**1. *In re Gabriel V.*, 2014 WL 3808916 (Tenn. Ct. App. at Nashville, July 31, 2014) from the Davidson County Juvenile Court.**

This is a private custody battle involving a Father’s motion for recusal. After a three-day hearing of a Petition to Establish Custody, Child Support, and Visitation, the trial court award Mother significantly more parenting time than Father. Father then filed a Motion for Recusal and for New Trial, alleging that Mother’s lawyer had been a public supporter of the trial judge’s campaign, which had been pending at the time of trial. The trial court denied the motion and Father appealed pursuant to Tenn. S.Ct. R. 10B § 2.02.

The Tennessee Court of Appeals first clarified that with an appeal of this type, it may only review the trial court’s decision to deny the recusal motion, rather than considering other issues and determinations of the trial court. The Court considered Tenn. S.Ct. R. 10, RJC 2.11, which provides that judges must disqualify themselves when their impartiality might be reasonably questioned, including in some situations when a judge learns that a party or a party’s attorney has given support to a judge’s campaign. The Court noted that Comment 7 to Rule 2.11 clarifies that campaign support from a party or his attorney is not alone enough to require disqualification; rather, disqualification is appropriate only when the judge’s impartiality may be reasonably questioned. In determining whether her impartiality may be reasonably questioned, a judge must consider the following factors: 1) the level of support or contributions given in relation to the total support given to that judge’s campaign and the total support for all candidates; 2) “if the support is monetary, whether any distinction between direct contributions and independent expenditures bears on the disqualification question”; 3) the timing of the support in relation to the status of the litigant’s case; and 4) “if the supporter or contributor is not a litigant, the relationship, if any, between the supporter or contributor and i) any of the litigants; ii) the issue before the court; iii) the judicial candidate or opponent; iv) the total support received by the judicial candidate or opponent and the total support received by all candidates for that judgeship.”

In this case, Mother’s counsel contributed a total of $450 (directly and indirectly) to the judge’s campaign. When it compared this contribution amount to the total $80,000 in total donations received by the judge’s campaign, the Court of Appeals determined that this amount was not sufficient to require the judge’s recusal.

Father also argued that Mother’s counsel “was listed in the judge’s campaign literature as a ‘friend’ of the judge and as a host of some campaign events.” The Court again determined that this involvement was not sufficient to mandate recusal because Mother’s counsel was listed among 150 other attorneys as supporting the judge in some way and did not participate in the campaign in a leadership role or attend financial meetings or volunteer events. Thus the Court of Appeals concluded that given Mother’s counsel’s minimal role in the judge’s campaign, the trial judge did not err in refusing to recuse herself.

**2. *In re J.F., et al.*, 2014 WL 4261114 (Tenn. Ct. App. at Knoxville, Aug. 28, 2014) from the Jefferson County Circuit Court.**

This is a DCS termination of parental rights case. Although they never married, Mother and R.F. had a long-term relationship and R.F. legally adopted Daughter. Curiously, the opinion fails to explain how R.F. succeeded in adopting Daughter when he was never married to Mother. In January 2011, Daughter and Brother were removed from Mother’s home and adjudicated dependent and neglected in Cocke County, but a few months later Mother regained temporary custody of the Children.

In February 2012, DCS received a referral from a neighbor who had observed Daughter through a window for three days. The neighbor approached Daughter and asked how she was doing, to which she replied that she was in trouble and was locked in her bedroom, had not had food or drinks in three days, and had not been allowed to use the bathroom. The neighbor brought Daughter chips and water, but Mother became aware of his generosity and nailed the window shut. Neighbor called DCS, who sent a case manager and law enforcement to the home. When they entered Daughter’s room, Daughter was dazed and lethargic. The case manager and law enforcement both noticed a powerful urine odor and learned that Daughter had been using a bucket in the corner of the room as a toilet, which was almost entirely full of urine and feces. An ambulance transported Daughter to the hospital, where she was diagnosed with dehydration. Mother was arrested and DCS took custody of the Children. Pursuant to a plea agreement, Mother pled guilty to child neglect and received a two year sentence in prison.

In March 2012, DCS filed a dependency and neglect petition, and in May 2012, petitioned the court to terminate Mother’s parental rights, filing an amended petition in May 2013. In September 2012, the Children were adjudicated dependent and neglected due to Mother’s severe abuse and R.F.’s failure to protect the Children. Mother appealed, which was consolidated with the termination petition in the circuit court. After a four-day trial in July 2013, the court terminated Mother’s parental rights on the grounds of abandonment by conduct exhibiting wanton disregard, severe child abuse, and a sentence of more than two years for severe child abuse. Additionally, the trial court determined that the September 2012 adjudicatory order was void due to the juvenile court’s lack of subject matter jurisdiction. Mother appealed.

Mother first questioned on appeal whether the trial court erred in finding that she had confined Daughter to her room for three days. Mother argued that the state’s entire case hinged on this factual finding and that the evidence did not meet the clear and convincing standard. The Court of Appeals examined the testimony of DCS case manager Vaughn, Daughter, and Neighbor, whose stories all were consistent with Mother confining Daughter for three days. It also noted that Leigh Anthony, a social services worker who was involved in Daughter’s treatment and therapy, testified as to Daughter’s statements regarding Mother’s behavior and that Daughter had not changed her story at all since she had begun treatment a year earlier. The Court then examined Mother’s testimony, who asserted that Daughter was never “locked in” her room, she had eaten regularly, and that Daughter sometimes lied so Mother was not surprised that she had told this “story.” The Court of Appeals noted that ultimately only Mother and Daughter knew what actually occurred, but the trial court had heard from multiple witnesses who credited Daughter’s testimony. Finally, it reiterated that trial courts are best situated to make credibility and factual determinations, thus appellate courts are hesitant to “second-guess a trial court’s credibility determinations unless there is concrete, clear, and convincing evidence to the contrary.” Therefore, the Court of Appeals determined that the evidence did not preponderate against the trial court’s finding that Daughter was confined to her room for three days.

Next, Mother argued that the trial court erred in terminating Mother’s parental rights on the ground of having a sentence of more than two years for child abuse because the trial court failed to explicitly find that Mother had committed severe abuse. The Court of Appeals noted the trial court found that Mother had confined Daughter to her room for three days and that Mother had conceded, “if I actually had her in her room for three days, I would agree it was severe abuse.” The trial court also considered the testimony of Dr. William Smith that Daughter’s diagnosis of dehydration could have resulted in serious bodily injury or death. In the trial court’s ruling, it tracked the language of Tenn. Code Ann. § 37-1-102(b), which defines severe child abuse, and concluded that “if the situation had continued, it would have resulted or could have resulted in serious bodily injury or death; and, if it had persisted, it would have.” Mother argued that the trial court did not expressly say that Mother’s conduct constituted severe abuse or cite the applicable statutory ground for termination, and DCS agreed but argued that the trial court’s conclusion amounted to an implicit finding of severe abuse. The Court of Appeals agreed, and held that given the trial court’s implicit finding, severe child abuse and a two-year sentence for child abuse were sufficiently established ground for termination in this case. The Court of Appeals continued by holding that upon its own independent review, the facts clearly and convincingly established the ground to terminate Mother’s rights.

Finally, Mother argued that the trial court erred in finding sufficient evidence to support the ground of wanton disregard for the child’s welfare prior to incarceration. Specifically, Mother asserted that although she made a “bad parenting choice” regarding the incident with Daughter, she was not a habitual criminal or drug abuser, and she was homeless only because she left her abusive spouse, J.D., whom she married after she and R.F. ended their relationship. The Court of Appeals noted first that Ms. Anthony, a social worker at Daughter’s psychiatric facility, testified that Daughter was diagnosed with major depressive disorder, oppositional defiance, ADHD, chronic post-traumatic stress disorder. Ms. Anthony testified that she believed Daughter “had been abused by mother and that her behavioral issues were attributable to a lack of nurture rather than nature.” Furthermore, the Court noted that Mother had chosen to become a homeless parent, and DCS had previously removed her children due to her inability to care for them. Despite this, Mother never worked during the time that her children were in her care. Finally, Daughter had told Mother that her older brother had inappropriately touched her and hurt her, but Mother continued to allow Older Brother to visit with Daughter. Given the foregoing, the Court of Appeals affirmed the decision of the trial court to terminate on the ground of wanton disregard for the child’s welfare prior to incarceration.

Although Mother did not dispute the trial court’s best interest determination on appeal, the Court of Appeals reviewed the finding regardless of “Mother’s apparent waiver of this issue.” The Court affirmed the finding that termination was in the child’s best interest because Brother was well-adjusted in his foster home and called his foster mother “mama,” and Daughter’s problematic behaviors had increased dramatically with medication and therapy.

**3*. Hendricks v. Smith*, 2015 WL 128537 (Tenn. Ct. App. at Knoxville, Jan. 8, 2015) from the Hamilton County Juvenile Court.**

This is a private child custody dispute. Mother and Father dated for exclusively for some period of time but never married. Soon after they ended their relationship, Son was born in January 2009 while Mother was living in Ohio and Father in Pennsylvania. In August 2009, Mother and Father resumed their relationship and moved to Chattanooga. In June 2010, Mother gave birth to Daughter, and in November 2010, Mother and Father finally ended their relationship.

In September 2011, much to Mother’s dismay, Father married Stepmother. Mother and Father then entered into a parenting plan that allowed Mother to move back to Ohio with the children so that she could finish her Master’s Degree. During this time, Father testified that on several occasions Mother failed to abide by the parenting plan and allow Father to see the children. Therefore, in February 2012, Father filed a petition for contempt and modification. Eventually, the children returned to Chattanooga, but their luggage indicated that they had been in the western United States, rather than just Ohio.

After a conference in February 2013 in which Mother asserted that she was working as an independent contractor, the parties entered into a permanent parenting plan in March 2013. However, two weeks later, Father filed for emergency temporary order of custody and for temporary restraining order after he learned that Mother had been working as a licensed prostitute at the Bunny Ranch in Nevada for approximately 9 months.

According to Mother’s testimony, she had gotten deeper into debt in Ohio due to her attending school and Father’s being thousands of dollars in arrears for medical bills and support for the children. Because Mother could not find employment as a social worker, she began working as a prostitute in Nevada, but never exposed the children to her occupation. By the time of trial, Mother was no longer employed as a prostitute, but had found work as a social worker in Nevada.

Testimony at trial also reflected that Father had snorted cocaine at his home with a woman other than Stepmother while the children were asleep in the home. At the time, Stepmother had gotten “picked up and … was in the drunk tank.”

In April 2014, the trial court entered an order incorporating a permanent parenting plan that designated Father as the primary residential parent. Specifically, the trial court held that “there was a material change in the circumstances of the children because of Mother’s deceit, Mother’s occupation as a prostitute, and Mother’s hostility toward Father and his wife.” The court did not conduct a best interest analysis in its order. Mother appealed, alleging that the juvenile court erred in awarding custody to Father. Father asserted that the juvenile court erred in failing to award him attorney’s fees.

The Court of Appeals noted that although the court and the parties were treating Father’s petition as though it were for a change in custody, it was really more in the nature of a rule 59 motion to alter or amend the judgment. In fact, because the March 2013 agreed permanent parenting plan was more of a modification to the 2011 parenting plan, Father’s petition was actually a motion to alter or amend the March 2013 modification of the 2011 permanent parenting plan. Thus, the juvenile court did not err in considering evidence dating back to the 2011 permanent parenting plan.

However, when determining whether to modify a parenting plan, a trial court must first determine whether a material change of circumstances has occurred, and then conduct a best interest analysis. In this case, the trial court failed to make any findings regarding the best interests of the children, and therefore, “did not apply ‘the correct legal standards to the evidence found in the record.’” Therefore, the Court vacated the Juvenile Court’s decision and remanded it to the court to engage in a best interest analysis. It then held that Father’s argument regarding attorney’s fees was rendered moot and pretermitted by the judgment being vacated.

**4. *In re Brian M., et. al*., 2015 WL 78179 (Tenn. Ct. App. at Knoxville, Jan. 6, 2015) from the Knox County Juvenile Court.**

This is a DCS termination of parental rights case. In September 2011, Daughter and Son (collectively “Twins”) were born premature at 24 weeks to Mother and Father. Twins had to remain in the hospital until they were six months old and even after being discharged continued to have medical issues. In March 2012, Father was arrested and later entered guilty pleas to possession of cocaine with intent to sell and possession of a firearm during the commission of a felony, culminating in an eleven-year sentence. Two months later, DCS removed Twins from Mother due to her substance abuse issues and placed them in a medically fragile foster home.

Four months later, Grandmother and Grandfather, who lived in Georgia, filed a petition for custody. The juvenile later entered an agreed order, finding Twins dependent and neglected and ordering that a home study be conducted for the Grandparents under the ICPC. However, Grandparents did not obtain approval under the ICPC home study because their jobs required them to travel extensively and they were therefore unable to supply the extensive attention and care that the Twins needed. The trial court “advised Grandparents that their petition would remain ‘open for the indefinite future’ and that they were ‘free to pursue whatever course of action they desire[d] with regard to the ICPC denial.’”

In September 2013, DCS filed a petition to terminate Father’s rights on the ground of wanton disregard. Grandparents filed motions to intervene and to continue until a second home study could be completed. Father then filed a motion requesting the trial court allow Grandparents to intervene and to grant their custody petition. Father asked in the alternative that the court grant a stay of the termination proceeding for Father to pursue an interlocutory appeal “regarding the applicability of the ICPC to a relative placement.” The juvenile court denied Grandparents’ motion to intervene and Father’s alternative motion to stay the termination proceeding. Father then moved to continue the termination proceeding, and the court accepted proof on that motion.

Numerous parties testified at the termination hearing, including Grandmother, who stated that she was employed as a nurse and was uniquely capable of caring for Twins’ unique medical needs. She testified that if she were given custody of Twins, she would accept employment with a facility that would allow her more time to spend caring for Twins and decrease her required travel time. She also stated that she had only visited Twins twice and Grandfather had not visited at all since Twins’ removal. The DCS case manager testified that Twins were doing well and improving remarkably, including learning to walk. Foster Mother testified that both children had to visit various doctors frequently and that she was willing to care for their medical needs. Father testified and expressed the desire that Twins be placed in the care of Grandmother, adding that DCS had not assisted him with services. The juvenile court terminated Father’s parental rights on the grounds of abandonment for wanton disregard of Twin’s welfare and earning a ten-year sentence while they were less than eight years old.

Father’s first issue on appeal wa whether the juvenile court erred in denying Grandparents’ motion to intervene in the termination proceeding. Father argued that Grandparents had a legal interest in the termination proceeding because if termination were granted, DCS would have the authority to consent to the foster parents adopting Twins, thereby rendering Grandparents’ custody petition moot. The Court of Appeals looked to Tennessee Rule of Civil Procedure 24.01, which governs intervention as of right, and to case law to guide its analysis. The Court of Appeals determined that because Grandparents’ relationship to the Twins alone did not amount to a substantial legal interest in the proceeding and because Father was able to adequately represent their interests during the proceeding, Grandparents did not meet the requirements to intervene as of right.

However, the Court continued by examining whether the trial court should have granted Grandparents’ motion under Rule 24.02 which governs permissive intervention and provides in part that a person may intervene “when an applicant’s claim or defense and the main action have a question of law or fact in common. In exercising discretion the court shall consider whether or not the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” Here, the Court of Appeals held that the proceedings, namely, Grandparents’ custody petition and Father’s termination proceeding, had a common question of law or fact: the best interest of Twins. Still, it ultimately determined that the best interest analysis is different in termination proceedings than it is in custody proceedings. Furthermore, allowing intervention would cause an undue delay in this termination proceeding.

Next, Father argued that the ICPC did not apply to the petition for custody because it was filed by the Grandparents of the Twins. Father cited two cases from other jurisdictions as support for his argument. The first case did not require approval under the ICPC because the state had decided against foster care, while the second case provided that the ICPC did not apply in cases when a child is returned to a natural parent in another state. The first noted that Father’s cited cases were non-binding and went to hold that they were distinguishable because here, the court had not yet ruled out foster care nor was it returning the child to a natural parent. The Court determined that the trial court “simply sought assistance pursuant to the ICPC to obtain the necessary information to render an informed decision on the custody petition.” Therefore, the trial court was affirmed in finding that the ICPC was applicable.

Father then argued that the court erred in denying the motion to continue the termination proceeding while the custody petition was still pending. The Court rejected this argument as well, holding that Grandparents were given adequate time to “ready themselves for the responsibility of caring for the Children,” and yet they still had not obtained employment that would allow them to care for the Twins’ needs, nor had they sufficiently established a relationship with the Twins. Therefore, the Court affirmed the decision of the trial court to deny a continuance.

Finally, Father argued that the trial court erred in determining that it was in the Twins’ best interest to terminate his parental rights. Father did not contest the trial court’s finding of the grounds for termination, but the Court of Appeals briefly acknowledged that it was satisfied with the trial court’s ruling on the subject. It then looked to Tenn. Code Ann. § 36-1-113(i), which provides a non-exhaustive list of factors to consider in determining whether termination is in the best interest of the child. In this case, the Court of Appeals held that because Father was unable to provide a suitable home, had not visited nor maintained a relationship with the Twins, and had not paid child support, the trial court did not err in terminating his rights.

**5. *In re Jaden W*., 2014 WL 7366683 (Tenn. Ct. App. at Knoxville, Dec. 26, 2014) from the Washington County Juvenile Court.**

Son was born in December 2012 to Mother and Father (collectively “Parents”). On August 15, 2013, Mother went to work, leaving Son in Father’s care. Allegedly, Father took a nap after feeding Son, and when he woke up two and a half hours later, Father found Son pale and unresponsive, and his leg was “twisted.” An ambulance arrived and transported Son to the local hospital. Instead of riding in the ambulance with his young Son, Father waited at home for Mother to arrive from work and drive him to the hospital. At the hospital, doctors discovered Son had bruising on his head, legs, and buttocks and had a subdural hematoma on the left side of his head. Son was then air lifted to the University of Tennessee Medical Center (“UTMC”) for more extensive treatment. At UTMC, doctors discovered Son had retinal hemorrhaging in both eyes and fractures in his left leg.

DCS was called and entered into an Immediate Protection Agreement with Parents, prohibiting them from having contact with Son for 48 hours. On August 27, 2013, Son was placed in state custody, and on September 11, 2013, Parents were arrested for aggravated child abuse and neglect. Shortly thereafter, on September 25, 2013, DCS filed a petition to terminate both Parents’ parental rights on the grounds of severe child abuse and wanton disregard. On February 18, 2014, the trial court terminated their parental rights. Parents appealed, raising several issues for review.

First, Mother and Father argue that the trial court erred in entering a no-contact order during the proceedings. The Court of Appeals quickly determined that Parents had waived this issue because, although in their brief they cited the law governing this issue, they failed to make an argument applying the law to the facts of the case.

Second, Parents asserted that the trial court erred in finding that Mother committed severe abuse by failing to protect Son from Father. Parents’ argument focused on their contention that the trial court’s finding was not based on scientific proof, citing the dissent in a United States Supreme Court case. The Court of Appeals held that because it had previously determined that that particular dissent did not apply to termination of parental rights cases and Parents cited no other authority to support their point, it reviewed this argument against the record. The facts presented at trial showed that Father had previously been arrested for domestic abuse of his ex-wife, and he likely had been abusive toward Mother. However, the Court of Appeals found that Father’s prior domestic abuse against his romantic partners was not sufficient to alert Mother that Father might harm their Son when there was no evidence of him ever exhibiting violence toward Son. Therefore, the Court of Appeals reversed this finding of the trial court.

Third, the Court addressed whether the trial court erred in terminating Mother’s rights for abandonment by wanton disregard. Once again, the Court criticized Parents’ brief, stating that it was “woefully inadequate on this issue” in that it failed to comply with Tennessee Rule of Appellate Procedure 27(7), which requires an argument section. However, citing Tennessee Rule of Appellate Procedure 2 the Court suspended the requirement of an argument section for “good cause” because a child’s welfare was at stake. The Court cautioned Parents’ attorney for the brief’s inadequacy, stating “suspension of the rules is not our usual course.”

Addressing the issue the Court noted that generally wanton disregard, which applies only to parents who are incarcerated when the petition is filed, is defined as prior criminal behavior and/or substance abuse. However, it held that an incarceration “serves only as a triggering mechanism” that allows the court to look more deeply into the family’s situation for patterns of behavior that are harmful to the child. The court noted that medical experts testified that when Son was admitted into the hospital his development was poor and had fallen below the growth curve. They further testified that Parents had missed Son’s check-up appointments and since being in foster care, Son was growing steadily. Accordingly, the Court of Appeals affirmed the decision of the trial court to terminate Mother’s parental rights on the ground of wanton disregard, finding that the testimony proved that Son was medically and nutritionally neglected in Mother’s care.

Fourth, Parents argue that the trial court erred in holding that Father had committed severe abuse against Son. The facts presented at trial indisputably showed that Son was in Father’s sole care from when Mother departed and Son was “fine,” to the time that paramedics arrived at Parents’ home to observe Son’s injuries. Therefore, Son was in Father’s care when he obtained the injuries. Medical testimony showed that Son had a subdural hematoma on the left side of his head, which according the medical experts, was likely caused by direct trauma to the head. The doctor testified that Son’s fractures were of the type that could not have been caused by accident, but rather by some sort of “twisting mechanism.” Medical opinion was that Son’s injuries could have caused death or permanent injury. Furthermore, Son’s injuries would cause developmental delays, he could no longer hear out of one ear, and at the time of trial, he was undergoing testing to determine whether his vision would be impaired. The trial court found that Parents’ testimony was unconvincing and lacking in credibility, and that their expert’s testimony was “not helpful,” offering no reason how Son’s well-being could have deteriorated so rapidly. Therefore, the Court of Appeals found that Father had committed severe child abuse under Tenn. Code Ann. §§ 37-1-102(b)(21)(A)(i) and 37-1-102(b)(23)(B).

Fifth, the Court of Appeals considered whether the trial court erred in determining that Father had abandoned Child by wanton disregard. In addition to the evidence presented regarding Mother’s wanton disregard of child, the Court of Appeals also noted that Father was taking five pain pills a day and seeking prescriptions for Lortab and diazepam at a pain clinic because the Veteran’s Administration Hospital would not prescribe it for him. Father was unemployed but purchasing 150 Lortab pills per month, even though he could receive other medications for free from the VA. The Court made it clear that although Father had prescriptions for his pain medication, “substance abuse does not require the use of illegal drugs.” Given this information and the fact that Father was the primary caretaker of Son and therefore equally as culpable as Mother for Son’s medical and nutritional neglect, the Court of Appeals affirmed the trial court on this ground as well.

Next, Parents presented three arguments that DCS failed to make reasonable efforts to reunite them with Son. First, they argued that “DCS’s failure to file a permanency plan and an affidavit of reasonable efforts… [was] fatal to the termination proceeding because such an affidavit is statutorily required under Tenn. Code Ann. § 37-1-166(c). The Court of Appeals disagreed, holding that case law had held that such a failure on DCS’s part is not fatal to the proceeding if DCS can show sufficient evidence to establish the reasonableness of its efforts. In this case, the Court held that the record contained sufficient evidence “regarding the requirements of the permanency plan, the services provided to Parents, and the outcomes of those services.”

Second, Parents contended that DCS’s failure to make reasonable efforts was demonstrated by the short length of time between the removal of Son and DCS’s filing of its termination petition. The Court of Appeals noted that Parents failed to cite to any authority that would “require DCS to wait a certain amount of time before initiating termination proceedings,” nor did the Court find such authority by its own research. Although the period of time between removal and termination was short, DCS acted reasonably given the severity of Son’s injuries.

Third, Parents argued that DCS’s efforts to reunite them with Son were not reasonable, but were instead a “sham.” The DCS case worker testified that the permanency plan required parents to maintain stable housing and employment, undergo a mental health assessment, and complete anger management, marriage, and nutritional counseling. Parents had only completed one class and had not obtained employment. Furthermore, they continued to live with Father’s parents, even though Grandfather had been convicted of carnal knowledge of a child and Parents had their own home that they could return to. Thus, the Court of Appeals determined that DCS had made reasonable efforts, but Parents had failed to take advantage of the resources provided them.

Finally, Parents argued that it was not in Son’s best interest to terminate their rights. The Court of Appeals again noted that Parents’ brief provided law on the issue, but failed to make an argument applying the facts of this case to the law. Nevertheless, it again noted that it would consider the merits of the case given its important subject matter. The Court cited Tenn. Code Ann. § 36-1-113(i), which provides a non-exhaustive list of factors for a court to consider when making its best interest determination. The trial court determined that all nine factors applied to this case in favor of terminating Parents’ rights. Taking all the facts together, including Parents’ refusal to find a suitable home, maintain housing, or accept responsibility for Son’s injuries and care, and the fact that Son was thriving in his current placement, the Court of Appeals agreed that the termination was in Son’s best interest and affirmed the decision of the trial court.

**6. *In re Camryne B*., 2014 WL 7181345 (Tenn. Ct. App. at Nashville, Dec. 16, 2014) from the Montgomery County Juvenile Court.**

This is a private grandparent visitation case. In November 2004, Daughter was born to Mother and Father (collectively, “Parents”), who were never married. In October 2008, Father filed a petition for legitimation, and Parents entered into an agreed parenting plan. Grandmother and Grandfather are Daughter’s paternal grandparents. Mother had a daughter previously, Sister, who was adopted by Grandmother in March 2013.

Daughter visited with Grandparents until summer 2012, when Parents terminated visits after disagreements arose with Grandmother. In May 2013, Grandparents filed a petition for grandparent and sibling visitation pursuant to Tenn. Code Ann. §§ 36-6-302 and 36-6-306. In September 2013, the trial court entered an order by default ordering that Grandparents have visitation with Daughter every third weekend, one week during the summer, and one day during the Christmas season. However, in December 2013, the order was set aside upon a motion by Parents. Grandparents then moved for contempt, arguing that although the trial court had ordered that Parents continue to allow visitation pursuant to the default order, Parents were not allowing visitation. In January 2014, the court entered another order clarifying that Daughter’s visitation with Grandparents should continue until the matter was heard in February 2014.

At trial, several witnesses testified, including a psychologist who had performed a forensic evaluation of Daughter and found that she was psychologically stable and healthy and had suffered no serious or severe emotional harm. Mother also testified, saying that Daughter had not been to Grandmother’s house in a year and a half and she was doing well in school and at home. In April 2014, the trial court entered an order finding that it was in the best interest of the child to have grandparent visitation and to have visitation with Sister. Parents were also found in willful contempt of the temporary visitation schedule. Parents appealed.

First, Parents argued that the trial court erred in awarding grandparent visitation. The Court of Appeals began its analysis by looking to Tenn. Code Ann. § 36-6-306(b)(1), which provides that when considering whether to award grandparent visitation, a trial court must first “determine the presence of a danger of substantial harm to the child.” Only after the court makes such a finding should it then consider whether grandparent visitation is in the best interest of the child pursuant to Tenn. Code Ann. § 36-6-306(c). The Court also clarified that the burden to show a danger of substantial harm is on the grandparents. Here, the Court of Appeals determined that the trial court failed to adhere to the proper statutory analysis in that it made no finding of a substantial harm to Daughter. In fact, the trial court made its determination primarily on the finding that Daughter should maintain a relationship with Sister, which was not the type of consideration contemplated under Tenn. Code Ann. § 36-6-306. Furthermore, the evidence revealed that in fact, Daughter was not suffering any substantial harm, but rather, after a year and a half away from Grandmother, was a well-adjusted, healthy child. Ultimately, the Court reversed this decision of the trial court, stating that “to order grandparent visitation without a finding of substantial harm violates Tenn. Code Ann. § 36-6-306 and the fundamental right of parents to raise their children as they see fit.”

Finally, Parents argued that the trial court erred in finding Parents in contempt for failure to allow temporary visitation prior to the hearing and in ordering that they spend ten days in jail, staying execution of jail time pending their compliance. The Court of Appeals noted that it reviews a trial court’s contempt decisions under the abuse of discretion standard. It also clarified that a trial court abuses its discretion when it applies an incorrect legal standard. The Court held that the trial court applied the incorrect legal standard in ordering visitation and thus abused its discretion “in imposing contempt sanctions for violation of the temporary visitation order.” Therefore, it reversed this decision of the trial court as well.

**7. *In re Jocelyn L*., 2014 WL 7148789 (Tenn. Ct. App. at Knoxville, Dec. 16, 2014) from the Anderson County Circuit Court.**

This is a DCS case involving a parent’s standing to appeal. In August 2012, DCS received a referral that Child had been sexually abused by Father. A subsequent investigation revealed that Child had made these disclosures to Mother. Later that month, DCS filed a petition for a restraining order in juvenile court, naming both Mother and Father as respondents. However, Mother was listed as a respondent only for the purpose of requiring that she not to allow Father to have contact with Child. The juvenile court entered an ex parte restraining order, ordering Father to be removed from Child’s home. Following a hearing conducted in May and September 2013, the juvenile court dismissed DCS’s petition, holding that it could not give great weight to Child’s disclosures “due to great attachment between Child [and] Mother.”

Mother appealed to the Circuit Court, and DCS filed a motion to dismiss, arguing that Mother lacked standing to appeal the decision of the juvenile court. In October 2013, the circuit court dismissed Mother’s appeal, holding that she lacked “standing to appeal the Department’s Petition from the juvenile court.” Mother appealed to the Court of Appeals.

Mother argued that the circuit court erred in dismissing her appeal of the juvenile court’s order for lack of standing. She contended that she did in fact have standing because she had filed a motion to suspend Father’s visitation rights in the juvenile court after it had modified its no contact order to allow Father supervised visitation, and because of the great attachment between Mother and Child and the court’s refusal to give Child’s disclosures credibility. The Court of Appeals began its analysis by reiterating that standing requires that before a party can appeal a trial court’s decision, the party must have been aggrieved by it. The Court further explained that “to be an aggrieved party means to have one’s legal interests injured or to have personal or property rights directly affected by operation of the trial court’s order.”

Here, the Court of Appeals determined that although Mother had filed a motion to suspend Father’s supervised visitation, it did not reveal Mother’s position as to “the central question in the Juvenile Court proceedings: did Father sexually abuse the Child.” At the time the juvenile court dismissed DCS’s petition, Mother had done nothing to show that she had aligned her position with that of DCS; Mother was simply a respondent for a limited purpose. Therefore, Mother’s motion to suspend Father’s supervised visitation was not sufficient to show that she was an aggrieved party when she had not aligned her position with DCS as to the central question at issue.

Furthermore, the Court of Appeals opined that Mother had conflated the legal meaning of the word “aggrieved” with its more common usage, meaning to be afflicted with pain. The Court acknowledged that Mother may have been upset or offended by the juvenile court’s dismissal of DCS’s petition, but such emotional anxiety does not meet the legal definition of being “aggrieved.” Therefore, the Court of Appeals affirmed the decision of the circuit court that Mother lacked standing to appeal the juvenile court’s dismissal of DCS’s petition.

**8. *In re R.L.M.*, 2015 WL 389635 (Tenn. Ct. App. at Knoxville, Jan. 29, 2015) from the Sullivan County Juvenile Court.**

This is a DCS termination of parental rights case. DCS successfully terminated Father’s parental rights on the grounds of failure to provide a suitable home and persistence of conditions. Father appealed, arguing generally that that the evidence did not adequately establish the ground or show that it was in Daughter’s best interest to terminate Father’s rights. DCS conceded that an essential element of its case was not established and thus, on appeal, the judgment of the trial court should be reversed.

The Court of Appeals began its analysis by examining the statutes under which DCS terminated Father’s rights at trial: Tenn. Code Ann. §§ 36-1-113(g)(1),(3) and 36-1-102(1)(A)(ii). The Court noted that the statutory definition of abandonment by failure to provide a suitable home specifically requires that the child was removed from the home “as a result of a petition filed in the juvenile court in which the child was found to be a dependent and neglected child.” Furthermore, for the ground of persistence of conditions, the Court noted that it had previously held that a party can only be successful on such ground when “the prior court order removing the child from the parent’s home was based on a judicial finding of dependency, neglect, or abuse.” Therefore, the Court determined that for both of these grounds, a required element is a final order, entered prior to the filing of the termination petition, adjudicating the child at issue to be dependent and neglected.

In this case, the record only contained a temporary custody order, not an adjudicatory order. Testimony from the DCS case worker referenced an adjudicatory order as did DCS’s petition to terminate. Even Father acknowledged that there was such a finding. However, the Court of Appeals held that “the mere suggestion or possibility of an order adjudicating the child dependent and neglected is not good enough…. No such order, assuming that one even exists, was admitted into evidence during the termination trial.” Without the presence of the actual adjudicatory order in the record, the grounds of persistence of conditions and failure to provide a suitable home are not proven by clear and convincing evidence. Therefore, the Court of Appeals reversed the trial court and dismissed DCS’s termination petition. Notably, the Court also clarified that its decision had no effect on the child’s custody, and custody was to remain as it had been before the Court of Appeals’ decision.

**9. *In re Mackenzie N., et al*., 2014 WL 6735151 (Tenn. Ct. App. at Nashville, Nov. 26, 2014) from the Overton County Chancery Court.**

This is a private termination of parental rights case. In September 2010, Grandmother went to California to visit Mother and Children after Father’s death. When she arrived, Grandmother became concerned about the Children’s living conditions. In February 2011, the Orange County Superior Court appointed Grandmother guardian of Children, which gave Grandmother discretion to regulate visitation between Mother and Children. During the next several months, visitation attempts broke down due to Mother’s inability to pay for a monitor to supervise her visitation with Children. In February 2012, Grandmother returned to Tennessee with Children after receiving permission from the California court.

Upon her return to Tennessee, Grandmother sought to be appointed guardian over Children in the Overton County Chancery court. Mother sought to participate in the hearing on Grandmother’s petition by telephone, but the court denied her request and appointed Grandmother as Children’s guardian in July 2012. Mother never visited Children in Tennessee, but she had weekly telephone calls with them. Eventually, Grandmother asked that Mother cease calling Children because Grandmother felt that the phone calls were upsetting them.

In March 2013, Grandmother filed a petition for adoption of a related child and termination of parental rights in the Overton County Chancery Court. In December 2013, the trial court entered an order terminating Mother’s parental rights on the grounds of abandonment by willful failure to support and by willful failure to visit in the four month period preceding the filing of the petition. Mother appealed, arguing that the trial court erred in determining that her failure to support or visit Children was willful.

The Court of Appeals began by clarifying that in termination of parental rights cases, “willful conduct consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent.” A parent does not willfully abandon his child when circumstances outside his control prevent him from paying support or visiting. The Court then turned to the specific circumstances in this case.

First, it examined Mother’s failure to support Children, noting that it was undisputed that Mother had not paid any support for Children during the relevant four month period. However, the Court noted that the evidence at trial revealed little about her ability to pay. Testimony revealed Mother’s hourly wage, but failed to elicit the number of hours Mother worked. Furthermore, no evidence suggested Mother had any other available resources to support her Children, rather than a boyfriend who received state assistance. Mother also testified that she had no disposable income and that she often lives in poverty. Specifically, in the two months preceding the hearing on the termination petition, Mother had taken her prescription medication because she could not afford it. Noting the heightened standard of proof in termination of parental rights cases, the Court of Appeals determined that given such little information regarding Mother’s income and finances, Grandmother failed to prove by clear and convincing evidence that Mother’s failure to support was willful.

Next, the Court considered whether Mother’s failure to visit was willful. Mother argued that Grandmother had obstructed Mother’s efforts to visit Children. Mother presented an email from Grandmother instructing Mother to stop calling the Children or Grandmother would block Mother’s phone number. The Court determined that although this email was sent two weeks after the termination was filed and thus outside of the relevant time period, it demonstrated that “mother made attempts to contact the children during the relevant four month period and that Grandmother rebuffed those attempts.” Mother presented another email, also composed outside the relevant four month period, in which she begged Grandmother to allow her to speak with Children. Again, the Court determined that this email showed that “Mother believed her attempts to contact the children were being obstructed by Grandmother.” Although these emails indicated that Grandmother had been somewhat of a hindrance to Mother’s ability to speak with her Children, the Court determined that Grandmother’s actions did not amount to a “significant restraint” as to preclude a finding of willfulness, when Mother never requested to visit her Children and the phone calls with Mother’s only attempts at communicating with them.

However, the Court made clear that although Grandmother was not a significant restraint, it still had to determine whether Mother’s failure to visit was willful. The Court of Appeals noted that the Tennessee Supreme Court had concluded in a prior case that parents are presumed to know of their duty to visit their Children. Therefore, the Court of Appeals assumed Mother knew she had an obligation to visit; it simply had to determine whether she had failed to do so willfully. The Court again noted that Grandmother had presented little evidence regarding Mother’s income, and therefore, it was unable to determine whether Mother had the financial means to visit. However, in her testimony at trial, Grandmother acknowledged that her move from California to Tennessee created an obstacle for Mother to visit her Children. Again, the Court of Appeals determined that Grandmother had failed to present sufficient evidence to establish that Mother’s failure to visit was willful. Thus, because Grandmother had failed to establish a ground to terminate by clear and convincing evidence, the decision of the trial court was reversed.

**10. *In re Madison M., et al.*, 2014 WL 4792793 (Tenn. Ct. App. at Nashville, Sept. 25, 2014) from the Overton County Circuit Court.**

This is a DCS dependency and neglect case. In January 2007, Daughter was born to Mother. In 2008 and 2011, Mother gave birth to Sons, and in 2009, Mother and Children began residing with Stepfather. In August 2012, after receiving a referral that Daughter was the victim of sexual abuse perpetrated by Stepfather, DCS filed a petition to adjudicate the Children dependent and neglected, alleging that all were at risk of abuse. The juvenile court entered an ex parte restraining order, bringing the children into protective custody and prohibiting Stepfather from having further contact with the Children. After a hearing, the court allowed Stepfather to have limited supervised visitation with Sons, and the Children could live with Mother if Stepfather moved out, which he did.

On April 22, 2013, the court entered an adjudicatory and dispositional hearing order holding that the Children were dependent and neglected: Daughter based on the sex abuse she suffered by Stepfather, and Sons due to their being at substantial risk of harm in Stepfather’s care. The juvenile court found that Daughter was the victim of severe abuse pursuant to Tenn. Code Ann. § 37-1-102(b)(21)(C).

Stepfather appealed to circuit court, and in his pre-trial brief, he argued that Daughter’s statements in her forensic interview should not be admitted because they were not trustworthy under Tennessee Rule of Evidence 803(25). DCS filed a motion asking that the circuit court admit the juvenile court transcript of two witnesses who had since come unavailable. Specifically, DCS sought to have the testimony of Dr. Berryman, a clinical psychologist, entered because she was exempt from subpoena pursuant to Tenn. Code Ann. § 24-9-101(a)(6), which provides that psychologists are exempt from subpoena at trial. DCS’ motion also mentioned that counsel for Stepfather agreed that the transcript of Dr. Berryman’s testimony could be admitted. DCS also sought to have the transcript of the testimony of Daughter’s former preschool teacher, Ms. Perry, entered because DCS was unable to locate Ms. Perry. She was no longer employed by Daughter’s school system and the school system refused to give DCS information as to her whereabouts. DCS had also unsuccessfully attempted to contact Ms. Perry via social media. DCS argued that the prior testimony of both witnesses should be admitted because Stepfather’s counsel had had the opportunity to cross-examine both witnesses.

At oral argument on the pre-trial briefs, Stepfather’s counsel acknowledged that he had previously agreed that prior Dr. Berryman’s testimony should be admitted, but “he asked the trial court to exclude the prior testimony of both witnesses on the basis that the circuit court is required, by statute, to ‘hear the testimony of witnesses and try the case de novo.’” The circuit court allowed the transcripts of both Berryman and Perry’s testimony into evidence, holding that the witnesses were unavailable. The court also admitted the video of Daughter’s forensic interview.

After a hearing in which several witnesses testified and numerous exhibits were admitted, the circuit court ruled that Daughter was the victim of severe child abuse perpetrated by Stepfather, that all Children were dependent and neglected, and that it was contrary to the Children’s best interests to be in Stepfather’s custody, thus creating no less drastic alternative to restraining Stepfather from being around the Children. Stepfather appealed to the Tennessee Court of Appeals.

First, Father argued that the trial court erred in admitting transcripts of the prior testimony of Dr. Berryman and Ms. Perry in lieu of requiring live testimony. The Court of Appeals first clarified that on appeal, a trial court’s evidentiary rulings are reviewed using an abuse of discretion standard, which is a less rigorous review and decreased likelihood that the decision will be reversed. It then looked to Tennessee Rule of Evidence 804(b)(1), which governs former testimony. The rule provides that former testimony may be admitted “if the party against whom the testimony is now offered had both an opportunity and a similar motive to develop the testimony by direct, cross, or redirect examination.” The Court then noted that Tennessee Rule of Evidence 804(a)(5) governs unavailability of witnesses and defines unavailability as “situations in which the declarant… is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance by process.”

Stepfather conceded that Berryman and Perry were both unavailable under the meaning of the rule; however, he argued that on appeal, that on appeal to the circuit court, a new trial should be conducted de novo pursuant to Tenn. Code Ann. § 37-1-159(a) and allowing transcripts of testimony from the juvenile proceeding is in conflict with the requirement that the testimony be new. The Court of Appeals rejected this argument, clarifying that a trial de novo “does not mean that an appeal actually erases any record of the juvenile court proceeding, or the testimony given therein, and it does not require the circuit court to literally proceed as if the juvenile court case never happened.” In fact, Tenn. Code Ann. § 37-1-159(c) requires that the juvenile court’s entire record of the case be taken to circuit court on appeal and thus contemplates that the circuit court will consider the juvenile court record, so long as it does not solely rely on the record without hearing other testimony and new evidence. Therefore, in this case, the Court of Appeals held that because the former testimony was admissible under Rule 804(b)(1) and because the circuit court did not solely rely on the juvenile court record, but rather heard the live testimony of several witnesses and considered numerous exhibits, the circuit court did not err in allowing the transcripts of the two unavailable witnesses to be considered.

Second, Stepfather argued that the video of Daughter’s forensic interview should not have been admitted into evidence because it was not trustworthy, as is required under Tennessee Rule of Evidence 803(25) which allows for child victims’ statements to be hearsay exceptions. In considering this exception, courts must consider the motivation of children to lie and the motivation of adults to coach children. Furthermore, a court must consider whether there is evidence corroborating the statements, the child’s demeanor, the time between the statement and the event descried, and whether the environment was coercive or suggestive. Stepfather argued that Daughter had difficulty verbally distinguishing between the truth and a lie and was developmentally delayed with language impairment, and thus her statements were not trustworthy.

The Court of Appeals acknowledged the issues that Stepfather pointed out; however, it ultimately rejected his argument, finding that Daughter “was unmistakably clear in communicating the details of the abuse to several people, despite her language impairment.” She made disclosures to several adults including her Dr. Berryman, her school counselor, her preschool teacher, a teacher’s aide, and her statements were all consistent. Her teacher, guidance counselor, and the psychologist all testified that Daughter was a truthful child, and the Court noted that these were neutral parties who had no reason to lie. Daughter gave specific details about the abuse, demonstrated how it happened, the manner in which it happened, and when it happened. She further described how Stepfather reacted when she told him to stop. Her statements were made spontaneously, first to her teacher who had simply asked the class about their weekend. Therefore, the court determined that the settings surrounding the statements were not coercive or suggestive. The Court also noted that Mother had consistently refused to believe Daughter and was adamant that Stepfather had not perpetrated the abuse. Therefore, the Court additionally concluded that Daughter had not been coached by Mother. Given all these factors, The Court of Appeals determined that the trial court did not abuse its discretion in allowing the video of Daughter’s forensic interview into evidence and affirmed its decision.

**11*. In re Kaiden T*., 2014 WL 7149215 (Tenn. Ct. App. at Nashville, Dec. 15, 2014) from the Overton County Chancery Court.**

This is a private termination of parental rights case. In November 2005, Son was born to unmarried Father and Mother. Initially, Mother had primary custody, and then, when Son was a year old, Mother and Father agreed to joint custody. However, after Mother was arrested in March 2010 for selling drugs, Mother and Father entered into an agreed order where Father was granted custody and Mother was allowed only supervised visitation. She was allowed to visit at Son’s sporting events and two weekly telephone calls. Mother was later ordered to pay child support.

In January 2013, Father and Stepmother petitioned to terminate Mother’s parental rights and for adoption by Stepmother, alleging Mother had abandoned Son by willfully failing to visit and willfully to pay support. A trial on the petition was conducted in January 2014 with several witnesses providing testimony, which revealed that Mother had attended less than ten of Son’s sporting events since 2010. Mother testified that on two occasions she had requested to visit with Son and Father failed to arrange the visits. Notably, both occasions were outside the statutorily relevant four-month period. Mother provided no other instances where she was denied a request to visit with Son. Mother’s last scheduled visitation was Christmas 2010, and although Father and Stepmother had arranged for Mother to visit again during Christmas 2011, Mother failed to attend. At this point, concerned about Mother’s empty promises to Son, Father and Stepmother ceased allowing Mother’s court-ordered telephone calls with Son until after their termination petition was filed.

It was undisputed that Mother never paid child support. Mother testified that she assisted her fiancé in raising chickens for a living, and in return he provided her a place to live for no charge. She testified that she was unable to gain employment that paid wages because she did not have a driver’s license. In 2008, Mother received a $5,000 fine, and her license was suspended until she paid the fine in full. At the time of trial, Mother had $500 left to pay of the fine and testified that she would pay child support when she regained her license and employment. After the hearing, the trial court entered an order finding that Father and Stepmother had proven by clear and convincing evidence that Mother had abandoned child by failing to support and visit. The trial court also found that it was in the best interest of Son that Mother’s rights be terminated. Mother appealed.

First, Mother argued that her failure to pay support was not willful because she lacked the income to do so and could not obtain employment because she did not have a driver’s license. The Court of Appeals noted that the trial court found that she and her fiancé raised chickens together, and she could have paid support from the income received from that. In addition, the trial court found that Mother had not even attempted to find employment that paid wages from which she could provide support for Son. Furthermore, the Court of Appeals noted that although Mother testified that she could not maintain employment because her driver’s license was suspended, her driver’s license was suspended in 2008, but she was employed at a gas station without a driver’s license until 2011. Therefore, the Court of Appeals affirmed the decision of the trial court and determined that Mother’s failure to pay support was willful.

Next, Mother argued that the trial court erred in finding that her failure to visit was willful because “Father and Stepmother thwarted her efforts by repeatedly ignoring and/or denying her scheduled weekly telephone calls with the child.” The Court of Appeals began by clarifying that in general, telephone calls are not to replace in-person visitation for the purposes of whether a parent has abandoned a child. However, on some occasions, when significant distances make it difficult to visit, telephone calls are in helpful in determining whether the failure to visit was willful. At this point, the Court cautioned that “Father and Step-mother’s unilateral attempt to modify the court order by ignoring or avoiding Mother’s telephone calls to the child is not to be condoned. Indeed, the trial court acknowledged that this behavior may have warranted a finding of contempt if Mother had brought that to the court’s attention; however, it was not.”

Even so, the Court of Appeals noted that during the relevant four-month period, Mother had approximately fifteen court-authorized opportunities to visit Son during his sporting events. Of these fifteen, Mother only attempted to visit Son at a karate lesson once. Unfortunately, Son was not there that day, but no testimony indicated that Father and Stepmother had planned this, nor that they even knew Mother was planning on attending that particular day. In fact, this attempt was the only time in a year and a half that Mother attempted to visit Son. Therefore, the Court of Appeals determined that the evidence did not prove that Stepmother and Father had thwarted Mother’s efforts to see her son, and affirmed the trial court’s ruling that Mother willfully failed to visit Son during the relevant statutory period.

Finally, Mother argued that although the trial court had concluded that it was in Son’s best interest that Mother’s rights be terminated, the trial court failed to identify sufficient findings of fact to form a proper basis for its conclusion. The Court of Appeals cited Tenn. Code Ann. § 36-1-113(k), which requires that trial courts must make specific findings of fact and conclusions of law in termination cases. Furthermore, the Court cited a Tennessee Supreme Court case in which it determined that the required findings for grounds and for best interest were not made and further stated “we may not conduct de novo review of the termination decision in the absence of such findings.” *In re Angela E*., 303 S.W.3d 240, 255 (Tenn. 2010). In this case, regarding the best interest element, the trial court simply found that Son had bonded with Stepmother and Father and Stepmother had been providing all the support and acting as parents to Son. The Court of Appeals held that this finding was inadequate and failed to consider the factors in Tenn. Code Ann. § 36-1-113(i). The Court acknowledged that its ruling would prolong uncertainty for the child, but reversed and remanded the case to the trial court to make specific findings of fact concerning the best interest component of the termination.

**12. *In the Matter of Terry S.C., Trevin S.C. and Trustin S.C*.., 2014 WL 3808911 (Tenn. Ct. App. at Nashville, July 31, 2014) from the Lincoln County Juvenile Court.**

This is a termination of parental rights case involving three male children born in 2000, 2002 and 2004. In 2004, DCS filed a Petition to Adjudicate Dependency and neglect upon Mother’s arrest for Assault on an Officer, Disorderly Conduct d Possession of Drug Paraphernalia. The juvenile court entered a Court Ordered Safety Plan stating that the children remain in their current placement with their maternal Grandmother, but Grandmother advised DCS that she could not care for the children. DCS subsequently filed a Petition for Temporary Custody and the juvenile court awarded custody of the children to DCS. DCS then created permanency plans for each child, requiring Mother to maintain regular, positive contact; to participate in alcohol/drug assessments, psychological evaluations and parenting assessments, and to follow all recommendations; to obtain/maintain stable housing; and to demonstrate legal financial stability. Mother signed the plans and they were ratified in January 2005.

In June 2005, DCS filed a Motion to Suspend Visitation as Mother had acted inappropriately during several visitation sessions. Mother failed to appear at a hearing on the motion, and the juvenile court suspended her visitation until she completed drug rehabilitation and could visit the children without acting disruptively. At a review hearing in 2005 at which Mother failed to appear, the juvenile court entered a Review Order stating that Mother was not in substantial compliance with permanency plans. At one point, the children were again placed with Grandmother and in November 2005 DCS filed a Motion for Divestment of Temporary Legal Custody seeking transfer of custody to Grandmother.

In June 2007, while Mother was incarcerated, an Aunt filed a petition seeking custody of the children to which Grandmother consented. Custody was granted to Aunt. But in March 2012, DCS filed a Petition for Temporary Legal Custody and Ex Parte Order indicating that Aunt was no longer able to care for the children. At a May 2012 preliminary hearing, an Order found probable cause that the children were dependent and neglected. A Family Permanency Plan created in April 2012 requiring Mother to set up visitation, pay child support, submit to random drug screens, participate in drug/alcohol assessments and mental health intakes, attend parenting classes, and provide proof of stable housing and legal income was ratified at a May 2012 hearing at which Mother failed to appear.

In June 2012, Mother was in Louisiana and the juvenile court ordered DCS to transmit an ICPC priority placement request to Louisiana. In July 2012, the juvenile court entered a Final Order of Adjudication and Disposition, finding the children dependent and neglected by clear and convincing evidence. In September 2012, a second Family Permanency Plan was entered, adding adoption as a secondary goal.

In March 2013, a permanency hearing was held to which Mother failed to appear. The juvenile court ordered that the permanency plan goal should be changed to “a sole goal of adoption” since it found DCS making reasonable efforts to assist Mother but found that Mother was not in substantial compliance, her ICPC home study was not approved, and she had not visited the children nor maintained contact with her DCS caseworker. In April 2013, DCS filed a Petition to Terminate Parental Rights against Mother in Lincoln County, alleging abandonment by willful failure to visit; abandonment by willful failure to support; abandonment by failure to establish a suitable home; substantial noncompliance with a permanency plan; and persistence of conditions. After an August 2012 trial, the juvenile court entered a thorough Order terminating Mother’s parental rights on all five grounds. Mother appealed, presenting the following issues for review: 1) Whether grounds for termination existed; 2) Whether the trial court erred in denying Mother’s motion for a mental evaluation; and 3) Whether termination was in the children’s best interests.

On appeal, the Court bemoaned Mother’s seven-sentence argument in her appellate brief as “woefully insufficient.” The Court finds DCS successfully proved the ground of abandonment by failure to visit, Tenn. Code Ann. 36-1-113 (g)(1), 36-1-102 (1)(A)(I). However, the Court found that DCS failed to prove that Mother abandoned the children by willfully failing to support them because it failed to present any evidence regarding Mother’s income, expenses, or support obligation. The Court also found that DCS did not succeed in proving that Mother abandoned the children under Tennessee Code Annotated section 36-1-102 (1)(A)(ii) by failing to provide a suitable home. The Court found Mother’s noncompliance with permanency plans was substantial, and that there was a persistence of conditions.

The Court held that DCS had made reasonable efforts on Mother’s behalf. Essentially, DCS’ efforts had been futile because Mother’s transient lifestyle had prevented DCS from providing her with services related to her issues with drug and alcohol abuse, mental illness, housing, parenting and unemployment. Lastly, the Court found that juvenile court did not abuse its discretion in denying Mother’s request to halt the trial for a mental evaluation. They note that ground of mental incompetence was not pled against mother and DCS made no allegation that she was mentally unfit to care for the children. The juvenile court also heard Mother’s testimony and observed her demeanor, finding her to be coherent.

**13. *In re A.S.C*., 2014 WL 4269114 (Tenn. Ct. App. at Nashville, August 9, 2014) from the Circuit Court for Sevier County.**

This is a termination of parental rights case between private parties. Mother and Father were never married; they worked together at an entertainment venue and dated only a few times before Mother became pregnant with Child in 2008. Child was born in 2009. Mother testified that Father was not happy to hear the news of her pegnancy. Father did not speak to her for a while after she informed him, and he told her that he and his girlfriend decided it would be for the best if Mother had an abortion. For his part, Father testified that it was Mother’s body and he asked her if she wanted to consider adoption or abortion.

Mother testified that she tried to get Father involved during the pregnancy but he “didn’t really seem interested.” A co-worker of Child’s maternal grandmother held an informal “mediation” between Mother and Father to go over both parents’ responsibilities with Child; however, Mother testified that Father was upset after the mediation and did not like the obligations implied. He declined to participate in a second mediation. For his part, Father testified that there was not much communication during the pregnancy, but that he did talk to Mother and would rub her stomach sometimes during work. Father testified that he learned from his girlfriend that Mother had gone to hospital for the birth of Child. Father went to see Child just after he was born. Mother let him hold Child and take pictures. Father had no other visits with Child. Father was unemployed at this point and did not provide health insurance or any support; Mother support Child fully.

In late 2009, when Child was six months old, DHS brought a child support action against Father. Around the same time, Father and his mother (P.S.) saw a family law attorney who provided them with a form parenting plan that P.S. delivered to Mother. Neither Father nor P.S. disputed Mother’s testimony that she never told them that they were not welcome to see Child, but P.S. testified that her couple visits were uncomfortable.

Mother, in her sole name, filed a petition to terminate Father’s rights on April 18, 2011. Father responded with a handwritten note asserting that he was contesting the case. In June 2011, Mother married Stepfather and they immediately file a motion to join Stepfather in the pending action and a motion for permission to file an “Amended Petition to Terminate Parental Rights and for Adoption by a [Stepparent]” with the amended Petition attached. In August 2011, Mother moved for default judgment based on Father’s failure to plead and make a proper defense.

In September 2011, Father responded by filing a counterclaim in which he requested to be designated as Child’s “alternate residential parent” and submitted a proposed parenting plan providing him with standard visitation every other weekend and one evening during alternating weeks. He also objected to proposed adoption of Child by Stepfather.

In August 2012, an unsuccessful mediation was held, and in October 2012, following a hearing, the trial court entered an agreed order allowing Mother and Stepfather to file and the Amended Petition and joining Stepfather as a party. In March 2013, the amended Petition was filed. After a bench trial, the Court terminated Father’s parental rights on abandonment grounds for failure to support and to visit. Father appealed, presenting the following issues: 1) whether the trial court erred in using the four-month period preceding the filing of the original Petition; 2) whether the trial court erred in terminating Father’s rights on basis of his failure to pay child support; 3) whether the trial court erred in terminating Father’s parental rights on the basis of his failure to visit the child; and 4) whether the trial court erred in terminating Father’s parental rights on the basis that it was in the best interest of the child.

The Court of Appeals affirmed with modifications. Addressing the four-month issue, the Court stated the trial court used the four-month period preceding the filing of the original termination petition by Mother rather than the time period preceding the filing of the amended petition. As earlier noted, Mother initially filed a petition to terminate on April 18, 2011. Following her marriage to Stepfather, on June 27, 2011, she filed a motion to join him and a motion for leave to file an amended petition to terminate and to low adoption by Stepfather. On October 5, 2012, the trial court entered an agreed order granting the motions. The Amended Petition was not filed until March 4, 2013, the day before trial.

At the outset of trial, the issue of which four-month period was applicable to the allegations of abandonment was briefly discussed, with the Counsel for Mother and Stepfather asserting that child support was not paid for four months preceding the filing of this latest petition. The Guardian ad litem, contended that the four month period investigated needed to be from the amended petition. Stepfather’s counsel argued that this was an amended petition filed under Rule 15 of the Rules of Civil Procedure, so all grounds related back to the time of the initial petition being filed. Ultimately, Mother’s position prevailed, with the trial court finding that the Amended Petition related back to the filing of the original Petition pursuant to Rule 15 of the Tennessee Rules of Civil Procedure. As a result, the trial court considered only Father’s conduct during the four-month period immediately preceding the original petition in April 2011.

The Court of Appeals sided with the Guardian ad litem. The Court acknowledged that Mother clearly lacked standing to file a petition to terminate Father’s rights by herself; therefore, the original termination petition she filed in April 2011 was null and void. Thus, there could be no “relation back” to this void petition. The four-month period from November 4, 2012, until the filing of the Amended Petition on March 4, 2013, was the applicable period.

Next, the Court considered the evidence regarding Father’s payment of child support in the four applicable months. By the time trial was held in March 2013, Father had paid his child support in full each month since July 2011. The Court thus concluded that the trial court erred in terminating Father’s rights for failure to pay child support and vacate this ground for termination.

The trial court also terminated Father’s rights for failure to visit, and again erred in considering the wrong four-month period; however, the Court concluded that the erroneous calculation is of no consequence as Father had only seen Child once in the Child’s life. Accordingly, the Court of Appeals affirmed on failure to visit. The Court also affirmed the trial court’s finding of abandonment based on Father’s willful failure to provide support to Mother in the months before the Child was born, and the finding that the Child’s best interest was served by permanently severing the rights of the father he had never known.

As an additional issue, Mother asserted that Father’s appeal should be dismissed for failure to comply with Tenn. R. App. P. 8(a), which governs appeals as of right in parental termination cases and provides that a notice of appeal in a termination of parental rights proceeding “shall indicate that the appeal involves a termination of parental rights case.” According to the Court, Mother is correct in noting that Father’s notice of appeal indicates only that it is a “civil” action. However, the notice of appeal reflects that a copy was sent to Mother’s counsel of the same day it was filed and was properly docked as a parental termination case. Accordingly, the requested relief was denied.

**14. *In re Aaron E*., 2014 WL 3844784 (Tenn. Ct. App. at Nashville, August 4, 2014) from the Juvenile Court for Maury County.**

This is a DCS termination of parental rights appeal. On October 8, 2010, Mother returned to her apartment after work to find the ten-month-old Child unable to move his leg. Child had been in care of Boyfriend, who also lived in the apartment. Mother took Child to the hospital, where he was diagnosed with a broken leg. He also had broken blood vessels in his eye and bruises to his ear and jaw. The hospital care team found Child’s injuries inconsistent with Boyfriend’s explanation of events and reported the injuries to DCS.

On October 12, 2010, DCS filed a Petition for Temporary Legal Custody of Child. In December 2010, the Juvenile Court for Maury County found Child to be dependent and neglected and granted DCS temporary custody. The Juvenile Court also ratified a permanency plan. The plan, whose goal was returning Child to Mother, was a product of a meeting between Mother and Father and family service worker Teresa Taylor. As conditions leading to the placement of Child in state custody, the plan listed Mother’s reaction to her child’s injuries and concern over her ability to select proper caretakers. It also identified Mother’s inability to recognize warning signs of possible abuse, and Mother’s lack of a support system. The plan identified several action steps and desired outcomes, such as Mother obtaining daycare and appropriate caretakers, Child’s medical and nutritional goals being met, and Mother’s securing a plan for transportation. The plan gave a target date of February 3, 2011, to return Child to Mother.

Mother became steadily employed, gotten a car, and her residential situation appeared stable. DCS petitioned for a trial home placement, and in June 2011, the Juvenile Court approved the trial home placement, relieving DCS of temporary custody of Child and granting custody to Mother. The placement did not go well: Mother fell behind in paying rent and her ability to pay for childcare was a concern. The Child’s Guardian ad Litem, with support of DCS, petitioned for a sixty-day extension of the trial home visit in hopes that Mother’s financial situation would stabilize. The Juvenile Court granted this extension.

However, in November 2011, DCS petitioned to revoke the trial home placement because Mother lost her job. DCS alleged that it had attempted to aid Mother with regard to housing, child care and budgeting, but Mother had not made necessary efforts. The Juvenile Court revoked the trial home placement pending a hearing scheduled for later November 2011. However, Mother waived the hearing and Child continued in custody of DCS.

DCS petitioned for child support from Mother. The Juvenile Court set support at $285/month to commence January 1, 2012. Mother’s grossly income, according to a child support worksheet dated December 2011, was $1,256.66. From January 1 to July 1, Mother failed to make any child support payments and DCS subsequently filed a Petition to Terminate Parental Rights against Mother and Father on June 27, 2012. Father’s whereabouts were unknown, and the Juvenile Court terminated his rights at a separate hearing. Mother’s matter proceeded to trial on the grounds of Mother’s abandonment by failure to support and persistence of conditions.

The Juvenile Court conducted a one-day trial in November 2013. On December 31, 2013, the trial court entered an order terminating Mother’s parental rights on both grounds pled.

Mother appealed, contesting both the grounds and best interest. In respect to abandonment, Mother argued that DCS failed to prove that no support payments were made by Mother during the applicable time period. She also argued that, even if DCS proved a failure to pay, any failure was not willful. Whether a parent failed to visit or pay child support is a question of fact, while whether such failure to visit or pay is willful is a question of law. For evidence of non-payment of child support, DCS introduced two documents showing $0.00 in payments from Mother beginning January 1, 2012. The first payment reflected was made on July 17, 2012, a few weeks after the petition was filed. From that point through November 2, 2013, $4,132 in payments were received. The Juvenile Court admitted both documents into evidence under Tenn. Code Ann. § 24-7-121(a), which provides that these records shall be the official records for all payments.

At trial, Mother objected to the introduction of the documents on the basis that they constituted hearsay. On appeal, she argued that, because a parental termination action has a “higher clear and convincing evidence standard,” this Court should “pay close heed to the limiting language…that no conclusive presumption of correctness attaches” to the documents. The Court disagreed. The documents were self-authenticating and, for that reason, are considered non-hearsay. The Juvenile Court properly overruled the hearsay objection.

Once admitted, the documents “constitute[d] prima facie evidence” of Mother’s failure to pay support. The burden then fell on Mother to rebut the evidence “by alternative or conflicting documentary evidence of payment of the support obligation.” Mother presented no evidence of payment of support for the time period in question; therefore, the trial court properly found that Mother had failed to pay support during the four-month period preceding the filing of the petition to terminate parental rights.

The Court recognizes that failure to pay support does not lead to termination of parental rights unless it is found to be willful. In this case, the capacity of Mother to pay child support during the four-month period preceding the petition was in question. The trial court found that Mother was unemployed for some of these four months, but that her failure to pay support was still willful. When a parent is able to work but not actively pursuing work or any other source of legal income, failure to support can be willful.

Although the record contains scant evidence regarding important factors bearing upon her capacity to pay support, the record amply shows Mother’s willingness to work. In fact, one of the reasons DCS petitioned for a trial home placement was that Mother had maintained a job for almost a year. Once Mother lost her job, a case worker and the foster mother testified that they tried to assist Mother in finding employment but that Mother never followed up. Mother herself testified she did apply for jobs. Rather than credit any of these testimonies, the trial court found willfulness based solely upon Mother’s job status as a Shell gas station. Mother had been gainfully employed at Shell from November 2011 until sometime in spring of 2012. Mother was sent home from work by her supervisor and either stopped showing up because she thought she had been terminated or was terminated. The trial court found it unlikely that Mother made any attempts to contact her supervisor at Shell to keep her job, and willful unemployment can equate to a willful failure to support. However, the Court of Appeals noted that Mother had testified that she had not left the job voluntarily and DCS called no witness from Shell to rebut her. In light of the foregoing, the Court could not say that clear and convincing evidence established that Mother willfully failed to fulfill her child support obligation during all four months immediately preceding the June 27, 2012 petition, and DCS failed to carry its burden of proof on this ground for termination.

In respect to persistence of conditions, DCS alleged the existence of the following conditions: Mother’s inability to determine appropriate caregivers for her child, resulting in the child’s broken leg; Mother’s lack of suitable housing; Mother’s willful unemployment since November 2011; and Mother’s lack of a stable residence. The Trial Home Visit was revoked because Mother was not providing proper care, had lost her job, was facing eviction, was not providing proper medical care, and did not have the ability to make arrangement for the Child.

Notably, Mother did not always avail herself of all the assistance and support offered through DCS. For instance, Mother declined to accept mental health treatment multiple times. Most of the conditions found by the trial court had existed since at least November of 2011 when Mother was fired from Shell, and these issues remained several months after the filing of the petition. The Court concluded that the trial court did not err in terminating Mother’s parental rights based upon the ground of persistence of conditions.

The Court, however, noted that in finding persistent conditions, the trial court erroneously found that the issues of “employment, housing, transportation and the provision for the child’s basic necessities existed” when Aaron was placed in DCS custody, were identified as barriers to reunification, and were addressed in the initial permanency plan. The Court of Appeals found this statement overly broad. In fact, the permanency plan made no reference to Mother’s employment and housing situation. If employment or housing had been barriers to reunification since the time of the child’s initial removal, Ms. Taylor could not have testified that Mother’s employment for almost a year and maintenance of the same residence influenced DCS’s decision to petition for a trial home placement sometime prior to June 20, 2011.

The Court also concluded that there was clear and convincing evidence that it was in the child’s best interest to terminate Mother’s parental rights because of the risks a reunion posed. For these reasons, This Court affirmed the Juvenile Court’s judgment terminating Mother’s parental rights.

**15. *In re Colby et al*., 2014 WL 3778562 (Tenn. Ct. App. at Nashville, July 30, 2014) from the Circuit Court for Maury County.**

This is Mother appeal of the termination of her parental rights. The child, C.W., was born to Mother and Father on October 30, 2010. On January 10, 2011, bad weather forced Mother and Father to stay home, and C.W. was in perfectly good health. Mother left for work at 7 AM the next day, leaving C.W. at home with Father. Mother received texts from Father saying that CW began projectile vomiting around 11 A.M. The vomiting continued after Mother returned home. Mother called a pediatrician and followed the advice, but C.W. continued vomiting so Mother took him to the ER. The ER physician diagnosed C.W. with a virus and sent him home. C.W. continued the vomiting for two more days when Mother noticed a bulge in the soft spot on top of his head. She took C.W. to a clinic on January 14 and was referred to Vanderbilt Medical Center for evaluations. At Vanderbilt, child abuse pediatrician Dr. Lowen examined C.W. Her results were unremarkable but she was concerned because C.W. had internal brain injuries.

After running tests, Dr. Lowen diagnosed C.W. with chronic subdural bleeding and acute bleeding and contusions on the front part of the brain. She testified that the injuries were very serious and inflicted on separate occasions with great force. The first injuries (subdural bleeding) were at least two weeks old, but the second injuries (acute bleeding and contusions) were only days old. C.W. was too young to cause these injuries to himself, and Dr. Lowen ruled out a blood disorder, so attention turned to the parents. Since Mother was unable to offer an explanation for the injuries, Dr. Lowen concluded that this was an abusive situation. She testified with a reasonable degree of medical certainty that the second set of injuries were the result of abusive trauma.

Vanderbilt notified DCS and law enforcement to investigate for possible child abuse. Neither Mother nor Father was able to provide a credible explanation for either injury. Mother divulged to CPS worker Ms. Pellowski that Father had a history of domestic violence against her,which Father corroborated. Mother and Father’s stories were mostly consistent except regarding physical discipline of the children (C.W.’s half-brother, E.K., was four at the time). Mother stated she never physically punished the children, whereas Father admitted to having spanked both children and seeing Mother use physical punishment. Father also told Ms. Pellowski he was concerned about Mother’s frustration with C.W.

During police investigations with Detective Camargo, Father stated that Mother had an anger problem. Mother indicated to Det. Camargo that she may have caused one of the injuries to C.W. when she flopped down too hard while holding him. Father told him he felt somewhat responsible for the more recent injury as he alone had been with C.W. on the day it was likely inflicted, but that he would never intentionally hurt C.W. and was not sure how the injuries were sustained. Mother and Father provided other theories of how he might have sustained his injuries but had no specific theories and notably never mentioned a “bouncy seat.”

On January 20, 2011, DCS filed a petition with the Juvenile Court of Maury County to have C.W. declared dependent and neglected. The Juvenile Court granted temporary custody of C.W. to the DCS the next day and conducted hearings on the dependency and neglect petition in January 2012. .At this hearings, Mother and Father proposed that C.W.’s injuries may have been caused by E.K.’s pushing him in a bouncy seat. On April 17, 2012, the Juvenile Court filed an order finding C.W. to be a dependent and neglected child. The Juvenile Court found that DCS carried its burden of proving that C.W. was dependent and neglected, that he suffered abuse, and that he suffered severe child abuse. Mother and Father both filed appeals to the circuit court for de novo review of this decision.

On October 8, 2012, the Juvenile Court released specific findings of fact to supplement its previous order. It recounted the testimony of the two medical expert witnesses (Dr. Lowen and the Parents’ expert Dr. Houda) who agreed that C.W. suffered a traumatic brain injury that could not have been accidental or self-inflicted. These findings presented the three areas over which the experts disagreed: whether the trauma should be labeled as abusive; whether the injury constituted severe child abuse; and whether E.K. could have caused the injury.

The first disagreement was a matter of semantics, as Dr. Houda believed the term “abuse” implies intent in inflicting injury. In terms of the second disagreement, Dr. Houda found that the injury was not severe because C.W. appears to have since developed normally; whereas Dr. Lowen testified that the effects take a long time to manifest themselves and the likelihood of long-term deficits was high, making the abuse “severe.” In terms of the third disagreement, Dr. Houda said E.K. might have been able to generate enough force to cause C.W.’s injuries when taking the bouncy seat into account. Dr. Lowen unequivocally denied the injury could have been caused by E.K. even with external factors. Neither doctor inspected the bouncy seat in question, as it had been disposed of by this point. The Juvenile Court pointed out that the parents’ failure to mention the bouncy seat as a possible cause of injury raised concerns about the veracity of such an explanation.

 The Maury County Circuit Court conducted the appeal trial on March 6, 2013. The Court entered an order finding by clear and convincing evidence that C.W. was a dependent and neglected child, that C.W.’s brain injury was a result of abuse, and that Mother and Father failed to protect C.W. from reoccurrence of injuries. The Court also found that Mother and Father attempted to cover up one another and frustrate the efforts of DCS and law enforcement. Also noted by the Court was the fact that Mother and Father remained together in the two years the matter had been pending in courts while knowing that either one or the other likely abused their infant child. The Court ordered that C.W. remain in legal and physical custody of DCS and relieved its DCS of its requirement to make reasonable efforts to reunify. Mother filed notice of appeal.

On appeal, Mother argued that there was no clear and convincing evidence in the record to support a finding that Child is a dependent and neglected child. She also contended that the trial court erred in finding clear and convincing evidence that Mother committed severe child abuse against Child.

In respect to the dependency and neglect ground, Mother contended that the trial court erred in finding Child dependent and neglected. She presented alternative explanations for Child’s injuries, and pointed out that DCS did not provide any direct evidence of abuse towards Child. The Court rejected Mother’s argument. The Court recognized that a Child who is suffering from abuse or neglect is a dependent and neglected child, statutorily defined. None of Mother’s alternative explanations had evidentiary support. DCS need not exclude every other conceivable possibility to support a factual finding of nonaccidental trauma. The specific underlying facts need only be established by a preponderance of the evidence. Furthermore, DCS was not required to show direct evidence of abuse; it may be established from circumstantial evidence.

The Court found the evidence of dependent and neglect clear. During the first three months of his life, C.W. suffered two separate brain bleeding injuries that remain unexplained. Dr. Lowen testified that C.W.’s second injury was the result of abusive trauma. Additionally, Detective Camargo spoke with a staff member at the daycare who reported that nothing out of the ordinary occurred when C.W. was in his care on January 7th. It is undisputed that the only individuals who could have had contact with C.W. on the morning of January 11th are Mother, Father, and E.K. There was also evidence to suggest either of the parents may have caused the injury to C.W. when they alleged that the other used physical punishment with the children. In any event, the Court stated that it is not incumbent upon them to determine which of the parents abused C.W. The Court asserted that the definition of “abuse” focuses on the child’s circumstances, not the state of mind of the caregiver, and, notably, general abuse (which is not severe) does not necessarily involve any knowing conduct. The Court therefore upheld the trial court’s finding that C.W. suffered from abuse and neglect and that he was a dependent and neglected child as defined by Tenn. Code Ann. § 37-1-102(b)(12).

Mother also contended that the trial court erred in finding that she severely abused C.W. The Court held that it is undisputed that C.W. suffered severe child abuse; rather, Mother focuses on the “knowing” requirement of Section 37-1-102(b)(23). The term “knowing” is not defined in any statute pertaining to dependency and neglect proceedings, but the Court has discussed its use in this context at length in past cases. It is not unusual for the caregiver in child abuse cases to deny that the injury was purposefully inflicted and there often is no other witness. Consequently, the “knowing” element must often be gleaned from circumstantial element. It is also important to note that a parent’s failure to protect a child is also considered “knowing” if the parent has been faced with sufficient facts from which he or she could have and should have recognized that severe child abuse had occurred or its occurrence is highly probable.

Mother argued that because she had no reason to suspect that C.W. would be abused or neglected in Father’s care, she did not “knowingly” fail to protect him. The Court disagreed: the evidence clearly shows that several weeks prior to the disputed injury, he suffered another brain bleeding injury in a separate incident. Dr. Lowen “emphatically” stated that this first injury would have caused noticeable symptoms that his caregiver should have reported. Mother did not report or prevent its reoccurrence. Thus, Mother’s failure to protect C.W. is sufficient to support the trial court’s finding that she committed severe child abuse. Based upon the foregoing, the decision of the trial court is affirmed on all grounds.

**16. *In re Alysia S*., 2014 WL 7204406 (Tenn. Ct. App. at Nashville, October 21, 2014) from the Juvenile Court for Rutherford County.**

This is a termination of parental rights case with a lengthy factual history. Mother gave birth to Alysia in 2006. Mother and Father subsequently divorced and his parental rights were terminated. In 2010, Mother lost her job because of car issues and could not attend college courses or take Alysia to get immunizations to begin a Head Start program. Mother sought help from Charlene S., the mother of Alysia’s half-sister. Charlene agreed to care for Alysia temporarily. Charlene informed Mother that Alysia would be attending vacation bible school (VBS) with Charlene’s close friends, the Mitchells. Alysia began spending the night with them instead of with Charlene, unbeknownst to Mother.

DCS contacted Mother days after Alysia left home since Mother’s father reported concerns about Mother’s living conditions and possible drug use. The caseworker observed no concerns. Mother attended a meeting at DCS on June 18, 2010, with Charlene. Mother signed a DCS form titled “Power of Attorney for Care of a Minor Child” listing Charlene as the caregiver. Mrs. Mitchell obtained a “Power of Attorney Authorization of Temporary Guardianship” form online and edited it to suit her needs so the Mitchells could travel with Alysia. She faxed the document to Charlene, and Mother signed the form giving the Mitchells temporary guardianship from June 10, 2010, to January 1, 2011. Mother testified that Charlene explained to her that this document was necessary to enable Alysia to stay with the Mitchells for VBS while Charlene was working. Charlene told Mother to date the power of attorney for a later date in case anything happened. Also at this meeting, Mother, Charlene, and caseworkers signed a “Non-Custodial Permanency Plan” identifying Charlene as the “resource mom.” This plan was never submitted to a court for ratification.

According to Mother, after the DCS meeting, she called Charlene and Mrs. Mitchell trying to see Alysia, but they had excuses as to why they could not bring Alysia to Mother. Late July 2010, Mother learned that Alysia was actually living with the Mitchells and informed them she was coming to get Alysia. Mrs. Mitchell to Mother that was not a possibility. Mother went to the police for help in retrieving her daughter three times but the police refused to assist since DCS was involved. DCS records show that Mother contacted it several times to report that the Mitchells would not allow her to get her child. Mother continued passing alcohol and drug testing at her own expense.

On August 26, 2010, Mother was served with a petition for dependency and neglect filed by the Mitchells. Shortly thereafter, the Mitchells reported to DCS that Alysia told them that Mother’s other daughter, Alysia’s half-sister, “licked her bootie” while in Mother’s care. DCS classified the allegations as unfounded after an investigation and accordingly closed its file; however, the Mitchells took Alysia to a sexual assault center for counseling.

Following a probable cause hearing, by order entered October 14, 2010, the Juvenile Court found probable cause to believe that Alysia was dependent and/or neglected, and gave the Mitchells temporary custody while allowing Mother supervised visitation and phone calls. Mother met with DCS and signed a Family Permanency Plan with a goal target date of February 2011. Mother passed her third DCS drug screen that day, and a home visit went “perfectly fine.” Days later, when DCS learned that custody had been placed with the Mitchells by juvenile court, it closed its case without notifying Mother.

 The juvenile court held three adjudicatory hearings on the dependence and neglect petition in October and November 2010. In November, Mother began monthly supervised visitation with Alysia at the Exchange Club. This visit was Mother’s first time seeing Alysia since June despite her efforts. The visit went well, as did the next two.

By order entered January 21, 2011, the juvenile court adjudicated Alysia to be a dependent and neglected child. It removed Mother’s superior parental rights and awarded the Mitchells custody and full decision-making authority. The juvenile court cited as evidence of dependency and neglect the fact that Mother “totally abandoned” Alysia by leaving her with Charlene and not visiting Alysia once she knew Charlene left her with the Mitchells. Mother appealed to circuit court.

The circuit court found that the juvenile court had exceeded its authority in granting the disposition of custody of Alysia to the Mitchells, as they were non-parents and no one had conducted a study of their home. The circuit court also found there was no showing that Mother’s alleged immorality (e.g. “immoral” photographs Mother had posted on MySpace) had any impact on Alysia. By order entered August 19, 2011, the circuit court dismissed the petitions for dependency and neglect, set aside the juvenile court’s January 20, 2011 order, and reinstated Mother’s superior parental rights. It also directed the juvenile court to implement a plan resolving the custody matter with a view toward reunification.

On August 10, 2011, after the circuit court’s oral ruling but before the entry of the written order, the Mitchells filed a petition to terminate Mother’s parental rights before the same judge who previously made the finding of dependency and neglect. The petition alleged four grounds for termination: substantial noncompliance, persistent conditions, failure to make reasonable and consistent payments, and that returning the child would pose a risk of harm. When this termination petition was filed, Mother had not made a child support payment in four months and three days. The record contains no indication that Mother had been advised that failure to make payments could result in termination of her parental rights.

On August 22, 2011, Mother filed a motion asking the juvenile court to implement a plan to resolve the pending custody matter with a view towards reunification. In September, the Mitchells appealed the circuit court’s dismissal of their dependency and neglect case to the Court of Appeals. On September 30, 2011, the juvenile court held a hearing to determine how to proceed based on the circuit court’s order requiring reunification (which was on appeal) and the petition for termination filed by the Mitchells. The juvenile court directed parties to select a counselor for Alysia, and ruled that it would consider the recommendations of the counselor.

The juvenile court held a hearing on December 20, 2011, and Mother orally moved to increase her visitation with a view toward reunification. The juvenile court denied Mother’s request for unsupervised parenting time but granted her additional visitation.

On January 18, 2012, the Mitchells filed a motion to modify the visitation schedule, noting that Mother failed to appear for the January 15 visitation (Mother said she got her Sundays mixed up). Mother and Alysia’s January visits went well. On January 30, 2012, the Mitchells amended their previous motion and sought to “terminate and limit” Mother’s visitation and telephone calls. They alleged that during Mother’s January 21 call with Alysia, Alysia informed Mother on more than one occasion that she did not want to talk to Mother, and before Mother hung up the phone, they overheard her say that she “hate[d] those mother\*\*\*\*\*.”

On February 14, 2012, the juvenile court held a hearing on the Mitchells’ motion to terminate and limit Mother’s parenting time and calls. The court found that Mother exhibited poor judgment by allowing Alysia to hear profane language during the January 21 call and therefore reduced Mother’s visitation schedules. The order provided that Mother could not bring any gifts to her visits (except during an Easter visit).

On March 13, 2012, an agreed order was entered that recognized Mother’s and the guardian ad litem’s concerns that Alysia had still not begun counseling directed at aiding with the reunification effort. The agreed order stated that Alysia’s behavior had been digressing. The order stated that Dr. Jennifer Hanket would provide therapy to Alysia and she began therapy with Dr. Hanket on March 29, 2012. Subsequently, Mother was unable to visit with Alysia. A May 18 record from the Exchange Club indicated that the guardian ad litem reported that Mother was to have no contact with Alysia until Dr. Hanket said it was okay. According to this record, Alysia did not want to see Mother.

On September 4, 2012, the guardian ad litem filed a “Motion for Reinstatement of Mother’s Visitation.” According to this motion, Dr. Hanket believed it was in Alysia’s best interest for visitation with Mother to be reinstated. Following a hearing on November 26, 2012, an agreed order was entered setting forth the parties’ agreement that Betsy Crow, a licensed attorney with specialized guardian ad litem training, would supervise visitation. The final visit supervised by Ms. Crow occurred on January 26, 2013. Alysia used her safe sign and said she was ready to go with 15 minutes left in the visit. When Ms. Crow asked if anything happened, Alysia said no and that this was her best visit with Mother, but she wanted to leave because she was going bike riding with her parents. Ms. Crow never saw anything inappropriate from Mother.

At a hearing on January 28, 2013, the parties announced their agreement to have future visitation supervised by the Kymari House. The next week, on March 15, 2013, Dr. Hanket was deposed. She estimated that it would take 18-24 months to successfully reunify Mother and Alysia. The next visit occurred on March 23, 2013, but Alysia refused to enter the building. At the next two visits, Alysia again refused to enter the building. The Kymari House refused to schedule further visits because of Alysia’s reaction.

On April 11, 2013, the Court of Appeals issued its opinion in the Mitchells’ appeal of the circuit court’s decision to dismiss the petition for dependency and neglect. The Court affirmed the circuit court’s decision to dismiss the petition for dependency and neglect.

The trial on the Mitchells’ petition to terminate Mother’s parental rights began on May 10, 2013. By the time of trial, Alysia had been living with the Mitchells for two years and eleven months. She was six. Mother had remarried and was expecting twins. She had maintained steady employment for eighteen months. She had been living at her current residence for about 18 months, and she and her husband could financially provide for Alysia.

Mother testified that she had attempted to comply with the plan entered by DCS by stabilizing her home and employment and becoming drug-free. She had completed two alcohol and drug assessments and her own expense and had been attending weekly recovery meetings for three years. The DCS caseworker, Shirley Reed, testified that she had not been in contact with Mother for about three years. She emphasized that DCS never removed Alysia from Mother’s care and had no grounds to do so.

Ms. Reed testified that she understood from the June 2010 meeting that Alysia was staying with Charlene and would be returning to Charlene’s house after church camp. Ms. Reed testified that Mother called DCS stating that she wanted Alysia returned to her. Ms. Reed was also aware that Mother attempted to get help from the police. Ms. Reed testified that she informed Mrs. Mitchell by telephone that DCS did not have custody of the child and did not have any restrictions keeping Alysia from Mother, and that the Mitchells were taking Mother’s child from her unnecessarily.

Ms. Reed was of the opinion that Mother had a stable home with no concerns. She testified that Mother took every drug screen that DCS requested and passed follow-up drug screens. Ms. Reed testified that DCS closed its case completely when the Mitchells were awarded temporary custody in October 2010. Subsequently, DCS was out of the case and the non-custodial permanency plan was rendered null.

Lori Myers, the licensed clinical social worker who counseled Alysia at the sexual assault center, also testified. Starting in September 2010, Ms. Myers saw Alysia one to two times per month until February 2012. She testified that she could not say whether the alleged sexual abuse did or did not happen. Dr. Hanket testified next. She had met with Alysia 21 times and described her as a sweet and very happy child. She said when Alysia talked about Mother she would reflect ambivalence, anger, or sadness.

Dr. Hanket also met with Mother 6-8 times. She said Mother followed her recommendations and did everything that was asked of her. She said Mother “has not given me any cause for concern.” Dr. Hanket testified that s was aware Alysia began refusing to visit with Mother about six weeks before the termination trial and eight days after Dr. Hanket gave her deposition testifying that reunification would be unlikely if visits did not go well (Mrs. Mitchell was present at this deposition). Dr. Hanket said she found it odd that Alysia consistently participated in visits prior to the deposition and stopped immediately thereafter.

Around this time, Alysia began to exhibit behavioral problems. During Dr. Hanket’s last visit with Alysia, on April 23, she observed a “dramatic change” in Alysia. Alysia was disobedient, very hyper and upset, and couldn’t control herself. Dr. Hanket was concerned that Alysia felt torn, and acknowledged the possibility that Alysia loves Mother and also loves the Mitchells. Because of Alysia’s refusal to visit Mother, Dr. Hanket’s current estimation as to a timeline for reunification was closer to the 24-month mark if not longer. Alysia would have to buy in to make reunification successful, and Dr. Hanket acknowledged the possibility that reunification would never happen successfully. She testified that it would be traumatic to Alysia if she was torn away from the Mitchells, but it would also not be in Alysia’s best interest to continue floating.

Dr. Hanket conceded that she had expressed several concerns to the guardian ad litem about possible coaching. One example involved Alysia telling Dr. Hanket that the Mitchells “forced” her to call them “mommy and daddy.” Another example was when Mother missed a telephone call, and Alysia told Dr. Hanket that the Mitchells had told her that “Katie lied.” Additionally, the Mitchells did not ensure that Alysia received packages and letters from Mother.

Dr. Hanket also acknowledged that Alysia’s decision-making process could have been influenced by such things as the vacations she takes with the Mitchells and the material things they could provide financially. During one of their last sessions, Alysia said her life with the Mitchells was better because of her “beautiful clothes,” and life with Mother was worse because Mother spanked her.

Much of the trial’s testimony centered on whether Mother willfully failed to support Alysia. Mother admitted she did not make a monetary child support payment to the Mitchells during that four-month period. She testified that she was working at a temporary agency during the relevant time period and accepted every job she was offered through the agency. Mother testified that during this time, the staffing agency held back her first paycheck and she had to use the rest of her checks to pay off her bills. She also testified that the Mitchells told her, when court proceedings began, that there was no need to send them child support payments and that she should use the money to pay for the cost of supervised visitation. Mr. Mitchell testified that he did tell Mother at the initial probable cause hearing in juvenile court that he and his wife did not need Mother’s child support. Despite these instructions, Mother testified that she sent packages containing clothing and other items to the Mitchells’ P.O. Box and with the guardian ad litem. According to Mother, when she would ask Alysia about items that were sent, Alysia would say that she did not receive them.

Mother conceded that she missed a few phone calls with Alysia but claimed that it was because of work meetings and the fact she was not allowed a phone at work. She acknowledged that during calls, Mother asked Alysia questions and Alysia would reply, “I don’t want to talk to you. I don’t want to talk to you.” When Mother was asked about Alysia being in a stable home with the Mitchells for the past three years, she said, “That’s because the legal procedures have taken that long. It’s not because I haven’t fought for that long.” She said she was willing to do “whatever it takes” to be reunited with Alysia.

The trial court entered a written order on October 23, 2013, incorporating by reference a letter ruling sent by the judge to the attorneys. The letter ruling set forth the four grounds for termination alleged in the Mitchell’s petition. When ruling on grounds for termination, the court only addressed two issues: abandonment by failure to support and persistent conditions. The juvenile court found that both of these grounds for termination were proven. The court found it was in Alysia’s best interest to terminate Mother’s parental rights, and granted full guardianship rights to the Mitchells. Mother timely filed a notice of appeal, simply asking whether the trial court erred in finding that her parental rights should be terminated.

The Court reversed the juvenile court’s decision and remandd for the entry of an order that implements a plan to expeditiously reunite Alysia with her mother. In respect to Mother’s willful failure to support, the Court noted that the Mitchells’ petition to terminate parental rights alleging that Mother had failed to pay support cited Tenn. Code Ann. § 36-1-113(g)(9)(A)(ii). However, those grounds cannot be used to terminate the rights of a parent who is a child’s biological parent at the time the termination petition is filed. In this case, these grounds are inapplicable.

During trial, both sides appeared to proceed under the assumption that the termination petition alleged abandonment by willful failure to support pursuant to 36-1-113(g)(1), which does apply to biological parents. Throughout the trial, the judge heard testimony about Mother’s circumstances during the four-month period prior to the filing of the termination petition. The Mitchells’ attorney specifically cited “abandonment” and its definition in § 36-1-102 in his closing argument, and Mother’s attorney discussed the applicability of this ground as well. Mother’s brief on appeal also analyzed the ground of abandonment under subsection (g)(1), stating that a ground for termination not included in the petition can be properly found if the ground was tried by implied consent. The Court noted that Mother consented to the ground of abandonment by willful failure to support being tried by the trial court.

Willfulness of a parent’s conduct depends on the parent’s intent and intent is seldom capable of direct proof. Because testimony may be critical to the determination of whether a parent’s conduct was willful, trial courts are best situation to make a determination of willfulness. In the trial court’s letter ruling, it made specific findings when analyzing the ground of abandonment by willful failure to support. At the outset, the court noted the “litany of proceedings during which Mother requested modification of her visitation schedule due to her work requirements.” Specifically, efforts were made to accommodate Mother’s work schedule during hearings on September 30, 2011, and June 15, 2012. On appeal, the Court had no transcript of these hearings that would enable a review of Mother’s work schedule. However, Mother’s representations about her day-to-day work schedule would not shed light on whether she had the ability to support Alysia during the relevant time frame between April 10 and August 9, 2011.

The trial court stated that Mother could not deny that she had been employed, received compensation for her employments, and chosen to pay her debts, except for any funds for which is he obligated to provide for the child’s benefit. Therefore, the trial court found that Mother’s failure to provide for the Child’s support was in fact “willful.”

According to the Court of Appeals’ calculation, however, Mother earned somewhere between $270 and $351 per week at the lighting factory from March 27 until May 10, 2011. Mother testified that her monthly bills during this four-month period included $320 for rent, $120 for insurance, $60 for water, $120-$140 for the electric bill, $300 for groceries and household items, and an unspecified amount for her telephone bill. Mother was also responsible for paying the cost of supervised visitation with Alysia, which was $15/hour. She was also attempting to pay her attorney’s fees. She did not have a vehicle, so she was paying someone to take her to and from visitation, to and from court, and to her place of employment. In May 2011, Mother purchased a car and assumed a $200/month car payment. She also paid for car insurance.

On May 10, 2011, Mother said the lighting factory where she worked laid her off as temporary workers were no longer needed. She testified that she did not receive a paycheck during the entire month of June. The Court of Appeals found that Mother provided compelling testimony that she did the best she could to support Alysia while also attempting to comply with the DCS plan and court orders. When summarizing the testimony of Mother’s husband, the trial court said Husband testified that Mother had “more consistent periods of employment” and “worked at the same place as him for a lengthy period.” The Court noted that the trial court did not make a finding that Mother was employed at Rio, the lighting company, at any point, especially during the four-month period at issue. Thus, the Court found the evidence about Mother’s employment at Rio neither clear nor convincing.

Mother testified that she began working at Rio on August 8, two days before the termination petition was filed. Therefore, the Court found it reasonable to assume that the duration of Mother’s employment of Rio occurred after the four-month period at issue. When summarizing the testimony of witnesses, the trial court confusingly stated that “contrary to Mother’s assertions, [her husband] testified that Mother has worked consistently while he has known her with the exception of a 6-7 month period.” The Court of Appeals, however, found no such testimony in the record. From the Court’s reading, Husband testified that Mother had experienced period of unemployment and that one such period lasted 6-8 months.

The trial court did not make any express findings about Mother’s employment; instead, it found that Mother could deny that she has been employed, received compensation for her employment, and chosen to pay her debts. Simply finding that Mother worked and was compensated does not, by itself, mean that she had the ability to pay child support. The trial court did not make any findings regarding Mother’s income, nor did it mention her expenses.

The trial court found that Mother failed to pay a cent during the time frame the Court must consider. The Court notes that in January 2011, Mother was told to stop bringing gifts for Alysia to the unsupervised visits. Yet, the records from the Exchange Club indicate that Mother brought several items to Alysia at the beginning of the four-month period. The items were removed and returned to Mother at her departure. The trial court also failed to mention the school clothing Mother sent to Alysia during the four-month period. The Court also noted that the Mitchells told Mother not to pay them monetary child support.

The Court believed the holding of In re Adoption of A.M.H. 215 S.W.3d-793 (Tenn.2007), in which a Chinese couple placed their four-week-old in temporary foster care while they attempted to regain financial stability, is instructive. Here, Mother was actively pursuing litigation to regain custody of Alysia throughout the four-month period, and was spending a substantial portion of her limited resources to satisfy the DCS and juvenile court. According to the Court, the evidence in this case does not support a finding that Mother wilfully or intentionally abandoned Alysia.

The next ground was substantial noncompliance with the permanency plan. Tennessee Code Annotated section 37-2-402(9) defines a permanency plan as a “written plan for a child placed in foster care with the department of children’s services or in the care of an agency.” Here, Alysia was not placed in foster care with DCS or in the care of an agency. The family permanency plan Mother signed did not meet the statutory definition of a permanency plan, and therefore the Court finds this ground for termination inapplicable. Even if this plan did fit the definition of a permanency plan, the Court holds that Mother complied with the plan at her own expense.

The Mitchells’ petition to terminate Mother’s parental rights also alleged persistent conditions. Considering the unique circumstances of this case, the Court found this ground inapplicable. This ground for termination applies “only where the prior court order of removal was based on a judicial finding of abuse or neglect” (Tenn.Code Ann. 36-1-113(g)(3)). Here, the only judicial finding of dependency and neglect was by the juvenile court, and that finding was set aside by the circuit court. Furthermore, the Court is unable to find the persistence of conditions when they previously held that Alysia was not subject to conditions that rendered her dependent or neglected in the first place.

The final ground for termination argued by the Mitchells, under § 36-1-113(g)(9), was that returning the child to Mother would pose a risk of substantial harm. The Mitchells asked the Court to review the facts and determine whether this ground was proven. As discussed, the grounds listed in subsection (g)(9) cannot be used as a basis for terminate the parental rights a biological parent; therefore, the Court found this ground inapplicable and that there are no grounds for terminating Mother’s rights.

Because Mother’s voluntary relinquishment of custody was entered as a temporary measure with the full intent that custody would be returned to her, the Court of Appeals held that she was entitled to superior rights to custody when compared to the Mitchells as non-parents. In Alysia’s case, the final orders in the dependency and neglect proceedings held that the juvenile court was not authorized to grant disposition of custody to the Mitchells and that there was no basis for a finding of dependency and neglect. The circuit court thus held that reunification was appropriate, and, finding the case analogous to A.M.H., the circuit court instructed the juvenile court to implement a plan to resolve the matter with a view toward reunification.

On remand, the juvenile court appeared reluctant to reunify Mother and Alysia. The Court held that there is no basis for such hesitation, and declared that evidence that Alysia will be harmed from a change in custody does not constitute the substantial harm required to prevent Mother from regaining custody. Furthermore, young children cannot be the decision makers when it comes to reunification. The Court expressed its worry over this case and the proceedings. In this case, DCS found no reason to remove Alysia from Mother; yet, Mother was only allowed supervised visitation with her child.

 Mother expressed concern that even if the Court remanded her case for reunification, Alysia would not be reunified with her under the trial court’s authority. Afterward, the Mitchells filed a “Final Order of Adoption” indicating that they adopted Alysia by order of the chancery court for Rutherford County on June 9, 2014, while this appeal was pending. The chancery court’s order recognizes that Mother’s parental rights were terminated, and therefore Mother was not entitled to notice of the adoption proceeding. It waived the statutory six-month waiting period and immediately granted the adoption and changed Alysia’s first and last name.

Mother was unaware of the adoption proceeding until she received the appellees’ brief on appeal with the attached order. She claims that the juvenile court judge’s decision to encourage an immediate adoption shows that she cannot act impartially in this case. Mother asked the Court to require the appointment of a special judge to oversee any proceedings on remand.

The Court remanded this matter to the juvenile court for the entry of an order that implements a plan to expeditiously reunite Alysia with her mother. It dismissed the termination petition, reinstated Mother’s parental rights, vacates the juvenile court orders concerning visitation, and designated the current custody and guardianship orders as temporary in nature.

**17. *State of Tennessee v. Barry D. McCoy*., 2014 WL 6725695 (Tenn. Sup. Ct. at Nashville, Dec. 1, 2014).**

This is a criminal case involving the State’s request for permission to offer as evidence a video-recorded statement made by the child victim to a forensic interviewer.

On November 2, 2010, Barry McCoy was indicted for seven counts of rape of a child victim (the “Child”). Two weeks prior to the scheduled date of trial, the State provided the Defendant with notice of its intent to offer as evidence a video recording of a statement made by the Child to a forensic interviewer pursuant to Tenn. Code Ann. § 24 -7-123, which purports to authorize such statements to be introduced as evidence when certain requirements are met.

The Defendant objected to the admission, and the trial court denied the State permission to introduce the statement on three grounds: (1) the legislature overstepped its constitutional bounds because the enactment of the law cited intruded upon the inherent authority of the judiciary to regulate the admissibility of evidence; (2) the content of the video recording qualified as hearsay evidence not otherwise admissible; and (3) because article 1, section 9 of the Tennessee Constitution provides that “in all criminal prosecutions, the accused hath the right…to meet the witnesses face to face.” In making this ruling, the trial court assumed that the State had complied with each of the conditions set out in Tenn. Code Ann. §24-7-123.

After denying admission, the trial court granted the State’s request for an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. The Court of Criminal Appeals granted the appeal but remanded for further proceedings based upon the rationale that “[T]he trial court… ruled on the constitutionality of [the law at issue] without having reviewed the video recording or [having] consider[ed] whether the recording would qualify for admission under the statute…. Because the trial court failed to first determine the statute’s applicability in this case, the constitutional challenge is not yet ripe for review.”

On remand, the trial court held a pre-trial evidentiary hearing to address the admissibility of the video recording under Tenn. Code Ann. § 24-7-123, which provides multiple requirements for allowing a video recording of a child’s forensic interview into evidence.

The Child, who was thirteen and a seventh-grade student by the time of the pre-trial evidentiary hearing, was called as a witness to verify that he had submitted to a video-recorded interview as part of the investigation. He acknowledged that he had watched the video prior to his testimony and confirmed the truthfulness of his statement. On cross-examination, he admitted that he had anger problems, had become physically violent with his mother and others, and that the Defendant, whom he knew from his school, had often been called on to assist him during his episodes of anger.

The Child’s mother testified that her son had been diagnosed with bipolar disorder, attention deficit disorder, separation anxiety, and intermittent explosive disorder. She acknowledged that she had called on others, including the Defendant, to assist her son. Anne Post, a forensic interviewer with the Montgomery County Child Advocacy Center, testified for the State. She stated that she had conducted an interview with the Child on March 31, 2010, compliant with her professional training.

The trial court found that the State had fulfilled each of the requirements set forth in Tenn. Code Ann. § 24-7-123. In an order, the trial court concluded that even though Ms. Post met the statutory qualifications required of a forensic interviewer, the video recording was inadmissible as evidence for the same three reasons: (1) the intrusion on the exclusive powers of the judiciary; (2) the hearsay nature of the video statement; and (3) the Confrontation Clause violation. The trial court again granted an interlocutory appeal pursuant to Rule 9. This time, the Court of Criminal Appeals denied the State’s request for an interlocutory appeal, reasoning that “because the State will presumably call the [Child] as a witness at trial, the trial court’s suppression of the video interview cannot be said to have ‘eliminate[d] the heart of the State’s case.’ The state has thus not shown how it will be irreparably injured by the trial court’s ruling or how the trial court’s order has ‘eliminate[d] any reasonable probability of a successful prosecution.’”

On July 3, 2013, the State filed an application with the Supreme Court for discretionary review and the Court granted permission to appeal.

The Court addressed the trial court’s first reason for excluding the evidence by noting that the Tennessee Constitution includes two direct provisions establishing the separation of powers. Article II, section I dictates that the powers of the government are divided into three distinct departments. Article II, section II elaborates that no one department can exercise powers belonging to either of the others except in cases directed or allowed. The Tennessee Supreme Court has repeatedly held that “[a] legislative enactment which does not frustrate or interfere with the adjudicative function of the courts does not constitute an impermissible encroachment upon the judicial branch of government” (Lynch v. City of Jellico. 205 S.W.3d 384, 393 (Tenn.2006)).

In this case, the Court looked to whether the legislature acted beyond its constitutional authority by the adoption of Tenn. Code Ann. §24-7-123. The Defendant argued that the statute is an unconstitutional attempt to create a legislative exception to the hearsay provisions as written in the Tennessee Rules of Evidence. Conversely, the Court determined the statute can be interpreted with both the Rules of Evidence and the Tennessee Constitution.

The Court reiterated that it has never held that the legislature has no authority to enact a statute bearing on the introduction of evidence. The Court instead stated that the legislature overstepped its bounds by enacting evidentiary rules only where it interferes with the adjudicative function of the courts. Here, the Court held that the statute in question does not interfere with the adjudicative function of Tennessee courts. Rather, it serves as a specific exception to the general rule against the admission of hearsay evidence, given that Rule 802 realizes that sources of law outside the Tennessee Rules of Evidence may develop an exception. Furthermore, the Court stated that the statute does not attempt to overturn any evidentiary rule.

The Court determined that the statute at issue also gives trial courts discretion in the decision of whether a video-recorded statement can be used as evidence. It states that video recordings “may be considered” at trial. The section also obliges the trial judge to determine how reliable the statement is. Additionally, it includes a provision that permits the trial judge to take into account other factors deemed appropriate in his or her determination.

In respect to hearsay, the Court recognized that a three-pronged test can be used to determine whether a statement is hearsay: (1) the statement must be made outside court; (2) it must be an assertion; and (3) it must be presented to verify the matter asserted. An out-of-court statement does not, the Court noted, qualify as hearsay evidence if it was offered to show its effect on the hearer without regard to its verity.

The Court determined that the video-recorded interview of the Child qualified as hearsay evidence. It was made out of court and qualified as an assertion made by the Child. Lastly, its purpose was to prove the Child’s truth. While the trial court ruled that the video recording did not fit within any exception, the Court disagreed because Tennessee Rule of Evidence 802 allows admissions if they are allowed otherwise by law. The Court determined that the legislature acted lawfully by enacting Tenn. Code Ann. §24-7-123 as an exception to the rule against admission.

Next, the Court noted that the right of confrontation affords protection to criminal defendants by allowing them the right to physically face and cross-examine witnesses. The Confrontation Clause is intended to guarantee reliability of evidence by subjecting it to testing. The salient question is whether an out-of-court statement is testimonial. The United States Supreme Court has stated that statements are testimonial when an objective witness could readily believe that the statement would be available for use at a later trial.

Under Confrontation Clause jurisprudence, if a hearsay statement is non-testimonial, then the declarant is not a witness. However, when a hearsay statement is testimonial, the party hoping to enter the statement must either (1) present the declarant as a witness who will testify and submit to cross-examination, or (2) demonstrate that the witness is unavailable to testify, but the defendant has had prior opportunity for cross-examination. When a witness is available at trial for cross-examination, there are no restrictions as to the use of prior testimonial statement, but the Confrontation Clause does require that the defendant be given the opportunity for effective cross-examination.

In respect to this framework, the Tennessee Supreme Court held that the video-recorded statement was testimonial because the State planned on using it to establish an act of sexual contact. Therefore, to admit this evidence, the Child must have been unavailable for trial and that the Defendant had to have a previous opportunity for cross-examination unless the Child was made available at trial. The State acknowledged that §24-7-123(b)(1) provides that the witness must authenticate the video recording before it is submitted and be available for cross-examination at trial. This Court agreed and held that the sole circumstance under which a child victim’s video-recorded statements may be lawfully admitted is when the witness first authenticates the recording and then appears for cross-examination at trial.

This Court holds that admitting the video-recorded statements would not violate the Defendant’s right of confrontation as long as the child witness authenticated the video recording and appeared for cross-examination at trial, notwithstanding the testimonial nature of the statement.

**18. *Smith v. Lakeside*., 439 S.W.3d 303 (Tenn. 2014).**

This is an appeal involving motions for summary judgment. James B. Smith, the deceased, worked at a FedEx facility in Memphis driving a piece of warehouse equipment. On September 5, 2004, he fell asleep in the driver’s seat. He appeared lethargic when awoken and began crying. He left work at approximately 1:00 p.m. to go home but was found by Shelby County Sherriff deputies asleep in his automobile parked on a dead end road two miles from the FedEx facility. When awoken, Mr. Smith made nonsensical statements. After confirming he was not intoxicated, the deputies took him into custody and transported him to the Lakeside Triage Center to evaluate if he should be involuntarily committed for psychiatric treatment.

A contract between The Triage Center and Shelby County Health Care stipulated that Shelby County Health Care must “contract with independent contractor physicians to provide ‘medical clearances’” for persons arriving at the Triage Center. A “medical clearance” is an exam to determine whether someone has physical medical issues that require immediate medical attention. Persons at the Triage Center are not expected to remain there for more than eight hours.

Mr. Smith arrived at the Triage Center at 5:25 pm. On Sunday, September 5, 2004 and was transported by ambulance to St. Francis Hospital on September 7, 2004, at 6:30 p.m. This lawsuit centers on the treatment Mr. Smith received during his 49-hour stay at the Triage Center.

When Mr. Smith arrived at the Triage Center, he was mentally confused and had a temperature of 100 Fahrenheit. Dr. John O’Connell examined Mr. Smith and cleared him medically, allowing an evaluation of whether Mr. Smith should be involuntarily committed. Between 2:30 and 3:00 a.m. on September 6, Cindy Zahn (an assessor) conducted a psychological assessment of Mr. Smith, finding him to be confused or nonsensical. At this point, the Triage Center staff contacted Mr. Smith’s wife who had been searching for him since September 5. She stated that he did not have a history of psychiatric problems or substance abuse and that he had been complaining about not feeling well.

Ms. Zahn passed this information on to Avalon Nathaniel, an on-duty nurse. Ms. Zahn’s preliminary assessment was that Mr. Smith had a mood disorder, but she suggested to Ms. Nathaniel that his condition could be caused by something other than a psychiatric disorder. At this point, Mr. Smith’s evaluation continued with an evaluation for involuntary commitment because Dr. O’Connell had issued a medical clearance.

Around 3:50 a.m. on September 6, Dr. O’Connell ordered tests of Mr. Smith. At 6:10 a.m., Mr. Smith’s temperature had increased to 101. At 9:43 a.m., the Triage Center received the results of Mr. Smith’s tests, which showed an elevated white blood cell count and an elevated blood nitrogen (“BUN”) and creatinine levels. At 2:20 p.m., in anticipation of involuntary commitment, Ms. Mills set that Mr. Smith would be transferred to the psychiatric Lakeside Hospital. At 5:00 p.m., Veronica Jackson, a social worker, signed a certificate of need to commit Mr. Smith; by this point, he was drooling, unable to swallow, and was so unsteady on his feet that he seemed intoxicated.

At 7:10 p.m., Dr. O’Connell, believing that Mr. Smith had undergone a psychotic break, signed the second certificate of need to involuntarily commit Mr. Smith. However, Dr. O’Connell revoked this clearance because he thought Mr. Smith’s medical problems should be addressed before he was transported to Lakeside Hospital, and ordered more tests. Mr. Smith lost control of his bladder at 1:00 p.m. the following day. By 4:15 p.m., Dr. O’Connell decided that Mr. Smith’s symptoms arose from a disease rather than a psychiatric disorder, but the Med’s emergency room would not accept Mr. Smith because it was on “diversion status.”

Mr. Smith arrived at St. Francis Hospital’s emergency room at 7:15 p.m. mostly unresponsive. The physicians diagnosed him with viral encephalitis. His temperature rose to 105 and he experienced cerebral edema, seizures, and strokes. He remained in the intensive care unit for several weeks. On November 17, 2004, he was stable enough to be released; however, he never regained full function. After returning home, he remained bedridden and unable to communicate.

In December 2004, Mr. Smith began to develop respiratory problems and died at Methodist South Hospital on February 1, 2005. Ms. Smith filed her initial complaint against Lakeside, Shelby County Health Care, and Methodist Healthcare—Memphis Hospitals alleging five causes of action: (1) a health care liability claim, (2) an intentional infliction of emotional distress claim, (3) a negligent infliction of emotional distress claim, (4) a claim for violating the Emergency Medical Treatment and Active Labor Act (EMTALA) for failing to appropriately screen Mr. Smith at the Triage Center; and (5) a claim for violating EMTALA for failing to appropriately transfer Mr. Smith to St. Francis Hospital.

On November 21, 2006, about one year after filing of this complaint, Lakeside filed its first motion for summary judgment and statement of undisputed facts. Lakeside stated that Ms. Smith’s health care liability claim should fail. Lakeside alleged that Methodist Healthcare’s negligence was the independent cause of Mr. Smith’s death. It also challenged Ms. Smith’s other claims.

Ms. Smith filed her third amended complaint on June 12, 2009, naming Lakeside and Shelby County Health Care as the defendants. This complaint restated her previous allegations, but added a new claim against Lakeside for false imprisonment and a new claim against Shelby County Health Care for battery.

With multiple, complex filings and a trial scheduled for April 12, 2010, the trial court held a hearing on Lakeside’s motions for summary judgment on March 17, 2010. The trial court stated that it was going to rule in favor of the plaintiff on the EMTALA issue, the outrageous conduct, and the negligent infliction of emotional distress. It ruled in favor of the Defendant on false imprisonment and agency. The trial court recognized that some of the issues were close. As a basis for the ruling, the trial court instructed that Lakeside’s counsel make those. It also instructed that the plaintiff’s counsel prepare the order and rationale for the Court’s ruling on the motions in which they were successful.

As the trial court failed to explain the factual and legal basis for its decisions, the parties returned to court on March 25, 2010. Counsel for both parties had prepared orders regarding the issues that the court had ruled on in their favor. Lakeside’s orders were meticulous. Ms. Smith’s counsel asserted that the trial court had not made detailed findings during the hearing, and Lakeside’s draft orders were therefore essentially the contents of Lakeside’s briefs.

The trial court responded to Ms. Smith’s arguments by recalling that it wrote the causes of action down, and then on the foundation for the ruling ordered that the parties prepare Orders. The trial court also conceded that it did not state foundation for any rulings. The trial court requested that Ms. Smith’s counsel prepare detailed objections to Lakeside’s proposed orders. Her counsel did so, and the parties returned to the court on April 8, 2010.

The court was not receptive to Ms. Smith’s objections, even though the court acknowledged that it did not give her anything but the most superficial ruling. The trial court then signed the draft orders prepared by Lakeside’s counsel, stating that Ms. Smith’s counsel said she would like to protect the integrity of the Court, but the court was willing to risk it and sign Lakeside’s order to let them argue how they wanted to when they reached the appellate court.

Lakeside then filed another motion for summary judgment on November 4, 2010, with new grounds for the summary dismissal of all of Ms. Smith’s claims. Ms. Smith filed her fourth amended complaint on July 22, 2011. On July 14, 2011, Lakeside filed a supplemental memorandum supporting its renewed motion for summary judgment. The trial court initially declared that it would deny Lakeside’s motion. However, it later stated it was granting Lakeside’s motion in regard to the EMTALA claims; and later still, it stated it was denying Lakeside’s motion. Finally, the trial court announced that it needed more time to consider Lakeside’s motion.

The parties reconvened on September 6, 2011. The trial court asked if Ms. Smith would be entitled to an appeal if it granted Lakeside a summary judgment. The court stated that the possibility of a plaintiff prevailing at trial and receiving a recovery “which is then taken away by the Appellate Courts” was “the worst of all possibles.”

Toward the end of the hearing, the trial court said to Ms. Smith’s counsel: “I understand you disagree with the Court’s position on this… I’m directing the Defendant to prepare the order and to establish the rationale for the Court’s ruling in quite specific detail, and let this go forward as quickly as possible to the Appellate Court.” Ms. Smith’s counsel asked whether the trial court was ruling in Lakeside’s favor, and the court responded that it was granting Lakeside summary judgment on all claims.

The parties returned to court on September 15, 2011 to discuss Ms. Smith’s objections to Lakeside’s order. Her counsel stated that “the problem with the Order is that [Lakeside’s counsel] has asserted things in the Order that the Court did not rule. Just things that he wants, wishes the Court had ruled on, but the Court was silent on those things.” The trial court admitted that “It may be that things are part of…opposing counsel’s order that may have been a part of my thought processes.” The order was filed on October 3, 2011. Its language seems drawn from the text of the papers Lakeside filed in support of its motion for summary judgment.

Ms. Smith appealed these orders. On January 18, 2013, the Court of Appeals vacated the orders granting summary judgment. It remanded the case to the trial court for the entry of orders complying with Tenn. R. Civ. P. 56.04. The appellate court held that the trial court’s oral statements afforded no basis for its ruling. It also concluded that the trial court failed its obligation pursuant to Rule 56.04 by requiring Lakeside’s counsel to establish rationale for the decision.

This appeal requires inspection of the relationship between three procedural principles: (1) as reflected in Tenn. R. Civ. P. 56.04: “[t]he trial court shall state the legal grounds upon which the court denies or grants the motion [for summary judgment]”; (2) that, after the trial court has decided a summary judgment motion, the court can authorize counsel to prepare and submit a proposed order for the court’s consideration; and (3) that courts speak through their orders, judgments, and minute entries.

The trial court did not state the legal grounds for its decisions to grant Lakeside’s motions for summary judgment from March 17, 2010, and September 6, 2011. The orders filed by the trial court from April 8, 2010, and October 3, 2011, did contain details of the factual and legal grounds upon which the order was based. The question before the Supreme Court was whether these grounds were Lakeside’s or that of the trial court.

Lakeside insisted that grounds stated in its orders were based on the trial court’s last official word. Ms. Smith insisted that Tenn. R. Civ. P. 56.04 requires that trial courts state their grounds before a draft order is submitted. The Court held that Ms. Smith had the better argument, and that the record did not show that any orders were the product of the trial court’s independent judgment.

The Court held that a court’s decision must be, and must appear to be, its own independent result. Trial judges should examine findings and conclusions prepared by counsel to determine that they accurately reflect the judge’s conclusions, not any counsel’s. Judges are depended upon to explain why a particular ruling is correct based on applicable legal principles. The Court reiterated that providing reasons for a ruling reinforces the legitimacy of the legal process.

This Court provided a history of 56.04 to back its opinion, noting that it had been amended twice. These amendments addressed two concerns. They reflected the growing awareness of both the Advisory Commission and the Court that explanations for judicial decisions promote respect and acceptance of the legal system. Also, skeletal orders containing no explanation of reasons complicate the ability of appellate courts to review the trial court’s decision.

The Supreme Court noted that the Court of Appeals has been hesitant to vacate summary judgment orders that do not comply with 56.04 and to remand them to the trial court. The court reviews summary judgment orders when the basis for the trial court’s decision can be readily gleaned from the record. The Court agreed that judicial economy supported the Court of Appeals’ approach to enforcing 56.04 in proper circumstances. However, in the future, the Supreme Court held that the resolution of issues relating 56.04 in trial court should take into consideration the significance of assuring that a trial court’s decision is adequately explained and is the product of the trial court’s independent judgment.

The Court noted that current acceptance of the practice in which trial courts request counsel to prepare draft findings, conclusions, and orders differs from the disapproval of this practice a century ago. In 1981, the Supreme Court stated explicitly that this practice is permissible and sometimes desirable, but it noted that independent findings prepared by the trial judge are preferable. The Court in this case continued to adhere to this view.

The Court held that a trial court’s verbatim adoption of orders submitted by prevailing parties detracts from the appearance of a judge being hardworking and independent and thus could diminish the reputation of the judiciary. It even risks an appearance of bias toward one party. Even so, most courts approve the practice of trial courts receiving and using party-prepared findings, conclusions and orders based on two stipulations. First, the findings and conclusions must accurately reflect the decision of the trial court. Second, the record must reasonably demonstrate that the decision represents the trial court’s deliberations and decision. Reviewing courts have accordingly declined to accept findings, conclusions, or orders when the record lacks insight into the trial court’s decision.

The Court then turned to the application of 56.04 in the present case. The Court emphasized that 56.04 must be interpreted in a way that assures that a trial court’s decision whether to grant or deny a motion for summary judgment is its own. This Court concluded that 56.04 requires the trial court to state the grounds for its decision before it requests the prevailing party to draft orders. It determined that this practice will ensure that the decision is the trial court’s but will also (1) assure the parties that the trial court independently considered their arguments, (2) enable reviewing courts to determine the basis for the court’s decision, and (3) promote independent decision-making.

The Court did not construe any comments from the March 17, 2010 hearing as an articulation of the grounds upon which the trial court decided to grant the motions. In fact, the trial court stated it was leaving the basis for the ruling to Lakeside’s counsel. Lakeside insisted that the grounds contained in their order should have been imputed to the trial court since the court signed its order. The Court declined to accredit this “reverse-engineered circumvention” of 56.04. This interpretation would presuppose the performance of the judicial act reflected in the order. The record showed that the trial court did not provide the basis for its decision prior to the preparation of the draft orders, so the order’s grounds cannot be attributed to the trial court.

At the third hearing on September 6, 2011, the trial court stated it wanted to avoid what it perceived to be the “worst of all possibles,” or a trial resulting in a plaintiff’s verdict that is overturned on appeal. It therefore granted a summary judgment dismissing all remaining claims against Lakeside and directed Lakeside’s counsel to prepare the order and to establish rationale for the court’s ruling in specific detail. The Court held that this unequivocally shows that the reasoning behind the trial court’s decision was left to be crafted by Lakeside’s counsel.

In respect to the April 8, 2010 and October 3, 2011 orders, the Court concluded that the trial court failed to comply with 56.04. It did not state its grounds when it decided to grant the motions for summary judgment. The record provided no basis for attributing the reasons included in Lakeside’s orders to the trial court. Thus, the Court found that the trial court failed to perform the high judicial function that 56.04 required by not providing the parties with the grounds for its decision. Because of this, there is no proof the trial court exercised an independent judgment, and this Court vacated the orders granting Lakeside’s motions for summary judgment.

**19*. In re Jackson G. et al.,* 2014 WL3844793. (Tenn. Ct. App., July 17, 2014) from the Chancery Court for Hickman County.**

This is a termination of parental rights case. Mother and Father met while they were coworkers and lived together for two years. They had two children together, Jackson who was born in 2008, and Juniper who was born in 2009. Father ended the relationship with Mother while she was pregnant with Juniper.

On June 29, 2010, Mother filed a petition to establish parentage, set child support, and establish a Permanent Parenting Plan. The juvenile court ruled that Father was the biological and legal father of the child and ordered that he pay $249 per month in child support. After this, Father’s involvement in the children’s lives diminished.

Father made only two child support payments. The State filed two petitions for criminal contempt against Father on behalf of Mother in 2011 for failure to pay child support. Father agreed to a payment plan in both instances but failed to pay. Father’s visits with the children also became infrequent. His last visit occurred on August 7, 2011. He did not contact or visit the children again until March 26, 2013.

On September 27, 2012, Mother and Dan E., Mother’s husband as of 2011, filed a petition to terminate Father’s parental rights and for Dan E. to adopt both children. They alleged two grounds for termination: (1) failure to visit; and (2) failure to support financially. The case was set to be tried on July 3, 2013.

At trial, Father testified that his failure to support and visit the children was due in part to depression, but he did not seek treatment. He testified that he had experienced a previous episode of severe depression prior to his relationship with Mother where he attempted suicide and was admitted to a facility for four days.

He also testified that he did not have the means to support the children as his job requires him to travel the Midwest on a weekly basis, and he had no income for a chunk of time. At the time of trial, Father had become a fixture on his coworker’s couch and had no plans to obtain his own housing.

As for not visiting the children, Father contended that Mother prevented him from visiting the children based on one conversation with Mother in fall of 2011. Mother allegedly told Father he could not see the children until he caught up on his child support payments. Mother refuted this testimony, stating that she told him he should just visit the children.

On September 18, 2013, the trial court entered its final order in which it found Father not to be a credible witness, and terminating his parental rights on both grounds. Father appealed based on four issues: (1) whether the trial court’s failure to enter an order within 30 days renders the judgment void; (2) whether the trial court erred in finding that Father abandoned the minor children; (3) whether the trial court erred in finding that terminating his rights is in the children’s best interests; and (4) whether the trial court abused its discretion in allocating both the entire guardian ad litem fee and portions of Mother’s litigation costs to Father.

In its analysis, the Court found Father’s reliance on the thirty days statute (Tenn. Code Ann. § 36-1-113(k)) for the purpose of vacating the trial court’s judgment was misplaced. The Court observed that this statute did not afford the remedy of vacating the trial court’s judgment simply because it was entered more than thirty days following the conclusion of the hearing *or* (emphasis added) more than six months after the petition was served on Father.

The Court has recognized that delays in the final resolution of parental termination proceedings affect the parties’ right to a prompt and just adjudication of both interests and rights. This directive is not limited to trial courts; the General Assembly has also instructed appellate courts to expedite appeals of termination proceedings. However, the statute does not require nor mention vacating a trial court’s judgment based on an untimely filing of findings and conclusions. Moreover, the Court noted, this failure did not result in the loss of the trial court’s jurisdiction.

In this case, closing arguments were heard on August 13, 2013 and the trial court entered its final order on September 18, 2013. Although the final order was entered 35 days after the conclusion of the trial, the Court found no justification to vacate the judgment due to this modest delay. The Court found no basis to vacate the order as Father requests, and turned its attention to whether the record contained clear and convincing evidence supporting the termination of Father’s parental rights.

With respect to the ground of failure to visit, the trial court found that Father’s testimony about his self-diagnosed depression was not credible. They found that his testimony was in direct conflict with his abilities to function as evidenced by his daily routine while working in Clarksville. Because of these determinations, the Court affirmed the trial court’s finding that Father wilfully failed to visit the children.

In terms of Father’s failure to support financially, the trial court found it unreasonable for Father to voluntarily remain at a job with no income for 18 months while having the ability to attain a paying job. Accordingly, the Court affirmed the finding that Father willfully failed to support the children. The Court also affirmed the trial court’s determination that terminating Father’s parental rights is in the children’s best interests.

In terms of the award of discretionary costs, the Court recognized that a court’s decision to allocate fees is solely within its discretion, and its decision will be upheld as long as it is not clearly unreasonable. The trial court furthermore found that Father is better able to bear the costs than Mother. In conclusion, the judgment of the trial court is affirmed.

**20*. In re Kaliyah S.*, 2015 WL 273659 (Sup. Ct. of Tenn.at Knoxville, September 4, 2014) from the Eastern Section Juvenile Court for Bradley County.**

This is an appeal regarding a petition to terminate the parental rights of a biological parent and addressing whether the State is required to prove that it made reasonable efforts to reunify the parent with the child as a precondition to termination. Mother is the biological mother to two children (Kaliyah S. and Jaya P.) to different fathers. The child at issue in this appeal is Kaliyah, born in July 2008. This appeal reviews only the termination of Father’s parental rights as to the older child, Kaliyah.

When Kaliyah was born, Mother and Father were no longer together, and Mother had begun a relationship with Josh. Mother, Josh, and Father all knew that Father, and not Josh, is Kaliyah’s biological father; however, Mother listed Josh as Kaliyah’s father on her birth certificate. In October 2008, when Kaliyah was about three months old, DCS responded to a call from Mother and Josh’s home and found suspicious bruises on Kaliyah. DCS filed a dependency and neglect petition in the juvenile court against both Mother and Josh. The juvenile court entered an order finding Kaliyah dependent and neglected and removed her from the home. The order included a no-contact provision prohibiting Josh from contact with Kaliyah.

The permanency plan DCS subsequently developed for Mother and Josh referenced its ongoing child abuse investigation and the no-contact order against Josh. However, Mother continued her relationship with Josh and conceived Jaya while Kaliyah was in DCS custody. On June 25, 2009, DCS returned Kaliyah to Mother since Josh was no longer living there. Not long after, Josh moved back in with Mother and Kaliyah and Jaya was born in January 2010.

By October 2010, Mother worked a couple of jobs and attended school. While she was away, Josh was the caregiver for two-year-old Kaliyah and infant Jaya. Meanwhile, Father spent a significant amount of time in jail on drug offenses and domestic assault charges. He was released on November 29, 2011, just a week before commencement of the termination trial in this case. When Father was not in jail, Mother occasionally brought Kaliyah to visit him. He also visited her occasionally in her foster home but never sought custody. On May 6, 2010, the juvenile court entered an order establishing Father as Kaliyah’s biological father and ordered him to make child support payments. He made no support payments.

On November 22, 2010, 11-month-old Jaya began having seizures. At the hospital, she was found to have suffered intracranial hemorrhaging, retinal bleeding, and leg fractures. DCS received a report diagnosing infant Jaya with possible shaken baby syndrome. DCS concluded that her injuries resulted from abuse and took both Kaliyah and Jaya into emergency protective custody. Both were placed in foster care.

On November 30, 2010, DCS filed a combined petition in the juvenile court asserting that Kaliyah and Jaya were dependent and neglected and seeking termination of the parental rights of both Mother and Josh under the basis of severe abuse. On December 3, 2010, the juvenile court found probable cause to conclude that both children were dependent and neglected by reason of severe abuse. When DCS filed this petition, it was laboring under the mistaken belief that Josh, listed on Kaliyah’s birth certificate, was Kaliyah’s biological father.

Eventually, DCS discovered that Father had been determined to be Kaliyah’s biological father and prepared a permanency plan for Father and brought it to him in jail. He signed the plan and mailed it back to DCS in December 2010. On May 25, 2011, while Father was still incarcerated, DCS amended its juvenile court petition to include Father as a respondent and to seek termination of his parental rights to Kaliyah. The ground for termination of Father’s rights was abandonment by engaging in conduct prior to incarceration that exhibited wanton disregard for the child’s welfare. DCS declared: “Reasonable efforts [to reunify] are not required in the termination grounds against [Father].”

Beginning December 5, 2011, the juvenile court conducted a trial in this matter concluding on March 11, 2013. The evidence related to Father was undisputed. It included his October 2012 testimony that he was again incarcerated on additional charges of aggravated assault and aggravated domestic assault. On the last day of trial, Father’s attorney made an oral motion to dismiss the termination petition against Father. Counsel for Father asserted: “[N]othing in the file…indicates the State made any reasonable efforts with respect to [Father]. And I think what had happened was because [Father] had been lumped in with two potential abusers, and in severe abuse cases [DCS does not] have to make reasonable efforts.” The termination petition did not allege DCS had made reasonable efforts as to Father but instead maintained that the reasonable efforts were not required.

On May 30, 2013, the juvenile court entered an order terminating the parental rights of Mother, Josh, and Father. As to Father, the juvenile court held that DCS had proven the ground of abandonment by engaging in conduct prior to incarceration that exhibited wanton disregard for Kaliyah’s welfare. Because DCS had proven that ground for termination, the juvenile court held that DCS was absolved of making reasonable efforts as to Father. Father appealed. Mother and Josh did not.

The Court of Appeals issued a divided decision reversing the juvenile court’s termination of Father’s parental rights. The majority disagreed with the trial court’s holding that proving the ground of abandonment absolved DCS of its duty to make reasonable efforts as to Father. The majority held that DCS is not relieved of its duty to make reasonable efforts until *after* a court of competent jurisdiction has made an adjudication that the alleged aggravated circumstances exist. Therefore, the majority concluded that DCS was required to make reasonable efforts to assist Father until the juvenile court made an actual finding of aggravated circumstances.

In a dissenting opinion, Judge D. Michael Swiney expressed the view that DCS is relived of its duty to make reasonable efforts when aggravated circumstances are present *from the time the child is removed from the home*. The dissent reasoned that, under the statutory definition of aggravated circumstances, abandonment is treated the same as the other more severe aggravated circumstances. Judge Swiney argued that under the majority’s holding, DCS would be required to make reasonable efforts at reunification pending a hearing even where more egregious aggravated circumstances were involved (e.g., rape against the child). Judge Swiney affirmed the trial court’s termination of Father’s parental rights.

Both the majority and dissent noted a split of authority within the Court of Appeals regarding the point at which DCS is relieved of its duty to make reasonable efforts when aggravated circumstances are involved. Based on this split, the Supreme Court deemed this case appropriate for its consideration.

On appeal to the Court, the State raised an argument disputing the premise of the issue as framed by the majority and the dissent of the intermediate appellate court. The State reasoned that Tenn. Code Ann. § 37-1-166(g), requiring DCS to make reasonable efforts to reunify the family after a child is removed on the based on dependency and neglect, is *generally* not applicable in proceedings to terminate parental rights. The State noted that dependency and neglect issues are addressed separately from termination issues. Accordingly, the State believed that proving reasonable efforts is a precondition to termination of parental rights *only* to the extent that the reasonable efforts requirement is specifically incorporated into the termination statute.

The Court examined relevant statutes and their legislative history with an eye toward the development of the reasonable-efforts requirement. The Court noted that in the early 1970s, statutes that governed termination proceedings were spread out in the Tennessee Code. Before 1977, the salient way to involuntarily terminate a biological parent’s parental rights was to prove that the child had been abandoned. Finding a child to have been abandoned stood as a substitute for the biological parent’s consent to adoption, as there were no specific procedures for termination of parental rights of a biological parent.

In 1977, Tennessee’s General Assembly expanded the grounds for termination and set out procedures for termination proceedings. The General Assembly amended Section 37-246 to allow courts to terminate the parental rights of a biological parent if the petitioner established abandonment, severe child abuse, substantial noncompliance with a permanency plan, or persistent conditions. The amendment also dictated that the petitioner must prove the termination was in the best interest of the child. This best interest provision included six factors for courts to consider, the second of which was: “Whether the parent has effected a lasting adjustment *after reasonable efforts* by available social agencies for such duration of ti that lasting adjust does not reasonably appear possible.” (Tenn. Code Ann. § 37-246(e)(2) (Supp. 1978) (emphasis added)).

At the time of the amendment, Tennessee’s objective was to keep biological families intact. This also informed legislation at the national level. In 1980, the federal government enacted the Adoption Assistance and Child Welfare Act (AACWA). Its purpose was to facilitate a nationwide child welfare system that would keep children with their biological parents and reduce foster care placements using reasonable efforts by social services. Congress offered federal funding for foster care to states that enacted legislation in conformity with federal regulations. Participating states had to require their state agencies to make reasonable efforts to keep children in their parent’s home. If foster care proved necessary, these states were required to make reasonable efforts to reunify the family as soon as possible.

When the federal law was enacted, it did not define the term “reasonable efforts,” leaving participating states to define it themselves. Courts began interpreting the reasonable-efforts requirement, resulting in different definitions of “reasonable efforts” and differences on the state level at the point when the state agency had to make efforts for reunification.

In the early 1990s, Tennessee’s Legislature codified a reasonable-efforts requirement in Section 37-1-166(g). A primary goal of this new statute was to comply with the federal requirements to preserve federal funding for foster care. Still, there was no indication that the legislation considered whether the State’s reasonable efforts to reunify would be considered in the context of a proceeding to terminate parental rights.

In 1993, Tennessee formed a study commission on adoption that sought to shift the focus away from parental interests to focus on children’s need for stability and permanency. The work of this commission provided a revision of Tennessee’s adoption statutes and was enacted in 1995. The changes included an overhaul of the statutes on the rights of biological parents and the procedures for terminating these rights. They removed the provisions on termination of parental rights from Title 37 on juveniles, foster care, and dependency and neglect proceedings and consolidated the termination provisions into a single separate statute: Tennessee Code Annotated § 36-1-113. The new statute specifically applied to both the State and to private parties who sought to terminate the parental rights of a biological parent.

The new termination statute included specific procedures for terminating parental rights. It spelled out the two-prong test for termination of parental rights: grounds and best interest. The 1995 overhaul left intact the 1992 reasonable-efforts requirement set forth in Section 37-1-166. It remained in Title 37 as part of the juvenile statutes and was not expressly incorporated into Section 36-1-113, the new termination statute.

By November 1997, federal officials acknowledged that AACWA’s goal of preserving families made some children suffer. They realized that continued efforts toward reunification resulted in the child languishing in foster care. This realization triggered enactment of the Federal Adoption and Safe Families Act of 1997 (ASFA). AFSA placed a greater emphasis on the child’s interests by mandating a permanent home as early as possible.

States again amended statutes to comply with ASFA. Tennessee in turn amended Section 37-1-166(g), redefining the term “reasonable efforts” to emphasize the child’s health and safety. It also relieved DCS of its obligation to provide reasonable efforts to reunify if a court of competent jurisdiction determines that a child has been subjected to aggravated circumstances.

The Court next reviewed Tennessee cases on termination of parental rights involving the issue of whether DCS had made reasonable efforts to reunify the family. The Court stated that even after Legislature codified the reasonable-efforts requirement in 1992, “the extent of DCS’s efforts to reunify the family was addressed in cases involving termination of parental rights only as a factor considered in the best-interest analysis.”

In 2004, that began to change with an influential decision in *In re C.M.M.*, 2004 WL 438326 (Tenn. Ct. App., March 9, 2004). In *In re C.M.M.*, the Court of Appeals discussed whether the State is required to prove that it fulfilled its duty to provide reasonable efforts. It stressed the importance of the directive in Section 37-1-166 that DCS make reasonable efforts, and also addressed the relationship between the statute on reasonable efforts and the statute on termination of parental rights. The *In re C.M.M.* court held that the reasonable efforts required by Section 37-1-166 are the same sort of reasonable efforts required by Section 36-1-113.

The *In re C.M.M.* court acknowledged that DCS is not required to reunify parents and children in every case; however, the court held that when the termination proceeding involves grounds that implicate DCS’s obligation, it is essential for its case that DCS prove it made reasonable efforts to reunite the child and parent(s). The *In re C.M.M.* court also held that, in such cases, DCS bears the burden of proving that it made reasonable efforts pursuant to 37-1-166(b) even when the parent has not questioned DCS’s efforts. Based on these facts, the *In re C.M.M.* court reversed the termination of the mother’s parental rights because DCS did not prove it fulfilled the reasonable efforts requirement.

In *In re Tiffany B*., 228 S.W.3d 148 (Tenn. Ct. App. 2007) the parents were drug addicts who relied on petty crime for income; when not incarcerated, they were homeless and unemployed. Their rights were terminated. On appeal, the *In re Tiffany B.* court stressed that a child’s well-being hinges on DCS’s efforts to assist parents. The opinion described DCS’s responsibility to develop a permanency plan and make reasonable efforts to help parents rehabilitate themselves so they can better care and provide for their children.

The appellate court in *In re Tiffany B.* held that DCS’s efforts were lacking in this case. The opinion stated that the court observed that DCS did not satisfactorily attempt to locate or assist either parent but instead expected the parents to initiate remedial efforts themselves. The appellate court reversed the termination because DCS failed to prove it had made reasonable efforts.

Subsequent to these decisions, many courts began requiring DCS to prove that it had made reasonable efforts to assist the respondent parent. This Court had not yet directly addressed whether DCS is required to prove that it made reasonable efforts as a precondition to termination.

In *In re Bernard T.,* 319 S.W.3d 586 (Tenn. 2010), the Court touched upon the reasonable-efforts requirement. In *In re Bernard T.,* the putative father’s parental rights were terminated based on failure to comply with the parenting plan, persistent conditions, and failure to establish paternity. On appeal, the intermediate appellate court reversed the termination since the record did not show DCS made reasonable efforts to assist the father. On appeal, the Court recognized that the responsibility to provide reasonable efforts occurs when DCS first separates the child from the parents, and that this responsibility typically arises in cases that involve the first three grounds listed in the termination statute.

Ultimately, the Court reversed the decision of the Court of Appeals because the record showed clear and convincing evidence that DCS made reasonable efforts to assist the putative father. Thus, the Court discussed reasonable efforts in the context of a termination proceeding, but did not hold that the State is required to prove by clear and convincing evidence that it made reasonable efforts to assist the parent to obtain a termination of parental rights.

Throughout the years, some courts held that DCS could fulfill its burden of proof by establishing either that it made reasonable efforts *or* by showing that reasonable efforts would be futile. In other parental termination cases, DCS sought to avoid the reasonable efforts requirement by demonstrating that there were “aggravated circumstances” absolving it of the requirement. This has occurred in cases where the ground for termination is the one at issue in the present case: abandonment by conduct prior to incarceration that shows wanton disregard for the child’s welfare.

The Court notes that in cases where a private party filed a petition to terminate the parental rights of a biological parent, the private petitioner has not been required to prove reasonable efforts to reunify as a precondition termination. This pertains even to cases in which the child was at some point taken into DCS custody. Regardless of the petitioner, all of these cases apply to Section 36-1-113, which governs termination of parental rights.

In interpreting Section 36-1-113, the Court explained that the statute provides that a petitioner must prove two elements by clear and convincing evidence to terminate parental rights of a biological parent: (1) at least one of the listed grounds for termination, and (2) that termination is in the child’s best interest. The section does not include DCS’ reasonable efforts to reunify as a required element to be established alongside grounds and best interest. Instead, it is a factor to be weighed in determining the child’s best interest.

Apart from its reference in one of the best-interest factors, the phrase “reasonable efforts” only indirectly appears in Section 36-1-113. Reasonable Efforts appears in the definition for “abandonment” and again when the statute dictates that DCS *may* elect not to file a petition to terminate parental rights if it has not yet made reasonable efforts.

Next, the Court looked at 37-1-166, in which “reasonable efforts” is defined in the dependency and neglect statutes. This section states that the aggravated-circumstances exception relieves DCS of its reasonable efforts burden when a court of competent jurisdiction determines that aggravated circumstances are involved.

The Court found that nothing in the plain language of Section 36-1-113 indicates that a petitioner in a proceeding to terminate parental rights is required to put on proof of DCS’ reasonable efforts. The language in the statute only suggests that the trial court is to consider reasonable efforts of DCS in determining whether termination of the parent’s rights is in the child’s best interest. Section 37-1-166 also contains language indicating that proof of reasonable efforts is compulsory in a termination proceeding.

In *In re C.M.M.*, the Court of Appeals concluded that if DCS is instructed under Section 37-1-166 to make reasonable efforts to reunify in a dependency and neglect proceeding, then it must prove that it made such reasonable efforts in any ensuing termination proceedings. The Court in *Kaliyah* disagreed, as neither the language of Section 36-1-113 nor its legislative history bears out this interpretation. The Court points out that Section 37-1-166 does not apply to any proceeding, but instead only in juvenile court proceedings. Circuit and chancery courts have concurrent jurisdiction with the juvenile court in actions to terminate parental rights; limiting Section 37-1-166 to juvenile court actions indicates the legislative intent that it apply only in dependency and neglect actions.

Additionally, this Court notds, Section 36-1-113 does not include reasonable efforts in the grounds for termination. The Court employed the principle of “*expression unius est esclusio alterius*,” which suggests that where legislature includes specific language in one section of a statute but omits it in another, it is assumed that this inclusion or exclusion was purposeful. When Section 36-1-113 was enacted, states were able to adopt termination statutes requiring a showing of reasonable efforts in termination proceedings. Tennessee did not do so.

This Court staetd that the Legislature’s choice to include reasonable efforts *only* in the factors to be considered in the best-interest analysis demonstrates intent *not* to make proof of reasonable efforts a precondition to termination of parental rights. Accordingly, the Court in *Kaliyah* overruled the holding in *In re C.M.M.* insofar as it demanded that DCS prove it made reasonable efforts to reunify the family.

The State also argued that it is anomalous to infer that Section 36-1-113 requires DCS to prove reasonable efforts, but not require similar proof from a private party because the same statute applies regardless of petitioner. The Court agreed, and held that, in a termination proceeding, the extent of DCS’s efforts to reunify the family could be weighed in a best-interest analysis, but proof of reasonable efforts is *not* a precondition to termination. Instead, reasonable efforts must be proven by a preponderance of the evidence, not by clear and convincing evidence.

The Court stated that it does not seek to lessen the importance of DCS’s efforts in aiding parents who want to regain custody of their child. The Court agreed with the *In re C.M.M.* opinion that in many circumstances, the success of a parent’s remedial efforts is interwoven with DCS’s efforts to provide support. In a given parental termination case, the Court believed the best-interest factor regarding DCS’s efforts to support the respondent parent may be determinative; however, the extent of DCS’s efforts should be weighed in the best-interest analysis, and not be an essential element in a proceeding to terminate the parental rights of the respondent parent.

Under the Court’s holding, DCS was not required to prove that it made reasonable efforts to assist Father in these termination proceedings, regardless of whether it had such an obligation in the custody/dependency and neglect proceedings. The Court noted that in this appeal, Father did not challenge the juvenile court’s determination that termination of his parental rights is in Kaliyah’s best interest; therefore, this issue is inapplicable. Thus, the Court reinstated the termination of Father’s parental rights.