

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 23, 2015 Session

IN RE S.S.-G.

Appeal from the Chancery Court for Williamson County
No. 1576A Robbie T. Beal, Chancellor

No. M2015-00055-COA-R3-PT – Filed November 16, 2015

This is a termination of parental rights case. Father/Appellant appeals the termination of his parental rights on grounds of severe child abuse pursuant to Tennessee Code Annotated Section 36-1-113(g)(4) and persistence of conditions pursuant to Tennessee Code Annotated Section 36-1-113(g)(3). The child was found to be dependent and neglected by order of the Juvenile Court, and Appellant appealed the dependency and neglect finding to the Circuit Court. The ground of persistence of conditions requires a prior finding of dependency and neglect. However, our record does not reflect the status of Appellant's appeal of the dependency and neglect order. In the absence of proof of full adjudication of the dependency and neglect appeal, we hold that the trial court erred in applying the ground of persistence of conditions. Accordingly, we reverse the termination of Appellant's parental rights on that ground. Concerning the termination of Appellant's parental rights on the ground of severe child abuse, the trial court's order states only that Appellant "has sexually abused the child . . . pursuant to T.C.A. § 37-1-602 and that this sexual abuse constitutes severe abuse pursuant to T.C.A. § 37-1-102(b)(2[1])." Because the code sections that the trial court relies upon contain numerous definitions of "child sexual abuse" and "severe child abuse," in the absence of specific citation to the exact definition(s) relied upon, we cannot make a meaningful review of the trial court's decision. Accordingly, we vacate the trial court's termination of Appellant's parental rights on the ground of severe child abuse and remand with instructions for the trial court to make specific findings as required under Tennessee Code Annotated Section 36-1-113(k).

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is
Reversed in Part, Affirmed in Part, and Remanded**

KENNY ARMSTRONG, J., delivered the opinion of the Court, in which ANDY D. BENNETT, J. and BRANDON O. GIBSON, J., joined.

David R. Grimmett, Nashville, Tennessee, for the appellant, J M.S.

Deana C. Hood, Franklin Tennessee, for the appellee, J.P.G. and K.J.G.

Stephanie P. Edwards, Nashville, Tennessee, Guardian Ad Litem.

OPINION

I. Background

In 2004, J.P.G. (“Mother”) moved to Nashville to pursue a music career.¹ At that time, Mother was separated from her husband, K.J.G. (together with Mother, “Appellees”). While in Nashville, Mother commenced an affair with J.M.S. (“Appellant”) and became pregnant with the child at issue in this case, S.S-G, who was born on May 24, 2006. J.M.S. is listed as the child’s father on the birth certificate, and he was legally established as the father by order of the Williamson County Juvenile Court entered on November 6, 2006. Mother and K.J.G. ultimately reconciled, and the child has resided with the Appellees since birth. For approximately two years after the Williamson County Juvenile Court established Appellant’s paternity of the child, Mother and Appellant attempted to co-parent; however, their relationship was acrimonious.

The record indicates that, during the summer and fall of 2008, the child’s former nanny, R.S., witnessed the child placing her fingers in her vagina on five to ten occasions. On one occasion, R.S. observed the child put a hard plastic toy in her vagina. Although R.S. found this behavior troubling, she never reported the behavior to Mother.

On October 31, 2008, Mother and Appellant had an argument in the presence of the child concerning the child’s Halloween activities. Thereafter, the child went with Appellant for weekend visitation. When the child returned to Mother’s home, the child’s nanny, R.M., proceeded to bathe the child. The nanny testified that, while she was preparing the bath, the child began placing her fingers in her vagina. The nanny told the child, “No, [S. S-G] we don’t do that.” Mother heard the nanny reprimand the child and came into the bathroom. At that point, Mother witnessed the child’s behavior and told her, “We don’t do that.” The child

¹ In cases involving minor children, it is the policy of this Court to redact the parties' names so as to protect their identities.

allegedly replied, “Daddy do that” and “Daddy put finger in my butt.” Later that night, Mother testified that she spoke with a friend on the telephone concerning the child’s behavior. This conversation took place while the child was lying with Mother on the bed. While Mother was talking to her friend about whether Mother should take the child to the emergency room, the child began to put her hand down the front of her diaper. Mother then asked the child, “Are you okay? What’s wrong? Are you wet?” to which the child answered, “I’m just checking something.” The child’s medical records indicate that Mother stated, to the examining physician, that Mother “questioned [S. S-G] and asked her who does that,” to which the child responded, “Daddy.”

Based on the foregoing events, on November 4, 2008, referral was made to the Tennessee Department of Children’s Services (“DCS”), which began an investigation into the alleged sexual abuse. DCS’s investigation included a forensic interview with the child. According to DCS’s dependency and neglect petition, *infra*, during this November 10, 2008 interview, the child made “a disclosure that her father had touched her pee pee with his hand when she had no clothes on, and th[en] stated that, ‘My dad pee pee comes out and drops.’” Following its investigation, DCS determined that “the child’s disclosure of sexual abuse by her father . . . poses a risk to the child’s safety.” Accordingly, DCS implemented a Safety Plan, which specified that Appellant was not to have contact with the child until the matter was heard. Following a preliminary hearing, Appellant was allowed supervised visitation with the child.

On or about November 21, 2008, DCS filed a dependency and neglect petition in the Juvenile Court of Davidson County. Thereafter, Mother intervened in the proceeding and filed her own petition for dependency and neglect, in which she, too, alleged sexual abuse against the child by Appellant. In late 2009, the Juvenile Court Magistrate heard the dependency and neglect petitions. The Magistrate found that neither DCS nor Mother had proven that sexual abuse occurred. Accordingly, the matter was dismissed. After dismissal, Appellant was allowed unsupervised visitation. Upon entry of a final order, DCS appealed the case to the Juvenile Court for de novo review; however, Mother did not appeal.

After hearing the dependency and neglect petition over six days, on March 25, 2011, the Juvenile Court entered an order of adjudication, wherein it found that the child was dependent and neglected. Specifically, the Juvenile Court found that: (1) the child “is a dependent, neglected and abused child pursuant to Tennessee Code Annotated § 37-1-102(b)(12)(B)(F)(G) and (b)(1);” (2) the perpetrator of the abuse is J.M.S.; and (3) J.M.S. “has sexually abused [the child] and that abuse constitutes severe abuse pursuant to Tennessee Code Annotated § 37-1-102(b)(23)(C) and . . . § 37-1-602(3)(B)(ii)(viii) [sic].” Appellant appealed the Juvenile Court order to the Circuit Court. On October 21, 2011, the Juvenile Court entered an Agreed Order, under which Appellant was allowed supervised

visitation with the child. Appellant was also ordered to undergo a parenting assessment, and the child was ordered to resume treatment and counseling. As discussed *infra*, our record does not contain any information concerning the disposition of Appellant's appeal to the Circuit Court.

While the Circuit Court appeal of the adjudication of dependency and neglect was pending, on April 2, 2012, Appellees filed a petition to terminate J.M.S.'s parental rights and for adoption in the Chancery Court for Williamson County. As the first ground for their petition, Appellees relied on Tennessee Code Annotated § 36-1-113(g)(4), citing the Juvenile Court's prior adjudication of dependency and neglect based upon a finding of severe child abuse. Appellees cited, as a second ground for termination of Appellant's parental rights, Tennessee Code Annotated § 36-1-113(g)(3), persistence of conditions. Appellees also asserted that termination of Appellant's parental rights would be in the child's best interest. On May 4, 2012, Appellant filed his answer to the petition to terminate parental rights. Therein, Appellant denied the material allegations made in the petition and specifically averred that Appellees could not rely on the Juvenile Court order because it was not final. By order of May 10, 2012, the Chancery Court appointed a guardian ad litem to represent the child's interests. Because the child was represented by a guardian ad litem in the Juvenile Court proceedings, the Chancery Court entered an order on June 4, 2012, allowing the Juvenile Court guardian ad litem, Stephanie Edwards, to also represent the child in the termination of parental rights case.

The trial court heard the petition to terminate Appellant's parental rights over eight days in August and October, 2013. By order of October 17, 2014, the trial court terminated Appellant's parental rights. The court specifically found, by clear and convincing evidence, that Appellant "has sexually abused the child . . . pursuant to T.C.A. § 37-1-602 and that this sexual abuse constitutes severe abuse pursuant to T.C.A. § 37-1-102(b)(2[1]) which constitutes grounds for termination of parental rights pursuant to T.C.A. § 36-1-113[(g)(4)]." The court found, as a second ground for termination of Appellant's parental rights, persistence of conditions under Tennessee Code Annotated Section 36-1-113(g)(3). The court also found, by clear and convincing evidence, that termination of Appellant's parental rights is in the child's best interest. On November 6, 2014, Appellant filed a motion to alter or amend the trial court's order. This motion was denied by order of December 8, 2014.

II. Issues

Appellant raises six issues for review as stated in his brief:

1. Whether a two and a half year old child's uncorroborated disclosure of sexual abuse alone meets the burden of clear and convincing evidence to

- prove severe child abuse.
2. Whether clear and convincing evidence exists to show that [Appellant] committed aggravated sexual battery for the purpose of severe abuse.
 3. Whether the trial court made adequate findings of fact for the grounds of persistence of conditions in order to provide adequate appellate review.
 4. Whether a persistence of conditions was proven by clear and convincing evidence.
 5. Whether clear and convincing evidence supports the finding that termination is in the child's best interest.
 6. Whether a guardian ad litem who fails to speak with OR meaningfully meet with her client in over three years of litigation provides ineffective assistance of counsel.

III. Standard of Review

Under both the United States and Tennessee Constitutions, a parent has a fundamental right to the care, custody, and control of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 651 (Tenn. 1972); *Nash–Putnam v. McCloud*, 921 S.W.2d 170, 174 (Tenn. 1996). Thus, the state may interfere with parental rights only when a compelling interest exists. *Nash–Putnam*, 921 S.W.2d at 174-75 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)). Our termination statutes identify “those situations in which the 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 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)). A person seeking to terminate parental rights must prove both the existence of one of the statutory grounds for termination and 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).

Because of the fundamental nature of the parent's rights and the grave consequences of the termination of those rights, courts must require a higher standard of proof in deciding termination cases. *Santosky*, 455 U.S. at 769. Accordingly, both the grounds for termination and that termination of parental rights is in the child’s best interest must be established by clear and convincing evidence. Tenn. Code Ann. § 36-3-113(c)(1); *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 the evidence.” *In re M.J.B.*, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004). Such evidence “produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established.” *Id.* at 653.

In light of the heightened standard of proof in termination of parental rights cases, a reviewing court must modify the customary standard of review in Tennessee Rule of Appellate Procedure 13(d). As to the trial court's findings of fact, our review is de novo with a presumption of correctness unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d). We must then determine whether the facts, as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements necessary to terminate parental rights. *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002).

In its order terminating Appellant's parental rights, the trial court made several findings concerning the credibility of certain witnesses. Specifically, the court "decline[d] to accept the majority of [Appellant's] testimony at trial . . . as unbelievable." The court further noted that Appellant's "testimony is less than credible and his conduct is remarkably suspicious." In contrast, the court specifically "accepted [K.J.G.'s] testimony as credible." Likewise, the court found that "[M]other credibly related the events of the child's disclosure" despite Mother's acrimonious relationship with the Appellant. When the resolution of an issue in a case depends on 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. See *Whitaker v. Whitaker*, 957 S.W.2d 834, 837 (Tenn. Ct. App. 1997); *McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn. 1995). The weight, faith, and credit to be given to any witness's testimony lies in the first instance with the trier of fact, and the credibility accorded will be given great weight by the appellate court. See *Whitaker*, 957 S.W.2d at 837; *McCaleb*, 910 S.W.2d at 415; *Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997).

IV. Assistance of Guardian Ad Litem

In his brief, Appellant states that "[b]etween March 22, 2011 and June 4, 2014 . . . the Guardian ad Litem never spoke with the child and only met with the child one time in order to observe the child's interaction with [Appellant]." Appellant argues that "such actions do not meet the requirements of an effective assistance of a Guardian ad Litem and therefore, this matter should be reversed."

Tennessee Supreme Court Rule 40A Section 6 sets out the role of a guardian ad litem in a custody case. The rule provides, in relevant part, that "the guardian ad litem is to represent the child's best interests by gathering facts and presenting facts for the court's consideration subject to the Tennessee Rules of Evidence." Section 8 of Tennessee Supreme Court Rule 40 A details the guardian ad litem's specific responsibilities; the rule provides, in pertinent part:

(b) A guardian ad litem shall:

(1) conduct an investigation to the extent that the guardian ad litem considers necessary to determine the best interests of the child, which can include, but is not limited to, to ascertaining:

- (i) the child's emotional needs, such as nurturance, trust, affection, security, achievement, and encouragement;
- (ii) the child's social needs;
- (iii) the child's educational needs;
- (iv) the child's vulnerability and dependence upon others;
- (v) the child's need for stability of placement;
- (vi) the child's age and developmental level, including his or her sense of time;
- (vii) the general preference of a child to live with known people, to continue normal activities, and to avoid moving;
- (viii) the love, affection and emotional ties existing between the child and the parents;
- (ix) the importance of continuity in the child's life;
- (x) the home, school and community record of the child;
- (xi) the willingness and ability of the proposed or potential caretakers to facilitate and encourage close and continuing relationships between the child and other persons in the child's life with whom the child has or desires to have a positive relationship, including siblings; and
- (xii) the list of factors set forth in Tenn. Code Ann. § 36-6-106.²

(2) obtain and review copies of the child's relevant medical, psychological, and school records as provided by Section 7.³

(3) within a reasonable time after the appointment, interview:

- (i) the child in a developmentally appropriate manner, if the child is four years of age or older;
- (ii) each person who has significant knowledge of the child's

² Tennessee Code Annotated Section 36-6-106 sets out the factors relevant to the best interest analysis.

³ Section 7 of Tennessee Supreme Court Rule 40A outlines the procedure required for a guardian ad litem to access a child's medical records.

history and condition, including any foster parent of the child;
and
(iii) the parties to the suit;

In granting the Guardian ad Litem's requests for fees, the trial court included, in its orders, specific findings that the Guardian ad Litem's fees were reasonable and that the Guardian ad Litem had performed her role in the case. For example, in its July 28, 2014 order, the court found "that the GAL had displayed throughout the proceedings appropriate advocating for the best interests of the child independent of either party." The court also found that the Guardian ad Litem had performed her role as an advocate for the child's best interest "appropriately and only after a very lengthy history of involvement in the dependency and neglect proceedings." Therefore, the court found "no reason to believe that the GAL became a 'second chair' to the [Appellees]." The court specifically found that the Guardian ad Litem's hourly fee of \$200 was "appropriate," and that her fees "are reasonable and necessary for the maintenance and support of the minor child." Likewise, in its order terminating Appellant's parental rights, the trial court again noted that "the guardian ad litem was an active participant throughout the trial and provided invaluable service to the Court...."

Appellant's argument that the Guardian ad Litem's alleged failure to meet with the child a significant number of times should result in reversal of the order terminating his parental rights is a rather novel argument. Despite the child's age, i.e., two and one-half at the beginning of these proceedings, Appellant argues that "the record is replete with evidence that this child was exceptionally bright and verbal considering she was between five (5) and seven (7) years old at the time of the termination petition." Again, the Guardian ad Litem was involved in this case from the time of the dependency and neglect action. Appellant, however, contends that given the child's level of maturity, the Guardian ad Litem "failed to spend one second with the child to advise her regarding the ramifications of a termination proceeding or to even ascertain the child's wishes or wants." No matter how precocious a child may be, it is usually not the policy of a court to consider the preference of the child (in custody matters) until the child is at least twelve years old. *See* Tenn. Code Ann. § 36-6-106(a)(13). Furthermore, the Appellant has provided no case citation, nor has our own researched revealed any such case law to support his argument that a guardian ad litem's failure to meet regularly with his or her child/client establishes ineffective assistance of counsel requiring reversal of the trial court's decision. That being said, neither the record, nor the trial court's findings support Appellant's contention that the Guardian ad Litem's representation in this case was ineffective.

We have reviewed the Guardian ad Litem's billing records, which are undisputed in the record. Furthermore, we have reviewed the Guardian ad Litem's filings made on behalf

of the child, including her response to Appellant’s motion to review the issue of a bonding assessment, her motion to suspend visitation, and her proposed findings of fact and conclusions of law. Furthermore, as noted in the trial court’s orders, the Guardian ad Litem was present for all substantive hearings in this case. The record of the Guardian ad Litem’s participation in this case supports the trial court’s specific finding that the Guardian ad Litem’s service and participation were “invaluable” to the court. The mere fact that the Guardian ad Litem did not speak to the child “regarding the ramifications of a termination proceeding,” and did not “ascertain the child’s wishes or wants” is not dispositive on the question of whether the Guardian ad Litem performed her duties under Tennessee Supreme Court Rule 40A, *supra*. From the totality of the circumstance, and in light of the age of this child, we cannot conclude that the Guardian ad Litem’s representation of the child’s interests was anything other than thorough.

V. Grounds for Termination of Parental Rights

As noted earlier, the trial court relied on two statutory grounds in terminating Appellant’s parental rights: (1) persistence of conditions under Tennessee Code Annotated Section 36-1-113(g)(3); and (2) severe child abuse under Tennessee Code Annotated Section 36-1-113(g)(4). The Tennessee Supreme Court has instructed this Court to review every ground relied upon by the trial court to terminate parental rights in order to prevent “unnecessary remands of cases.” *In re Angela E.*, 303 S.W.3d 240, 251 n.14 (Tenn. 2010). Accordingly, we will review both of these grounds.

A. Persistence of Conditions

Tennessee Code Annotated Section 36-1-113(g)(3) provides that termination of parental rights may be based upon persistence of conditions. Persistence of conditions is defined as:

- (3) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months:
 - (A) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;
 - (B) 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(s) or guardian(s) in the near future; and

(C) 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.

The purpose behind the “persistence of conditions” ground for terminating parental rights is “to prevent the child’s lingering in the uncertain status of foster child if a parent cannot within a reasonable time demonstrate an ability to provide a safe and caring environment for the child.” *In re Arteria H.*, 326 S.W.3d 167, 178 (Tenn.Ct.App.2010), *overruled on other grounds* by *In re Kaliyah S.*, 455 S.W.3d 533 (Tenn.2015).

In *In re Audrey S.*, 182 S.W.3d 838, 872 (Tenn.Ct.App.2005), this Court held that, based upon the statutory text and its historical development, the ground of persistence of conditions found in Tennessee Code Annotated Section 36-1-113(g)(3) provides a ground for termination of parental rights only where the prior court order removing the child from the parent’s home was based on a judicial finding of dependency, neglect, or abuse. In the instant case, the Juvenile Court found, in its March 25, 2011 order, that S.S-G.is “dependent, neglected and abused.” The Juvenile Court made this finding pursuant to Tennessee Code Annotated §§ 37-1-102(b)(12)(B) (“[The child’s] parent . . . by reason of cruelty, mental incapacity, immorality or depravity is unfit to properly care for such child.”); (F) (“[The child] is in such condition of want or suffering or is under such improper guardianship or control as to injure or endanger the morals or health of such child of others.”); (G) (“[The child] is suffering from abuse or neglect.”); and (b)(1) (“‘Abuse’ exists when a person under the age of eighteen (18) is suffering from, has sustained, or may be in immediate danger of suffering from or sustaining a wound, injury, disability or physical or mental condition caused by brutality, neglect or other actions or inactions of a parent. . . .”). Specifically, the Juvenile Court found that the child was the victim of “child sexual abuse,” as defined at Tennessee Code Annotated Section 37-1-602(a)(3)(B) (“the commission of any act involving the unlawful sexual abuse, molestation, fondling or carnal knowledge of a child under thirteen . . .”) at the hands of Appellant. Although our record does not contain any filings concerning the appeal of the Juvenile Court’s order to the Circuit Court, in their respective briefs, the parties indicate that Appellant did, in fact, appeal the Juvenile Court order to the Circuit Court. However, the parties also state, without providing any documentation such as an order from the Circuit Court, that the filing of the petition to terminate Appellant’s parental right in the Chancery Court “stayed” the Circuit Court appeal of the Juvenile Court’s adjudicatory order on dependency and neglect. Likewise, the trial court’s October 17, 2014 order states only that “[Appellant] filed a Notice of Appeal to the Davidson County Circuit Court,” and that the Appellees’ filing of the petition to terminate Appellant’s parental rights “stay[ed] all further proceedings pending outcome of this trial.” However, as noted above,

our record contains no order from the Circuit Court staying, dismissing, or otherwise adjudicating Appellant's appeal of the Juvenile Court's order on dependency and neglect. In the absence of any evidence from which this Court can determine the status of Appellant's appeal of the Juvenile Court order, we have concern as to whether the persistence of conditions ground for termination of parental rights is applicable in this case.

Although, in *In re Audrey S.*, we clarified that, in order for the ground of persistence of conditions to apply in termination of parental rights cases, there must be a prior judicial finding of dependency and neglect, we did not specifically address the question of whether the order containing the prior finding of dependency and neglect must be final and, thus, res judicata on the question of the conditions that led to the child's removal, the persistence of which may provide a ground for termination of the parent's rights. We have, however, addressed the res judicata question in the context of another statutory ground for termination of parental rights, i.e., severe child abuse pursuant to Tennessee Code Annotated Section 36-1-113(g)(4). In relevant part, the statute provides that grounds for termination of parental rights exist where "[t]he parent . . . has been **found** to have committed severe child abuse . . . under any **prior order of a court**" *Id.* (emphases added).

As discussed in detail by this Court in *In the Matter of Shyronne D.H., et al.*, No. W2011-00328-COA-R3-PT, 2011 WL 2651097 (Tenn. Ct. App. July 7, 2011):

Generally, a trial court's judgment becomes final thirty days after its entry unless a party files a timely notice of appeal or specified post-trial motion. Before that time, the judgment lies within the bosom of the court and may be set aside or amended on motion of a party or upon the court's own motion. It is in this slightly different, but substantially related, sense of a final judgment in which the doctrine of res judicata is implicated This Court has referred to this as the concept of "final completion." *Swift v. Campbell*, 159 S.W.3d 565, 573 (Tenn.Ct.App.2004); *see also* Lawrence A. Pivnick, Tennessee Circuit Court Practice § 27:9 n. 22 (2010). In this sense, then, a judgment may be considered "final" in order to confer jurisdiction on an appellate court pursuant to Tennessee Rules of Appellate Procedure Rule 3(a), while not being "final" for purposes of res judicata because such an appeal is pending.

This is, in fact, the rule in Tennessee, where a "a judgment is not final and res judicata where an appeal is pending." Creech [*v. Addington*], 281 S.W.3d [363,] at 377-78 [(Tenn. 2009)]. . . . Our Supreme Court, citing the Restatement (Second) of Judgments § 13 cmt. f, has noted that Tennessee's rule is a minority position and that the predominant view in other jurisdictions is that the "taking of an appeal does not affect the finality of a judgment for res

judicata purposes.” *Creech*, 281 S.W.3d at 378 n. 17 (collecting cases from other jurisdictions). However, it is an inescapable conclusion that, in Tennessee, a judgment from a case in which an appeal is pending is not final and cannot be res judicata until all appellate remedies have been exhausted.

Shyronne, 2011 WL 2651097, at *6 (some internal citations omitted). The doctrine of res judicata is “based on the public policy favoring finality in litigation and does not depend upon correctness or fairness, as long as the underlying judgment is valid.” *Lee v. Hall*, 790 S.W.2d 293, 294 (Tenn.Ct.App.1990) (citing *Moulton v. Ford Motor Co.*, 533 S.W.2d 295, 296 (Tenn.1976)). When there is an existing final judgment upon the merits by a court of competent jurisdiction, that ruling is conclusive of rights, questions, and facts in issue as to the parties. *Galbreath v. Harris*, 811 S.W.2d 88, 90 (Tenn. Ct. App. 1990).

As noted above, we have addressed the res judicata issue before in the context of parental rights termination cases relying on earlier findings of dependency and neglect based on severe child abuse. In *State Department of Human Services v. Tate*, No. 01-A-01-9409-CV-00444, 1995 WL 138858, at *1 (Tenn. Ct. App. Mar. 31, 1995), this Court reviewed a judgment terminating mother’s parental rights. In *Tate*, the juvenile court found that the children were dependent and neglected based on its finding of severe child abuse by the mother. *Id.* at *5. The circuit court affirmed the juvenile court’s finding in a de novo hearing. *Id.* In the later termination proceeding, the circuit court held that the previous finding of severe child abuse was res judicata. *Id.* However, the circuit court’s application of res judicata was based on the fact that the mother did not appeal the previous finding of severe child abuse. *Id.* In affirming the judgment of the trial court, this Court stated that:

We are of the opinion the circuit court did not err in finding that the doctrine of res judicata barred the defendant from challenging the prior findings of severe child abuse. Defendant had a full and fair opportunity to litigate this issue in the prior suit. The defendant chose not to appeal the court's order in the prior action, and, therefore, the finding of severe child abuse is a final decision, which the defendant is barred from challenging.

Id.

Likewise, in *In re Heaven L.F.*, 311 S.W.3d 435 (Tenn.Ct.App.2010), we addressed a similar factual scenario. In that case, a mother appealed the trial court’s termination of her parental rights. The trial court’s decision relied on an earlier finding of dependency and neglect and severe child abuse. *Id.* at 437. Specifically, the juvenile court found the children

to be dependent and neglected and found that both the mother and father had committed severe child abuse. *Id.* On de novo review, the circuit court affirmed both findings. *Id.* Both parents appealed to this Court, and, by our decision entered on February 4, 2009, we affirmed the circuit court's finding “that both parents had committed severe child abuse and that the children were dependent and neglected.” *Id.* The father did not appeal our decision, and we noted that, at that point, our decision that the father had committed severe child abuse became a final judgment. *Id.* The mother, however, sought permission to appeal our decision to the Tennessee Supreme Court. Our Supreme Court denied certiorari on June 15, 2009. *Id.* In a later trial, which was the subject of *In re Heaven L.F.*, 311 S.W.3d 435, both the mother's and the father's parental rights were terminated, and the mother appealed, asserting that the trial court erred in finding that the issue of whether she committed severe child abuse was res judicata. *Id.* at 439. On appeal, we determined that “the order finding that Mother had committed severe child abuse became a final, non-appealable judgment on June 15, 2009,” i.e., the date on which her application for permission to appeal to the Supreme Court was denied. *Id.* Thus, we concluded that the issue was properly res judicata. *Id.* at 439-40; see also *In re Serenity S.*, No. W2014-00080-COA-R3-PT, 2014 WL 6612571 (Tenn. Ct. App. Nov. 24, 2014) (holding that “[b]ecause Mother did not appeal the trial court's finding of severe child abuse within the time allowed by law, the order became a final order and the finding of severe child abuse is res judicata. Thus, the trial court did not err in finding that Mother has committed severe abuse for purposes of terminating her parental rights.”). In the foregoing cases, the underlying judgment was final and res judicata because the parent had exhausted his or her appellate remedies, either by a failure to appeal or by a denial of permission to appeal. There is no proof that such finality of the dependency and neglect order exists in the instant case.

Although we have not previously considered the exact question that arises in this appeal, i.e., whether the order on dependency and neglect must be final and res judicata in order to form the basis for termination of parental rights on the ground of persistence conditions, we are cognizant that “statutes ‘in pari materia’—those relating to the same subject or having a common purpose—are to be construed together, and the construction of one such statute, if doubtful, may be aided by considering the words and legislative intent indicated by the language of another statute.” *Graham v. Caples*, 325 S.W.3d 578, 582 (Tenn.2010) (quoting *Wilson v. Johnson Cnty.*, 879 S.W.2d 807, 809 (Tenn.1994)). Courts must adopt the most “reasonable construction which avoids statutory conflict and provides for harmonious operation of the laws.” *Carver v. Citizen Utils. Co.*, 954 S.W.2d 34, 35 (Tenn. 1997). Based upon this authority, we conclude that it would be incongruous for us hold that res judicata principles apply to one ground for termination, i.e., a prior finding of severe child abuse, and not to apply the same principle to the ground of persistence of conditions. If the order outlining the conditions that led to the removal of the child, i.e., the dependency and neglect order, is pending appeal, that order is not res judicata. Accordingly,

until the dependency and neglect order has reached its “final completion,” *Swift v. Campbell*, 159 S.W.3d 565, 573 (Tenn.Ct.App.2004), either because there has been no appeal, or through the exhaustion of all appellate remedies, we hold that the prior order, which is not res judicata, cannot form the basis, standing alone, for termination of parental rights on any ground that contemplates reliance on a previous finding or order. Because there is no evidence in our record from which we can determine the current posture of Appellant’s appeal from the Juvenile Court’s order on dependency and neglect, and based upon the foregoing analysis, we conclude that the trial court erred in terminating Appellant’s parental rights on the ground of persistence of conditions. Accordingly, we reverse the trial court’s termination of Appellant’s parental rights on this ground.

B. Severe Child Abuse

Tennessee Code Annotated Section 36-1-113(g)(4) provides a ground for termination of parental rights where:

The parent or guardian has been found to have committed severe child abuse as defined in § 37-1-102, under any prior order of a court or is found by the court hearing the petition to terminate parental rights or the petition for adoption to have committed severe child abuse against the child who is the subject of the petition or against any sibling or half-sibling of such child, or any other child residing temporarily or permanently in the home of such parent or guardian[.]

Here, the Appellees’ petition to terminate Appellant’s parental rights relies, as one of the grounds for termination of parental rights, on the Juvenile Court’s finding of severe child abuse. Because the Juvenile Court’s order on dependency and neglect is not final and, thus, not res judicata on the question of severe child abuse, the trial court cannot rely on the Juvenile Court’s order to terminate Appellant’s parental rights, *see* discussion *supra*. That being said, from our review of the record, it appears that the trial court attempted to make an independent, de novo, finding of severe child abuse. As set out above, Tennessee Code Annotated Section 36-1-113(g)(4) allows for termination of parental rights when the court that is hearing the petition finds that a party has committed severe child abuse against the child. Tennessee Code Annotated Section 37-1-102(b)(21) defines “severe child abuse,” in part, as:

(A)(i) The knowing exposure of a child to or the knowing failure to protect a child from abuse or neglect that is likely to cause serious bodily injury or death and the knowing use of force on a child that is likely to cause serious bodily injury or death;

(ii) "Serious bodily injury" shall have the same meaning given in § 39-15-402(d).

(B) Specific brutality, abuse or neglect towards a child that in the opinion of qualified experts has caused or will reasonably be expected to produce severe psychosis, severe neurotic disorder, severe depression, severe developmental delay or intellectual disability, or severe impairment of the child's ability to function adequately in the child's environment, and the knowing failure to protect a child from such conduct;

(C) The commission of any act towards the child prohibited by §§ 39-13-502 -- 39-13-504, 39-13-515, 39-13-522, 39-15-302, 39-15-402, and 39-17-1005 or the knowing failure to protect the child from the commission of any such act towards the child; or

After summarizing the relevant evidence adduced at the hearing on the petition to terminate parental rights, in its order terminating Appellant's parental rights, the trial court found, in relevant part:

THEREFORE, and in summary of the aforementioned testimony, the Court can concluded by clear and convincing evidence that the child has engaged in masturbatory behavior outside the norms for age appropriateness. Further, the child's behavior has regressed and she experiences increased stress when dealing with the issues surrounding her father that occurs and manifests itself immediately preceding and after visitations with her father. However, the Court accepts that explanations can exist for all of this conduct other than sexual abuse. The Court also accepts that the father's testimony is less than credible and his conduct is remarkably suspicious. The Court finds that the child on the Halloween weekend following her father's visitation, did make fact specific disclosures that implicated her father and inappropriate sexual conduct. The Court is not satisfied that Dr. Bernet was able to explain that these statements were the product of "innocent lying." Upon being remanded by both [her nanny] and her mother for the masturbatory behavior that she was at the time engaging in, it would seem unlikely that her first reaction would be to implicate her father as a perpetrator. The Court is placed in the position of having to weigh those statements against the inherent unreliability of a two (2) year old; no matter how verbal.

Considering all of the facts and circumstances of this case taken as a whole, the Court finds that by clear and convincing evidence, the [Appellees] have proved that the [Appellant] has sexually abused the child . . . pursuant to

T.C.A. §37-1-602 and that this sexual abuse constitutes severe abuse pursuant to T.C.A. § 37-1-102(b)(2[1]) which constitutes grounds for termination of parental rights . . . pursuant to T.C.A. § 37-1-113.

Tennessee Code Annotated Sections 37-1-602(a)(3)(A)-(D) contains numerous definitions for the term “[c]hild sexual abuse.” The statute provides, in part:

(3)(A) “Child sexual abuse” means the commission of any act involving the unlawful sexual abuse, molestation, fondling or carnal knowledge of a child under thirteen (13) years of age that prior to November 1, 1989, constituted the criminal offense of:

- (i) Aggravated rape under § 39-2-603;
- (ii) Aggravated sexual battery under § 39-2-606;
- (iii) Assault with intent to commit rape or attempt to commit rape or sexual battery under § 39-2-608;
- (iv) Begetting child on wife's sister under § 39-4-307;
- (v) Crimes against nature under § 39-2-612;

- (vi) Incest under § 39-4-306;
- (vii) Promotion of performance including sexual conduct by minor under § 39-6-1138.
- (viii) Rape under § 39-2-604;
- (ix) Sexual battery under § 39-2-607; or
- (x) Use of minor for obscene purposes under § 39-6-1137;

(B) “Child sexual abuse” also means the commission of any act involving the unlawful sexual abuse, molestation, fondling or carnal knowledge of a child under thirteen (13) years of age that on or after November 1, 1989, constituted the criminal offense of:

- (i) Aggravated rape under § 39-13-502;
- (ii) Aggravated sexual battery under § 39-13-504;
- (iii) Aggravated sexual exploitation of a minor under § 39-17-1004;
- (iv) Criminal attempt as provided in § 39-12-101 for any of the offenses in (a)(3)(B)(i)--(iii);
- (v) Especially aggravated sexual exploitation of a minor under § 39-17-1005;
- (vi) Incest under § 39-15-302;
- (vii) Rape under § 39-13-503;
- (viii) Sexual battery under § 39-13-505; or
- (ix) Sexual exploitation of a minor under § 39-17-1003;

(C) “Child sexual abuse” also means one (1) or more of the following acts:

(i) Any penetration, however slight, of the vagina or anal opening of one (1) person by the penis of another person, whether or not there is the emission of semen;

(ii) Any contact between the genitals or anal opening of one (1) person and the mouth or tongue of another person;

(iii) Any intrusion by one (1) person into the genitals or anal opening of another person, including the use of any object for this purpose, except that it shall not include acts intended for a valid medical purpose;

(iv) The intentional touching of the genitals or intimate parts, including the breasts, genital area, groin, inner thighs, and buttocks, or the clothing covering them, of either the child or the perpetrator, except that it shall not include:

(a) Acts that may reasonably be construed to be normal caretaker responsibilities, interactions with, or affection for a child; or

(b) Acts intended for a valid medical purpose;

(v) The intentional exposure of the perpetrator's genitals in the presence of a child, or any other sexual act intentionally perpetrated in the presence of a child, if such exposure or sexual act is for the purpose of sexual arousal or gratification, aggression, degradation, or other similar purpose;

(vi) The sexual exploitation of a child, which includes allowing, encouraging, or forcing a child to:

(a) Solicit for or engage in prostitution; or

(b) Engage in an act prohibited by § 39-17-1003; and

(D) For the purposes of the reporting, investigation, and treatment provisions of §§ 37-1-603--37-1-615 “child sexual abuse” also means the commission of any act specified in subdivisions (a)(3)(A)-(C) against a child thirteen (13) years of age through seventeen (17) years of age if such act is committed against the child by a parent, guardian, relative, person residing in the child's home, or other person responsible for the care and custody of the child;

As set out in its order, *supra*, the trial court states only that the Appellant “has sexually abused the child pursuant to T.C.A. §37-1-602” and that “this sexual abuse constitutes severe abuse pursuant to T.C.A. § 37-1-102(b)(2[1]).” The trial court’s failure to include the specific statutory definitions that it relies upon leaves this Court unable to make a meaningful review of the trial court’s decision.

“Because of the gravity of their consequences, proceedings to terminate parental rights require individualized decision making.” *In re Tiffany B.*, 228 S.W.3d 148, 156 (Tenn. Ct.

App. 2007); *In re Giorgianna H.*, 205 S.W.3d 508, 516 (Tenn. Ct. App. 2006); *In re Marr*, 194 S.W.3d 490, 496 (Tenn.Ct.App.2005). Tennessee Code Annotated section 36-1-113(k) explicitly requires trial courts hearing parental termination cases to “enter an order that makes specific findings of fact and conclusions of law.” Specific findings of fact and conclusions of law facilitate appellate review and promote just and speedy resolution of appeals. *In re Tiffany B.*, 228 S.W.3d at 156; *In re Giorgianna H.*, 205 S.W.3d at 516; *In re Marr*, 194 S.W.3d at 496. Without these findings and conclusions, appellate courts are left to wonder on what basis the trial court reached its ultimate decision. *In re M.E.W.*, No. M2003–01739–COA–R3–PT, 2004 WL 865840, at * 19 (Tenn. Ct. App. Apr. 21, 2004).

In a termination case, however, “[a] trial court's failure to comply with [Tennessee Code Annotated section] 36-1-113(k) affects more than the standard of appellate review. It affects the viability of the appeal.” *In re G.N.S.*, No. W2006–01437-COA-R3-PT, 2006 WL 3626322, at *6 (Tenn. Ct. App. Dec. 13, 2006) (quoting *In re C.R.B. and A.L.B.*, No. M2003-00345-COA-R3-JV, 2003 WL 22680911, at *4 (Tenn. Ct. App. Nov. 13, 2003)). “A trial court’s failure to comply with [Tennessee Code Annotated Section] 36-1-113(k) fatally undermines the validity of a termination order.” *In re S.M.*, 149 S.W.3d 632, 639 (Tenn. Ct. App.2004). This Court cannot simply review the record de novo and determine for ourselves where the preponderance of the evidence lies, as we might do in other civil cases. *State v. C.H.K.*, 154 S.W.3d 586, 591 (Tenn. Ct. App. 2004); *see also Adoption Place, Inc. v. Doe*, No. M2007-01214-COA-R3-PT, 2007 WL 4322014, at *6 (Tenn. Ct. App. Dec. 5, 2007) *perm. app. denied* (Tenn. Feb. 4, 2008). When a trial court has failed to comply with Tennessee Code Annotated section 36-1-113(k), “the appellate courts must remand the case with directions to prepare the required findings of fact and conclusions of law.” *In re Tiffany B.*, 228 S.W.3d at 156; *In re Giorgianna H.*, 205 S.W.3d at 516; *In re Marr*, 194 S.W.3d at 496. Tennessee appellate courts strictly construe Tennessee Code Annotated section 36-1-113(k) and require meticulous compliance with its mandates. *In re M.E.I.*, No. E2004-02096-COA-R3-PT, 2005 WL 2346978, at *2-3 (Tenn. Ct. App. Sept. 26, 2005). We view the requirements regarding specific findings and conclusions “with great seriousness,” not as a “trivial technicality.” *White v. Moody*, 171 S.W.3d 187, 191 (Tenn. Ct. App. 2004).

We have applied the foregoing principles in termination of parental rights cases that were decided on the statutory ground of abandonment. Tenn. Code Ann. § 36-1-113(g)(1) (“Abandonment by a parent or guardian, as defined in § 36-1-102 . . .”). Tennessee Code Annotated Section 36-1-102(1)(A) contains numerous definitions for the term “abandonment” as used for purposes of termination of parental rights. In the context of the statutory ground of abandonment, this Court has previously held that “[s]imply stating that a parent has ‘abandoned the child’ is insufficient.” *See, e.g., L.D.N. v. R.B.W.*, No. E2005-02057-COA-R2-PT, 2006 WL 369275, at *4 (Tenn. Ct. App. Feb. 17, 2006); *In re Adoption of T.L.H.*, No. M2008-01408-COA-R3-PT, 2009 WL 152475 (Tenn. Ct. App. Jan. 21, 2009)

(holding that the trial court's finding that "the abandonment of the minor child . . . was willful" was not sufficient to establish "whether [the trial court] found abandonment based on failure to visit, failure to support, or both."). Like the ground of abandonment, the ground of severe child abuse also refers to definitions contained in another statute, i.e., Tennessee Code Annotated Section 37-1-102. Just as Tennessee Code Annotated Section 36-1-102(1)(A) contains numerous definitions of what constitutes abandonment for purposes of termination of parental rights under Tennessee Code Annotated Section 36-1-113(g)(1), Tennessee Code Annotated Section 37-1-102(b)(21) contains several definitions of what constitutes "severe child abuse" for purposes of termination of parental rights under Tennessee Code Annotated Section 36-1-113(g)(4). Here, the trial court not only failed to specify the particular definition of "severe child abuse" upon which it relies, but it also broadly cites Tennessee Code Section 37-1-602, which contains many definitions of what constitutes "child sexual abuse." As with its reference to Tennessee Code Annotated Section 37-1-102(b)(21), in referring to Tennessee Code Annotated Section 37-1-602, the trial court did not specifically list the exact definition(s) it relied upon in reaching its conclusion that termination of Appellant's parental rights was warranted on grounds of severe child abuse.

We have noted that "a recitation in a final order that a parent has 'abandoned the child' is a conclusion of law, not a finding of fact." *In re K.N.R.*, No. M2003-01301-COA-R3-PT, 2003 WL 22999427, at *4 (Tenn. Ct. App. Dec. 23, 2003). Accordingly, "[a] parental termination order must set forth the findings of fact that underlie the conclusions of law." *In re Adoption of T.L.H.*, 2009 WL 152475, at *5 (citing *In re K.N.R.*, 2003 WL 22999427, at *5). We hold that the same reasoning applies to other grounds for termination of parental rights, including severe child abuse. Where the statute provides several possible definitions for a ground, the trial court must specify the exact definition that it relies upon in reaching its ultimate conclusion. In the absence of such specificity, this Court cannot conduct a meaningful appellate review. Accordingly, we vacate the trial court's termination of Appellant's parental rights on the ground of severe child abuse and remand the case for entry of an order that fully complies with the requirements of Tennessee Code Annotated Section 36-1-113(k).

In light of the fact that we are reversing and vacating the grounds for termination of parental rights, we pretermite discussion of the best interest analysis at this time. However, in the interest of giving the trial court sufficient information to provide this Court with an order that facilitates full and thorough appellate review, we note that, while the trial court's October 14, 2014 order summarizes the evidence, it does not go so far as to make sufficient independent findings of facts based upon the evidence. The trial court's order does contain a lengthy summary of the testimony adduced at the hearing and a few credibility observations. For the most part, however, the order merely summarizes the testimony without indicating which testimony or which facts the trial court relies on to support its decision to terminate

Father's parental rights. This Court is a reviewing court. This means that we independently review the evidence de novo on the record. Accordingly, a trial court's mere summation of the evidence is not helpful to our review. Rather, it is the trial court's independent findings based on the evidence that are necessary for meaningful appellate review. While summation of the evidence may be necessary and helpful to the trial court in making its findings and conclusions, the court must go beyond mere summation by linking the evidence to its clearly stated findings of fact and conclusions of law.

We further note that, in determining whether termination of a parent's rights is in the child's best interest, Tennessee Code Annotated Section 36-1-113(i) sets out specific factors that the trial court "shall consider" in making its best interest determination. Here, the trial court's order fails to specifically reference any of the statutory best interest factors. Although the trial court's order does discuss the lack of any bond between Appellant and the child, its best interest analysis is sparse at best. Should the trial court determine, on remand, that clear and convincing evidence supports termination of Appellant's parental rights on one of the statutory grounds, it would aid appellate review if, in its best interest analysis, the trial court would reference the applicable statutory best interest factors and would make more detailed findings on this question. To this end, we also vacate the trial court's finding that termination of Appellant's parental rights is in the child's best interest.

VI. Conclusion

For the foregoing reasons, we reverse the trial court's termination of Appellant's parental rights on the ground of persistence of conditions. We vacate the trial court's termination of Appellant's parental rights on the ground of severe child abuse. The case is remanded for the entry of an order containing specific findings of facts and conclusion of law, which should include the specific statutory sections and/or definition on which the court relies, and for any further proceedings that may be necessary and are consistent with this opinion. Costs of the appeal are assessed to the Appellees, J.P.G. and K.J.G, for all of which execution may issue if necessary.

KENNY ARMSTRONG, JUDGE