IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs January 31, 2003

IN THE MATTER OF: D.M. AND M.M., CHILDREN UNDER EIGHTEEN YEARS OF AGE

Appeal from the Juvenile Court for Dickson County
No. 10-99-034-C A. Andrew Jackson, Judge

No. M2002-01317-COA-R3-JV - Filed February 20, 2003

The Juvenile Court terminated the parental rights of the mother of two small children. We reverse, because we do not believe the State has proven the grounds for termination by clear and convincing evidence, or that it is in the children's best interest to have their mother's rights terminated.

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

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

J.M. Clement, Jr., Dickson, Tennessee, for the appellant, M.H.D.M.

Paul G. Summers, Attorney General & Reporter; Elizabeth C. Driver, Assistant Attorney General, for the appellee, Tennessee Department of Children's Services.

OPINION

I. A CHILD WITH CHILDREN OF HER OWN

M.D.M. was only fifteen years old when she gave birth to her oldest son, D.M., on July 4, 1998. She was adjudged a delinquent child in October of 1998 for reasons that are not apparent from the record. In October of 1999, she tested positive for marijuana use in aftercare, and was again adjudged delinquent and placed in the custody of the Department of Childrens' Services (DCS). The Juvenile Court found D.M. to be a dependent and neglected child due to his mother's adjudication, and placed him in DCS custody as well.

M.D.M was two months pregnant at the time. Her second son, M.M., was born on April 18, 2000 in a Memphis maternity home. The infant roomed with her in the maternity home and was later

placed in a Clarksville foster home with D.M. In July of 2000, DCS was able to place M.D.M. in the same foster home with her two children.

The foster parents reported that there was very little evidence of a bond between M.D.M. and D.M., and that M.D.M. often seemed very impatient with the children. M.D.M. earned her G.E.D. while in foster care. She also found a job at Hardee's, where she proved to be a good worker, and did public service work which was apparently a required condition of her probation. M.D.M. was removed from the foster home of her children on December 28, 2000, and was placed in a different foster home. With the encouragement of her caseworker, she explored the possibility of joining the Army.

M.D.M. signed two permanency plans for each of her children while she was still a minor. The requirements of the plans included such things as staying away from drugs and alcohol, completion of anger management classes, completion of parenting classes, and regular visitation with the children. M.D.M. seemed to have the most difficulty with the parenting classes, and her visitation tended to be sporadic after she left the home she shared with her children.

In May of 2001, M.D.M. turned 18. She was released from state custody and enlisted in the Army. She completed basic training in Missouri, followed by advanced individual training in Virginia, and was granted her first leave in October of 2001. She returned to Tennessee where she visited her children, and signed two new permanency plans, one for each child. These documents indicated for the first time that DCS was considering adoption as an alternative goal to reunification.

The mother's duties under the plan included completion of parenting classes, submission to random drug screens, regular visitation with D.M., weekly telephone contact with her case worker, the provision of a safe and stable home, and the payment of child support "as ordered by the court." At the conclusion of her leave, she was assigned to Fort Hood, Texas.

II. TERMINATION PROCEEDINGS

On December 10, 2001, the Department of Childrens' Services filed a petition to terminate the parental rights of M.D.M., as well as those of W.E.B. and D.B., the fathers of the two children. The petition asserted that the respondents had failed to pay child support in accordance with the child support guidelines, *see* Tenn. Code Ann. § 36-5-101, and failed to exercise reasonable visitation with the children, *see* Tenn. Code Ann. § 36-1-102. The petition also claimed that M.D.M. had failed to substantially comply with the responsibilities of the permanency plan. *See* Tenn. Code Ann. § 36-1-113(g)(2). On January 10, 2002, the court appointed a guardian ad litem to protect the interests of the children. Thereafter, things moved rather quickly.[1]

[1] We note that expeditious handling of termination cases has become the public policy of this state. However, it should never be accomplished by ignoring due process or the constitutional rights of parents to the custody and care of their own children.

On January 16, the court terminated the parental rights of W.E.B. and D.B. The court appointed attorney J.M. Clement to represent M.D.M. on February 22. A hearing on the petition against M.D.M was scheduled for February 27, but she was unable to attend, since she was still at Fort Hood. Mr. Clement was present, and he filed a motion for a continuance, which the court granted. The court also ordered the attorney to file any motion in regard to the mother's rights under the Soldiers' and Sailors' Civil Relief Act of 1940 by March 27, so the State and the guardian ad litem would have time to file a response.

Mr. Clement filed an answer on March 27, which included his Motion for Stay under the Soldiers' and Sailors' Civil Relief Act. The answer also recited the attorney's efforts to make contact with M.D.M. and the difficulties he experienced. Mr. Clement telephoned M.D.M.'s commanding officer, who advised him that the mother wanted to contest the petition. The attorney's subsequent letter to the mailing address furnished by the officer was returned as undeliverable. After the return of the letter, M.D.M. reached Mr. Clement by telephone on March 26. He advised her to contact the Judge Advocate General, and have him contact the attorney, so the two could prepare a meritorious defense.

In an Amended Answer, filed on April 8, M.D.M. claimed that contrary to the assertions of the petitioner, she had visited her children while on leave in November, personally delivered Christmas presents to them on December 24, and called or attempted to call her case manager three times in November, twice in December, twice in February, three times in March, and once in April.

She also appended documents to her Answer to indicate that she had participated in drug testing given by her unit, was attending parenting classes, had applied to a program that furnishes special educational and medical needs to family members of all soldiers, applied for off-post housing for her children, and signed a Letter of Instructions for Guardians and Escorts, designating a temporary guardian for her children in the event of emergency or deployment overseas.

The trial took place as scheduled on April 10, 2002, before the Juvenile Court of Dickson County, Tennessee. Up until the day of trial, it was uncertain whether the Army would give M.D.M. leave to attend, but she was granted a ten-day leave starting April 9, and she met Mr. Clement for the first time on the morning of trial. He renewed his motion for continuance under the Civil Relief Act, but the court denied the motion, reasoning that M.D.M. was not stationed out of the country, had ample notice of the proceeding, and was actually present at trial.

The only witnesses to testify at trial were the DCS case manager for M.D.M., the case manager for the two children, and M.D.M. herself. Both case workers testified that in their opinion, it was in the best interest of the children that her parental rights be terminated. The attorney for DCS objected to the admission of any of the documents appended to M.D.M.'s Answer as hearsay. The trial court sustained the objection.

M.D.M. was, however, able to testify as to the efforts she had made to comply with permanency plan. She admitted that she had not completed parenting classes, but testified that she

had applied for Army-sponsored parenting classes in December 2001, and began attending them in January of 2002. At the time of trial, she was one week away from completing the program.

She was also asked what steps she had taken to secure adequate housing for her children. She said that she had made application for such housing, but her answer, and the testimony of the case managers, revealed a classic "Catch 22" situation. The Army would not permit her to move from the barracks to private quarters without proof of custody of the children. But she could not get custody until a home study could be performed, and such a study could not be performed while she lived in the barracks. The children's case manager did write a letter for the guidance of her commanding officer, explaining her situation. M.D.M. also testified that she applied to the Army's ECI program for children with developmental delays.

M.D.M. was also asked whether she had ever paid child support. She admitted that she had not, but the record shows that she wrote a letter to her former caseworker on May 28, 2001 (while she was still in basic training) asking how much child support she needed to pay. The record does not show that she ever received a response, and we could find no child support order in the record.

At the conclusion of the proof, the trial court announced that it found that multiple grounds for termination of M.D.M.'s parental rights had been proven, including abandonment and failure to substantially comply with the permanency plan. The court also found that continuing the parent/child relationship diminishes the children's chances for early integration into a stable and permanent home, and that it was in their best interest that their mother's parental rights be terminated. This appeal followed.

III. GROUNDS FOR TERMINATION

Parents have a constitutional right to the care and custody of their children. *O'Daniel v. Messier,* 905 S.W.2d 182 (Tenn. Ct. App. 1995); *Stanley v. Illinois*, 45 U.S. 645 (1972). But those rights are not absolute, and may be terminated on appropriate statutory grounds. Due process requires that the grounds which allow the state to terminate the parent-child relationship must be established by clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745 (1982).

Tennessee Code Annotated § 36-1-113 governs termination of parental rights in this state. A parent's rights may be terminated only upon "(1) a finding by the court by clear and convincing evidence that the grounds for termination o[f] parental or guardianship rights have been established, and (2) that termination of the parent's or guardian's rights is in the best interests of the child." Tenn. Code Ann. § 36-1-113(c). Our courts have interpreted the statute to mean that the grounds and the best interests of the child must both be established by clear and convincing evidence. *Nash-Putnam v. McCloud,* 921 S.W.2d 170 (Tenn. 1996).

In the present case, contrary to the findings of the trial court, we do not believe that DCS has presented clear and convincing evidence of grounds for termination. The grounds of abandonment by reason of failure to visit or failure to support in the four months preceeding the filing of the Petition for Termination require that these derelictions be willful. *See* Tenn. Code Ann. § 36-1-

102(A); *In Re Swanson*, 2 S.W.3d 180 (Tenn. 1999). There was simply no proof that M.D.M. failed to visit her children during the relevant period when she had the opportunity, and although she paid no child support, it appears that DCS did not give her adequate guidance in this matter.

Failure to comply with the requirements of the permanency plan was another ground relied on by the trial court. The attorney for DCS characterized the efforts of M.D.M. to comply with the plan as "too little, too late." She argued that like many parents, M.D.M. didn't make much of an effort until the termination petition was filed and she was faced with the very real prospect of losing her rights to her children.

This court has recognized that a parent's last minute efforts to take responsibility for her children in the weeks prior to trial may in fact be "too little, too late," when preceded by a lengthy period of ignoring that responsibility. See, for example, *State v. Hunter*, App. No. M1999-02606-COA-R3-CV (Tenn. Ct. App. Mar. 29, 2000).

We note, however, that M.D.M. made substantial progress to improve her prospects in life (including her prospects for being able to support her children) both before and after she was in foster care. As a teenage single mother of two, those prospects could indeed have been bleak, and it is perhaps not surprising that when she was in foster care she was not sufficiently attentive to her children, or appreciative of the value of the parenting classes that were offered to her.

But she earned her G.E.D., found and held gainful employment, and enlisted in the United States Army. We also note that as member of the armed forces, her freedom of action is necessarily limited. The record shows that M.D.M. made an effort to maintain contact with her children before the termination petition was filed, by making numerous phone calls to inquire about their welfare, and visiting when she could. She also testified that she enrolled in parenting classes before the termination petition was filed (even though they did not begin until afterward). She did make some effort to acquire housing for the children, and to qualify for special educational benefits, although these efforts may not have been made until after the termination petition was filed. We note that DCS may have undercut its own argument of "too little, too late," by objecting to the admission of documents that might have provided proof of a timeline for M.D.M.'s efforts to comply with the permanency plan. In any case, it appears to us that M.D.M. demonstrated at least partial compliance with the plan.

Even if we agreed, however, that DCS had proven at least one ground for termination by clear and convincing evidence, this would not be legally sufficient without clear and convincing evidence that termination was also in the best interest of the children.

IV. BEST INTEREST

Both social workers testified that they believed it to be in the best interest of D.M. and M.M. that their mother's parental rights be terminated. Their main concerns seemed to be the medical needs

of the children, their need for permanence, and the length of time they have already been in foster care.

The documentation in the record shows that D.M. has been diagnosed with Reactive Attachment Disorder, a psychological condition that implies failure to bond, and with strabismus (crossing of the eyes), amblyopeia (loss of vision), and hearing and speech impairments. M.M. suffers from gastric reflux, a swallowing problem, which can affect his ability to get the nutrition he needs for normal growth and development. He also suffers from asthma, eczema, and is allergic to nuts, milk products and chocolate.

It was apparent to the trial court, as it is to this court, that both these children will require the services of health professionals to manage their conditions for years to come, and that DCS has been providing those services up to the present. M.D.M. testified that the Army furnishes services for children with special needs, as well as medical insurance for the families of armed forces personnel. But because of the accelerated scheduling of the proceedings and its own evidentiary rulings, the court was unable to explore in any detail the scope or quality of those resources.

Questioned as to DCS's plans for the children, their case manager testified that "the children are young enough to be adopted, and they need permanence." A follow-up question as to the advisability of waiting until the mother completed her service was answered, "It's not in their best interest to wait. It's in their best interest to have permanence because they're in their bonding years, and they need a family."

We note, however, that there was no testimony as to any adoptive parents waiting in the wings. The record shows that so far, D.M. has been in four different foster homes, and that M.M. has been in the birthing center and three foster homes. The listing of homes and dates of placement show that DCS has done a commendable job of keeping the two boys together. We accept the implication of the case manager's testimony that as the children get older, the possibility of adoption decreases, but we are troubled by the lack of proof as to the likelihood of a suitable adoption at this point in time. Although the matter is not free of doubt, we do not believe that DCS has met its burden of proving by clear and convincing evidence that the termination of their mother's parental rights is in the best interest of D.M. and M.M.

V.

The order of the trial court is reversed. Remand this cause to the Juvenile Court of Dickson County for further proceedings consistent with this opinion. Tax the costs on appeal to the appellee.

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BEN H. CANTRELL, PRESIDING JUDGE, M.S.