

FILED

07/28/2023

Clerk of the  
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
Assigned on Briefs May 1, 2023

IN RE ZOEY L.<sup>1</sup>

Appeal from the Probate Court for Cumberland County  
No. 2021PF7892 William Talley Ridley, Judge

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No. E2022-01067-COA-R3-PT

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In a private petition for termination of parental rights, the petitioner alleged multiple grounds for termination: (1) abandonment for failure to visit; (2) abandonment for failure to support; and (3) failure to manifest an ability and willingness to assume custody. The trial court found the Father's parental rights should be terminated based upon these three grounds and that termination was in the child's best interest. We affirm the trial court's ruling as to the termination grounds of abandonment by failure to visit and failure to support. Because the trial court did not make findings of fact concluding that placing legal and physical custody with Father would pose a risk of substantial harm to the physical or psychological welfare of the child, we must vacate the trial court's ruling as to the failure to manifest an ability and willingness to assume custody ground. We affirm the trial court's conclusion that termination of Father's parental rights is in the best interest of the child.

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

JEFFREY USMAN, J., delivered the opinion of the court, in which JOHN W. MCCLARTY and CARMA DENNIS MCGEE, JJ., joined.

Kyle Brooks Cokkinias, Crossville, Tennessee, for the appellant, Zachary L.

Kevin R. Bryant, Crossville, Tennessee, for the appellee, Shelby S.

**OPINION**

I.

Shelby S., who is seeking to adopt Zoey L., brought a private petition to terminate the parental rights of Zachary L. (Father). Zoey was born in September 2015 to Zachary

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<sup>1</sup> It is the policy of this Court to protect the privacy of children in parental termination cases by avoiding the use of full names.

L. and Kaitlyn A. Shortly after Zoey's birth, her biological parents divorced; Father was granted custody. Kaitlyn A., who last saw Zoey in 2018, has not been involved in Zoey's life. She did not challenge the termination of her parental rights before the trial court nor has she appealed from the trial court's decision to terminate her rights. Father, however, did appeal.

Father entered into a romantic relationship with Shelby S. He and Zoey moved into Shelby's home in 2016, and since Zoey was nine months old, Zoey has lived with Shelby. Zoey refers to Shelby as her Mother, and Shelby is the only mother Zoey has known.

When Father was imprisoned in 2018 after pleading guilty to criminal simulation and fraudulent use of a credit card, he gave legal custody of Zoey to Shelby, executing a temporary guardianship agreement in January 2018 and a power of attorney in March 2018. Shelby has had custody of Zoey ever since. Shelby is not related to Zoey through blood or marriage. At the time Father gave Shelby custody of Zoey, he also had several relatives living in the area, including his father, stepmother, mother, brother, and sister-in-law. Father choose not to give custody to any of his family members when he was incarcerated, instead giving custody to Shelby.

Over the next few years, Father was in and out of prison in connection with multiple felonies; included among the charges were offenses for vandalism<sup>2</sup> and for reckless endangerment with a deadly weapon. While the details provided to the trial court were scant, Father testified that one vandalism charge was in connection with his actions taken at Shelby's house. Initially, Father and Shelby continued their relationship through Father's incarceration. Shelby and Father exchanged letters regarding their loving relationship and Zoey. After Father was released, he moved back into Shelby's house with her and Zoey. However, he did not seek to formally transfer custody of Zoey back to himself, instead leaving custody with Shelby.

Shelby and Father's romantic relationship ended in February 2019 as a result of the domestic violence perpetrated by Father against Shelby. Father reached a plea agreement that resulted in a conviction of reckless endangerment with a deadly weapon, and he was reincarcerated. Shelby obtained an order of protection against Father.<sup>3</sup> When Father was released this time, he did not live with Shelby and Zoey.

In September 2019, Father attempted to send Zoey a birthday card and a money

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<sup>2</sup> The record contains two judgments from the Criminal Court in Cumberland County where Father pled guilty to the class E felony of vandalism over \$1,000 pursuant to Tennessee Code Annotated section 39-14-408. The first judgment had an offense date of September 1, 2018 and the second judgment had an offense date of July 7, 2020. However, Father testified to a third misdemeanor vandalism charge in conjunction with the reckless endangerment charge.

<sup>3</sup> The Order of Protection was obtained in 2020 and subsequently extended.

order for child support. Both of these were sent via certified mail, requiring a signature from Shelby to be delivered. Both pieces of mail were stamped “Return to Sender – Unclaimed – Unable to Forward” by the post office. The pieces of mail were addressed correctly and were returned to Father. Father suggested Shelby engaged in some improper action in preventing these from reaching Zoey. Shelby suggested that delivery may have been attempted while she was at work. The trial court was not persuaded that Shelby had done anything improper or to prevent either piece of mail from being received.

Shelby and Father both testified that Father paid forty dollars in child support in February 2020. Father testified that he repeatedly sent money for child support in the fall of 2019, but Shelby testified that she never received any other child support from Father. The trial court found Shelby to be credible and found Father not to be.

In February 2020, Father filed a petition for visitation, which the trial court granted. Beginning in February 2020, Father was granted visitation every other weekend. Pursuant to the visitation order, Father’s and Shelby’s representatives were to meet at the sheriff’s office to exchange Zoey. Due to the order of protection, both Shelby’s and Father’s representatives were to facilitate the exchange. However, Father promptly stopped exercising his visitation rights. Shelby’s mother continued to appear at the sheriff’s office to exchange Zoey, but neither Father nor his representative appeared. To explain his failure to appear, Father indicated that he failed to exercise his visitation because he feared being arrested on an outstanding charge given the exchange location. Father took no further action to address this matter, and he simply stopped visiting Zoey. Father last exercised his visitation in March 2020.

Father went back to prison in August 2020 and has remained incarcerated ever since. After returning to prison, Father did not provide any further monetary support to Shelby for Zoey. While incarcerated in October 2020, Father sent a letter to Shelby regarding custody of Zoey. Therein, Father offered to sell seventy percent of custody of Zoey to Shelby, while retaining thirty percent. Father indicated that he would sell custody of Zoey to Shelby if she would pay Father \$15,000 with a down payment of \$3,500. Shelby did not pay.

Father took several classes while incarcerated. Father completed the Cognitive Behavioral Intervention Program, the Kairos Inside Weekend Program, the Victim Impact Program, Release for Success, and the Career Management for Success program. Additionally, Father obtained certificates of completion as part of the Standardized Craft Training Program in Construction Site Safety, HVAC Level One, and Core. Father testified that he received credits in prison for completing the programs that shortened his sentence. The trial court concluded that Father took these courses for the purpose of shortening his time in prison.

Father testified at the time of the termination hearing that he was soon to be released

again; he anticipated a release in July 2022. Father testified that he would be employed after his release as an HVAC technician. He had obtained his HVAC certification while incarcerated. Father also testified that he expected to have a place to live after his release. He testified that his stepmother was going to give him some land where he could put a trailer. However, Father did not have a trailer yet.

Shelby filed this Petition for Termination and Adoption on February 26, 2021, alleging several grounds for termination of the biological parents' parental rights and seeking to adopt Zoey. A trial was held on July 11, 2022. The trial court found that Shelby's testimony was credible. While the trial court found that Father was sincere, it determined that his testimony was not credible.

Shelby and Father both testified that Zoey calls Shelby "mom," as Shelby is the only mother that Zoey has ever known. When Zoey was having a hard time adjusting due to remembering some of Father's violent behavior, Shelby took Zoey to therapy. Zoey has since graduated from therapy. Zoey participates in soccer and t-ball and rides horses every weekend. Shelby's mom also lives with Shelby and Zoey. Zoey has bonded with Shelby's family as well. Zoey completed kindergarten and was going to be enrolled in the same school for first grade in the fall of 2022.

When Father was not incarcerated in 2018 and 2019, he would take Zoey to see his extended family. Father's father, stepmother, mother, brother, sister-in-law, and several nephews lived in the area. Father, Father's brother, and Father's mother all testified that Father's family regularly saw Zoey, but only when Father had Zoey and generally prior to Father's incarceration in 2018. After Father was incarcerated in August 2020, Father's extended family did not see Zoey at all. Father's brother testified that he did text to see Zoey, but Shelby did not respond. During the first two years of Zoey's life, before Father gave Shelby custody of Zoey, Father's mother testified that she regularly watched Zoey for Father and Shelby. Father's mother testified that, at the time of trial, she had not seen Zoey in four years, which included time Father was out of prison.

The trial court terminated Father's parental rights based upon (1) abandonment for failure to visit; (2) abandonment for failure to support; and (3) failure to manifest an ability and willingness to assume custody, and the court's finding that termination was in Zoey's best interest. Father appealed the termination of his parental rights.

## II.

Parents have a fundamental constitutional interest in the care and custody of their own children. *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007). This fundamental interest is "far more precious than any property right." *In re Carrington H.*, 483 S.W.3d 507, 522 (Tenn. 2016) (quoting *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982)). "[P]ublic policy strongly favors allowing parents to raise their biological or legal

children as they see fit, free from unwarranted governmental interference.” *In re Bernard T.*, 319 S.W.3d 586, 597 (Tenn. 2010). However, a parent’s rights are not absolute and may be terminated on clear and convincing evidence that statutory grounds for termination exist and that termination is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c)(1)-(2); *In re Adoption of Angela E.*, 402 S.W.3d 636, 639 (Tenn. 2013).

In a termination of parental rights case, we review a trial court’s findings of fact de novo on the record with a presumption of correctness unless the evidence preponderates otherwise. *In re Bernard T.*, 319 S.W.3d at 596; see Tenn. R. App. P. 13(d). “In light of the heightened burden of proof in termination proceedings, however, the reviewing court must make its own determination as to whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, amount to clear and convincing evidence of the elements necessary to terminate parental rights.” *In re Carrington H.*, 483 S.W.3d at 524 (citing *In re Bernard T.*, 319 S.W.3d at 596-97). The grounds for termination and the determination that termination is in the child’s best interest must be established by clear and convincing evidence, that is, evidence that “enables the fact-finder to form a firm belief or conviction regarding the truth of the facts” and which “eliminates any serious or substantial doubt about the correctness of these factual findings.” *In re Bernard T.*, 319 S.W.3d at 596; see Tenn. Code Ann. § 36-1-113(c). “The trial court’s ruling that the evidence sufficiently supports termination of parental rights is a conclusion of law, which appellate courts review de novo with no presumption of correctness.” *In re Carrington H.*, 483 S.W.3d at 524 (citing *In re M.L.P.*, 281 S.W.3d 387, 393 (Tenn. 2009)). Questions of law are reviewed de novo with no presumption of correctness. *Id.* This court applies the versions of the parental termination statutes in effect on the date the petition was filed. *In re Braxton M.*, 531 S.W.3d 708, 732 (Tenn. Ct. App. 2017) (holding “that the version of the statute in effect at the time of the petition’s filing controls this action”).

### III.

Under Tennessee Code Annotated section 36-1-113(c), termination of parental rights must be based upon (1) a finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and (2) a finding that termination of the parent’s rights is in the best interests of the child. The trial court found by clear and convincing evidence three grounds for termination of Father’s parental rights and that it was in Zoey’s best interests to terminate Father’s parental rights.

#### A. Grounds for Termination

The trial court found clear and convincing evidence that Father’s parental rights should be terminated based upon: (1) abandonment by failure to visit; (2) abandonment by failure to support; and (3) failure to manifest a willingness and ability to assume custody of the child. On appeal, Father does not challenge the grounds for termination. Father only challenges the trial court’s best interest analysis. Nevertheless, it is incumbent upon this

court to address each ground for termination pursuant to the Tennessee Supreme Court directive to this court to “review the trial court’s findings as to each ground for termination and as to whether termination is in the child’s best interests, regardless of whether the parent challenges these findings on appeal.” *In re Carrington H.*, 483 S.W.3d at 525-26.

### 1. Abandonment by Failure to Visit

In the case of an incarcerated parent, abandonment means that:

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

(a) Failed to visit, has failed to support, or has failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding the parent’s or guardian’s incarceration;

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

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

Tenn. Code Ann. § 36-1-102(1)(A)(iv) (effective March 6, 2020 to June 30, 2021)).

Visitation must be more than just token visitation, which is visitation that “under the circumstances of the individual case, constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child.” Tenn. Code Ann. § 36-1-102(1)(C). “The absence of willfulness is an affirmative defense pursuant to Rule 8.03 of the Tennessee Rules of Civil Procedure.” Tenn. Code Ann. § 36-1-102(1)(I) (effective March 6, 2020 to June 30, 2021). Father did not plead the absence of willfulness as a defense.

Irrespective of Father’s pleading, the trial court found by clear and convincing evidence that Father willfully abandoned Zoey pursuant to Tennessee Code Annotated section 36-1-102 by willfully and voluntarily failing to visit for the four months immediately preceding Father’s incarceration. *See* Tenn. Code Ann. § 36-1-102(1)(A)(iv)(a). The trial court also found that Father had not visited in the four months immediately preceding the filing of the petition to terminate and that Father only engaged

in “token visitation” because when Father received visitation, he failed to exercise his visitation. *See* Tenn. Code Ann. § 36-1-102(1)(C).

Shelby filed the petition for termination on February 26, 2021; however, Father was incarcerated at that time, so the relevant four-month period is the four months prior to Father’s incarceration. Tenn. Code Ann. § 36-1-102(1)(A)(iv)(a); *see In re Braxton M.*, 531 S.W.3d at 726 (looking at the four-month period immediately preceding Father’s incarceration). Shelby and Father both testified that the last time he exercised visitation with Zoey was in March 2020. Accordingly, Father had not visited, token or otherwise, for the four months prior to his incarceration. The record provides clear and convincing evidence to support the trial court’s finding that Father willfully abandoned Zoey by failing to visit.

## 2. Abandonment by Failure to Support

Abandonment by an incarcerated parent also occurs when a parent failed to support or make reasonable payments toward the support of the child “for four (4) consecutive months immediately preceding the parent’s or guardian’s incarceration.” Tenn. Code Ann. § 36-1-102(1)(A)(iv)(a) (effective March 6, 2020 to June 30, 2021). The trial court concluded that Father failed to support Zoey pursuant to Tennessee Code Annotated section 36-1-102(1)(A). “The absence of willfulness is an affirmative defense pursuant to Rule 8.03 of the Tennessee Rules of Civil Procedure.” Tenn. Code Ann. § 36-1-102(1)(I) (effective March 6, 2020 to June 30, 2021). Father did not plead absence of willfulness as a defense.

Irrespective of Father’s pleading, the trial court found by clear and convincing evidence that Father willfully failed to support Zoey during the four consecutive months immediately preceding Father’s incarceration. Tenn. Code Ann. § 36-1-102(1)(A)(iv)(a); *see In re Braxton M.*, 531 S.W.3d at 726 (looking at the four-month period immediately preceding Father’s incarceration). The trial court specifically found that Father had failed, without good cause or excuse, to make reasonable and consistent child support payments. The trial court reached this conclusion both as to the four months preceding Father’s incarceration and the filing of the petition to terminate. The trial court found that Father had, at best, made two child support payments totaling \$70: one payment in February 2020 of \$40 and one attempted payment in September 2019 of \$30. The trial court found these payments were no more than token payments as defined by Tennessee Code Annotated section 36-1-102(1)(B). Both payments also fell outside of the relevant four-month period prior to Father’s reincarceration in August 2020, during which time Father made no payments.

Looking at the four months immediately preceding Father’s incarceration, there is clear and convincing evidence that Father willfully failed to pay any child support during this time period. Tenn. Code Ann. § 36-1-102(1)(A)(iv)(a). The record provides clear and

convincing evidence to support the trial court’s finding that Father abandoned Zoey by willfully failing to provide support or reasonable payments toward the support of Zoey in the four months immediately preceding his incarceration.

### 3. Failure to Manifest an Ability and Willingness to Assume Custody

Parental rights may also be terminated when “a parent or guardian has failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility of the child, and placing the child in the [parent’s] legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child.” Tenn. Code Ann. § 36-1-113(g)(14). The trial court found that “the Respondents have failed to manifest an ability and willingness to assume legal and physical custody of the child.” While the trial court made findings related to Father’s willingness and ability to assume custody, the trial court failed to make any finding with regard to the second prong. That is, the trial court failed to make factual findings regarding whether placing Zoey in Father’s custody would pose a risk of substantial harm to Zoey’s physical or psychological welfare.<sup>4</sup>

This court confronted a similar circumstance in the case of *In re Ethan W.* wherein the trial court “failed to address the second prong of the failure to manifest ground” in its ruling. *In re Ethan W.*, No. M2021-01116-COA-R3-PT, 2023 WL 415999, at \*10 (Tenn. Ct. App. Jan. 26, 2023), *perm. App. Denied* (Tenn. Apr. 20, 2023). In such circumstances, this court concluded in *In re Ethan W.*, “we cannot conduct our own de novo review of the proof” as to this ground, but that remand was unnecessary to address the second prong because other grounds for termination were established by clear and convincing evidence. *Id.* As noted above, we have affirmed the trial court’s determination as to the abandonment by failure to visit and failure to support grounds for termination. Therefore, we vacate the trial court’s finding as to the failure to manifest an ability and willingness to assume custody ground but proceed to the best interest analysis.

### B. Best Interest

If a statutory ground for termination of parental rights has been shown by clear and convincing evidence, the focus shifts to what is in the child’s best interest. *In re Audrey S.*, 182 S.W.3d 838, 877 (Tenn. Ct. App. 2005). The Tennessee Supreme Court has summarized the law regarding the best interest analysis as follows:

Facts considered in the best interests analysis must be proven by “a

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<sup>4</sup> In addressing the best interest factors, the trial court went so far as to indicate that it was not sure that evidence had been specifically presented to address the mental or emotional detriment that would follow a change in custody.



preponderance of the evidence, not by clear and convincing evidence.” “After making the underlying factual findings, the trial court should then consider the combined weight of those facts to determine whether they amount to clear and convincing evidence that termination is in the child’s best interest[s].” When considering these statutory factors, courts must remember that “[t]he child’s best interests [are] viewed from the child’s, rather than the parent’s, perspective.” Indeed, “[a] focus on the perspective of the child is the common theme” evident in all of the statutory factors. “[W]hen the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child . . . .”

Ascertaining a child’s best interests involves more than a “rote examination” of the statutory factors. And the best interests analysis consists of more than tallying the number of statutory factors weighing in favor of or against termination. Rather, the facts and circumstances of each unique case dictate how weighty and relevant each statutory factor is in the context of the case. Simply put, the best interests analysis is and must remain a factually intensive undertaking, so as to ensure that every parent receives individualized consideration before fundamental parental rights are terminated.

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

The General Assembly amended Tennessee Code Annotated section 36-1-113(i) effective April 22, 2021. *See* 2021 Tenn. Pub. Acts, Ch. 190 § 1 (S.B. 205). As the petition in this case was filed prior to the effective date, the previous version of the statute applies. *In re Riley S.*, No. M2020-01602-COA-R3-PT, 2022 WL 128482, at \*14 n.10 (Tenn. Ct. App. Jan. 14, 2022) *perm. app. denied* (Tenn. Mar. 17, 2022); *In re J.S.*, No. M2022-00142-COA-R3-PT, 2023 WL 139424, at \*6 (Tenn. Ct. App. Jan. 10, 2023) (“This court applies the versions of the parental termination statutes in effect on the date the petition was filed.”). Accordingly, the factors to be considered are:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child’s best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol, controlled substances or controlled substance analogues as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i).

The trial court found that it was in Zoey's best interest to terminate Father's parental rights. In considering the factors, the trial court found that Father was incarcerated with no definitive release date having been presented to the court. *See* Tenn. Code Ann. § 36-1-113(i)(1). Furthermore, the trial court found that Father had trouble maintaining his own life, much less parenting his minor child. *See id.* The trial court found that Father failed to maintain regular visitation or contact with Zoey. *See* Tenn. Code Ann. § 36-1-113(i)(3). The trial court found that a meaningful relationship existed, but the meaningful relationship was between Shelby and Zoey. *See* Tenn. Code Ann. § 36-1-113(i)(4). The trial court noted that Zoey calls Shelby "mom" and has been the only mother Zoey has ever known. *See id.* Shelby has been the only person taking care of Zoey for several years. *See id.* Regarding the effect that a change in caretakers would have on Zoey, the trial court noted Father's own testimony that a change in custody would not be in Zoey's best interest at this time. *See* Tenn. Code Ann. § 36-1-113(i)(5). The trial court observed that Father had perpetrated domestic violence against Shelby, who was the caretaker of Zoey and a member of the household at the time. *See* Tenn. Code Ann. § 36-1-113(i)(6). The trial court observed there was no evidence that Father had provided a healthy and safe home for

Zoey. Tenn. Code Ann. § 36-1-113(i)(7). Father admitted that he has committed four felonies during Zoey's lifetime, resulting in his incarceration. *Id.* One of those felonies was against Shelby, and there was also criminal vandalism perpetrated as to Shelby's home. *Id.* The trial court found that Father had only paid token support in support of Zoey. Tenn. Code Ann. § 36-1-113(i)(9). The record supports the trial court's findings with regard to these factors.

The trial court concluded that, based on these factors, it was in the best interest of Zoey to terminate Father's parental rights.<sup>5</sup> On appeal, Father challenges the best interest analysis arguing that it is not in Zoey's best interests for Father's parental rights to be terminated because (1) Shelby is of no relation, whether by blood or marriage; (2) Shelby knew that her custody of Zoey was meant to be temporary; and (3) Shelby alienated Zoey from Father and Father's family, sending back letters during Father's incarceration. Father argues that it would be in the best interest of Zoey to maintain her familial relationship with Father and Father's extended family.

The trial court did not find Father's blood relative or marriage argument convincing. Father himself testified that he gave custody of Zoey to Shelby instead of a family member when he went to prison. The trial court reasoned as follows regarding this decision:

[Father] voluntarily placed legal custody with Shelby . . . . And I find that to be an important factor as to best interest, because he felt that she was the best person. Although he had family, and he testified that his father was helping him, and his brother and mother and everybody lived nearby in the community, and has a rather large family, but he cho[]se specifically to place custody of his child with [Shelby].

Father also testified that, even once he was released, it would not be in Zoey's best interest to be immediately returned into his custody stating:

I don't think it would be fair to Zoey to uproot her that fast. I think she should be worked back into my life slowly, because as . . . young as she is, I don't think she would understand. And I would be willing to do that.

There was no evidence presented that any of Father's relatives sought to see Zoey while Father was incarcerated beyond a few text messages. Neither Father's brother nor his mother could state the last time they requested to see Zoey.

Father next argues that Shelby knew that her custody of Zoey was supposed to be

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<sup>5</sup> The trial court found Tennessee Code Annotated section 36-1-113(i)(2) did not apply and that insufficient evidence was presented to reach a conclusion regarding Tennessee Code Annotated section 36-1-113(i)(8).

temporary as evidenced by the letters Shelby wrote Father during his pre-2019 incarceration. Father's argument is not well developed regarding how the original expectation for Zoey to be in the temporary custody of Shelby is relevant to the best interest analysis. We have recognized that continuity and stability in the child's life are of great importance, and so, with all else even, the trial court should attempt to maintain stability and continuity in a child's life. *Taylor v. Taylor*, 849 S.W.2d 319, 328, 332 (Tenn. 1993); *Steen v. Steen*, 61 S.W.3d 324, 328 (Tenn. Ct. App. 2001); *Gaskill v. Gaskill*, 936 S.W.2d 626, 630 (Tenn. Ct. App. 1996); *Hill v. Robbins*, 859 S.W.2d 355, 358 (Tenn. Ct. App. 1993). While the initial agreement may have been intended to be temporary, Shelby has had custody of Zoey since 2018. She has been the source of continuity and stability for Zoey.

Father also argues that Shelby cut off contact between Father and Zoey and his extended family and Zoey. The letters and cards that Father attempted to use as a basis for the contention that Shelby had undermined his relationship with Zoey were from the fall of 2019, almost four years prior to trial. The trial court found Shelby to be credible, and Father not to be credible. The trial court found unconvincing Father's contention that Shelby caused the letters to be returned to Father. Father's brother and mother both testified that they wanted to see Zoey while Father was incarcerated, and they may have sent a message to Shelby to that effect. Father's family was not persistent in seeking to be a part of Zoey's life. The trial court noted that none of the extended family filed a petition with the court regarding visitation with Zoey while Father was incarcerated.

In considering the statutory factors, we agree that the evidence supports termination of Father's parental rights. Father has been in and out of prison since 2018. Instead of being reformed as a result of his imprisonment, Father has continued to reoffend, resulting in having been incarcerated four times during Zoey's life. *See* Tenn. Code Ann. § 36-1-113(i)(1). At the time of trial, Zoey was only six years old. This factor favors termination.

When Father was out of prison, he did petition the court for visitation, but less than a month later he stopped visiting Zoey. *See* Tenn. Code Ann. § 36-1-113(i)(3). The trial court acknowledged that Father formerly had a meaningful relationship with Zoey, but noted he had not been in her life on a regular basis since he first went to prison in 2018. *See* Tenn. Code Ann. § 36-1-113(i)(4). On the other hand, Shelby has been the only constant parent in Zoey's life, having been in Zoey's life since she was nine months old. *See id.* Zoey calls Shelby "mom," and Shelby is the only mother Zoey has known. *See id.* The trial court concluded that there is a meaningful relationship in this case, but it is between Shelby and Zoey. Factors (i)(3) and (i)(4) support termination of Father's parental rights.

Father and Shelby both testified that keeping Shelby in Zoey's life is in her best interest. *See* Tenn. Code Ann. § 36-1-113(i)(5). In addition, Father has pled guilty to a felony in connection with domestic violence perpetrated towards Shelby. *See* Tenn. Code

Ann. § 36-1-113(i)(6). Among the other criminal activity engaged in by Father, there was also criminal vandalism perpetrated by Father in connection with Shelby's home. *See id.*; Tenn. Code Ann. § 36-1-113(i)(7). At the time of trial, Father testified that he would be released from prison in July 2022. However, he also testified that he did not have a place to live after his release. *See id.* Father testified that he expected to receive a piece of land from his stepmother and intended to place a trailer on the property. *See id.* However, Shelby has lived in the same house with Zoey since 2016. *See id.* In addition, Father has not paid child support pursuant to the child support guidelines over the last several years preceding the trial. *See* Tenn. Code Ann. § 36-1-113(i)(9). Furthermore, Father treated Zoey's custody as something to be sold, offering to sell seventy percent of the custody of Zoey to Shelby in exchange for \$15,000. Having considered the statutory factors, the arguments advanced by Father on appeal, and the reasoning of the trial court, we conclude that clear and convincing evidence supports the trial court's conclusion that the termination of Father's rights is in Zoey's best interest.

#### IV.

While we vacate the trial court's ruling as to the termination ground of failure to manifest an ability and willingness to assume custody of the child, we affirm the trial court's ruling as to the termination grounds of abandonment by failure to visit and failure to support. We also affirm the trial court's ruling that termination is in the child's best interest. Accordingly, we affirm the judgment of the Cumberland County Probate Court terminating the parental rights of Zachary L. Costs of this appeal are taxed to Appellant, Zachary L., for which execution may issue if necessary.

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JEFFREY USMAN, JUDGE