IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 30, 2002

IN RE: J. M. C. H.

Appeal from the Juvenile Court for Dickson County
No. 08-99-0024-CC A. Andrew Jackson, Judge

No. M2002-01097-COA-R3-JV - Filed November 26, 2002

This case involves a Mother's appeal of a decision by the trial court to terminate her parental rights with regard to her daughter based on willful failure to support and/or visit the minor child during the four months preceding the filing of the petition. There was no transcript or statement of the evidence of the trial court proceedings. Because the lack of a transcript prevents us from determining whether clear and convincing evidence supported the termination and denies the Mother proper appellate consideration of her claims, we vacate the judgment of the trial court and remand.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Vacated and Remanded

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., and WILLIAM C. KOCH, JR., J., joined.

J. Reese Holley, Dickson, Tennessee, for the appellant, M. J. H.

Nathan T. Brown, Dickson, Tennessee, for the appellee, G. R. C.

OPINION

M.J.H. ("Mother") is the mother of J.M.C.H. ("Child"), born on January 13, 1998. On August 16, 1999, G.R.C., Mother's first cousin, and his wife, F.M.C., filed a petition seeking custody of Child by alleging that Child was abandoned as well as dependent and neglected as defined in Tenn. Code Ann. § 37-1-101(b)(12). The petition stated that Child had resided with G.R.C. and F.M.C. since May of 1998.

An emergency order awarding temporary custody of Child to G.R.C. and wife was entered the same day the petition was filed, and after a hearing the trial court awarded G.R.C. and wife temporary physical and legal custody of Child pending a home study and final hearing. The trial

court also made a finding that Child was dependent and neglected. The trial court reserved the issue of visitation until a later date.[1]

On November 3, 1999, permanent physical and legal custody of Child was awarded to G.R.C. and wife. The trial court further ordered that Mother would have no visitation until such time that she petitioned the court for a hearing.[2] On November 14, 1999, the trial court entered an order prohibiting visitation between Mother and Child.

G.R.C. and F.M.C. filed a petition to terminate the parental rights of Mother on June 18, 2001, based on the grounds of abandonment in that Mother willfully failed to support and visit the child for a period of four (4) months immediately preceding the filing of the petition. Mother filed an affidavit of indigency in which she stated that she had income of only $20.00 per week and AFDC income of $122.00 per month. At that time, the trial court appointed counsel to represent Mother and a guardian *ad litem* to represent Child. Mother then answered the petition, denying the abandonment of Child.

On April 8, 2002, a hearing was held in the Dickson County Juvenile Court on the petition to terminate the parental rights of Mother. The trial court terminated the parental rights of Mother to Child after considering the amended petition, the answer to the petition, the testimony of witnesses, the report of the guardian *ad litem*, the statements of counsel, and the entire record, and held:

> That there was clear and convincing evidence that the Respondent has not provided the Court with an address for visitation, did not apply to the court for visitation with the minor child, and willfully failed to visit with the minor child, . . . , for four (4) consecutive months immediately preceding the filing of the Petitions; has willfully failed to support or make reasonable payments toward the support of the minor child, . . . , for four (4) consecutive months immediately preceding the filing of the Petition, and has abandoned said minor child. The Court further found by clear and convincing evidence that the likelihood of any change on the part of Respondent is poor, and that termination of her parental rights to the said minor child, . . . , is in the best interests of said minor child;
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> That the report of . . . , Guardian *ad litem* for the minor child, . . . , to the effect that the Guardian *ad litem* had investigated the matter and had concluded that it would be in the best interests of the minor child that the Petition for Termination be sustained.

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[1]The trial court record contains the confidential home study of G.R.C. and F.M.C. completed by the Department of Children's Services in Dickson County. The home study recommends that Child be placed in the home of G.R.C. and F.M.C. and that only supervised visitation with Mother and Child be approved by the court.

[2]There is no petition in the record filed by Mother seeking visitation with Child.

> That the Petitioner, G.R.C., is a fit and proper person to continue to have the custody of said child, and that it is in the best interests of said child for the parental rights of Respondent, [Mother], to said minor child, . . . , be terminated. . . .

The order also reflects that by the time of the hearing G.R.C. and his wife had divorced. The wife was dismissed from the action; G.R.C. was the sole petitioner. Custody was awarded to G.R.C., and a new home study was ordered.

Mother filed a timely notice of appeal from the final judgment of the trial court. G.R.C. filed a motion to dismiss the appeal with this court for failure to comply with Tenn. R. App. P. 24 because Mother had not filed a transcript of the proceedings or a statement of the evidence. Mother answered the motion to dismiss, stating that no court reporter was present at the hearing on the petition to terminate parental rights and that she had filed a Tenn. R. App. P. 24(d) notice with the trial court indicating that no transcript or statement of the evidence would be filed on appeal. We denied the motion to dismiss on the basis that the intent of the Tennessee Rules of Appellate Procedure are to allow cases to be resolved on their merits, and waived the Mother's failure to file a timely Tenn. R. App. P. 24(d) notice.

I. Termination of Parental Rights

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, 92 S. Ct. 1208, 1212-13 (1972); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174-75 (Tenn. 1996); *In Re Adoption of a Female Child*, 896 S.W.2d 546, 547 (Tenn. 1995); *Nale v. Robertson*, 871 S.W.2d 674, 678 (Tenn. 1994). This right is a fundamental but not absolute right, and the state may interfere with parental rights if there is a compelling state interest. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388 (1982); *Nash-Putnam*, 921 S.W.2d at 174-75.

Terminating parental rights has the legal effect of reducing the parent to the role of a complete stranger, "severing forever all legal rights and obligations of the parent." Tenn. Code Ann. § 36-1-113(*l*)(1). The United States Supreme Court has recognized the unique nature of proceedings to terminate parental rights, stating that "[f]ew consequences of judicial action are so grave as the severance of natural family ties." *M.L.B. v. S.L.J.*, 519 U.S. 102, 119, 117 S. Ct. 555, 565 (1996) (quoting *Santosky*, 455 U.S. at 787, 102 S. Ct. at 1412 (Rehnquist, J., dissenting)). As a result, "[T]he interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." *Id.* The constitutional protections of the parent-child relationship require certain safeguards before the relationship can be severed. *See O'Daniel v. Messier*, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995). This most drastic interference with a parent's rights requires "the opportunity for an individualized determination that a parent is either unfit or will cause substantial harm to his or her child before the fundamental right to the care and custody of the child can be taken away." *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999).

Because the decision to terminate parental rights affects fundamental constitutional rights, courts must apply a higher standard of proof when adjudicating termination cases. *Santosky*, 455 U.S. at 769, 102 S. Ct. at 1403; *In re M.W.A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998); *O'Daniel*, 905 S.W.2d at 186. To justify the termination of parental rights, the grounds for termination must be established by clear and convincing evidence. Tenn. Code. Ann. § 36-1-113(c)(1); *In re M.W.A.*, 980 S.W.2d at 622; *State Dep't of Human Servs. v. Defriece*, 937 S.W.2d 954, 960 (Tenn. Ct. App. 1996). "This heightened standard . . . serves to prevent the unwarranted termination or interference with the biological parents' rights to their children." *In re M.W.A.*, 980 S.W.2d at 622.

This court has explained that standard:

> [A]lthough it does not require as much certainty as the "beyond a reasonable doubt" standard the "clear and convincing evidence" standard is more exacting than the "preponderance of the evidence" standard. *O'Daniel v. Messier*, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995); *Brandon v. Wright*, 838 S.W.2d 532, 536 (Tenn. Ct. App. 1992). In order to be clear and convincing, evidence must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992); *O'Daniel v. Messier*, 905 S.W.2d at 188. Such evidence should produce in the fact-finder's mind a firm belief or conviction as to the truth of the allegations sought to be established. *O'Daniel v. Messier*, 905 S.W.2d at 188; *Wiltcher v. Bradley*, 708 S.W.2d 407, 411 (Tenn. Ct. App. 1985). In contrast to the preponderance of the evidence standard, clear and convincing evidence should demonstrate that the truth of the facts asserted is "highly probable" as opposed to merely "more probable" than not. *Lettner v. Plummer*, 559 S.W.2d 785, 787 (Tenn. 1977); *Goldsmith v. Roberts*, 622 S.W.2d 438, 441 (Tenn. Ct. App. 1981); *Brandon v. Wright*, 838 S.W.2d at 536.

In re C.W.W., 37 S.W.3d 467, 474 (Tenn. Ct. App. 2000).

Thus, under that standard, the party with the burden of proof, herein the party seeking to have Mother's rights terminated, must persuade the factfinder that his factual contentions are "highly probable." *Estate of Acuff v. O'Linger*, 56 S.W.3d 527, 537 (Tenn. Ct. App. 2001). On appeal, this court must determine *de novo* whether the petitioner has proved his case by clear and convincing evidence. *Id.* at 534. That determination requires us to review the facts presented at trial.

II. Lack of a Transcript or Statement of the Evidence

On appeal, Mother asserts that the trial court's previous order prohibiting visitation and Mother's affidavit of indigency, both of which are included in the technical record, preponderate against the trial court's finding that Mother willfully failed to visit or support her child in view of the holding in *In re Swanson*. The petitioner argues that without a transcript or statement of the evidence this court cannot review the evidence developed at trial and must presume there was sufficient evidence to support the trial court's factual findings.

The lack of a transcript or a sufficiently complete statement of the evidence prevents our review of the evidence to determine whether it supports or preponderates against the trial court's findings and prevents our application of the clear and convincing evidence standard. In other contexts, this insufficiency of the record would require us to presume the trial court's findings would have been supported by the record had it been preserved and filed. *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992). We would have to accept as conclusive the trial court's factual findings. *King v. King*, 986 S.W.2d 216, 220 (Tenn. Ct. App. 1998).

However, as this court has previously held, the constitutional implications of a termination proceeding require a record of sufficient completeness to permit proper appellate consideration of the parent's claims.

> Full appellate consideration of a trial court's determination to terminate a parent's rights is part of the process designed to achieve an accurate and just decision and, therefore, cannot be denied to a parent because of his of her financial inability to produce a record for such review.
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> Thus, we hold that, in cases involving the termination of parental rights, a record of the proceeding of sufficient completeness to permit proper appellate consideration of the parent's claims must be made in order to preserve that parent's right to an effective appeal. If the parent whose rights are to be terminated is indigent, then the trial court must ensure that such a record is created and made available to a parent who seeks to appeal.

In re Adoption of J.D.W., No. M2000-00151-COA-R3-CV, 2000 Tenn. App. LEXIS 546, at *12 (Tenn. Ct. App. Aug. 16, 2000) (no Tenn. R. App. P. 11 application filed) (footnotes omitted). That holding was based upon prior holdings by the United States Supreme Court, as explained:

> In *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996), the U.S. Supreme Court held that a parent's interest in defending against a state's action in terminating parental rights required a record complete enough to allow fair appellate consideration of the parent's claims. *See M.L.B.*, 519 U.S. at 121-22, 117 S. Ct. at 566, 136 L. Ed. 2d at 491. Relying on previous rulings regarding due process and equal protection,[3] the Court in *M.L.B.* held, "we place decrees forever terminating

[3]Specifically, the Court relied upon *Griffin v. Illinois*, 351 U.S. 12, 18-19, 76 S. Ct. 585, 590-91, 100 L. Ed. 891, 899 (1956) (recognizing "the importance of appellate review to a correct adjudication of guilt or innocence" and holding that appellate review, including transcripts needed to pursue appeals, cannot be denied indigent defendants where it is available to more affluent persons), *Mayer v. Chicago*, 404 U.S. 189, 196-98, 92 S. Ct. 410, 415-16, 30 L. Ed. 2d 372, 379-80 (1971) (declining to limit *Griffin* to cases where the defendant faced incarceration, holding an indigent defendant found guilty of conduct only "quasi criminal in nature . . . cannot be denied a record of sufficient completeness to permit proper [appellate] consideration of his claims"), *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27, 101 S. Ct. 2153, 2160, 68 L. Ed. 2d 640, 650 (1981) (recognizing that the object of termination proceedings is not simply (continued...)

> parental rights in the category of cases in which the state may not 'bolt the door to equal justice.'" *M.L.B.*, 519 U.S. at 124, 117 S. Ct. at 568, 136 L. Ed. 2d at 493. The Court ruled that the State could not withhold from an indigent parent seeking review of a termination of parental rights "a 'record of sufficient completeness' to permit proper [appellate] consideration of [her] claims." *M.L.B.*, 519 U.S. at 128, 117 S. Ct. at 570, 136 L. Ed. 2d at 495.
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> "Only a transcript[4] can reveal to judicial minds other than the Chancellor's the sufficiency, or insufficiency, of the evidence to support his stern judgment." *M.L.B.*, 519 U.S. at 121-22, 117 S. Ct. at 566, 136 L. Ed. 2d at 491. . . . Without a complete record of the evidence below, we are unable to conduct the type of review required in termination cases. "A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one. Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision." *Lassiter*, 452 U.S. at 27, 101 S. Ct. at 2160, 68 L. Ed.2d at 650. Full appellate consideration of a trial court's determination to terminate a parent's rights is part of the process designed to achieve an accurate and just decision and, therefore, cannot be denied to a parent because of his or her financial inability to produce a record for such review.

In re Adoption of J.D.W., 2000 Tenn. App. LEXIS 546, at *9-*12 (some footnotes omitted).

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[3](..continued)
to infringe upon the parent's interest, but to end it, thus "working a unique kind of deprivation," and holding that a case-by-case determination of the need for appointed counsel for an indigent parent facing termination of parental rights was required), and *Santosky*, 455 U.S. at 758-59, 102 S. Ct. at 1397, 71 L. Ed. 2d at 610 (a parent's interest is "far more precious than any property right," and the "clear and convincing" proof standard is constitutionally required in proceedings to terminate that interest).

[4]Although the Court used the word "transcript" in its opinion, it also used the phrase "record of sufficient completeness." *See M.L.B.*, 519 U.S. at 128, 117 S. Ct. at 570, 136 L. Ed. 2d at 495 (citing *Mayer*, 404 U.S. at 198, 92 S. Ct. at 416, 30 L. Ed. 2d at 380). In a footnote the Court indicated that a full verbatim transcript may not be required. *See M.L.B.*, 519 U.S. at 112, 117 S. Ct. at 561, 136 L. Ed. 2d at 485 n.5 (quoting *Draper v. Washington*, 372 U.S. 487, 495, 83 S. Ct. 774, 779, 9 L. Ed. 2d 899, 905 (1963) ("Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise."); *Mayer v. Chicago*, 404 U.S. at 194, 92 S. Ct. at 414-15, 30 L. Ed. 2d at 378 ("A record of sufficient completeness does not translate automatically into a complete verbatim transcript.")). Because the case before us contains neither a transcript nor any attempt at a complete record of the evidence or events at trial, we need not determine what a "record of sufficient completeness for appellate review" needs to contain. We simply note that we are unable to review the sufficiency of the evidence in the case before us.

The record herein includes an affidavit of indigency filed by Mother.[5] The court appointed counsel to represent her, indicating she was found indigent by the court. Because full appellate consideration cannot be accomplished without a transcript or record of sufficient completeness so as to allow this court to fulfill its obligations to make an "individualized determination," *In re Swanson*, 2 S.W.3d at 188, applying the required evidentiary standard, we must vacate the judgment terminating the parental rights of Mother and remand to the trial court for a new trial. If the trial court determines that mother is still indigent, the court shall ensure the availability of a record of trial evidence and events which is sufficiently complete to allow an appellate court to review the evidence in accordance with applicable standards. Costs of this appeal are taxed to G.R.C., for which execution may issue if necessary.

PATRICIA J. COTTRELL, JUDGE

[5]The affidavit includes a notation it was approved. We are unable to determine who approved the affidavit, but no one has questioned Mother's indigency.