

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
Assigned on Briefs March 7, 2015

**IN RE FAITH W.**

**Appeal from the Juvenile Court for White County  
No. 3945 Sammie E. Benningfield, Jr., Judge**

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**No. M2014-01223-COA-R3-PT – Filed May 20, 2015**

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Mother appeals the termination of her parental rights. The trial court found three grounds for termination: abandonment by failure to support, substantial non-compliance with the permanency plan, and persistence of conditions. The trial court also found that termination of Mother’s parental rights was in the best interests of the child. Finding the evidence clear and convincing, we affirm.

**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.

Kelsy Austin Miller, Cookeville, Tennessee, for the appellant, Sandra P.<sup>1</sup>

Herbert H. Slatery III, Attorney General and Reporter, Jason I. Coleman, Assistant Attorney General, and Leslie Curry, Nashville, Tennessee, for the appellee, Tennessee Department of Children’s Services.

**OPINION**

Faith W., a seventeen-month-old child, was taken into protective custody by the Tennessee Department of Children’s Services (“the Department”) on July 13, 2012, after a referral that Sandra P. (“Mother”) had been exposing the child to drugs. At the time of removal, Mother admitted that she had used meth the previous day and that the child was with her. The child’s father was incarcerated at the time of removal. Lacking a less

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<sup>1</sup> This court has a policy of protecting the identity of children in parental termination cases by initializing the last names of the parties.

restrictive alternative, the child was placed in foster care and has remained with the same foster family since she's been in the Department's custody.<sup>2</sup>

Mother entered into a permanency plan in July 2012. Generally stated, the plan required Mother to address her substance abuse issues, obtain and maintain stable housing, have reliable transportation, obtain a legal means of income, complete a parenting assessment, complete a mental health assessment, and to pay child support as ordered by the State. The plan also listed several action steps requiring Mother to, *inter alia*, attend parenting classes, live drug-free and not associate with known drug abusers, obtain substance abuse counseling, follow the recommendations of counseling and treatment, and submit to random drug screens. A second plan was created in January 2013 with the same actions steps. In July 2013, a third plan was created with additional action steps requiring Mother to not incur any new legal charges, maintain a home free of illegal drug use, follow all recommendations from substance abuse and mental health counseling, and not use illegal drugs. A fourth plan was created in January 2014, after the Department filed its petition to terminate Mother's parental rights, with the goal of adoption.

The Department filed its petition to terminate the parental rights of both Mother and the child's father on December 27, 2013. The case went to trial on May 14, 2014. By order entered on June 3, 2014, the trial court terminated the parental rights of both parents. As for Mother, the court found three grounds for termination of her parental rights: abandonment by failure to support, substantial non-compliance with the permanency plan, and persistence of conditions. The trial court also found that the termination of Mother's parental rights was in the best interests of the child. Mother appeals contending that the evidence does not clearly and convincingly establish the grounds upon which her rights were terminated or that termination of her rights was in the best interests of the child. The child's father did not appeal the termination of his parental rights.

#### STANDARD OF REVIEW

To terminate parental rights, two things must be proved by clear and convincing evidence: (1) the existence of at least one of the statutory grounds for termination, and (2) that termination is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). "Clear and convincing evidence enables the fact-finder to form a firm belief or conviction regarding the truth of the facts, and eliminates any serious or substantial doubt about the correctness of these factual findings." *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010) (citing *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005); *In re Valentine*, 79 S.W.3d at 546) (other

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<sup>2</sup> Following the child's removal, Mother stipulated to a dependency and neglect order entered on September 7, 2012.

citations omitted). When a trial court has made findings of fact, we review the findings de novo with a presumption of correctness under Tenn. R. App. P. 13(d). See *In re Bernard T.*, 319 S.W.3d at 596; *In re Angela E.*, 303 S.W.3d 240, 246 (Tenn. 2010). 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.* The trial court’s conclusions of law are reviewed de novo with no presumption of correctness. *In re Bernard T.*, 319 S.W.3d at 597.

## ANALYSIS

### I. GROUNDS FOR TERMINATION

The trial court terminated Mother’s parental rights on three grounds: abandonment by failure to support, substantial non-compliance with the permanency plan, and persistence of conditions. With respect to the grounds of substantial non-compliance with the permanency plan and persistence of conditions, Mother essentially argues (1) that these grounds trigger a mandatory, “statutory duty” by the Department to make reasonable efforts to assist her in making it possible for the child to return home, and (2) that the Department has the burden of proving its reasonable efforts, by clear and convincing evidence, as an essential element of its termination case. Mother does not contend that she substantially completed the permanency plan requirements or that she has resolved the conditions that led to the child’s removal into foster care. Instead, Mother contends that “the trial court erred in finding by clear and convincing evidence . . . substantial noncompliance, and the existence of persistent conditions as a ground for termination due to the lack of reasonable efforts on the part of the Department.”

We find no merit to this argument in light of the Supreme Court’s recent decision in *In re Kaliyah S.*, 455 S.W.3d 533 (Tenn. 2015), which directly addressed the issue of “reasonable efforts” by the Department in the context of parental termination cases. In a case of first impression, the Court expressly considered “whether the State is required to prove that it made reasonable efforts to reunify the parent with the child as a precondition to termination.” *Id.* at 533. The Court stated:

[I]n a termination proceeding, *the extent of DCS’s efforts to reunify the family is weighed in the court’s best-interest analysis, but proof of reasonable efforts is not a precondition to termination of the parental rights of the respondent parent.* As with other factual findings made in connection with the best-interest analysis, reasonable efforts must be proven by a preponderance of the evidence, not by clear and convincing evidence. *In re Audrey S.*, 182 S.W.3d at 861. After making the underlying factual findings, the trial court should then consider the combined weight of those facts to determine whether they amount to clear and convincing

evidence that termination is in the child's best interest. *See In re Adoption of Kleshinski*, No. M2004-00986-COA-R3-CV, 2005 WL 1046796, at \*17 (Tenn. Ct. App. May 4, 2005) (citing *In re M.J.B.*, 140 S.W.3d 643, 654 (Tenn. Ct. App. 2004)); *see also In re Giorgianna H.*, [205 S.W.3d 508, 519 (Tenn. Ct. App. 2006) ]; *Tenn. Dep't of Children's Servs. v. T.M.B.K.*, 197 S.W.3d 282, 288 (Tenn. Ct. App. 2006).

*Id.* at 556 (emphasis added). “En route to ruling the Court expressly overruled prior appellate decisions ‘to the extent that those cases required the State to prove reasonable efforts as an essential component of the termination petition.’” *In re J.A.G.*, No. M2014-01469-COA-R3-PT, 2015 WL 1022281, at \*3-4 (Tenn. Ct. App. Feb. 27, 2015) (quoting *Id.*)

The holding in *Kaliyah S.* effectively ends Mother's appeal on the grounds of substantial non-compliance and persistence of conditions. *See In re J.A.G.*, 2015 WL 1022281, at \*3-4. Mother does not contend that she substantially completed the permanency plan requirements or that she has resolved the conditions that led to the child's removal into foster care, nor could she successfully do so because the child was removed from Mother's custody due to drug exposure, and at trial, the proof established that Mother continued to abuse drugs and associate with known drug abusers. Specifically, the evidence established, through the testimony of the Department case worker, that Mother admitted to drug use on five separate occasions during July 2012 through July 2013, and she was arrested in October 2013 for injecting pain pills. Moreover, although Mother initially participated in alcohol and drug addiction treatment, she failed to successfully complete the treatment. Mother also failed to successfully complete mental health counseling, for she was dismissed due to multiple missed appointments.

Based on the evidence presented at trial, the court concluded that the Department clearly and convincingly proved substantial non-compliance and persistence of conditions as grounds for terminating Mother's rights to the child. The evidence does not preponderate against the court's findings. Mother's argument is entirely focused on her position that the Department failed to prove its “reasonable efforts” to assist her as a precondition to termination. In view of the Court's holding in *Kaliyah*, Mother cannot prevail. *See In re J.A.G.*, 2015 WL 1022281, at \*4. Accordingly, we will address the reasonableness of the Department's efforts in the best interest analysis.

Mother also challenges the trial court's finding of abandonment by failure to support as a ground for termination of her parental rights. Mother does not dispute that she failed to pay child support during the relevant time period; instead, she insists her failure to provide support was not willful because she “had no ability to pay.” However, Mother does not provide any further argument or reasoning for this assertion, other than to state that she brought food, clothing, and drinks to her visits with the child.

To find that Mother abandoned her child by failing to support her 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)).

The trial court made the following findings relative to the willfulness of Mother’s failure to pay support during the four-month period preceding the filing of the petition:

[Mother] has not contributed to the support of the child since 7-13-12, except for a cash bond for failure to support the child in the amount of \$1,700 on 3-10-14 and \$580 paid on 4-4-14. By Order of the Juvenile Court of White, County, Tennessee, [Mother] was order[ed] to pay child support for [the child] in the amount of \$285 per month. [Mother] is able bodied and capable of working and supporting the child. [Mother] was aware of her duty to support the child. [Mother] has made no attempt to support the child prior to the March contempt petition and has provided no justifiable excuse for failing to support the child. . . .

In support of the trial court’s determination, Mother admitted that she knew she had a duty to provide support. Mother further testified that she was generally able to work and made money by cleaning houses and cars, babysitting, and holding various jobs. Moreover, Mother testified that she received governmental support for housing, food, and her electric bill, and that she receives support from her mother, father, and grandfather.

As for Mother’s statement that she provided food, clothing, and drinks during visits with her daughter within the four-month period, such gifts would constitute mere token support, which is not sufficient to preclude a finding of a willful failure to support. Token support is support that “under the circumstances of the individual case, is insignificant given the parent’s means.” Tenn. Code Ann. § 36-1-102(1)(B). In the context of token support, the word “means” connotes both income and available resources for the payment of debt. *In re Adoption of Angela E.*, 402 S.W.3d at 641 (citing *In re Z.J.S.*, No. M2002-02235-COA-R3-JV, 2003 WL 21266854, at \*11 n.24 (Tenn. Ct. App. June 3, 2003)).

Considering the foregoing and the entire record, it has been clearly and convincingly established that Mother was aware of her duty to support the child, that she had the ability to provide support, and that she willfully failed to do so. Therefore, we affirm the finding that Mother abandoned the child by willfully failing to pay support.

Only one statutory ground for termination need be established to uphold a trial court's decision, Tenn. Code Ann. § 36-1-113(c); *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn.2003); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002), and we have affirmed the trial court's finding of three grounds for termination. Therefore, we will now determine whether the facts, as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish that termination of parental rights is in the child's best interest. *In re Taylor B. W.*, 397 S.W.3d 105, 112 (Tenn. 2013).

## II. BEST INTERESTS OF THE CHILD

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 list of factors in this subsection "is not exhaustive, and the statute does not require a trial court to find the existence of each enumerated factor before it may conclude that terminating a parent's rights is in the best interest of a child." *In re M.A.R.*, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005). Moreover, 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 Mother's parental rights was in the best interests of the child. Specifically, the trial court found that Mother did not pay child support consistently, that she has "shown little or no genuine interest in the welfare of the child," and she "continue[s] to make lifestyle choices that prevent [her] from being able to parent the child or to provide a home for the child." *See* Tenn. Code Ann. § 36-1-113(i)(9). The trial court noted that Mother's "use of controlled substances renders [her] consistently unable to care for the child in a safe and stable manner," Tenn. Code Ann. § 36-1-113(i)(7), and Mother's "mental and/or emotional status would be detrimental to the child and/or prevent [her] from effectively providing safe and stable care and supervision for the child." Tenn. Code Ann. § 36-1-113(i)(8). The trial court further found that the physical environment of Mother's home is unhealthy and unsafe for the child due to Mother's drug use and the presence of criminal activity and drug paraphernalia in the home. Tenn. Code Ann. § 36-1-113(i)(7).

The trial court also found that Mother had not made an adjustment of circumstances, conduct, or conditions to provide a stable home for the child, evidenced by, *inter alia*, her continued use of drugs. Tenn. Code Ann. § 36-1-113(i)(1). The trial court further found that Mother failed to make lasting adjustments after reasonable efforts by available social agencies for such duration of time that lasting adjustments does not reasonably appear possible. Tenn. Code Ann. § 36-1-113(i)(2). Relative to the Department's efforts, the trial court found that, *inter alia*, the Department provided

Mother with transportation to visit with the child, assisted Mother in setting up alcohol and drug consultations, encouraged Mother to follow through with the in-patient alcohol and drug treatment arranged by the provider, and, when Mother was discharged from a mental health treatment center due to her failure to attend, the Department assisted Mother in getting into another mental health treatment center. Having reviewed the evidence, we conclude that the Department expended reasonable efforts in attempting to assist Mother, who never made a sufficient corresponding effort to remedy the conditions which led to the child's placement with the Department.

Lastly, the trial court found that the child is in a foster home that wishes to adopt her, and that the child has established a strong bond with the foster parents. Considering these factors from the perspective of the child, the evidence clearly and convincingly established that it is in the child's best interests that Mother'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 Mother.

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FRANK G. CLEMENT, JR., JUDGE