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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 4, 2020 Session

IN RE ELLIE K.

Appeal from the Juvenile Court for Franklin County
No. 2018-JV-82 Thomas C. Faris, Judge

No. M2019-01269-COA-R3-PT

The grandparents of a minor child filed a petition seeking to terminate the parental rights of the child's biological father. Following a hearing on the petition, the trial court terminated the father's parental rights, determining that clear and convincing evidence existed to establish five statutory grounds for termination: abandonment by failure to visit, abandonment by failure to support, persistence of the conditions leading to the child's removal, abandonment by conduct prior to incarceration demonstrating wanton disregard for the child's welfare, and failure to manifest an ability and willingness to assume legal and physical custody of or financial responsibility for the child. The trial court also determined by clear and convincing evidence that termination was in the child's best interest. The father has appealed. Discerning no reversible error, we affirm the trial court's judgment in all respects, including the termination of the father's parental rights.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court
Affirmed; Case Remanded**

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and W. NEAL MCBRAYER, J., joined.

Glen A. Isbell, Winchester, Tennessee, for the appellant, Hugh K.

Christina Henley Duncan, Manchester, Tennessee, for the appellees, David B. and Rachel B.

OPINION

I. Factual and Procedural History

This parental rights termination action was filed on October 5, 2018, by David B. and Rachel B. (“Grandparents”), the maternal grandparents of the minor child, Ellie K. (“the Child”). The Child was born in March 2017 to Shelby B. (“Mother”) and Hugh K. (“Father”), who were not married. According to Grandparents, the Child was determined to be dependent and neglected by the Franklin County Juvenile Court (“trial court”) on April 25, 2018, and custody of the Child was awarded to Grandparents. In their petition, Grandparents averred that the Child had resided with them since shortly after her birth and that Mother had also resided with them until mid-February 2018. Grandparents stated that Mother was believed to be living in Tullahoma, Tennessee, and that Father was incarcerated.

Grandparents alleged that Mother and Father had abandoned the Child by willfully failing to visit or support her for at least four months preceding the filing of the petition. Grandparents also alleged that the conditions leading to the Child’s removal from the custody of the parents still persisted. Grandparents further averred that termination of the parents’ rights was in the Child’s best interest. Following service of process on Mother and Father, the trial court appointed counsel for each parent.

On February 26, 2019, Grandparents filed an amended petition, claiming that although Father had been incarcerated at the time of the original petition’s filing, he had willfully failed to visit and support the Child for a four-month period established by aggregating the periods of non-incarceration prior to the filing of the petition. Grandparents also averred that Father had engaged in conduct prior to his incarceration that exhibited a wanton disregard for the Child’s welfare. The amended petition contained additional allegations that the parents had failed to manifest an ability and willingness to assume legal and physical custody or financial responsibility for the Child and that placing the Child in the parents’ custody would pose a risk of substantial harm to the Child.

The trial court conducted a trial on the petition on May 10, 2019.¹ Subsequently, on June 18, 2019, the trial court entered an order terminating Father’s parental rights. The trial court found that Father was the putative father of the Child, pursuant to Tennessee Code Annotated § 36-1-102(43), and that his parental rights could therefore be terminated pursuant to Tennessee Code Annotated §§ 36-1-113 and 36-1-117(c). The

¹ Mother surrendered her parental rights to the Child at the beginning of the termination trial, and she is not participating in this appeal. Therefore, we will confine our analysis solely to Father.

court determined that the Child had been adjudicated dependent and neglected on April 25, 2018, and that custody of the Child had been placed with Grandparents.

The trial court made several factual findings, including that Father had been incarcerated during a portion of the four months immediately preceding the termination petition's filing, such that the requisite four-month period could be established by aggregating Father's periods of non-incarceration. On this point, the court specifically found that Father was incarcerated from June 13, 2018, to October 5, 2018; from February 12, 22, or 23, 2018, to March 20, 2018; and from February 10 to 11, 2018, which latter period did not count as a period of incarceration because it was of less than seven days' duration. The court thus determined that the requisite four-month period would begin in January 2018.

Finding that there was clear and convincing evidence that statutory grounds existed to terminate Father's parental rights and that termination of his rights was in the Child's best interest, the trial court ordered Father's parental rights to be terminated. The court incorporated its findings of fact and conclusions of law as stated in its ruling from the bench, which were memorialized in an attached excerpt from the trial transcript.

In its transcribed oral ruling, the trial court found that Father had not maintained consistent contact with the Child since he moved out of Grandparents' residence in November 2017. The court also found that Father had amassed thirteen criminal convictions in four separate counties within the two preceding years. The court further found that Father suffered from substance abuse and mental health issues and had twice attempted suicide. Based on the proof presented, the court determined that Grandparents had proven the statutory ground of persistence of the conditions leading to removal of the Child from Father's custody by clear and convincing evidence.

With regard to the statutory ground of failure to manifest a willingness and ability to assume legal and physical custody of or financial responsibility for the Child, the trial court found that Father's employment record was "spotty" and that Father's drug use had been "continuous," rendering him unable to care for the Child. The court further found that Father's numerous criminal convictions, at least three of which were felonies, coupled with Father's suicide attempts, established clear and convincing evidence of the ground of abandonment by conduct exhibiting wanton disregard for the welfare of the Child prior to incarceration.

Concerning abandonment by failure to support, the trial court found that Father had never paid child support for the Child. Although acknowledging that an order of support had never been entered by the court, the court stated that "it's absolutely known that you have to support a child and properly care for a child." The court thus found that

the ground of abandonment by failure to support had also been sufficiently proven by clear and convincing evidence.

With reference to the ground of abandonment by failure to visit, the trial court determined that although Father had engaged in three visits with the Child during the statutorily determinative period, such visitation should be considered merely token. The court thus concluded that this ground had been proven by clear and convincing evidence “but with a little doubt.” As such, the court determined that all five statutory grounds alleged in the petition had been sufficiently proven.

Concerning the best interest of the Child, the trial court reviewed the statutory factors in turn, making specific findings with regard to each. The court ultimately concluded that Grandparents had proven, by clear and convincing evidence, that termination of Father’s parental rights was in the best interest of the Child. Father timely appealed.

II. Issues Presented

Father presents the following issues for our review, which we have restated slightly as follows:

1. Whether the trial court erred by determining that Grandparents had proven the statutory grounds for termination of Father’s parental rights by clear and convincing evidence.
2. Whether the trial court erred by determining that Grandparents had proven, by clear and convincing evidence, that termination of Father’s parental rights was in the Child’s best interest.

III. Standard of Review

In a termination of parental rights case, this Court has a duty to determine “whether the trial court’s findings, made under a clear and convincing standard, are supported by a preponderance of the evidence.” *In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006). The trial court’s findings of fact are reviewed *de novo* upon the record, accompanied by a presumption of correctness unless the evidence preponderates against those findings. *See* Tenn. R. App. P. 13(d); *see also In re Carrington H.*, 483 S.W.3d 507, 523-24 (Tenn. 2016); *In re F.R.R., III*, 193 S.W.3d at 530. Questions of law, however, are reviewed *de novo* with no presumption of correctness. *See In re Carrington H.*, 483 S.W.3d at 524 (citing *In re M.L.P.*, 281 S.W.3d 387, 393 (Tenn. 2009)). The trial court’s determinations regarding witness credibility are entitled to great weight on appeal

and shall not be disturbed absent clear and convincing evidence to the contrary. See *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002).

“Parents have a fundamental constitutional interest in the care and custody of their children under both the United States and Tennessee constitutions.” *Keisling v. Keisling*, 92 S.W.3d 374, 378 (Tenn. 2002). It is well established, however, that “this right is not absolute and parental rights may be terminated if there is clear and convincing evidence justifying such termination under the applicable statute.” *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)). As our Supreme Court has explained:

The parental rights at stake are “far more precious than any property right.” *Santosky [v. Kramer]*, 455 U.S. [745,] 758-59 [(1982)]. Termination of parental rights has the legal effect of reducing the parent to the role of a complete stranger and of [“]severing forever all legal rights and obligations of the parent or guardian of the child.” Tenn. Code Ann. § 36-1-113(1)(1); see also *Santosky*, 455 U.S. at 759 (recognizing that a decision terminating parental rights is “final and irrevocable”). In light of the interests and consequences at stake, parents are constitutionally entitled to “fundamentally fair procedures” in termination proceedings. *Santosky*, 455 U.S. at 754; see also *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty, N.C.*, 452 U.S. 18, 27 (1981) (discussing the due process right of parents to fundamentally fair procedures).

Among the constitutionally mandated “fundamentally fair procedures” is a heightened standard of proof—clear and convincing evidence. *Santosky*, 455 U.S. at 769. This standard minimizes the risk of unnecessary or erroneous governmental interference with fundamental parental rights. *Id.*; *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010). “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 at 596 (citations omitted). The clear-and-convincing-evidence standard ensures that the facts are established as highly probable, rather than as simply more probable than not. *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005); *In re M.A.R.*, 183 S.W.3d 652, 660 (Tenn. Ct. App. 2005).

* * *

In light of the heightened burden of proof in termination proceedings, however, the reviewing court must make its own determination as to

whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, amount to clear and convincing evidence of the elements necessary to terminate parental rights. *In re Bernard T.*, 319 S.W.3d at 596-97.

In re Carrington H., 483 S.W.3d at 522-24. “[P]ersons seeking to terminate [parental] rights must prove all the elements of their case by clear and convincing evidence,” including statutory grounds and the best interest of the child. *See In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010). In addition, as our Supreme Court has explained, this Court is required “to review thoroughly the trial court’s findings as to each ground for termination and as to whether termination is in the child’s best interests.” *In re Carrington H.*, 483 S.W.3d at 525.

IV. Grounds for Termination of Father’s Parental Rights

Tennessee Code Annotated § 36-1-113 (Supp. 2019) lists the statutory requirements for termination of parental rights, providing in relevant part:

- (a) The chancery and circuit courts shall have concurrent jurisdiction with the juvenile court to terminate parental or guardianship rights to a child in a separate proceeding, or as a part of the adoption proceeding by utilizing any grounds for termination of parental or guardianship rights permitted in this part or in title 37, chapter 1, part 1 and title 37, chapter 2, part 4.

* * *

- (c) Termination of parental or guardianship rights must be based upon:
 - (1) A finding by the court by clear and convincing evidence that the grounds for termination of 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.

The trial court determined that the evidence clearly and convincingly supported a finding of five statutory grounds to terminate Father’s parental rights: (1) abandonment through failure to visit the Child, (2) abandonment through failure to support the Child, (3) abandonment through conduct prior to incarceration exhibiting a wanton disregard for the Child’s welfare, (4) persistence of the conditions leading to the Child’s removal from

Father's custody, and (5) failure to manifest an ability and willingness to assume custody of or financial responsibility for the Child. We will address each statutory ground in turn.

A. Abandonment by Failure to Visit

Concerning statutory abandonment, Tennessee Code Annotated § 36-1-113(g)(1) (Supp. 2019) provides as relevant to this action:

- (g) Initiation of termination of parental or guardianship rights may be based upon any of the grounds listed in this subsection (g). The following grounds are cumulative and nonexclusive, so that listing conditions, acts or omissions in one ground does not prevent them from coming within another ground:
 - (1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred; . . .

Regarding the definition of abandonment applicable to this ground, Tennessee Code Annotated § 36-1-102(1)(A) (Supp. 2019) provides in relevant part:

- (iv) A parent or guardian is incarcerated at the time of the filing of a proceeding, pleading, petition, or amended petition to terminate the parental rights of the parent or guardian of the child who is the subject of the petition for termination of parental rights or adoption, or a parent or guardian has been incarcerated during all or part of the four (4) consecutive months immediately preceding the filing of the action and has:

* * *

- (b) Failed to visit, has failed to support, or has failed to make reasonable payments toward the support of the child during an aggregation of the first one hundred twenty (120) days of non-incarceration immediately preceding the filing of the action[.]

Tennessee Code Annotated § 36-1-102(1) further provides that:

- (J) For purposes of this subdivision (1), a period of incarceration lasting less than seven (7) consecutive days must be counted as days of non-incarceration; and

- (K) For purposes of this subdivision (1), aggregation is accomplished by counting the days preceding, following, and in-between each period of incarceration of at least seven (7) consecutive days.

In the case at bar, Grandparents alleged in their original petition that Father had abandoned the Child by failing to visit. Father was incarcerated from June 13, 2018, to October 5, 2018, the date of the original petition's filing. Prior to that period of incarceration, Father was also incarcerated from February 23, 2018, to March 20, 2018. Therefore, in order to reach the requisite 120 days, Father's period of non-incarceration from March 21, 2018, to June 12, 2018 (eighty-two days), would have been aggregated with an additional thirty-eight days of non-incarceration prior to February 23, 2018, which time period accordingly would have begun on January 16, 2018. As such, the statutorily determinative period spans January 16, 2018, to February 22, 2018, aggregated with March 21, 2018, to June 12, 2018 ("Determinative Period").

Having properly determined that "the requisite four months would begin January 2018 when the periods of non[-]incarceration are aggregated," the trial court further found that Father's visits with the Child during that four-month period constituted token visitation. Tennessee Code Annotated § 36-1-102(1)(E) provides that "[f]or purposes of this subdivision (1), 'failed to visit' means the failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation." Subsection (C) further provides that "'token visitation' means that the visitation, under the circumstances of the individual case, constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child."

The evidence proffered at trial established that during the Determinative Period, Father saw the Child once in February 2018 before he entered jail, and four additional times in March and April 2018. Father's visitation rights were suspended by the trial court on April 25, 2018, and the court directed that Father would need to "file a new petition and take action to comply with previous orders of the court if [he] want[ed] visitation."

The trial court ultimately characterized Father's visitation during the Determinative Period as "token" and concluded that the ground of abandonment by failure to visit had been proven. However, during the court's oral ruling from the bench, which is incorporated into its final order terminating Father's rights, the court also expressed that the evidence regarding this ground was "clear and convincing evidence but with a little doubt." As our Supreme Court has elucidated, however, this Court "must make its own determination as to whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, amount to clear and convincing evidence." *See In re Carrington H.*, 483 S.W.3d at 525. Moreover, we reiterate that "[c]lear 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 at 596 (emphasis added; citations omitted). Accordingly, the trial court’s expression of “a little doubt” concerning this ground is in accordance with the appropriate standard of review and is neither fatal to the court’s finding nor dispositive of the issue.

Following our thorough review of the evidence presented, we agree with the trial court that Father’s visitation during the Determinative Period amounted to token visitation. Father testified that he briefly saw the Child before his February 2018 incarceration. Following his release in March 2018, Father participated in a total of three supervised visits with the Child. In addition, he and Mother attended the Child’s birthday party at the end of March 2018.

On March 27, 2018, the trial court entered an order directing that Father submit to a mental health assessment and an alcohol and drug assessment and follow all resultant recommendations. Father admitted during his testimony that he had failed a drug test that was administered to him on March 21, 2018. On April 25, 2018, Father failed to appear for a hearing conducted in the dependency and neglect proceedings, and his visitation with the Child was suspended until such time as Father filed a petition and demonstrated that he had complied with previous court orders. Father never did so, and he had no further visitation with the Child before his incarceration in June 2018, which lasted through the date of the termination petition’s filing.

Upon careful review of the record, we conclude that Father’s visits with the Child during the Determinative Period constituted “perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child.” *See* Tenn. Code Ann. § 36-1-102(1)(C). “Whether visitation is ‘token’ . . . is a fact-intensive inquiry to be decided on a case-by-case basis.” *In re Keri C.*, 384 S.W.3d 731, 748 (Tenn. Ct. App. 2010) (determining that the mother’s four to five visits with the child during the four-month determinative period were sufficiently infrequent and of short duration so as to constitute token visitation). We therefore determine that the evidence preponderates in favor of a finding, by clear and convincing evidence, of the statutory ground of abandonment by failure to visit.

B. Abandonment by Failure to Support

The statutory definition of abandonment by failure to financially support, detailed above, requires a determination of whether Father “failed to support, or has failed to make reasonable payments toward the support of the child during an aggregation of the first one hundred twenty (120) days of non-incarceration immediately preceding the filing of the action[.]” *See* Tenn. Code Ann. § 36-1-102(1)(A)(iv)(b). This analysis

would accordingly utilize the same Determinative Period as the ground of abandonment by failure to visit.

The statute also provides that “failed to support” or “failed to make reasonable payments toward such child’s support” means “the failure, for a period of four (4) consecutive months, to provide monetary support or the failure to provide more than token payments toward the support of the child.” *See* Tenn. Code Ann. § 36-1-102(1)(D). “That the parent had only the means or ability to make small payments is not a defense to failure to support if no payments were made during the relevant four-month period.” *Id.* In addition, the statute provides: “Every parent who is eighteen (18) years of age or older is presumed to have knowledge of a parent’s legal obligation to support such parent’s child or children.” *See* Tenn. Code Ann. § 36-1-102(1)(H).

In the case at bar, Father admitted that he had paid no support for the Child during the Determinative Period. Father, who was twenty-one years of age at the time of trial, testified that he had held various jobs prior to his incarceration and that he had also maintained a lease on a residence and ownership of two vehicles. As the trial court found, Father was presumed to have knowledge of his duty to support the Child, yet he paid no support whatsoever during the Determinative Period. Based upon our review of the evidence presented, we determine that the evidence preponderates in favor of a finding, by clear and convincing evidence, of the statutory ground of abandonment by failure to support.

C. Abandonment by Conduct Prior to Incarceration Exhibiting a
Wanton Disregard for the Welfare of the Child

Tennessee Code Annotated § 36-1-102(1)(A) provides as an additional definition of abandonment:

- (iv) A parent or guardian is incarcerated at the time of the filing of a proceeding, pleading, petition, or amended petition to terminate the parental rights of the parent or guardian of the child who is the subject of the petition for termination of parental rights or adoption, or a parent or guardian has been incarcerated during all or part of the four (4) consecutive months immediately preceding the filing of the action and has:

* * *

- (c) [] engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child[.]

A parent's actions constituting wanton disregard for the welfare of a child are not restricted to solely the four-month period prior to incarceration. *See In re Audrey S.*, 182 S.W.3d 838, 871 (Tenn. Ct. App. 2005). This Court has consistently held that "probation violations, repeated incarceration, criminal behavior, substance abuse, and the failure to provide adequate support for a child can, alone or in combination, constitute conduct that exhibits a wanton disregard for the welfare of a child." *In re Audrey S.*, 182 S.W.3d at 867-68; *see also In re K.F.R.T.*, No. E2015-01459-COA-R3-PT, 2016 WL 908926, at *4 (Tenn. Ct. App. Mar. 10, 2016). "Simply stated, a parent's 'poor judgment and bad acts that affect the children constitute a wanton disregard for the welfare of the children.'" *In re T.L.G.*, No. E2014-01752-COA-R3-PT, 2015 WL 3380896, at *3 (Tenn. Ct. App. May 26, 2015) (quoting *State, Dep't of Children's Servs. v. Hood*, 338 S.W.3d 917, 926 (Tenn. Ct. App. 2009)).

Father herein admitted to engaging in criminal behavior following the Child's birth that resulted in multiple periods of incarceration. As the trial court found, Father's criminal record, incurred during the two years that the Child had been in Grandparents' custody, was substantial. Father also admitted to using illegal drugs and failing a drug screen. Unfortunately, as Father further acknowledged, he had twice attempted suicide within the year before trial. We conclude that the evidence regarding Father's conduct prior to his incarceration, including his use of illegal drugs, criminal behavior, and failure to pay child support for the Child, supports the trial court's determination that the statutory ground of abandonment through wanton disregard was proven by clear and convincing evidence. We therefore affirm the trial court's reliance on this statutory ground for termination.

D. Persistence of the Conditions Leading to the Child's Removal

The trial court further found clear and convincing evidence of the statutory ground of persistence of the conditions leading to removal of the Child from Father's custody. Regarding this statutory ground, Tennessee Code Annotated § 36-1-113(g)(3) (Supp. 2019) provides:

- (3)(A) The child has been removed from the home or the physical or legal custody of a parent or guardian for a period of six (6) months by a court order entered at any stage of proceedings in which a petition has been filed in the juvenile court alleging that a child is a dependent and neglected child, and:
 - (i) The conditions that led to the child's removal still persist, preventing the child's safe return to the care of the parent or guardian, or other conditions exist that, in all reasonable

probability, would cause the child to be subjected to further abuse or neglect, preventing the child's safe return to the care of the parent or guardian;

- (ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent or guardian in the near future; and
- (iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable, and permanent home.

- (B) The six (6) months must accrue on or before the first date the termination of parental rights petition is set to be heard[.]

Father contends that the trial court erred by applying this statutory ground because the Child was not in his physical custody or home at the time of the dependency and neglect ruling. The trial court adjudicated the Child to be dependent and neglected as to Father on March 27, 2018. Father claims that he had left Grandparents' residence, where the Child continued to reside, in November 2017, such that the Child was not in his physical custody at the time of the dependency ruling.

We note, however, that the statute provides that this ground can apply whenever a child is removed "from the home or the physical or legal custody of a parent." *See* Tenn. Code Ann. § 36-1-113(g)(3)(A) (emphasis added). In this matter, the Child was removed from Father's legal custody by the trial court's March 27, 2018 order. We therefore find Father's contention to be unavailing.

Because the Child was found to be dependent and neglected and was removed from Father's legal custody on March 27, 2018, the Child had been removed for a period of more than six months by the time of the termination trial on May 10, 2019, in satisfaction of the statute's requirement. Following our thorough review of the evidence, we conclude that conditions existed "that, in all reasonable probability, would cause the child to be subjected to further abuse or neglect, preventing the child's safe return to the care of the parent." *See* Tenn. Code Ann. § 36-1-113(g)(3)(A)(i).

The proof also demonstrated that Father had incurred numerous criminal charges and had accordingly been incarcerated for a significant amount of time following the dependency and neglect ruling. Father admitted to his use of illegal drugs as recently as four months prior to the termination trial, and he also failed to support or regularly visit the Child when he was not incarcerated. As such, there was no evidence presented to

demonstrate that Father maintained the ability to parent the Child safely if the Child were returned to Father's care. Moreover, based on the sheer number of Father's criminal convictions during the brief time that the Child had been in Grandparents' custody, it appears unlikely that the conditions preventing the Child's return to Father's care would be remedied at an early date. We therefore determine that the evidence preponderated in favor of the trial court's finding, by clear and convincing evidence, that conditions persisted preventing the Child's safe return to the care of Father.

E. Failure to Manifest an Ability and Willingness to Assume Custody of or Financial Responsibility for the Child

The trial court also found clear and convincing evidence to support termination of Father's parental rights pursuant to Tennessee Code Annotated § 36-1-113(g)(14) (Supp. 2019), which provides as an additional ground for termination:

A parent or guardian has failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility of the child, and placing the child in the person's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child[.]

This Court has recently explained the following with regard to this ground for termination of parental rights:

Essentially, this ground requires DCS to prove two elements by clear and convincing evidence. First, DCS must prove that [the parent] failed to manifest "an ability and willingness to personally assume legal and physical custody or financial responsibility of the child[ren]." Tenn. Code Ann. § 36-1-113(g)(14). DCS must then prove that placing the children in [the parent's] "legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child[ren]." *Id.*

* * *

We have made the following observations about what constitutes "substantial harm":

The courts have not undertaken to define the circumstances that pose a risk of substantial harm to a child. These circumstances are not amenable to precise definition because of the variability of human conduct. However, the use of the modifier "substantial" indicates two things. First, it connotes

a real hazard or danger that is not minor, trivial, or insignificant. Second, it indicates that the harm must be more than a theoretical possibility. While the harm need not be inevitable, it must be sufficiently probable to prompt a reasonable person to believe that the harm will occur more likely than not.

Ray v. Ray, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001) (footnotes omitted).

In re Maya R., No. E2017-01634-COA-R3-PT, 2018 WL 1629930, at *7-8 (Tenn. Ct. App. Apr. 4, 2018) (additional internal citations omitted).

This Court has also previously held that the first prong of Tennessee Code Annotated § 36-1-113(g)(14) requires the petitioner to prove that a parent has failed to meet the requirement of manifesting both a willingness and an ability to assume legal and physical custody of the child or has failed to meet the requirement of manifesting both a willingness and an ability to assume financial responsibility of the child. *In re Amynn K.*, No. E2017-01866-COA-R3-PT, 2018 WL 3058280, at *14 (Tenn. Ct. App. June 20, 2018); *but see In re Ayden S.*, No. M2017-01185-COA-R3-PT, 2018 WL 2447044, at *7 (Tenn. Ct. App. May 31, 2018) (reversing this ground for termination when parents were unable but had demonstrated willingness to assume custody and financial responsibility of their children). Concerning the standard of proof applicable to this statutory ground for termination, this Court has recently explained:

Initially, there was a “split in authority” as to how the first element was proven. *See In re Colton B.*, [No. M2018-01053-COA-R3-PT,] 2018 WL 5415921, at *9 [(Tenn. Ct. App. Oct. 29, 2018)]. “In *In re Ayden S.*, No. M2017-01185-COA-R3-PT, 2018 WL 2447044, at *7 (Tenn. Ct. App. May 31, 2018), a panel of this Court concluded that the first prong of the statute requires the petitioner to prove both an inability and an unwillingness of the parent to assume custody or financial responsibility for the child.” *Id.* Because the parents at issue wanted custody, this negated a required element of the ground. *In re Ayden S.*, 2018 WL 2447044, at *7.

Another panel of this Court respectfully disagreed with that approach in *In re Amynn K.*, No. E2017-01866-COA-R3-PT, 2018 WL 3058280, at *14 (Tenn. Ct. App. June 20, 2018), holding, instead, that

[T]he first prong of Tennessee Code Annotated § 36-1-113(g)(14) requires that the petitioner prove that a parent has failed to meet the requirement of manifesting both a willingness and an ability to assume legal and physical

custody of the child or has failed to meet the requirement of manifesting both a willingness and an ability to assume financial responsibility of the child.

Stated differently, “the parent must have ‘manifest[ed], by act or omission, an ability and willingness.’” *Id.* at *13 (quoting Tenn. Code Ann. § 36-1-113(g)(14)).

Recently, members of this panel have endorsed the latter approach adopted in *In re Amynn K.* See, e.g., *In re H.S.*, No. M2019-00808-COA-R3-PT, 2020 WL 1428777, (Tenn. Ct. App. Mar. 20, 2020) (“After careful consideration of the conflicting authorities, we accept DCS’s invitation to follow the holding of *In re Amynn K.*”); *In re Jayda H.*, No. E2019-00855-COA-R3-PT, 2019 WL 6320503, at *9 (Tenn. Ct. App. Nov. 25, 2019) (“[C]onsistent with the discussion in the *In re Amynn K.* decision, we do not view a parent’s demonstration of ‘willingness’ as fatal to this ground when accompanied by a failure to manifest the requisite ‘ability.’”); see also *In re Bentley Q.*, No. E2019-00957-COA-R3-PT, 2020 WL 1181804, at *10 (Tenn. Ct. App. Mar. 11, 2020); *In re Serenity S.*, No. E2019-00277-COA-R3-PT, 2020 WL 522439, at *16 (Tenn. Ct. App. Jan. 31, 2020); *but see In re Neveah M.*, No. M2019-00313-COA-R3-PT, 2020 WL 1042502, at *16 (Tenn. Ct. App. Mar. 4, 2020) (following *In re Ayden S.* with one judge concurring in results only).

We also find guidance in our supreme court’s decision in *In re Bernard T.*, 319 S.W.3d 586, 604 (Tenn. 2010), wherein the Court considered a similar ground for termination, applicable to putative fathers, which applies when “[t]he person has failed to manifest an ability and willingness to assume legal and physical custody of the child[.]” Tenn. Code Ann. § 36-1-113(g)(9)(A)(iv). The Court affirmed termination under this ground where the father had “manifested a commendable willingness to assume legal custody of all the children” but “conceded that he was unable to support the children financially and that he could not provide them with a stable residence.” *Id.* According to the Court, “This testimony alone provide[d] clear and convincing evidence that [the father] [did] not presently have the ability to assume legal and physical custody of any of the children.” *Id.* at 604-05.

* * *

It is important to note that the statute does not focus on a parent’s bare subjective claim of willingness. Instead, it asks whether the parent “has

failed to manifest, by act or omission, . . . [a] willingness to personally assume legal and physical custody[.]” Tenn. Code Ann. § 36-1-113(g)(14). In assessing a parent’s willingness, “we look for more than mere words.” *In re Jaxx M.*, No. E2018-01041-COA-R3-PT, 2019 WL 1753054, at *9 (Tenn. Ct. App. Apr. 17, 2019) (quoting *In re Cynthia P.*, No. E2018-01937-COA-R3-PT, 2019 WL 1313237, at *8 (Tenn. Ct. App. Mar. 22, 2019)). A lack of effort can undercut a claim of willingness. *Id.*; see, e.g., *In re Antonio J.*, No. M2019-00255-COA-R3-PT, 2019 WL 6312951, at *9 (Tenn. Ct. App. Nov. 25, 2019) (“While Mother’s words have indicated that she is willing to resume custody and financial responsibility for her children, her actions have betrayed her unwillingness to make the effort required for reunification.”). “Parents must have demonstrated their willingness by attempting to overcome the obstacles that prevent them from assuming custody or financial responsibility for the child.” *In re Jonathan M.*, [No. E2018-00484-COA-R3-PT,] 2018 WL 5310750, at *5 [(Tenn. Ct. App. Oct. 26, 2018)].

In re Nevaeh B., No. E2019-01539-COA-R3-PT, 2020 WL 1527001, at *6-8 (Tenn. Ct. App. Mar. 31, 2020). *But see In re Zaylee W.*, No. M2019-00342-COA-R3-PT, 2020 WL 1808614, at *5 (Tenn. Ct. App. Apr. 9, 2020) (agreeing with the holding in *In re Ayden S.* that “if a party proves only the ‘ability’ criterion or the ‘willingness’ criterion, the requirements of the statute are not met, and this ground may not serve as a basis for terminating parental rights.”).

In the instant action, we determine that Father lacked both the ability and willingness to personally assume legal and physical custody of or financial responsibility for the Child. Father was incarcerated at the time of the termination trial, and although he postulated that he would be released within a few months, he presented no documentary evidence demonstrating his actual release date. Father testified that he had a promise of employment and a place to live following his release from incarceration, but he again provided no documentary proof of same. Despite Father’s testimony that he had maintained various forms of employment since he was eighteen years old, Father had never paid support for the Child.

Although Father acknowledged his past struggle with methamphetamines and marijuana, he had never completed treatment for his chemical dependency issues. Father admitted that he had failed a drug test administered in March 2018 and that he had last used methamphetamine in November or December 2018. Father further admitted that he had used marijuana in January 2019. Father also acknowledged that he had attempted suicide in June 2018 and again in January 2019. Although Father sought mental health care following these attempts, he had not yet followed up with further appointments. As such, Father lacked the ability to assume custody of or responsibility for the Child.

Moreover, Father lacked the willingness to assume custody of or financial responsibility for the Child, as demonstrated by his actions. Despite Father's testimony that he desired to care for and have a relationship with the Child, Father's behavior during the time the Child was in Grandparents' custody tells a different story. As this Court has previously explained, although Father's words have indicated that he is willing to resume custody and financial responsibility for the Child, his "actions have betrayed [his] unwillingness to make the effort required for reunification." See *In re Antonio J.*, No. M2019-00255-COA-R3-PT, 2019 WL 6312951, at *9 (Tenn. Ct. App. Nov. 25, 2019). It is well established that a parent's actions can demonstrate a lack of willingness to assume custody of or financial responsibility for the child. See *In re Keilyn O.*, No. M2017-02386-COA-R3-PT, 2018 WL 3208151, at *8 (Tenn. Ct. App. June 28, 2018); *In re Amynn K.*, 2018 WL 3058280, at *15.

Predicated upon our careful review of the record, we conclude that the evidence presented at trial further demonstrated that placing the Child in Father's "legal and physical custody would pose a risk of substantial harm to [her] physical or psychological welfare." See Tenn. Code Ann. § 36-1-113(g)(14). We therefore determine that the trial court properly found the existence of this statutory ground based on clear and convincing evidence.

V. Best Interest of the Child

Father contends that Grandparents did not present sufficient evidence to support the trial court's finding by clear and convincing evidence that termination of his parental rights was in the best interest of the Child. We disagree. When a parent has been found to be unfit by establishment of at least one statutory ground for termination of parental rights, as here, the interests of parent and child diverge, and the focus shifts to what is in the child's best interest. See *In re Audrey S.*, 182 S.W.3d at 877; see also *In re Carrington H.*, 483 S.W.3d at 523 ("The best interests analysis is separate from and subsequent to the determination that there is clear and convincing evidence of grounds for termination.") (quoting *In re Angela E.*, 303 S.W.3d at 254)). Tennessee Code Annotated § 36-1-113(i) (Supp. 2019) provides a list of factors the trial court is to consider when determining if termination of parental rights is in a child's best interest. This list is not exhaustive, and the statute does not require the court to find the existence of every factor before concluding that termination is in a child's best interest. See *In re Carrington H.*, 483 S.W.3d at 523; *In re Audrey S.*, 182 S.W.3d at 878 ("The relevancy and weight to be given each factor depends on the unique facts of each case."). Furthermore, the best interest of a child must be determined from the child's perspective and not the parent's. *White v. Moody*, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004).

Tennessee Code Annotated § 36-1-113(i) lists the following factors for consideration:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol, controlled substances or controlled substance analogues as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

As our Supreme Court recently explained regarding the best interest analysis:

“The best interests analysis is separate from and subsequent to the determination that there is clear and convincing evidence of grounds for termination.” In re Angela E., 303 S.W.3d at 254.

When conducting the best interests analysis, courts must consider nine statutory factors listed in Tennessee Code Annotated section 36-1-113(i). These statutory factors are illustrative, not exclusive, and any party to the termination proceeding is free to offer proof of any other factor relevant to the best interests analysis. In re Carrington H., 483 S.W.3d at 523 (citing In re Audrey S., 182 S.W.3d 838, 878 (Tenn. Ct. App. 2005)). Facts considered in the best interests analysis must be proven by “a preponderance of the evidence, not by clear and convincing evidence.” In re Kaliyah S., 455 S.W.3d at 555 (citing 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[s].” Id. When considering these statutory factors, courts must remember that “[t]he child’s best interests [are] viewed from the child’s, rather than the parent’s, perspective.” In re Audrey S., 182 S.W.3d at 878. Indeed, “[a] focus on the perspective of the child is the common theme” evident in all of the statutory factors. Id. “[W]hen the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child” Tenn. Code Ann. § 36-1-101(d) (2017).

Ascertaining a child’s best interests involves more than a “rote examination” of the statutory factors. In re Audrey S., 182 S.W.3d at 878. And the best interests analysis consists of more than tallying the number of statutory factors weighing in favor of or against termination. White v. Moody, 171 S.W.3d 187, 193-94 (Tenn. Ct. App. 2004). Rather, the facts and circumstances of each unique case dictate how weighty and relevant each statutory factor is in the context of the case. See In re Audrey S., 182 S.W.3d at 878. Simply put, the best interests analysis is and must remain a factually intensive undertaking, so as to ensure that every parent receives individualized consideration before fundamental parental rights are terminated. In re Carrington H., 483 S.W.3d at 523. “[D]epending upon the circumstances of a particular child and a particular parent, the consideration of one factor may very well dictate the outcome of the analysis.” In re Audrey S., 182 S.W.3d at 878 (citing White v. Moody, 171

S.W.3d at 194). But this does not mean that a court is relieved of the obligation of considering all the factors and all the proof. Even if the circumstances of a particular case ultimately result in the court ascribing more weight—even outcome determinative weight—to a particular statutory factor, the court must consider all of the statutory factors, as well as any other relevant proof any party offers.

In re Gabriella D., 531 S.W.3d 662, 681-82 (Tenn. 2017).

In the instant action, the trial court concluded that the statutory factors weighed against maintaining Father's parental rights to the Child. In its final judgment, the trial court specifically considered each of the above-listed statutory factors and made respective findings. Following our review of the evidence presented, we agree with the trial court's determination.

With regard to the first two statutory factors, the evidence demonstrated that Father had not made an adjustment of his circumstances, conditions, or conduct such that it would be safe for the Child to reside with him. As the trial court found, Father was still incarcerated and had been convicted of multiple criminal charges, some of which were felonies. Based on Father's lengthy record, the trial court determined that it was unlikely that Father would make such an adjustment in the near future. We agree and determine that the first two factors militate in favor of terminating Father's parental rights.

With respect to factors three through five, the trial court found that Father had only engaged in token visitation with the Child when he was not incarcerated. As a result, the trial court found that no meaningful relationship existed between Father and Child and that the Child would likely not know who Father was. The court also determined that a change of caretakers would have a detrimental effect on the Child, and we agree. The proof demonstrated that Grandparents' home was the only home that the Child had really known. Furthermore, Grandparents testified that the Child was thriving and happy in their home and that the Child was safe with all of her needs met. Based on the evidence presented, we conclude that factors three through five also militate in favor of termination of Father's parental rights.

In reference to factors six and seven, the trial court found that Father had subjected the Child to neglect and that no evidence established that Father could provide a healthy and safe home for the Child. Again, we agree that the evidence preponderates in favor of these findings. Father had never paid support for the Child during the entire time that she was in Grandparents' custody. Father also had not maintained regular visitation with the Child or contact with Grandparents to inquire about her well-being. Father had likewise failed to file any pleadings with the court to have visitation reinstated. In addition,

Father's claims of a residence and employment following his release from jail were unsubstantiated and would have been merely speculative in any event.

Concerning factor eight, the trial court found that Father's suicide attempts indicated that his mental and emotional status would likely be detrimental to the Child. We further note that Father had never addressed his mental health or substance abuse issues as further support for the finding that his mental and emotional status would not be conducive to caring for the Child. Finally, with regard to the final factor, the trial court found that Father had not paid support for the Child. Father acknowledged that he had paid no support during the Determinative Period.

Based on our thorough review of the evidence in light of the statutory factors, we conclude that the evidence presented does not preponderate against the trial court's determination by clear and convincing evidence that termination of Father's parental rights was in the best interest of the Child. Having also determined that Grandparents established statutory grounds for termination, we affirm the trial court's termination of Father's parental rights.

VI. Conclusion

For the foregoing reasons, we affirm the trial court's judgment in all respects, including the termination of Father's parental rights to the Child. This case is remanded to the trial court, pursuant to applicable law, for enforcement of the trial court's judgment and collection of costs assessed below. Costs on appeal are assessed to the appellant, Hugh K.

THOMAS R. FRIERSON, II, JUDGE