

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 9, 2009

In re S.J.M.

Appeal from the Chancery Court for Dickson County
No. 10309-06 Robert E. Burch, Judge

No. M2009-01080-COA-R3-PT - Filed November 20, 2009

Father in Nebraska allowed his child's caregiver to take the child to Tennessee. A strange series of events led to DCS's being given custody of the child by the Dickson County Juvenile Court and the placement of the child in a foster home. Meanwhile, Father ran afoul of the law (again) and became an involuntary guest of the federal penal system under a fifteen-year sentence. The foster parents petitioned for termination of Father's and Mother's parental rights based on abandonment and sought adoption of the child. Father's mother intervened. Mother did not defend and her rights were terminated. Father defended. The trial court found Father had not abandoned the child, but that the parties had tried by consent the issue of Father's being sentenced to prison for a term of ten years or more when the child is younger than eight years of age, circumstances which present a ground for termination of Father's parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(6). The trial court then granted the adoption. Father filed a motion to alter or amend, presenting to the trial court a document showing that Father's sentence had been reduced to seven and one-half years. The motion was denied. Father appealed. We reverse the trial court's determination that the issue was tried by consent of the parties. Our decision necessitates that the adoption order be vacated and the child be returned to the legal custody of DCS.

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

ANDY D. BENNETT, J., delivered the opinion of the court, in which RICHARD H. DINKINS, J., joined. PATRICIA J. COTTRELL, P.J., M.S., not participating.

Anita Lynn Vinson, Erin, Tennessee, for the appellant, J.M.

Jennifer Davis Roberts, Dickson, Tennessee, for the appellees, D.S.H. and K.E.H.

Robert E. Cooper, Jr., Attorney General and Reporter, and Joshua Davis Baker, Assistant Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

S.J.M. (“the child”) was born in 2004 to C.R. (“Mother”) and J.M. (“Father”) in Omaha, Nebraska. The relationship between the parents did not last, and Father was awarded custody of the child in 2005 by the District Court of Douglas County, Nebraska. Due to a busy work schedule, Father required assistance to care for the child.¹ One of the caregivers was Jennifer G. In July 2005, Jennifer G. told Father that she needed to return to Tennessee due to a family illness. Father gave her permission to take the child with her to Tennessee. Jennifer G. stayed at the home of her parents in Dickson County, Tennessee.

On September 27, 2005, the parents of Jennifer G. contacted the Dickson County Sheriff’s Office asking what they should do with the child if she needed medical treatment because they did not have custody or guardianship of her. They also expressed concern that Father, who had a violent history, was coming to take the child back to Nebraska.

By the end of September 2005, Father had decided that Jennifer G. had no intention of returning the child to him. He sent Joshua K., Jennifer G.’s husband, and Patrick K., Joshua’s brother, to Tennessee to retrieve the child and return her to Nebraska. Jennifer G.’s parents called the authorities, and Detective Amy Longtin prevented the two Nebraska men from taking the child. Detective Longtin also reported the matter to the Department of Children’s Services (“DCS”). A hearing in Dickson County Juvenile Court was set to determine the proper custody of the child. Detective Longtin informed Father of the hearing.

On October 5, 2005, the Dickson County Juvenile Court held the hearing and placed S.J.M. in the legal custody of DCS. DCS, in turn, placed the child in the home of Jennifer G.’s parents. Joy G., Jennifer G.’s mother, worked as a caregiver for a relative of Kimberly H., whom Joy G. used as a caregiver for the child. S.J.M. stayed with Kimberly H. five or six days a week.

Meanwhile in Nebraska, Father, an ex-felon who was no stranger to the Nebraska judicial system, was arrested in mid-October for possession of a firearm. He soon posted bond. In January 2006, he spent two weeks in jail for failure to appear in traffic court. In April 2006, he was indicted on federal charges and remained in federal custody from that time forward.

During the course of Father’s legal troubles, the saga of S.J.M.’s custody continued. In November 2005, DCS requested Nebraska to do a home study of Father’s mother, P.M., as to her home’s suitability as a placement for S.J.M. P.M.’s home was approved in August 2006.

In February 2006, Joy G. was fired from her caregiver job, and she took the child back from Kimberly H. Kimberly H. then reported to DCS that Joy G. had been letting the child stay with her

¹Father owned and operated a gentlemen’s club and a security service.

and that Joy G.'s home was not a safe place for the child. On April 3, 2006, the child was placed in Kimberly H.'s home.

On July 3, 2006, Kimberly H. and her husband petitioned the Dickson County Chancery Court to terminate Father's and Mother's parental rights and to adopt the child. They alleged that both parents had abandoned the child for a period in excess of four months immediately preceding the filing of the petition. On October 4, 2006, the Dickson County Juvenile Court entered an order finding that the child was dependent and neglected and continuing DCS's legal custody of the child. On October 5, 2006, P.M. filed a motion to intervene in the chancery court case seeking custody of the child.

In the fall of 2006, Father pled guilty to the federal charge of unlawful transport of firearms and received a sentence of fifteen years. He later testified that the sentence was reduced to seven and one-half years in January 2007 due to his cooperation with the authorities in a homicide investigation.

Proof on the termination petition as to Mother was taken on March 13, 2007. She was properly served and did not appear or defend. Mother's parental rights were terminated. She has not appealed the termination of her parental rights. At the same hearing, DCS moved to dismiss the termination petition, but the motion was denied. Father was appointed legal counsel for his defense.

Proof as to the termination of Father's parental rights was taken on January 14, 2008. His deposition was taken June 13, 2008, by telephone. Arguments of counsel were made on November 6, 2008. The trial court declined to terminate Father's parental rights on the petition's ground of abandonment. The trial court terminated Father's parental rights based on his sentence of fifteen years in prison pursuant to Tenn. Code Ann. § 36-1-113(g)(6)² and held that the issue was tried by the consent of the parties even though it was not mentioned in the petition for termination. The trial court then heard more proof and granted the adoption. Father filed a motion to alter or amend, attaching the amended judgment reducing Father's sentence to 90 months (seven and one-half years). The motion was denied. Father appealed, claiming that the issue of the application of Tenn. Code Ann. § 36-1-113(g)(6) was not tried by the consent of the parties and that the motion to alter and amend should have been granted.

STANDARD OF REVIEW

The determination of whether an issue was tried by implied consent "rests in the discretion of the trial judge, whose determination can be reversed only upon a finding of abuse." *Zack Cheek Builders, Inc. v. McLeod*, 597 S.W.2d 888, 891 (Tenn. 1980). A trial court abuses its discretion

²Tenn. Code. Ann. § 36-1-113(g)(6) describes the following as a ground for termination:

The parent has been confined in a correctional or detention facility of any type, by order of the court as a result of a criminal act, under a sentence of ten (10) or more years, and the child is under eight (8) years of age at the time the sentence is entered by the court.

when it reaches a decision that is not supported by the evidence, when it applies an incorrect legal standard, or when it reaches a decision that contravenes logic or reasoning that causes an injustice to the complaining party. *Owens v. Owens*, 241 S.W.3d 478, 496 (Tenn. Ct. App. 2007).

ANALYSIS

Tenn. R. Civ. P. 15.02 recognizes that issues not raised in the pleadings may be tried by the implied consent of the parties. An amendment to conform the pleadings to the evidence is encouraged but is not required.³ “Implied consent . . . is much more difficult to establish (than express consent) and seems to depend on whether the parties recognized that an issue not presented by the pleadings entered the case at trial.” *Zack Cheek Builders*, 597 S.W.2d at 891 (quoting 6 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1493, at 462-63 (1971)). “Generally speaking, trial by implied consent will be found where the party opposed to the amendment knew or should reasonably have known of the evidence relating to the new issue, did not object to this evidence, and was not prejudiced thereby.” *Id.* at 890. Under the comparable Federal Rule:

In a motion under rule 15(b) to amend the complaint to conform to the proof, the most important question is whether the new issues were tried by the parties' express or implied consent and whether the defendant “would be prejudiced by the implied amendment, i. e., whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory.”

Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1086 (2d Cir. 1977) (quoting 3 James M. Moore, et al., MOORE'S FEDERAL PRACTICE ¶ 15.13(2), at 993 (2d ed. 1966)). This interpretation of the Federal Rule has been adopted by the Tennessee Supreme Court as to Tenn. R. Civ. P. 15.02. *Zack Cheek Builders*, 597 S.W.2d at 890-91.

A thorough review of the transcripts reveals that no party recognized that the application of Tenn. Code Ann. § 36-1-113(g)(6) had entered the case at trial. No counsel argued the statute to the court. The trial court observed that “the parties have submitted and argued to the court the sentence received by the father, which also can be a basis for termination of rights.” However, Father's incarceration was raised because counsel believed it was relevant to abandonment.⁴ Implied consent,

³Tenn. R. Civ. P. 15.02 states, in pertinent part, that:

[A]mendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

⁴The definition of “abandonment” as that term is used in the petition is found in Tenn. Code Ann. § 36-1-102(1)(A)(i):

For a period of four (4) consecutive months immediately preceding the filing of a proceeding or
(continued...)

however, cannot occur when evidence claimed to be supporting an issue not raised in the pleadings is also relevant to an issue that is actually raised in the pleadings. *McLemore v. Powell*, 968 S.W.2d 799, 803 (Tenn. Ct. App. 1997); *Hiller v. Hailey*, 915 S.W.2d 800, 805 (Tenn. Ct. App. 1995). We respectfully disagree with the trial court's finding that the issue of Tenn. Code Ann. § 36-1-113(g)(6) was tried by the consent of the parties. The evidence just does not support the trial court's conclusion.

Since we find that the trial court erred in terminating Father's parental rights, it is unnecessary to determine whether the motion to alter or amend should have been granted. It is, however, necessary to vacate the order of adoption and to return the legal custody of the child to DCS in accordance with the Dickson County Juvenile Court order of October 4, 2006.

CONCLUSION

The decision of the trial court that the application of Tenn. Code Ann. § 36-1-113(g)(6) was tried by the consent of the parties is reversed. The order of adoption is vacated, legal custody of the

⁴(...continued)

pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child.

Ms. Roberts, the appellees' attorney, maintained that, "under the statute of willful abandonment, I think we have proven our case, Your Honor, that he has failed to support and failed to visit. In addition, what substantiates that is his conviction of 15 years that shows an inability to do so"

The issue of abandonment under the definition found in Tenn. Code Ann. § 36-1-102(1)(A)(iv) was tried by consent. Tenn. Code Ann. § 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.

These two definitions of "abandonment" were often blended together by the parties, even though the definition in Tenn. Code Ann. § 36-1-102(1)(A)(iv) was not pled. For example, the guardian ad litem observed that, "[t]he issue is whether or not the father willfully abandoned the child for the four months preceding the petition, and obviously back it up before that for the four months preceding his incarceration." Ms. Roberts, the appellees' attorney, maintained that Father "had every available means at the beginning to get this child and visit with this child, within the four months prior to his incarceration." The trial court correctly observed that "[a]ll parties have argued this case on the basis of abandonment as defined by 36-1-102(1)(A)(iv), which is the incarceration definition, as opposed to 36-1-102(1)(A)(i), which is the, quote, normal [definition]."

child is returned to DCS, and the case is remanded to the trial court for further proceedings consistent with this opinion.

Costs of appeal are assessed against appellees Kimberly H. and her husband, David H., for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE