01412-COA-R3-PT, 2013 WL 500829, at *4 (Tenn. Ct. App. Feb. 8, 2013). The trial court’s judgment was reversed and remanded. *Id.*

On August 26, 2013, a second petition to terminate Father's parental rights was filed, alleging abandonment by failure to visit; abandonment by failure to support; abandonment by incarceration when confined under a sentence of ten years or more and the child is under eight years old; failure to make payments toward the support of the mother during the four months immediately preceding the birth of the child; and wanton disregard for the welfare of the child by engaging in illegal conduct that led to incarceration. Father filed an answer and sought to dismiss the petition based on res judicata.

The trial court held a hearing on December 4, 2013. On August 27, 2014, the trial court issued an order terminating Father's parental rights on the ground of wanton disregard. The trial court determined that res judicata did not apply and that the other grounds pled were not supported by clear and convincing evidence. Father appealed.

STANDARD OF REVIEW

“A parent has a fundamental right to the care, custody, and control of his or her child.” *In re Serenity B.*, No. M2013-02685-COA-R3-PT, 2014 WL 2168553, at *1 (Tenn. Ct. App. May 21, 2014), perm. app. denied (July 14, 2014). Only when there is a compelling state interest may the state interfere with parental rights. *Id.* “An order terminating parental rights shall have the effect of severing forever all legal rights and obligations of the parent or guardian of the child against whom the order of termination is entered and of the child who is the subject of the petition to that parent or guardian.” Tenn. Code Ann. § 36-1-113(l)(1).

Terminating a parent's fundamental parental rights has severe consequences; thus, termination cases require a higher standard of proof. *In re Serenity B.*, 2014 WL 2168553, at *2. To terminate parental rights, the court must find by clear and convincing evidence that at least one statutory ground for termination exists and that termination is in the child's best interest. Tenn. Code Ann. § 36-1-113(c); *In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006). “Clear and convincing evidence ‘establishes that the truth of the facts asserted is highly probable, and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence.’” *In re Serenity B.*, 2014 WL 2168553, at *2 (quoting *In re M.J.B.*, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004) (internal citations omitted)).

This Court must review the trial court's conclusions of law de novo with no presumption of correctness. *In re Valentine, Jr.*, 79 S.W.3d 539, 546 (Tenn. 2002). The court's factual findings are reviewed de novo with a presumption of correctness, unless the evidence preponderates to the contrary. TENN. R. APP. P. 13(d). Upon reviewing a decision to terminate parental rights, this Court's duty is to “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.” *In re Serenity B.*, 2014 WL 2168553, at *2.

ANALYSIS

A. Res Judicata

“The doctrine of res judicata or claim preclusion bars a second suit between the same parties or their privies on the same claim with respect to all issues which were, or could have been, litigated in the former suit.” *Jackson v. Smith*, 387 S.W.3d 486, 491 (Tenn. 2012). A party attempting to use res judicata as a defense “must demonstrate (1) that the underlying judgment was rendered by a court of competent jurisdiction, (2) that the same parties or their privies were involved in both suits, (3) that the same claim or cause of action was asserted in both suits, and (4) that the underlying judgment was final and on the merits.” *Id.* (citing *Lien v. Couch*, 993 S.W.2d 53, 56 (Tenn. Ct. App. 1998)).

Father’s res judicata defense fails because of the fourth factor. The decision of the trial court on the first petition did not address the grounds raised in the petition and ruled on a ground that was not pled. Moreover, that ruling was reversed and remanded; therefore, there was never a final judgment on the merits. Thus, the doctrine of res judicata does not apply.

B. Ground for Termination: Wanton Disregard

Father maintains that the wanton disregard ground cannot apply since he did not know of the existence of the child at the time he committed the acts that led to his incarceration. Father’s argument requires us to examine the statutory basis of the wanton disregard ground for termination of parental rights.

Tennessee Code Annotated Section § 36-1-102(1)(A)(iv) defines abandonment as follows:

A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and either has willfully failed to visit or has willfully failed to support or has willfully failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent’s or guardian’s incarceration, or *the parent or guardian has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child.*

(Emphasis added). The statutory language referencing wanton disregard is not limited by the four-month requirement at the beginning of the section. *In re Audrey S.*, 182 S.W.3d 838, 871 (Tenn. Ct. App. 2005). The language of the “wanton disregard” provision does, however, require incarceration “at or near the time of the filing of the termination petition.” *Id.* at 865.

Although Tenn. Code Ann. § 36-1-102(1)(A)(iv) does not specifically define “wanton disregard,” Tennessee courts have held that “probation violations, repeated incarceration, criminal behavior, substance abuse, and the failure to provide adequate support or supervision for a child can, alone or in combination, constitute conduct that exhibits a wanton disregard for the welfare of a child.” *Id.* at 867-68; *see also In re S.L.A.*, 223 S.W.3d 295, 299 (Tenn. Ct. App. 2006) (“Wanton disregard for the welfare of the child can be established by the parent’s previous criminal conduct along with a history of drug abuse.”); *In re H.A.L.*, No. M2005-00045-COA-R3-PT, 2005 WL 954866, at *6 (Tenn. Ct. App. Apr. 25, 2005) (quoting *State Dep’t of Children’s Servs. v. J.M.F.*, No. E2003-03081-COA-R3-PT, 2005 WL 94465, at *7 (Tenn. Ct. App. Jan. 11, 2005)) (“[A]n incarcerated parent who has multiple drug offenses and wastes the opportunity to rehabilitate themselves by continuing to abuse drugs, resulting in revocation of their parole and reincarceration, constitutes abandonment of the child, and demonstrates a wanton disregard for the welfare of the child.”) By defining the term by examples, Tennessee courts have recognized “wanton disregard” in much the same way as Justice Potter Stewart identified pornography: “[we] know it when [we] see it.” *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (J. Stewart, concurring).

The termination statutes recognize that children need parents who are concerned about their welfare. The actions that our courts have commonly found to constitute wanton disregard reflect a “me first” attitude involving the intentional performance of illegal or unreasonable acts and indifference to the consequences of the actions for the child.

Unless the context indicates otherwise, the term “child” is statutorily defined as “any person or persons under eighteen (18) years of age.” Tenn. Code Ann. § 36-1-102(13). In the context of “wanton disregard for the welfare of the child,” our courts have extended the definition of “child” to include the period of pregnancy.¹ *See, e.g., In re Jamazin H.M.*, W2013-01986-COA-R3-PT, 2014 WL 2442548, at *9 (Tenn. Ct. App. May 28, 2014), perm. app. denied (Aug. 22, 2014) (“The offenses for which Father is currently incarcerated . . . were committed while Mother was pregnant with Jamazin.”); *In re Jocilyn M.P.*, 435 S.W.3d 773, 782 (Tenn. Ct. App. 2014) (court considered criminal charges against Father “from the discovery of [Mother’s] pregnancy”); *In re O.J.B.*, No. W2009-00782-COA-R3-PT, 2009 WL 3570901, at *5 (Tenn. Ct. App. Nov.

¹ In the context of a parental rights termination, this Court has already found that “severe child abuse can result from prenatal drug use.” *In re Benjamin M.*, 310 S.W.3d 844, 848 (Tenn. Ct. App. 2009).

2, 2009) (involving a child born with cocaine in her system and a mother who continued to commit crimes while pregnant); *State of Tenn., Dep't of Children's Servs. v. Harville*, No. E2008-00475-COA-R3-PT, 2009 WL 961782, at *8 (Tenn. Ct. App. Apr. 9, 2009) (stating that exposing the child to cocaine *in utero* demonstrated a wanton disregard for the child's welfare); *In re S.L.A.*, 223 S.W.3d 295, 300 (Tenn. Ct. App. 2006) (finding that a mother showed a wanton disregard for her child by ingesting drugs during her pregnancy and while breastfeeding); *In re C.T.S.*, 156 S.W.3d 18, 25 (Tenn. Ct. App. 2004) (stating that the mother's ingestion of crack cocaine during her pregnancy "clearly exhibit[ed] a wanton disregard for the welfare of the child").

Father and Mother were not in a relationship. Father testified that they were not a regular couple, "It was just, you know, no couple things -- just we were having sex. You know what I'm saying." Father violated probation and was reincarcerated May 30, 2007. Anthony was born in January 2008. While Father admitted that he understood that "when you're having unprotected sex, then people can get pregnant," he maintained that he "didn't know she was pregnant until after the fact." Father claimed he "didn't find out until about two or three days later after [the child] was born." When he was specifically asked whether he had any knowledge that the mother was pregnant while she was pregnant, Father replied "Sir, I didn't [have] no knowledge until after she had the baby."

Can a Father "exhibit a wanton disregard for the welfare of the child" if he does not know the child exists?² We must interpret the statute in accord with the "natural and ordinary meaning" of the words used by the legislature. *Mills v. Fulmarque, Inc.*, 360 S.W.3d 362, 368 (Tenn. 2012). Logically, a person cannot disregard or display indifference about someone whom he does not know exists. In our opinion, while the statutory reference to "the child" can mean a child *in utero*, the wanton disregard language of Tenn. Code Ann. § 36-1-102(1)(A)(iv) must be construed to require that the father has knowledge of the child at the time his actions constituting wanton disregard are taken. In this case, the guardian ad litem did not prove that Father had such knowledge.

² We are fully aware that, in the first appeal, we quoted the following statement of the trial court:

[Father's parental rights] are hereby and forever terminated due to the Father's wanton disregard as found in T.C.A. § 36-1-102, due to the Father's continued engagement in criminal activity just before the minor child was born, *having full knowledge that he had a child on the way*, his continued involvement in criminal activity while incarcerated, and his behavior that continues to allow him to accumulate incidents and continues to prolong any possible release date.

In re Anthony R., 2013 WL 500829, at *2 (emphasis added). This statement by the trial court was made in the context of holding that Father exhibited wanton disregard for the welfare of the child. The trial court's holding was reversed because the wanton disregard ground for terminating parental rights was not pled in the complaint. Our action rendered the trial court's opinion a nullity and a new trial ensued which properly included the wanton disregard ground for termination. Consequently, we cannot consider the trial court's first opinion.

CONCLUSION

The trial court's holding that Father abandoned the child pursuant to Tenn. Code Ann. § 36-1-102(1)(A)(iv) is reversed. Costs of appeal are assessed against the guardian ad litem, G. Avery Mott.

ANDY D. BENNETT, JUDGE