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Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 4, 2020

IN RE LONDON B.

Appeal from the Circuit Court for Wilson County
No. 2017-AD-536 Clara W. Byrd, Judge

No. M2019-00714-COA-R3-PT

Father appeals from the termination of his parental rights. We reverse the trial court's finding that Father willfully failed to support the child in the four months prior to his incarceration, as well as the trial court's decision regarding abandonment for willful failure to visit and support in the four months prior to the filing of the termination petition. We affirm the grounds of willful failure to visit in the four months prior to incarceration and failure to visit by a putative father. We also affirm the trial court's finding that termination is in the child's best interest.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed in Part and Affirmed in Part

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which RICHARD H. DINKINS, and THOMAS R. FRIERSON, II, JJ., joined.

Tiffany Dawn Hagar, Antioch, Tennessee, for the appellant, Kevin B.

Angelique P. Kane and Lindsey Waller Johnson, Lebanon, Tennessee, for the appellee, Megan G., and John G.

OPINION

Petitioner/Appellee Megan G. ("Mother") and Respondent/Appellant Kevin B. ("Father") are the parents of a single child, born in 2012.[1] On September 23, 2017, Mother and her spouse, Petitioner/Appellee John G. ("Step-Father," and together with Mother, "Petitioners") filed a petition to terminate Father's parental rights to the child.

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[1] In cases involving the termination of parental rights, it is this Court's policy to remove the full names of children and other parties to protect their identities.

The petition alleged that following the child's birth, Mother and Step-Father had married and desired that Step-Father adopt the minor child. As the to the grounds for termination, the petition alleged the following:

1. [Father] has failed to visit altogether with his child since the summer of 2014, or even seek visitation. Prior to that he had a few token visits, visiting the child three or four times since [s]he was born.
2. [Father] has failed without good cause or excuse to make reasonable or consistent payments for the support of [the child] in accordance with the Tennessee Child Support Guidelines since the child's birth.
3. [Father] has abandoned [the child] as defined by TCA 36-1-102 in that for a period of at least four consecutive months immediately preceding the filing of the proceeding to terminate the paternal rights of [Father], as well as at least four (4) months prior to his incarceration, [Father] has willfully failed to visit and willfully failed to support or make reasonable payments toward the support of [the child.]

Thus, as we perceive it, the petition alleged six distinct grounds:[2] (1) failure by a putative father to seek reasonable visitation with the child, and if visitation has been granted, has failed to visit altogether, or has engaged in only token visitation under Tennessee Code Annotated section 36-1-113(g)(9)(A)(iii); (2) failure by a putative father, without good cause or excuse, to make reasonable and consistent payments for support of the child in accordance with the child support guidelines under section 36-1-113(g)(9)(A)(ii); (3) abandonment by willful failure to visit in the four months preceding the filing of the petition under sections 36-1-113(g)(1) and 36-1-102(1)(A)(i); (4) abandonment by willful failure to support in the four months preceding the filing of the petition under sections 36-1-113(g)(1) and 36-1-102(1)(A)(i); (5) abandonment by willful failure to visit in the four months preceding Father's incarceration under sections 36-1-113(g)(1) and 36-1-102(1)(A)(iv); and (6) abandonment by willful failure to support in the four months preceding Father's incarceration under sections 36-1-113(g)(1) and 36-1-102(1)(A)(iv).

In October 2017, Father filed a hand-written letter seeking a court-appointed attorney; Father was incarcerated at that time. Thereafter, Petitioners filed a motion for a default judgment against Father. The trial court entered an order appointing Father counsel on January 4, 2018. The parties later entered into an agreed order for the appointment of a guardian ad litem. The parties thereafter entered agreed orders requiring Father to respond to written discovery. When Father allegedly did not fully respond to discovery, Petitioners filed a motion asking that he not be allowed to present evidence at trial in defense of the petition. The trial court entered an order on November 13, 2018,

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[2] We have previously expressed some confusion as to whether the various forms of abandonment contained in Tennessee Code Annotated sections 36-1-113(g)(1) and 36-1-102(1)(A) are distinct grounds for termination or merely different definitions of a single ground. *See generally* ***In re Navada N.***, 498 S.W.3d 579, 591 n.8 (Tenn. Ct. App. 2016). For clarity in this case, we treat the various definitions of abandonment as separate grounds.

giving Father additional time to respond to discovery, but stating that for each answer that Father fails to respond to in full "that could be used by [Father] to prove or disprove an 'Admission' he already answered, those specific admissions shall be deemed admitted and [Father] shall not be allowed to testify differently at trial or enter evidence to the contrary at trial." Father never updated any of his discovery responses.

Trial eventually occurred on March 4, 2019. Father had been released from incarceration for some time by the trial date. At the beginning of trial, however, Father's counsel informed the trial court that her staff had been in contact with Father that morning and that he was not present due to car trouble. Father's counsel did not expressly seek a continuance of the trial, and the trial court noted that Father had known the trial date for some time, lived with family members who he could ask for transportation, and yet nevertheless had not appeared. Thus, the trial court proceeded with the trial but noted that Father could participate if he appeared; Father never appeared.

Mother, Step-Father, and Maternal Grandmother were the only witnesses. Mother testified that following the birth of the child, she lived with Maternal Grandmother, and Father visited with the child some during that time. These visits occurred at Maternal Grandmother's house, Paternal Grandmother's house, and other locations where Mother would take the child to see Father. Around the summer of 2014, however, Father asked Mother to bring the child to visit him where he resided at a hotel. The environment gave Mother a bad feeling, with prostitutes and drug users present. After that time, Mother did not take the child to visit Father at the hotel. However, Mother testified that after that time, Father made no additional requests to visit with the child; as such, no requests to visit were denied by Mother. Both Step-Father and Maternal Grandmother testified that they were not aware of any visitations since 2014, nor did they know of any rebuffed attempts to visit by Father since that time. And Maternal Grandmother testified that Father was well aware of her address, as he had visited with the child there and she had not moved.

Mother's bad feelings about Father's environment proved to be warranted. Following the birth of the child, Father was convicted of several crimes, including driving under the influence,[3] possession of illegal drugs, reckless aggravated assault, sale of marijuana, and driving with no driver's license.[4] At the time the petition was filed, Father was serving a sentence that began in May 2017. Father was released in late June 2018.

Father's employment and income were the subject of additional proof. Mother

[3] Some of Father's criminal activity occurred before the summer 2014 hotel incident. All of the cited crime, however, appears to have occurred following the birth of the child.

[4] Father admitted during discovery that he had been charged with various other crimes related to drugs such as heroin and methamphetamines, but there was no proof that Father was convicted of these crimes.

testified that prior to Father's incarceration, she had known him to work at various locations. Mother further testified that she was not aware of any mental or physical disability that prevented Father from working. Father's discovery responses were admitted into evidence. Therein, Father admitted that following the child's birth, he worked consistently. His full-time salary ranged from approximately $11.00 per hour to $17.50 per hour from 2012 to 2014. It also appears that Father held multiple jobs at one time from 2012 to 2014. Father explained that he left his prior employment because "there was an active warrant on me for several years." When asked to provide proof of moneys spent on the child, Father did not provide any documentation, but stated that he lived with this child for its first three months and paid for various items. Father further stated that he was "behind on child support" due to his incarceration and court costs and fines. According to Mother, however, throughout the child's life, Father had given her only approximately $150.00 and paid for a stroller and minimal diapers for the child. Both Mother and Maternal Grandmother denied that Father ever resided with Mother and the child.

All the witnesses testified that the child was well-provided in Petitioner's care. In particular, the child believes that Step-Father is her parent and has no memory of Father due to the long lapse in visitation.

At the conclusion of the proof, the trial court orally ruled that Petitioners had proven both grounds and best interest by clear and convincing proof. The trial court entered a written order containing findings of fact and conclusions of law on March 22, 2019. With regard to the grounds for termination, the trial court's order provided as follows:

> That based upon the foregoing unrefuted evidence, the Court finds by clear and convincing evidence that [Father] has:
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> 1. Failed to visit consistently throughout the child's life and has failed to seek reasonable visitation with the child and failed to visit altogether or engaged in token visits per Tenn. Code Ann. 36-1-102 and TCA 36-1-113.
> 2. [Father] abandoned [the child] as defined by Tenn. Code Ann. 36-1-102 and TCA 36-1-113, in that for a period of at least four consecutive months immediately preceding the filing of this petition, [Father] has willfully failed to visit and willfully failed to support or make reasonable payments toward the support of [the child].
> 3. Further, [Father] abandoned [the child] as defined by Tenn. Code Ann. 36-1-102 and TCA 36-1-113, in that for a period of at least four (4) consecutive months prior to his incarceration, [Father] willfully failed to visit and willfully failed to support or make reasonable payments toward the support of [the child].

Thus, it appears that the trial court found sufficient evidence of five of the six grounds alleged in the petition: (1) failure by a putative father to seek reasonable visitation with the child, and if visitation has been granted, has failed to visit altogether, or has engaged in only token visitation under Tennessee Code Annotated section 36-1-113(g)(9)(A)(iii); (2) abandonment by willful failure to visit in the four months preceding the filing of the petition under sections 36-1-113(g)(1) and 36-1-102(1)(A)(i); (3) abandonment by willful failure to support in the four months preceding the filing of the petition under sections 36-1-113(g)(1) and 36-1-102(1)(A)(i); (4) abandonment by willful failure to visit in the four months preceding Father's incarceration under sections 36-1-113(g)(1) 36-1-102(1)(A)(iv); and (5) abandonment by willful failure to support in the four months preceding Father's incarceration under sections 36-1-113(g)(1) and 36-1-102(1)(A)(iv). The trial court further found that termination was in the child's best interest. Father thereafter filed a timely notice of appeal.

ISSUES PRESENTED

Father generally appeals both the grounds for termination found by the trial court and the trial court's ruling that termination is in the child's best interest. Although Father's appellate brief does not contain specific argument as to the ground for termination under section 36-1-113(g)(9)(A), we will nevertheless consider whether the evidence was sufficient to support this ground, as directed by our supreme court. *See* ***In re Carrington H.***, 483 S.W.3d 507, 525–26 (Tenn. 2016).

STANDARD OF REVIEW

The Tennessee Supreme Court has previously explained that:

> A parent's right to the care and custody of her child is among the oldest of the judicially recognized fundamental liberty interests protected by the Due Process Clauses of the federal and state constitutions. ***Troxel v. Granville***, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); ***Stanley v. Illinois***, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); ***In re Angela E.***, 303 S.W.3d 240, 250 (Tenn. 2010); ***In re Adoption of Female Child***, 896 S.W.2d 546, 547–48 (Tenn. 1995); ***Hawk v. Hawk***, 855 S.W.2d 573, 578–79 (Tenn. 1993). But parental rights, although fundamental and constitutionally protected, are not absolute. ***In re Angela E.***, 303 S.W.3d at 250. "'[T]he [S]tate as parens patriae has a special duty to protect minors. . . .' Tennessee law, thus, upholds the [S]tate's authority as parens patriae when interference with parenting is necessary to prevent serious harm to a child." ***Hawk***, 855 S.W.2d at 580 (quoting ***In re Hamilton***, 657 S.W.2d 425, 429 (Tenn. Ct. App. 1983)); *see also* ***Santosky v. Kramer***, 455 U.S. 745, 747, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); ***In re Angela E.***, 303

S.W.3d at 250.

In re Carrington H., 483 S.W.3d at 522–23 (footnote omitted). In Tennessee, termination of parental rights is governed by statute which identifies "'situations in which that state's interest in the welfare of a child justifies interference with a parent's constitutional rights by setting forth grounds on which termination proceedings can be brought.'" ***In re Jacobe M.J.***, 434 S.W.3d 565, 568 (Tenn. Ct. App. 2013) (quoting ***In re W.B.***, Nos. M2004-00999-COA-R3-PT, M2004-01572-COA-R3-PT, 2005 WL 1021618, at *7 (Tenn. Ct. App. Apr. 29, 2005) (citing Tenn. Code Ann. § 36-1-113(g))). Thus, a party seeking to terminate a parent's rights must prove: (1) existence of one of the statutory grounds and (2) that termination is in the child's best interest. Tenn. Code Ann. § 36-1-113(c); ***In re D.L.B.***, 118 S.W.3d 360, 367 (Tenn. 2003); ***In re Valentine***, 79 S.W.3d 539, 546 (Tenn. 2002).

Considering the fundamental nature of a parent's rights, and the serious consequences that stem from termination of those rights, a higher standard of proof is required in determining termination cases. ***Santosky***, 455 U.S. at 769. As such, a party must prove statutory grounds and the child's best interests by clear and convincing evidence. Tenn. Code Ann. § 36-3-113(c); ***In re Valentine***, 79 S.W.3d at 546. Clear and convincing evidence "establishes that the truth of the facts asserted is highly probable . . . and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from evidence[,]" and "produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established." ***In re M.J.B.***, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004).

In termination cases, appellate courts review a trial court's factual findings de novo and accord these findings a presumption of correctness unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); ***In re Carrington H.***, 483 S.W.3d at 523–24 (citing ***In re Bernard T.***, 319 S.W.3d 586, 596 (Tenn. 2010); ***In re M.L.P.***, 281 S.W.3d 387, 393 (Tenn. 2009); ***In re Adoption of A.M.H.***, 215 S.W.3d 793, 809 (Tenn. 2007)). Our supreme court further explains:

> The trial court's ruling that the evidence sufficiently supports termination of parental rights is a conclusion of law, which appellate courts review de novo with no presumption of correctness. ***In re M.L.P.***, 281 S.W.3d at 393 (quoting ***In re Adoption of A.M.H.,*** 215 S.W.3d at 810). Additionally, all other questions of law in parental termination appeals, as in other appeals, are reviewed de novo with no presumption of correctness. ***In re Angela E.,*** 303 S.W.3d at 246.

In re Carrington H., 483 S.W.3d at 524.

Lastly, in the event that the "resolution of an issue in a case depends upon the

truthfulness of witnesses, the trial judge, who has had the opportunity to observe the witnesses and their manner and demeanor while testifying, is in a far better position than this Court to decide those issues." ***In re Navada N.***, 498 S.W.3d 579, 591 (Tenn. Ct. App. 2016) (citing ***McCaleb v. Saturn Corp.***, 910 S.W.2d 412, 415 (Tenn. 1995); ***Whitaker v. Whitaker***, 957 S.W.2d 834, 837 (Tenn. Ct. App. 1997)). This Court therefore "gives great weight to the credibility accorded to a particular witness by the trial court." ***In re Christopher J.***, No. W2016-02149-COA-R3-PT, 2017 WL 5992359, at *3 (Tenn. Ct. App. Dec. 4, 2017) (citing ***Whitaker***, 957 S.W.2d at 837).

DISCUSSION

I. Grounds for Termination

Here, the trial court found several grounds for termination, some that are applicable to parents generally, *see* Tenn. Code Ann. § 36-1-113(g)(1), and one that is applicable only to putative fathers. *See* Tenn. Code Ann. § 36-1-113(g)(9)(A). The term parent is defined broadly in Tennessee Code Annotated section 36-1-102 as "any biological, legal, adoptive parent or parents or, for purposes of §§ 36-1-127 -- 36-1-141, stepparents[.]" Tenn. Code Ann. § 36-1-102(37). In contrast, a putative father is defined as

> a biological or alleged biological father of a child who, at the time of the filing of the petition to terminate the parental rights of such person, or if no such petition is filed, at the time of the filing of a petition to adopt a child, meets at least one (1) of the criteria set out in § 36-1-117(c), has not been excluded by DNA testing as described in § 24-7-112 establishing that he is not the child's biological father or that another man is the child's biological father, and is not a legal parent[.]

Tenn. Code Ann. § 36-1-102(44). Here, there is no dispute that Father is the biological parent of the child, but that he has not been established as a legal parent. Thus, grounds applicable to both parents generally and putative fathers specifically are appropriate in this case. We will therefore consider both types of grounds found by the trial court.

A. Abandonment

Under Tennessee Code Annotated section 36-1-113(g)(1), abandonment by a parent or guardian, as defined by Tennessee Code Annotated section 36-1-102, may provide a ground for termination. At the time of the filing of the termination petition, Tennessee Code Annotated section 36-1-102 provided several definitions of abandonment, two of which are relevant here:

> (i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent or parents or the guardian or guardians of the child who is the

> subject of the petition for termination of parental rights or adoption, that the parent or parents or the guardian or guardians 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;
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> * * *
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> (iv) 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. If the four-month period immediately preceding the institution of the action or the four-month period immediately preceding such parent's incarceration is interrupted by a period or periods of incarceration, and there are not four (4) consecutive months without incarceration immediately preceding either event, a four-month period shall be created by aggregating the shorter periods of nonincarceration beginning with the most recent period of nonincarceration prior to commencement of the action and moving back in time. Periods of incarceration of less than seven (7) days duration shall be counted as periods of nonincarceration. Periods of incarceration not discovered by the petitioner and concealed, denied, or forgotten by the parent shall also be counted as periods of nonincarceration. A finding that the parent has abandoned the child for a defined period in excess of four (4) months that would necessarily include the four (4) months of nonincarceration immediately prior to the institution of the action, but which does not precisely define the relevant four-month period, shall be sufficient to establish abandonment; . . .

Tenn. Code Ann. § 36-1-102(1)(A) (2017).[5] The trial court found that Father had willfully failed to visit and support in both of the above time frames. Respectfully, we conclude that only abandonment under section 36-1-102(1)(A)(iv) is applicable in this case.

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[5] Section 36-1-102(1) was amended in 2018 to remove the words willful and willfully wherever they appear. *See* 2018 Tenn, Laws Pub. Ch. 875 (H.B. 1856), eff. July 1, 2018. The amended statute is not applicable in this case.

This Court has previously explained the reasoning for including a definition of abandonment that takes into account a parent's incarceration:

> The General Assembly's decision to provide two additional tests for abandonment for incarcerated or recently incarcerated parents reflects, in part, the difficulties inherent in proving that a parent has willfully failed to visit or support a child for four consecutive months when the parent was incarcerated during all or part of that time. Incarceration necessarily restricts a prisoner's freedom of movement, and many prisoners have no resources with which to continue paying child support once their crimes and resulting imprisonment have forced them to forfeit their regular jobs. Thus, the parent's incarceration provides a ready-made excuse for his or her failure to visit or support the child during the four-month period made relevant by the first statutory definition of abandonment. However, the strong public interest in providing procedures for terminating the parental rights of unfit parents does not dissipate simply because a parent's irresponsible conduct has reached the level of criminal behavior and incarceration. Tenn. Code Ann. § 36-1-102(1)(A)(iv)'s first test for abandonment prevents a parent from relying on his or her own criminal behavior and resulting imprisonment as a defense to the termination of his or her parental rights by allowing the court to examine the record of visitation and support during the most recent four-month period for which the excuse of incarceration is unavailable.

In re Audrey S., 182 S.W.3d 838, 866 (Tenn. Ct. App. 2005). Based on these considerations, we have explained that "[t]he statute is very specific for an incarcerated parent with regard to the relevant time period, limiting the analysis with regard to a failure to support to the period of 'four (4) consecutive months immediately preceding such parent's or guardian's incarceration. . . .'" ***In re Eimile A.M.***, No. E2013-00742-COA-R3-PT, 2013 WL 6844096, at *3 (Tenn. Ct. App. Dec. 26, 2013) (quoting Tenn. Code Ann. § 36-1-102(1)(A)(iv) (2010)).

Thus, section 36-1-102(1)(A) provides two forms of abandonment for willful failure to visit and support: one applicable to an incarcerated parent (subsection (iv)) and one applicable to non-incarcerated parents (subsection (i)). And we have repeatedly held that the definition of abandonment found in subsection (i) is inapplicable where the parent has been incarcerated during all or part of the four months preceding the filing of the termination petition. *See* ***In re Douglas H.***, No. M2016-02400-COA-R3-PT, 2017 WL 4349449, at *6 (Tenn. Ct. App. Sept. 29, 2017); ***In re Colton R.***, No. E2016-00807-COA-R3-PT, 2017 WL 499439, at *9 (Tenn. Ct. App. Feb. 7, 2017); ***In re Karma S.C.***, No. E2013-02198-COA-R3-PT, 2014 WL 879155 (Tenn. Ct. App. Mar. 5, 2014); ***In re W.B., IV***, No. M2004-00999-COA-R3-PT, 2005 WL 1021618 (Tenn. Ct. App. Apr. 29, 2005); *cf.* ***In re K.N.B.***, No. E2014-00191-COA-R3-PT, 2014 WL 4908505, at *13

(Tenn. Ct. App. Sept. 30, 2014) ("In short, there is evidence that Father was incarcerated during the four months before the petition was filed, and the ground of abandonment by an incarcerated parent was neither properly pleaded nor tried by consent. We therefore reverse the trial court's judgment terminating Father's parental rights to [the child] on the ground of abandonment pursuant to Tenn. Code Ann. § 36-1-113(g)(1), as defined in Tenn. Code Ann. § 36-1-102(1)(A)(i)."); ***In re Kylea K.***, No. E2017-02097-COA-R3-PT, 2018 WL 3084530, at *5 n.3 (Tenn. Ct. App. June 21, 2018) (noting that the wrong four month period was alleged in the petition, but the "proper definition of abandonment" applicable due to the parent's incarceration was tried by consent).

Here, the proof showed that Father was incarcerated from May 23, 2017, until after the filing of the termination petition. Father was therefore incarcerated at the time of the filing of the petition and for some months prior. As such, the incarcerated definition of abandonment is applicable in this case. Fortunately for Petitioners, they alleged abandonment both in the four months preceding the filing of the petition under section 36-1-102(1)(A)(i) and in the four months prior to Father's incarceration under section 36-1-102(1)(A)(iv). While we will not consider abandonment in the four months preceding the filing of the petition due to Father's incarceration, we conclude that abandonment for willful failure to visit and support by an incarcerated parent was properly pleaded in this case. As such, we will turn to consider those grounds for termination.

According to Father's answers to interrogatories, his relevant incarceration began on May 23, 2017. The four-month period at issue therefore spans from February 23, 2017 to May 22, 2017. There is no dispute that Father did not visit or support during that time. Rather, the only question is whether his failure to do so was willful.

In ***In re Audrey S.***, this Court discussed willfulness in the context of termination cases:

> The concept of "willfulness" is at the core of the statutory definition of abandonment. A parent cannot be found to have abandoned a child under Tenn. Code Ann. § 36-1-102(1)(A)(i) unless the parent has either "willfully" failed to visit. . . . In the statutes governing the termination of parental rights, "willfulness" does not require the same standard of culpability as is required by the penal code. Nor does it require malevolence or ill will. Willful conduct consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent. Conduct is "willful" if it is the product of free will rather than coercion. Thus, a person acts "willfully" if he or she is a free agent, knows what he or she is doing, and intends to do what he or she is doing. . . . Failure to visit or support a child is "willful" when a person is aware of his or her duty to visit or

> support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so. Failure to visit or to support is not excused by another person's conduct unless the conduct actually prevents the person with the obligation from performing his or her duty . . . or amounts to a significant restraint of or interference with the parent's efforts to support or develop a relationship with the child. The parental duty of visitation is separate and distinct from the parental duty of support. Thus, attempts by others to frustrate or impede a parent's visitation do not provide justification for the parent's failure to support the child financially.
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> The willfulness of particular conduct depends upon the actor's intent. Intent is seldom capable of direct proof, and triers-of-fact lack the ability to peer into a person's mind to assess intentions or motivations. Accordingly, triers-of-fact must infer intent from the circumstantial evidence, including a person's actions or conduct.

182 S.W.3d at 863–64.

We begin with willful failure to visit. Father asserts on appeal that he did not visit the child during the relevant four-month period because he was "blocked" from doing so by Mother and Maternal Grandmother. As noted above, visitation may be excused by another person's conduct only when there is a "a significant restraint of or interference with the parent's efforts to support or develop a relationship with the child." ***Id.*** On appeal, Father contends that his visitation with Mother was blocked and that she refused to allow him contact with herself or the child. Because Father did not testify and called no witnesses, his evidentiary support for this allegation is confined only to the discovery responses, particularly his answers to interrogatories, that he submitted prior to trial and the testimony presented by Petitioners.

Even assuming that Father's unsworn, unsupported interrogatory responses may be used in his favor,[6] Mother and her witnesses specifically denied taking any action to interfere with Father's visitation in this case. According to Mother, although the parties mutually set up visitation prior to the 2014 hotel incident, after that incident, Mother declined to make an effort to set up additional visitation with Father. After that incident, however, Mother testified that Father never again attempted to set up visitation, even though he had the means to contact her though Maternal Grandmother. Although Father did contact Mother after that time, Mother testified that Father never again sought visitation with the child.

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[6] Father's responses to interrogatories do not comply with the Tennessee Rules of Civil Procedure. Specifically, Rule 33.01 provides that all interrogatories must be "answered separately and fully in writing under oath, unless it is objected to" and that the "answers are to be signed by the person making them[.]" Tenn. R. Civ. P. 33.01. Father's answers to interrogatories were neither signed by him nor sworn to under oath. Father's answers to Petitioners' requests for admission, however, were sworn to by Father.

Thus, even to the extent that Father's discovery responses create a factual dispute on this issue, Mother's testimony clearly demonstrated that no restraint, significant or otherwise, was placed on Father's ability to visit. The trial court clearly credited Mother's testimony in finding that Father had the means of contacting Mother for visitation, including seeing her in her place of employment, reaching out to Maternal Grandmother, and calling Mother, but that he simply chose not to make any effort toward visitation following the summer of 2014. And Father has not shown that the trial court erred in crediting Mother's testimony over Father's essentially non-existent proof on this issue. *See* ***In re M.A.R.***, 183 S.W.3d 652, 661 (Tenn. Ct. App. 2005) (quoting ***Wells v. Tenn. Bd. of Regents***, 9 S.W.3d 779, 783 (Tenn. 1999) ("[A]ppellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary.")). The trial court, therefore, did not err in ruling that Father's failure to visit in the four months prior to his incarceration was willful. Willful failure to visit in the four months prior to incarceration therefore provides an appropriate ground for termination of Fathers parental rights.

Father's argument that his failure to support during the four months prior to his incarceration fares better. In order to show a willful failure to support, Mother had the burden to show that Father was "able to provide financial support" during the relevant time frame. ***In re M.J.B.***, 140 S.W.3d 643, 654 (Tenn. Ct. App. 2004). Here, Mother testified that she was not aware of any disability that prevented Father from working and earning income. However, "[i]t is not enough for a petitioner to 'simply prove that [the parent] was not disabled during the relevant timeframe' and therefore assume that she [or he] was capable of working and paying child support." ***In re Noah B.B.***, No. E2014-01676-COA-R3-PT, 2015 WL 1186018, at *9 (Tenn. Ct. App. Mar. 12, 2015) (quoting ***In re Josephine E.M.C.***, 2014 WL 1515485, at *18 (Tenn. Ct. App. 2014)). Instead, to prove that a parent willfully failed to support, evidence of the parent's "financial means, expenses, or obligations during the relevant four month period" are often required. ***Id.*** *But see* ***In re Addalyne S***., 556 S.W.3d 774, 791 (Tenn. Ct. App. 2018), *perm. app. denied* (Tenn. 2018) (affirming the finding of willful failure to support when the parent admitted he had no justifiable excuse for not paying even when the evidence of his income and expenses was sparse). Even considering Father's admissions contained in his discovery responses, we cannot conclude that Petitioners met their burden to show that Father had the capacity to pay support during the relevant four-month period.

Here, the evidence shows that Father was not employed during the relevant time period. Of course, lack of employment alone may be insufficient to defeat a claim of willful failure to support when the lack of employment is willful, see ***In re M.P.J***., No. E2008-00174-COA-R3-PT, 2008 WL 3982912, at *10 (Tenn. Ct. App. Aug. 27, 2008), or the lack of employment is not based on a justifiable excuse. *See* ***In re Morgan K.***, No. M2018-0-0040-COA-R3-PT, 2018 WL 5733291, at *9 (Tenn. Ct. App. Oct. 31, 2018). And here it does appear that Father admitted during his discovery responses that his

unemployment may have been voluntary, as he stated that he left his employment to avoid active warrants against him. However, the evidence also shows that Father was required to pay a multitude of fines as a result of his criminal activity. And there was no evidence presented of his expenses during the four-month period. Under these unique circumstances, we conclude that the evidence does not meet the clear and convincing standard necessary to affirm this ground for termination. The trial court's ruling that Petitioners met their burden to prove Father's willful failure to support in the four months prior to incarceration is therefore reversed.

B. Failure to Visit by a Putative Father

In addition to the grounds related to abandonment, the trial court found one additional ground that is applicable only to putative fathers. Specifically, Tennessee Code Annotated section 36-1-113(g)(9)(A) provides, in relevant part, as follows:

> (9)(A) The parental rights of any person who, at the time of the filing of a petition to terminate the parental rights of such person, or if no such petition is filed, at the time of the filing of a petition to adopt a child, is the putative father of the child may also be terminated based upon any one (1) or more of the following additional grounds:
>
> * * *
>
> (iii) The person has failed to seek reasonable visitation with the child, and if visitation has been granted, has failed to visit altogether, or has engaged in only token visitation, as defined in § 36-1-102; . . . .

As previously discussed, Father has not visited with the child since sometime in 2014. According to the undisputed testimony at trial, Father failed to seek any visitation with the child since that time. Thus, while Father perhaps engaged in somewhat consistent visitation from the child's birth until 2014, by the time of the termination trial, he had exercised no visitation with the child in approximately five years. Token visitation is defined as visitation that "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[.]" Tenn. Code Ann. § 36-1-102(1)(C). Clearly, arguably consistent visitation for a period of approximately two years followed by a complete lack of visitation for the next five years meets the definition of token visitation. Petitioners therefore presented clear and convincing evidence that Father failed to seek reasonable visitation and when visitation did occur, it was only token. The trial court's ruling as to this ground for termination is therefore affirmed.

II. Best Interests

As at least one ground for termination is supported by clear and convincing evidence, we now consider whether clear and convincing evidence supports the trial court's determination that termination of Father's parental rights is in the child's best interests. "Upon establishment of a ground for termination, the interests of the child and parent diverge, and the court's focus shifts to consider the child's best interest." ***In re Audrey S.***, 182 S.W.3d 838, 877 (Tenn. Ct. App. 2005). Even where a parent is unfit, termination may not necessarily be in the best interests of the child. ***Id.***

Tennessee's termination statute lists the following factors to be used in the best interest analysis:

> (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.

Tenn. Code Ann. § 36-1-113(i). The Tennessee Supreme Court has explained that:

> Facts considered in the best interests analysis must be proven by a preponderance of the evidence, not by clear and convincing evidence. 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 interests. When considering these statutory factors, courts must remember that the child's best interests are viewed from the child's, rather than the parent's, perspective. Indeed, a focus on the perspective of the child is the common theme evident in all of the statutory factors. When 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.

In re Gabriella D., 531 S.W.3d 662, 681–82 (Tenn. 2017) (internal citations omitted). Furthermore, "[a]scertaining a child's best interests does not call for a rote examination" of the statutory factors. ***In re Audrey S.***, 182 S.W.3d at 878. The analysis requires "more than tallying the number of statutory factors weighing in favor of or against termination." ***In re Gabriella D.***, 531 S.W.3d at 682 (citing ***White v. Moody***, 171 S.W.3d 187, 193-94 (Tenn. Ct. App. 2004)). "The facts and circumstances of each unique case dictate how weighty and relevant each statutory factor is in the context of the case," and the analysis "must remain a factually intensive undertaking." ***In re Gabriella D.***, 531 S.W.3d at 682. Thus, "[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." ***Id.*** (citing ***In re Audrey S.***, 182 S.W.3d at 878). In undertaking this analysis, the court must examine all of the statutory factors, as well as other relevant proof put forth by the parties. ***Id.***

Father first contends that there was no evidence that Father has not made a lasting adjustment of circumstances. Tenn. Code Ann. § 36-1-113(i)(1).[7] Specifically, Father asserts that his discovery responses show that he is residing with family and Mother admitted that she allowed visitation there. Father also notes that he is now not incarcerated and has "paid his debt to society." We agree that the proof on this issue is

[7] No social services agencies were involved in this case. As such, section 36-1-113(i)(2) is inapplicable.

rather sparse. Although Father has been released from incarceration for some time, he did engage in considerable criminal conduct following child's birth that resulted in a significant period of incarceration. The evidence does not establish, however, that Father's current home is unsafe, other than the threat that Father would return to his criminal conduct. *See* Tenn. Code Ann. § 36-1-113(i)(7). As such, we must conclude that these factors are neutral or even slightly weigh against termination.

Other factors more clearly weigh against termination. Specifically, there is no evidence that Father committed abuse or neglect toward the child. *See* Tenn. Code Ann. § 36-1-113(i)(6). Other than Father's choice to engage in extensive criminal conduct, there was also no proof as to his mental or emotional state. *See* Tenn. Code Ann. § 36-1-113(i)(8).

Several significant factors, however, heavily weigh in favor of termination. As previously discussed, Father has not paid consistent support for the child. *See* Tenn. Code Ann. § 36-1-113(i)(9). Even Father's excuse for non-payment, that he had to leave his job due to "active warrants" and when he was incarcerated, show that his failure to pay support result from his own misconduct. Most importantly, as previously discussed, Father has not maintained consistent visitation with the child. *See* Tenn. Code Ann. § 36-1-113(i)(3). As such, there can be no dispute that Father does not have any relationship with the child, significant or otherwise. Indeed, the undisputed proof at trial demonstrates that Father's failure to maintain any contact with the child for approximately five years has resulted in a situation wherein the child does not know that Father exists; rather, the child believes that the man who is in her life daily is her parent. Father's lack of attentiveness to the child continued even up to the trial date, which he failed to appear for, despite sufficient notice.

Because of Father's lack of relationship with the child, a change in caretakers could have a devastating effect on her. *See* Tenn. Code Ann. § 36-1-113(g)(i)(5). As we have explained in a similar case,

> Father is a stranger to the child. Although no proof was specifically presented that a change in caretakers would be harmful to the child, common sense dictates that removing a child from the only family she has ever known and placing her with a stranger who has historically chosen to put his own desires ahead of the child's needs would cause harm to the child. Tenn. Code Ann. § 36-1-113(i)(4); *see also* ***Dattel Family Ltd. P'ship v. Wintz***, 250 S.W.3d 883, 892 (Tenn. Ct. App. 2007) ("This Court . . . is not required to check common sense at the courthouse door.").

In re Jaydin A., No. M2018-02145-COA-R3-PT, 2019 WL 6770494, at *8 (Tenn. Ct. App. Dec. 12, 2019). Father is likewise a stranger to his child in this case. And evidence was presented that the child would be harmed if Father were to come back into her life

after such a long absence. Thus, like in ***Jaydin***, "this factor weighs heavily in favor of termination." ***Id.***

In sum, we agree with Father that not all factors weigh in favor of termination in this case. Father's complete lack of relationship with the child, however, weighs heavily in favor of termination. Often, the lack of a meaningful relationship between a parent and child is the most important factor in determining a child's best interest. *See, e.g.,* ***In re Addalyne S.***, 556 S.W.3d 774, 795 (Tenn. Ct. App. 2018), *perm. app. denied* (Tenn. 2018); ***In re Jayvien O.***, No. W2015-02268-COA-R3-PT, 2016 WL 3268683, at *9 (Tenn. Ct. App. June 7, 2016) (affirming the trial court's decision where it found the lack of meaningful relationship the "most important[]" factor); ***In re Terry S.C.***, No. M2013-02381-COA-R3-PT, 2014 WL 3808911, at *18 (Tenn. Ct. App. July 31, 2014) ("[P]erhaps most importantly, [the mother] has failed to maintain regular visitation with the children and therefore has no meaningful relationship with them"). Because of Father's lack of relationship with the child, the evidence also shows that a change in caretakers would have a devastating effect on the child, removing her from the parents she knows and essentially placing her with a stranger. Based on the foregoing, the trial court did not err in ruling that Petitioners met their burden to show clear and convincing evidence that termination was in the child's best interest.

CONCLUSION

The judgment of the Wilson County Circuit Court is reversed in part and affirmed in part. The trial court's decision to terminate Father's parental rights is affirmed. Costs of this appeal are taxed to Appellant, Kevin B., for which execution may issue if necessary.

J. STEVEN STAFFORD, JUDGE