

FILED

05/31/2023

Clerk of the
Appellate Courts

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

IN RE NOAH B. ET AL.

Appeal from the Juvenile Court for Knox County
No. 106105 Timothy E. Irwin, Judge

No. E2022-00432-COA-R3-PT

A mother appeals the trial court’s decision to terminate her parental rights based on the grounds of (1) abandonment by failure to support, (2) persistence of conditions, and (3) failure to manifest an ability and willingness to personally assume custody or financial responsibility of the children. She further challenges the trial court’s finding by clear and convincing evidence that termination of her parental rights was in the best interest of the children. We affirm the trial court in all respects.

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

ANDY D. BENNETT, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, C.J., and J. STEVEN STAFFORD, P.J., W.S., joined.

Mary Livingston Ward, Knoxville, Tennessee, for the appellant, Rebecca B.

Jennifer Schrader Bjornstad, Knoxville, Tennessee, for the appellees, Ruby and Shane A.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

At the center of this appeal are two children, Noah B. and Rickey L., born to Rebecca B. (“Mother”) and Derrick L. (“Father”)¹ in March 2018 and February 2019, respectively. The Tennessee Department of Children’s Services (“DCS” or “the Department”) received a referral that Rickey L. suffered from medical maltreatment and nutritional neglect. The allegations from the referral are as follows:

¹ Mother and Father are not married; however, Father is listed on both children’s birth certificates. Father’s parental rights are not at issue in this appeal.

2. CPS Investigator Rodney Freeman went to the family home on June 17, 2019, Rickey was on his third hospitalization for gastrointestinal issues. When hospitalized each time, Rickey gained weight, but he loses weight or no longer gains weight when he returns home. Rickey is currently not on track for his age on the growth chart. He has been diagnosed with Failure to Thrive and severe malnourishment. His head is beginning to shrink, which is an indication that the poor nutrition is now hindering his brain development.
3. Rickey was evaluated by Speech Therapy while he was hospitalized, and he did not have any issues with sucking. There are no medical reasons for Rickey's Failure to Thrive.
4. The mother was responsible for feeding the baby during the hospital stays, and he lost weight. She was consistently non-compliant with hospital instructions for feeding and burping the baby. The mother was observed feeding the baby without ensuring that he was held at a 90 degree angle as instructed. She left him lying flat during those feedings. The mother was found sleeping in the chair with the child lying flat. She was difficult to awaken for feedings on several occasions at the hospital, but the mother reports that she feeds the baby every three hours at home as instructed. The mother allows the baby to sleep in a bassinet at home with a couch pillow and Boppy cushion to prop him up. The mother also left Noah in the room alone with Rickey.
5. The mother failed to pick up Rickey's prescription for Zantac, but she also claimed that she was giving him his medication as directed. When asked to produce the medication, she was unable to do so. When the mother did produce medication at a meeting, she produced a bottle with the labeling torn off. She stated that she picked the medication up in April and only missed a couple of doses. The bottle had a month's supply of medication, which showed a significant surplus.

On July 17, 2019, pursuant to an Immediate Protection Agreement,² both children were placed in the custody of Ruby and Shane A. ("Petitioners"), who are "distant paternal cousins" of the children. On July 25, 2019, the Department filed a Petition for Adjudication of Dependency and Neglect, to Transfer Temporary Legal Custody and for Expedited Hearing, alleging that the children were dependent and neglected due to allegations of medical maltreatment and nutritional neglect of Rickey. The petition sought to award "temporary legal custody" of the children to the Petitioners. On July 31, 2019, an Interim Order Verifying Transfer of Custody was entered in the Juvenile Court for Knox County ("juvenile court") stating that "there is probable cause to believe the [children are]

² The petition for termination of parental rights as well as the juvenile court's final order terminating Mother's rights both state that the "children were placed with [Petitioners] on July 17, 2019, pursuant to an Immediate Protection Agreement." However, neither party cites to the location in the record where the Immediate Protection Agreement may be found, and we have been unable to locate the agreement in the record.

dependent and neglected.” The order went on to award “physical custody” of the children to Petitioners and provided Petitioners with “the authority to consent to medical, surgical, hospital, dental, educational, psychological, psychiatric, and institutional care for the children.”

The juvenile court held an adjudicatory hearing on December 11, 2019 and, by adjudicatory order entered on December 27, 2019, found clear and convincing evidence that the children were dependent and neglected due to Mother’s “inability to provide appropriate care and supervision.” The juvenile court awarded “legal and physical custody” of the children to Petitioners and allowed Mother to participate in supervised visitation and “therapeutic visits with Dr. Marie Bly or one of her agents.” The court further ordered Mother to complete the following tasks prior to the next hearing: “i. complete all parenting classes, ii. complete a mental health assessment and follow recommendations, iii. complete a full psychological exam/evaluation with Dr. Marie Bly, iv. have stable and appropriate housing, v. have a legal source of income, [and] vi. have had good and consistent visits with the children.”

The juvenile court held a follow-up hearing on February 25, 2020 and entered a final disposition on May 22, 2020 stating:

Dr. Bly did not recommend continued visits, due to the children’s progressive remission. Dr. Bly opined that the children need time to heal, visitation with parents is retriggering trauma, and continuing visitation would be detrimental to the children.

The court suspended visitation with the parents, awarded physical custody to the Petitioners, and held that, “*prior to* Parents filing a petition seeking that therapeutic visitation resume, the Parents must continue individual counseling and their counselor must recommend that therapeutic visitation resume. After therapeutic visitation continues with success, the parents may motion for supervised visitation.” Mother appealed this ruling to the Knox County Circuit Court (“circuit court”).

The circuit court held a de novo hearing on February 3, 2021, and made the following findings of fact:

- a. [Mother] has a job at Wendy’s, per her testimony.
- b. The mother does not have appropriate housing. The mother testified that she was living with her mother and father. The mother amended her testimony to say that her father does not live there, but merely visits every day.
- c. Jill Jensen, formerly of the Department of Children’s Services, testified that the mother’s parents were previously substantiated for abuse against the mother when she was a minor.

- d. The mother's housing is not suitable for the children in the instant case.
- e. The mother's subsequently born child, Landon,^[3] was born in August 2020 suffering withdrawal from nicotine which required him to stay in the Neonatal Intensive Care Unity (NICU), for treatment of withdrawal symptoms. Consequently, the Court finds that, based upon the mother's smoking while pregnant, the mother is inclined to neglect or refuse to provide necessary medical, surgical, institutional, or hospital care for the child. The Court makes this finding because it is consistent with the problems that led to Rickey[']s hospitalizations.

Based on these findings, the circuit court held that the children were dependent and neglected and that Mother should "have no contact whatsoever with the children pending further orders" of the juvenile court. The circuit court further determined that Mother:

[M]ay petition to have supervised visitation with the children when she can establish that she has complied with all the requirements of the December 27, 2019 Juvenile Court order. This petition shall include proof that she has been engaged in therapy to address the issues that have been raised by this case, including anger management and the dangers posed to her children by her relationship with her biological parents.

Petitioners filed a petition to terminate Mother's parental rights on June 26, 2021, alleging the following grounds for termination: Tenn. Code Ann. § 36-1-113(g)(1), abandonment by failure to support; Tenn. Code Ann. § 36-1-113(g)(14), failure to manifest an ability and willingness to assume custody or financial responsibility of the children; and Tenn. Code Ann. § 36-1-113(g)(3)(A), persistence of conditions. On September 20, 2021, Petitioners filed a motion for default judgment and/or scheduling conference stating that Mother had failed to plead or otherwise defend against the petition for termination. On that same day, Mother filed a handwritten, pro se response to the petition stating:

I, Rebecca B[.], want to fight the petition to terminate my rights. I have completed everything I have been told to complete. I currently have custody of my youngest son and I am buying my own place. I have a stable job and have lived in the same place for over a year.

Thereafter, Mother was appointed counsel. The juvenile court held a hearing on the petition on March 10, 2022; Mother and Ruby A. testified. The juvenile court entered an

³ Mother's third son, Landon, is not at issue in this appeal. Landon was removed from Mother's custody for a period of time due to physical abuse perpetrated on the child by Mother's boyfriend. Landon was returned to Mother's custody in August 2021. Mother regained custody because she had "substantially complied with the department and completed permanency plan's requirements including parenting assessment, parenting education, anger management, and has been consistently visiting." Mother had a fourth son, Kayden, born in January 2022, and he also resides in her home.

order on May 6, 2022, terminating Mother’s parental rights, based upon findings that Petitioners proved all three grounds for termination by clear and convincing evidence and that termination was in the best interest of the children. Mother appeals.

STANDARD OF REVIEW

Under both the federal and state constitutions, a parent has a fundamental right to the care, custody, and control of his or her own child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Angela E.*, 303 S.W.3d 240, 249-50 (Tenn. 2010) (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174-75 (Tenn. 1996) (citing *Nale v. Robertson*, 871 S.W.2d 674, 678 (Tenn. 1994)). Although this right is fundamental, it is not absolute and may be terminated in certain situations. *In re Angela E.*, 303 S.W.3d at 250. Our legislature has identified ““those situations in which the state’s interest in the welfare of a child justifies interference with a parent’s constitutional rights by setting forth grounds on which termination proceedings can be brought.”” *In re Jacobe M.J.*, 434 S.W.3d 565, 568 (Tenn. Ct. App. 2013) (quoting *In re W.B., IV.*, Nos. M2004-00999-COA-R3-PT, M2004-01572-COA-R3-PT, 2005 WL 1021618, at *7 (Tenn. Ct. App. Apr. 29, 2005)).

Tennessee Code Annotated section 36-1-113 provides the grounds and procedures for terminating parental rights. First, a petitioner seeking to terminate parental rights must prove that at least one ground for termination exists. Tenn. Code Ann. § 36-1-113(c)(1); *In re Angela E.*, 303 S.W.3d at 251. Second, a petitioner must prove that terminating parental rights is in the child’s best interest. Tenn. Code Ann. § 36-1-113(c)(2); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

The termination of a parent’s rights is one of the most serious decisions courts make because “[t]erminating parental rights has the legal effect of reducing the parent to the role of a complete stranger.” *In re W.B., IV.*, 2005 WL 1021618, at *6. Moreover, termination of parental rights severs “forever all legal rights and obligations of the parent.” *Id.* (quoting Tenn. Code Ann. § 36-1-113(l)(1)). Consequently, a parent has a constitutional right to fundamentally fair procedures during termination proceedings. *In re Hannah C.*, No. M2016-02052-COA-R3-PT, 2018 WL 558522, at *2 (Tenn. Ct. App. Jan. 24, 2018) (citing *In re Carrington H.*, 483 S.W.3d 507, 522 (Tenn. 2016)).

Tennessee law ensures fundamental fairness in termination proceedings by requiring a heightened standard of proof—clear and convincing evidence. See Tenn. Code Ann. § 36-1-113(c)(1); *In re Carrington H.*, 483 S.W.3d at 522. Before a parent’s rights may be terminated, a petitioner must prove both the grounds and the child’s best interest by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c); *In re Valentine*, 79 S.W.3d at 546. “Clear and convincing evidence ‘establishes that the truth of the facts asserted is highly probable, and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence.’” *In re Serenity B.*, No. M2013-

02685-COA-R3-PT, 2014 WL 2168553, at *2 (Tenn. Ct. App. May 21, 2014) (quoting *In re M.J.B.*, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004)).

We review the trial court's findings of fact de novo with a presumption of correctness unless the evidence preponderates otherwise. TENN. R. APP. P. 13(d); *In re Serenity B.*, 2014 WL 2168553, at *2. In light of the heightened standard of proof, we must then make our 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 (quoting *In re Bernard T.*, 319 S.W.3d 586, 596-97 (Tenn. 2010)).

ANALYSIS

I. Grounds for Termination

A. Abandonment by failure to support

The juvenile court terminated Mother's parental rights for abandoning her children by failing to support them. *See* Tenn. Code Ann. §§ 36-1-113(g)(1), 36-1-102. As defined in Tenn. Code Ann. § 36-1-102(1)(A)(i), abandonment by failure to support occurs when a parent:

For a period of four (4) consecutive months immediately preceding the filing of a proceeding, pleading, petition, or any amended petition to terminate the parental rights of the parent or parents or the guardian or guardians of the child who is the subject of the petition for termination of parental rights or adoption, that the parent or parents or the guardian or guardians either have failed to visit or have failed to support or have failed to make reasonable payments toward the support of the child[.]

"[F]ailed to support" or "failed to make reasonable payments toward such child's support" is defined as "the failure, for a period of four (4) consecutive months, to provide monetary support or the failure to provide more than token payments toward the support of the child." Tenn. Code Ann. § 36-1-102(1)(D). "That the parent had only the means or ability to make small payments is not a defense to failure to support if no payments were made during the relevant four-month period." *Id.*

An adult parent is presumed to know of their legal obligation to provide monetary support to their children regardless of whether the court has ordered the parent to do so. *See* Tenn. Code Ann. § 36-1-102(1)(H); *In re Braxton M.*, 531 S.W.3d 708, 724 (Tenn. Ct. App. 2017)). Pursuant to Tenn. Code Ann. § 36-1-102(1)(I), a parent may assert, as an affirmative defense, that their failure to financially support a child was not willful. A parent

“shall bear the burden of proof that the failure to . . . support was not willful” and must establish the lack of willfulness by a preponderance of evidence. Tenn. Code Ann. § 36-1-102(1)(I).

Pursuant to Tenn. Code Ann. § 35-1-102(1)(A)(i), we must focus on the four-month period before the filing of the petition, which is February 26, 2021 to June 25, 2021. *See In re Jacob C.H.*, No. E2013-00587-COA-R3-PT, 2014 WL 689085, at *6 (Tenn. Ct. App. Feb. 20, 2014) (explaining that the statutory four-month period covers four months preceding the day the termination petition was filed and does not include the day the petition was filed). Mother testified that she provided child support for the children during the relevant time period, but she lacked any proof verifying that the support was paid. When pressed for specific dates, Mother stated that her payments were made in October and November, which was well after the petition for termination was filed and outside the timeframe we must consider. Mother also testified that she provided “stuff for the boys” that was sent back by Petitioners, but she had no memory of when she sent the “stuff.” Mother’s testimony about her employment status was likewise imprecise and vague. She testified that she worked at Dominos for approximately six months from March 2021 to September 2021. There was no testimony regarding Mother’s living expenses during the relevant time period. In contrast, Ruby A. testified that any support received was outside the relevant four-month time frame. She also stated that Petitioners never received any packages in the mail, cards, or other supplies for the children.

On the issue of Mother’s support of the children, the trial court held:

[T]here is clear and convincing evidence that grounds to terminate the mother’s parental rights exist under T.C.A. 36-1-113(g)(1) for abandonment. The mother has willfully failed to provide any more than token support for the child for more than four months prior to the filing of this Petition. In fact, the mother has failed to provide any support whatsoever during the four months prior to filing the Petition. The mother did not make any other contribution to the support of the child.

Mother argues that the trial court erred in finding that she failed to support the children because “there was no evidence presented or testimony elicited as to Mother’s financial means other than Mother’s testimony that she worked during the relevant period.” Mother asserts that this “scarcity of evidence regarding Mother’s financial means” resulted in the court’s inability to determine whether her support of the children was merely “token support.” Other than Mother’s vague testimony, there is no evidence that Mother provided any financial support for the children from February 26, 2021 to June 25, 2021. Insofar as the trial court’s finding is based on a credibility determination favoring Ruby A.’s testimony over Mother’s testimony, “we give great deference to the trial court’s [witness credibility] findings and will not disturb those findings absent clear and convincing

evidence to the contrary.” *In re M.L.D.*, 182 S.W.3d 890, 897 (Tenn. Ct. App. 2005) (citing *Sullivan v. Sullivan*, 107 S.W.3d 507, 510 (Tenn. Ct. App. 2002)). The evidence does not preponderate against the trial court’s determination that Mother did not financially support the children during the relevant time period. We need not engage in analysis of whether the support was “merely token” because there was no support provided at all.

To the extent that Mother attempts to assert on appeal that her failure to support the children was not willful, such an argument is waived. Effective July 1, 2018, the General Assembly amended Tenn. Code Ann. § 36-1-102(1) to make the absence of willfulness an affirmative defense. *See In re Jude M.*, 619 S.W.3d 224, 236 (Tenn. Ct. App. 2020). Thus, Petitioners were not required to prove that Mother’s failure to support was “willful” in order to establish the ground of abandonment under Tenn. Code Ann. § 36-1-102(1)(A)(i). *See In re Archer R.*, No. M2019-01353-COA-R3-PT, 2020 WL 820973, at *5 (Tenn. Ct. App. Feb. 19, 2020) (“[A] petitioner is no longer required to prove the respondent in a termination proceeding acted ‘willfully’ in failing to . . . support his or her child[.]”). Mother was permitted to raise a lack of willfulness as an affirmative defense to abandonment in her answer to the termination petition, and she bore the burden to prove her failure to support was not willful. *See* Tenn. Code Ann. § 36-1-102(1)(I). However, Mother did not raise a lack of willfulness as an affirmative defense in her pro se answer. Moreover, Mother did not present any evidence that her failure to support was not willful such that the issue could have been tried by implied consent. *See In re Lauren F.*, No. W2020-01732-COA-R3-CT, 2021 WL 5234712, at *8 (Tenn. Ct. App. Nov. 1, 2021). As a result, she has waived this issue. *See Pratcher v. Methodist Healthcare Memphis Hosps.*, 407 S.W.3d 727, 735 (Tenn. 2013) (stating that, “[a]s a general rule, a party waives an affirmative defense if it does not include the defense in an answer or responsive pleading”); *In re Imerald W.*, No. W2019-00490-COA-R3-PT, 2020 WL 504991, at *4 n.5 (Tenn. Ct. App. Jan. 31, 2020) (stating that a parent waives a lack of willfulness as an affirmative defense when the parent fails to raise the defense at trial).

Even if the issue had not been waived, Mother presented no documentation of making any support payments during the relevant four-month period, and she failed to put on any evidence of her income or expenses during the relevant period. Accordingly, we affirm the trial court’s determination that Mother abandoned the children by failing to support them within the meaning of Tenn. Code Ann. §§ 36-1-113(g)(1) and 36-1-102(1)(A)(i).

B. Persistence of conditions

The trial court also terminated Mother’s parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(3). This ground is often referred to as “persistence of conditions.” *In*

re Audrey S., 182 S.W.3d 838, 871 (Tenn. Ct. App. 2005). Persistence of conditions may be a basis for terminating a parent’s parental rights if:

The child has been removed from the home or the physical or legal custody of a parent . . . for a period of six (6) months by a court order entered at any stage of proceedings in which a petition has been filed in the juvenile court alleging that a child is a dependent and neglected child, and:

- (i) The conditions that led to the child’s removal still persist, preventing the child’s safe return to the care of the parent . . . , or other conditions exist that, in all reasonable probability, would cause the child to be subjected to further abuse or neglect, preventing the child’s safe return to the care of the parent . . . ;
- (ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent . . . in the near future; and
- (iii) The continuation of the parent . . . and child relationship greatly diminishes the child’s chances of early integration into a safe, stable, and permanent home[.]

Tenn. Code Ann. § 36-1-113(g)(3)(A). A petitioner seeking to terminate parental rights pursuant to this ground must prove each of the statutory elements by clear and convincing evidence. *In re Justin D.*, No. E2019-00589-COA-R3-PT, 2020 WL 4473032, at *9 (Tenn. Ct. App. Aug. 4, 2020).

The persistence of conditions ground “focuse[s] on the results of the parent’s efforts at improvement rather than the mere fact that he or she had made them.” *In re Audrey S.*, 182 S.W.3d at 874. The purpose behind this ground for termination is “to prevent the child’s lingering in the uncertain status of foster child if a parent cannot within a reasonable time demonstrate an ability to provide a safe and caring environment for the child.” *In re A.R.*, No. W2008-00558-COA-R3-PT, 2008 WL 4613576, at *20 (Tenn. Ct. App. Oct. 13, 2008) (quoting *In re D.C.C.*, No. M2007-01094-COA-R3-PT, 2008 WL 588535, at *9 (Tenn. Ct. App. Mar. 3, 2008)). Therefore, the court must determine “the likelihood that the child can be safely returned to the custody of the [parent], not whether the child can safely remain in foster care.” *In re K.A.H.*, No. M1999-02079-COA-R3-CV, 2000 WL 1006959, at *5 (Tenn. Ct. App. July 21, 2000). Moreover, “[a] parent’s continued inability to provide fundamental care to a child, even if not willful, . . . constitutes a condition which prevents the safe return of the child to the parent’s care.” *In re Nevada N.*, 498 S.W.3d 579, 605 (Tenn. Ct. App. 2016) (quoting *In re A.R.*, 2008 WL 4613576, at *20).

Although neither party has raised this issue, we must begin our analysis by examining whether the threshold requirements of Tenn. Code Ann. § 36-1-113(g)(3)(A) have been met. The persistence of conditions ground only applies if the child has been “removed from the home or the physical or legal custody of a parent or guardian for a period of six (6) months by a court order entered at any stage of proceedings in which a petition has been filed in the juvenile court alleging that a child is a dependent and neglected child.” Tenn. Code Ann. § 36-1-113(g)(3)(A); *see also In re Lucas S.*, No. M2019-01969-COA-R3-PT, 2021 WL 710841, at *4 (Tenn. Ct. App. Feb. 24, 2021). In determining whether the threshold requirements have been met in this case, we take guidance from three recent cases: *In re Disnie P.*, No. E2022-00662-COA-R3-PT, 2023 WL 2396557, at *10 (Tenn. Ct. App. Mar. 8, 2023); *In re Anna W.*, No. W2022-00657-COA-R3, 2022 WL 17820763, at *5 (Tenn. Ct. App. Dec. 20, 2022); and *In re Khalil J.*, No. M2021-00908-COA-R3-PT, 2022 WL 1537396, at *11-12 (Tenn. Ct. App. May 16, 2022).

In *In re Khalil J.*, the child was removed from his parents’ custody on February 1, 2018 pursuant to a “Non-exigent Removal and Custody Order.” *In re Khalil J.*, 2022 WL 1537396, at *11. Four days later, on February 5, 2018, DCS filed a “Petition to Adjudicate Dependency and Neglect and for Temporary Legal Custody” in which it alleged the child was dependent and neglected. *Id.* This Court held that the child had not been “removed by a court order ‘as a result of’ or ‘following’ a petition alleging a child is dependent and neglected” as is required by Tenn. Code Ann. § 36-1-113(g)(3)(A). *Id.* at *12. Therefore, based on the fact that the petition alleging dependency and neglect was filed after the children were removed from the parents’ custody, the court reversed the juvenile court’s conclusion that DCS met its burden of proof on the ground of persistence of conditions. *Id.* at *12. Likewise, in *In re Anna W.*, 2022 WL 17820763, at *5, this Court held that the threshold requirements for the ground of persistence of conditions were not met where the children were removed from the mother’s custody four days prior to DCS’s filing a petition to adjudicate the children as dependent and neglected. Under *In re Khalil J.* and *In re Anna W.* we must consider the timing of removal of the children and the filing of the petition for dependency and neglect.

The *In re Disnie P.*, 2023 WL 2396557, at *10-11, the Court focused on the distinction between “physical”⁴ and “legal”⁵ custody. The procedural history of *In re Disnie P.* is as follows:

Prior to the filing of DCS’s petition for dependency and neglect in the juvenile court, the Child was not in the home or physical custody of Father or Mother because the Child was in the care of Petitioners. Father had left the Child with [a petitioner] advising her that he could no longer care for the Child. Father and [a petitioner] then completed an Immediate Protection Agreement allowing Petitioners to care for the Child Therefore, in order for this ground to apply to either Father or Mother, the Child must have been removed from their *legal custody* for a period of six months by a court order entered at any stage of proceedings in which a petition had been filed in the juvenile court alleging that the Child was dependent and neglected.

In re Disnie P., 2023 WL 2396557, at *10. Thus, the immediate protection agreement in *In re Disnie P.* transferred only physical custody to the petitioners. The court went on to consider whether the child was removed from either the mother or father’s legal custody subsequent to February 2020, the date DCS filed the petition alleging dependency and neglect. *Id.* at *11. The court found that the child was not removed from the father’s legal custody because the child was born out of wedlock, and the father never had legal custody

⁴ Pursuant to Tenn. Code Ann. § 36-1-102(40), “Physical custody” is defined as:

[P]hysical possession and care of a child. ‘Physical custody’ may be constructive, as when a child is placed by agreement or court order with an agency, or purely physical, as when any family, including a formal or informal foster family, has possession and care of a child, so long as such possession was not secured through a criminal act. An agency and a family may have physical custody of the same child at the same time[.]

⁵ “Legal custody” is not specifically defined in Tenn. Code Ann. § 36-1-102, but this Court has stated:

[T]he term “legal custody” denotes a distinction from physical possession, which is demonstrated by the fact that the Department of Children’s Services often exercises legal custody or guardianship over children who are in the possession of foster parents or relatives. *See, e.g., In re Maria B.S.*, No. E2012-01295-COA-R3-PT, 2013 WL 1304616 at *1 (Tenn. Ct. App. Apr. 1, 2013) (“DCS placed the Children with the Foster Parents in February 2010, while DCS retained legal custody of the Children pursuant to court order.”); *In re Amber M.S.*, No. M2010-00873-COA-R3-PT, 2010 WL 4941180 at *2 (Tenn. Ct. App. Nov. 30, 2010) (“[T]he girls were again placed in the legal custody of DCS and in the physical custody of separate foster families.”).

In re Joseph F., 492 S.W.3d 690, 701 (Tenn. Ct. App. 2016).

of the child. *Id.* (citing Tenn. Code Ann. § 36-2-303). So, the threshold requirements of the persistence of conditions ground were not met with respect to the father. *Id.* With respect to the mother, however, the child was removed from her legal custody by order entered in May 2020. *Id.* Thus, the court found that the child was removed from the legal custody of the mother for a period of six months as a result of a dependency and neglect petition; therefore, the threshold requirements of Tenn. Code Ann. § 36-1-113(g)(3)(A) were satisfied. *Id.*

In the case before us, the children were removed from Mother’s physical custody on July 17, 2019 and placed with Petitioners pursuant to an immediate protection agreement. Eight days later, on July 25, 2019, the Department filed a petition for adjudication of dependency and neglect alleging, among other things, that the children were dependent and neglected. On July 31, 2019, an interim order verifying transfer of custody was entered in the juvenile court. The juvenile court held an adjudicatory hearing on December 11, 2019 and, by adjudicatory order entered December 26, 2019, the court found clear and convincing evidence that the children were dependent and neglected due to Mother’s “inability to provide appropriate care and supervision.” The December 26, 2019 adjudicatory order awarded “legal and physical custody” of the children to Petitioners.

To summarize, Petitioners had physical custody—“physical possession and care”—of the children on July 17, 2019. *See* Tenn. Code Ann. § 36-1-102(40). The Department filed a petition alleging the children were dependent and neglected on July 25, 2019, and Petitioners’ physical custody of the children was confirmed by an interim order entered on July 31, 2019. On December 26, 2019, the juvenile court awarded legal custody of the children to the Petitioners. The petition to terminate parental rights was filed on June 26, 2021, eighteen months from the date the juvenile court entered the order removing the children from the legal custody of Mother. Therefore, the threshold requirements for the persistence of conditions ground were met because the children were removed from the *legal custody* of a parent for a period of more than six months by a court order entered during proceedings in which a petition was filed in the juvenile court alleging that the children were dependent and neglected. *See* Tenn. Code Ann. § 36-1-113(g)(3)(A). Additionally, six months accrued before the termination petition was heard. *See* Tenn. Code Ann. § 36-1-113(g)(3)(B).

Regarding the substance of the persistence of conditions ground, the trial court stated in its final order terminating Mother’s rights:

[T]he conditions which led to the removal of the children still persist; other conditions persist which in all probability would cause the children to be

subjected to further abuse and neglect and which, therefore, prevent the children's return to the care of the mother; there is little likelihood that the children could be returned to the mother in the near future, and little likelihood that the mother could have any unsupervised contact with the children in the near future; and the continuation of the legal parent and child relationship with the children greatly diminishes the children's chances of early integration into a stable and permanent home. The mother's home is inappropriate based upon her father, who is a pedophile, frequenting the home with the children present. The continuing relationship between the mother and her father, and the mother's exposure of her children to him are of very concerning to the Court. The mother does not have a driver's license and relies on her sister to provide transportation which totals four hours of driving time per day. The maternal aunt provides care for the children and has [four] children of her own. The mother recently ended a trial home placement where she regained custody of her one-year old who was removed from her home by the Department due to physical abuse by the mother's then boyfriend.

As the trial court recognized, "this ground for termination may be met when either the conditions that led to the removal persist or 'other conditions exist that, in all reasonable probability, would cause the child to be subjected to further abuse or neglect, preventing the child's safe return to the care of the parent.'" *In re Daylan D.*, No. M2020-01647-COA-R3-PT, 2021 WL 5183087, at *9 (Tenn. Ct. App. Nov. 9, 2021) (quoting Tenn. Code Ann. § 36-1-113(g)(3)(A)(i)). "Thus, even if the initial reasons that the children were placed in DCS custody have been remedied, if other conditions continue to persist that make the home unsafe, this ground may still be shown." *Id.*

The chief concerns leading to the children's removal were medical maltreatment and nutritional neglect. Specifically, the children were diagnosed with failure to thrive due to Mother's neglect. Ruby A. testified that Noah would "dig things out of the trash can" and wanted to "eat constantly" when he first came into her care. Since being in the Petitioners' care, however, both children have recovered from their failure to thrive diagnoses and are now physically on track.

We next consider whether other conditions exist that make the home unsafe. *See* Tenn. Code Ann. § 36-1-113(g)(3)(A)(i). As the juvenile court pointed out, other concerning conditions do exist. For example, in the nearly three years that the children were removed from Mother's custody, Mother had two more children, one of whom was temporarily removed from her custody because her then-boyfriend broke the child's rib when he was babysitting the child. In addition, Mother admitted that she continues to allow

her father, who had sexually abused her when she was fourteen years old, into her home. Mother's decision to expose her children to her sexually abusive father and a physically abusive boyfriend are concerning conditions that exist or have recently existed. Mother also testified that she did not have a driver's license and that she depended on her sister both for transportation and child care while she worked. Mother's sister has four children of her own, but the sister agreed to watch Noah, Rickey, and Mother's two other children each day until Mother returned from work. The logistics of this childcare and transportation arrangement are easily subject to disruption and probably untenable, especially since Mother did not have a driver's license or car at the time of trial and relied upon her sister to transport her to and from work.

Taken together, these circumstances prevent the children's safe return to Mother's care, and there is little likelihood that these conditions will be remedied in the near future. *See* Tenn. Code Ann. § 36-1-113(g)(3)(A)(i), (ii). Mother's testimony showed she was unconcerned about her father's presence in her home or the risk he might pose to her children. Finally, the children had not seen or visited with Mother for nearly three years at the time of the hearing. The children were thriving in Petitioner's home, and Petitioners were willing to adopt them if they became available for adoption. *See* Tenn. Code Ann. § 36-1-113(g)(3)(A)(iii). Therefore, we agree with the trial court that clear and convincing evidence supports termination of Mother's parental rights on the ground of persistence of conditions.

C. Failure to manifest an ability and willingness to personally assume custody

The trial court terminated Mother's parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(14). Under this ground, a parent's rights may be terminated when (1) he or she "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 (2) "placing the child in the person's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child." Tenn. Code Ann. § 36-1-113(g)(14). Both of these elements must be proven by clear and convincing evidence. *See* Tenn. Code Ann. § 36-1-113(c)(1), (g)(14).

The Tennessee Supreme Court has held that the first element of Tenn. Code Ann. § 36-1-113(g)(14) "places a conjunctive obligation on a parent . . . to manifest *both* an ability and willingness to personally assume legal and physical custody or financial responsibility for the child." *In re Neveah M.*, 614 S.W.3d 659, 677 (Tenn. 2020) (emphasis added). Because of this conjunctive obligation on a parent, a petitioner seeking to terminate a parent's rights under this ground need only prove that a parent failed to manifest *either* an ability *or* a willingness to assume custody. *Id.* (citing *In re Amynn K.*, No. E2017-01866-COA-R3-PT, 2018 WL 3058280, at *13-14 (Tenn. Ct. App. June 20, 2018)). "Ability

focuses on the parent’s lifestyle and circumstances[.]” and willingness focuses on the parent’s attempts “to overcome the obstacles that prevent [him or her] from assuming custody or financial responsibility for the child.” *In re Serenity W.*, No. E2018-00460-COA-R3-PT, 2019 WL 511387, at *6 (Tenn. Ct. App. Feb. 8, 2019). Thus, a parent’s mere desire to reunite with his or her child is insufficient to demonstrate an ability or a willingness. *In re Nicholas C.*, No. E2019-00165-COA-R3-PT, 2019 WL 3074070, at *17 (Tenn. Ct. App. July 15, 2019). Regarding the time period during which we must focus our inquiry on Mother’s conduct, this Court has held that:

[T]he critical time period for this ground is the time preceding the filing of the petition to terminate parental rights, *see In re M.E.N.J.*, No. E2017-01074-COA-R3-PT, 2017 WL 6603658, at *7 (Tenn. Ct. App. Dec. 27, 2017), though this court will also consider the parent’s actions following the filing of the petition and up to the time of trial, *see In re Maya R.*, No. E2017-01634-COA-R3-PT, 2018 WL 1629930, at *7 (Tenn. Ct. App. April 4, 2018).

In re Jeremiah S., No. W2019-00610-COA-R3-PT, 2020 WL 1951880, at *7 (Tenn. Ct. App. Apr. 23, 2020); *see also In re Kendall K.*, No. M2021-01463-COA-R3-PT, 2022 WL 10331612, at *7 (Tenn. Ct. App. Oct. 18, 2022).

Here, the trial court made the following findings regarding the ground of failure to manifest:

[T]here is clear and convincing evidence that grounds to terminate the mother’s parental rights exist under T.C.A. 36-1-113(g)(14) based upon the mother failing to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility of the children, and placing the children in either parent’s legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the children. The Court [o]rdered that the mother complete various tasks in order to be allowed to have supervised contact and the mother has failed to request a modification of the no contact order. Further, the mother has paid almost no support for the children

In the December 27, 2019 adjudicatory order, the juvenile court assigned several tasks for Mother to complete before her next review hearing, including: “i. complete all parenting classes, ii. complete a mental health assessment and follow recommendations, iii. complete a full psychological exam/evaluation with Dr. Marie Bly, iv. have stable and appropriate housing, v. have a legal source of income, [and] vi. have had good and consistent visits with the children.” In its March 12, 2021 order, the circuit court again required Mother to comply with the December 27, 2019 order, stating that Mother:

[M]ay petition to have supervised visitation with the children when she can establish that she has complied with all the requirements of the December 27, 2019 Juvenile Court order. This petition shall include proof that she has been engaged in therapy to address the issues that have been raised by this case, including anger management and the dangers posed to her children by her relationship with her biological parents.

At the termination hearing, Mother was questioned about whether she completed the tasks required in the December 27, 2019 order and whether she petitioned to resume visitation. She testified that she completed a mental health assessment and remained in therapy, but she had no documentation to verify that she completed the assessment. Mother did provide evidence that she had completed a twelve-hour course entitled “Nurturing Parenting” in July 2021. She testified that she had appropriate housing and showed pictures of her two-bedroom, two-bathroom trailer. She also testified she had a legitimate source of income making \$14.00 per hour working at Days Inn in Gatlinburg. Regarding her petition to resume visitation, she testified that she filed a petition to resume visitation but “she didn’t hear [any]thing back.” When questioned if she had a copy of the petition or a receipt for the filing fee, she said “[n]ot with me, no.”

The trial court apparently rejected Mother’s testimony that she filed a petition to resume visitation. As previously mentioned, “we give great deference to the trial court’s [witness credibility] findings and will not disturb those findings absent clear and convincing evidence to the contrary.” *In re M.L.D.*, 182 S.W.3d at 897. We agree that Mother’s failure to provide evidence that she completed all of the requirements from the December 2019 order, as well as her failure to provide evidence to support her testimony that she filed a petition to resume visitation, reflects poorly on her ability and willingness to resume custody of the children. Mother’s delay in completing the tasks assigned to her in December 2019 and in filing or following up on resuming visitation with her children shows she was not able or willing to resume visitation.

Regarding the second requirement of Tenn. Code Ann. § 36-1-113(g)(14), the evidence in the record demonstrates that placing the children in Mother’s custody “would pose a risk of substantial harm to the physical or psychological welfare of the child[ren].” Tenn. Code Ann. § 36-1-113(g)(14). “Substantial harm” requires (1) “a real hazard or danger that is not minor, trivial, or insignificant” and, (2) “[w]hile the harm need not be inevitable, it must be sufficiently probable to prompt a reasonable person to believe that the harm will occur more likely than not.” *In re Maya R.*, 2018 WL 1629930, at *8 (quoting *Ray v. Ray*, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001)). Dr. Bly was present for the dispositional hearing on February 25, 2020, and according to the court’s dispositional order entered on May 22, 2010, she “did not recommend continued visits, due to children’s progressive remission” and “opined that the children need time to heal, [because] visitation with parents is retriggering trauma, and continuing visitation would be detrimental to the

children.” There was no testimony to the contrary. This evidence shows that placing the children in the Mother’s custody would pose a risk of substantial harm to their psychological welfare. Moreover, Mother’s decision to expose her subsequently born children to her father who sexually assaulted her as a child, also poses a risk of harm to the welfare of the children. Therefore, we conclude that DCS proved this ground for termination, Tenn. Code Ann. § 36-1-113(g)(14), by clear and convincing evidence.

II. Best interest

Having determined that clear and convincing evidence of at least one statutory ground exists to terminate Mother’s parental rights, we must next consider whether the trial court properly found that termination of Mother’s parental rights was in the best interest of the children. *See* Tenn. Code Ann. § 36-1-113(c)(2); *In re Audrey S.*, 182 S.W.3d at 860.

After a court finds that clear and convincing evidence exists to support a ground for termination, the child’s interests diverge from those of the parent and the court focuses on the child’s best interests. *In re Audrey S.*, 182 S.W.3d at 877. A court must view the child’s best interest from the perspective of the child, not that of the parent. *Id.* at 878. A finding that at least one ground for termination of parental rights exists does not necessarily require that a parent’s rights be terminated. *Id.* at 877. Because some parental misconduct is redeemable, our termination of parental rights statutes recognize that “terminating an unfit parent’s parental rights is not always in the child’s best interests.” *Id.* A court’s factual findings in connection with its best interest analysis must be proven by “a preponderance of the evidence, not by clear and convincing evidence.” *In re Kaliyah S.*, 455 S.W.3d 533, 555 (Tenn. 2015). Once a court makes the underlying factual findings, it should “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.” *Id.*

“The best interest analysis is a fact-intensive inquiry, and each case is unique.” *In re Kenneth D.*, No. M2021-00214-COA-R3-PT, 2022 WL 556739, at *7 (Tenn. Ct. App. Feb. 24, 2022) (citing *White v. Moody*, 171 S.W.3d 187, 193-94 (Tenn. Ct. App. 2004)). A trial court must consider the factors enumerated in Tenn. Code Ann. § 36-1-113(i), but it is not required to find that each of the enumerated factors exists before concluding that it is in the best interest of the child to terminate a parent’s rights. *In re M.A.R.*, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005). Although in some circumstances “the consideration of one factor may very well dictate the outcome of the analysis,” *In re Audrey S.*, 182 S.W.3d at 878, a court is still obligated to consider “all the factors and all the proof.” *In re Gabriella D.*, 531 S.W.3d 662, 682 (Tenn. 2017).

The Tennessee General Assembly amended the statutory best-interest factors in 2021 “by deleting the previous subsection in its entirety and substituting a new subsection providing, inter alia, twenty factors to be considered in determining a child’s best interest.” *In re Jeremiah G.*, No. M2022-00869-COA-R3-PT, 2023 WL 2784608, at *9 (Tenn. Ct.

App. Apr. 5, 2023); *see* 2021 TENN. PUB. ACTS ch. 190 § 1 (S.B. 205), eff. Apr. 22, 2021. Because DCS filed the termination petition after April 22, 2021, the revised best interest factors apply in this case. *See In re Braxton M.*, 531 S.W.3d 708, 732 (Tenn. Ct. App. 2017) (quoting *In re Tianna B.*, No. E2015-02189-COA-R3-PT, 2016 WL 3729386, at *7 (Tenn. Ct. App. July 6, 2016)) (holding the version of a termination statute ““that was in force when the petition was filed governs this case””).

Without citing to the specific factors, the trial court held as follows regarding the best interests of the children:

That it is in the best interest of the children for the mother’s parental rights to be terminated. The children need stability and permanency in the home with the Petitioners. The mother has made some adjustments to her circumstances that might make it safe and in the children’s best interest to be in her home, but it is too early to know if the adjustments are lasting. The children have been in numerous therapies and had medical appointments since these Petitioners have been taking care of these failure to thrive children, and now that the children are healthy, the mother believes that she can care for the children. The mother has not demonstrated continuity and stability in meeting the basic needs of these children. These children need stability and to stay with Petitioners where they are. A change in caretakers would be devastating to these children. Dr. Bly stopped visits based upon harm resulting to the children from contact with their parents and the trauma that resulted from that contact. The Court does [not] know if the children are afraid of the mother or whether being in the mother’s home would trigger trauma symptoms, because there has not been any contact between the mother and children. The mother has not met the needs of the children and has waited until the 11th hour to try to show that she can provide for them and to try to obtain services. The mother has shown no sense of urgency with regard to the children and her relationship with them. The mother’s father has shown brutality to the mother and, because he is frequently in her home, he would be around the children just as he is with her two youngest children. The home is unsafe for children based upon the maternal grandfather’s presence. There is no secure attachment between the mother and children. The mother has not been around the children or had any contact with them whatsoever. The mother does not have a meaningful relationship with the children due to not having any contact with them. The children are very attached with the Petitioners who have provided for them since the removal. The mother’s care of the children was not safe and stable, as it resulted in them being diagnosed with failure to thrive. The mother has only made two child support payments in October 2021 and December 2021. The Court is unsure about the mental health of the mother but her decisions raise concerns for the Court that the mother continues to have mental health issues.

During the nearly three-year period following removal, Mother began to take steps to comply with the trial court's requirements for her to resume visitation; however, at the time of trial, Mother failed to produce evidence that she completed all of the requirements, and she failed to produce any evidence that she had filed a petition to resume visitation. *See* Tenn. Code Ann. § 36-1-113(i)(1)(K), (M) (“Whether the parent has taken advantage of available programs, services, or community resources to assist in making a lasting adjustment of circumstances, conduct, or conditions;” and “[w]hether the parent has demonstrated a sense of urgency in . . . seeking custody of the child, or addressing the . . . conditions that made an award of custody unsafe . . . [.]”). Because Mother’s visitation was suspended and she failed to provide evidence that she completed the requirements for resuming visitation, Mother had not re-built a relationship with the children, and there was no evidence that the children had any attachment to her. In fact, the evidence showed that it would be difficult for Mother to cultivate a positive relationship with the children because, as Dr. Bly opined, contact with Mother “retriggered trauma” and was “detrimental” to the children. *See* Tenn. Code Ann. § 36-1-113(i)(1)(B), (D), (E), (F), (G) (“The effect a change of caretakers and physical environment is likely to have on the child’s emotional, psychological, and medical condition,” “[w]hether the parent and child have a secure and healthy parental attachment,” “[w]hether the parent has maintained regular visitation[,]” “[w]hether the child is fearful of living in the parent’s home[,]” and “whether the parent . . . trigger[s] or exacerbate[s] the child[ren]’s experience of trauma or post-traumatic symptoms[.]”). In contrast, the children have found stability and continuity in their current home, where they have had lived for nearly their entire lives. *See* Tenn. Code Ann. § 36-1-113(i)(1)(H) (“Whether the child has created a healthy parental attachment with another person or persons in the absence of the parent[.]”). The court strongly factored in the presumption found in Tenn. Code Ann. § 36-1-113(i)(2) that a prompt and permanent placement is presumed to be in the child’s best interest, and the evidence showed that children recovered from their failure to thrive diagnosis and achieved stability with the Petitioners. *See also* Tenn. Code Ann. § 36-1-113(i)(1)(A) (“The effect a termination of parental rights will have on the child’s critical need for stability and continuity of placement throughout the child’s minority[.]”).

We give significant weight to factor (N) which requires us to consider “[w]hether the parent, or other person residing with or frequenting the home of the parent, has shown brutality or physical, sexual, emotional, or psychological abuse or neglect toward the child or any other child or adult.” Tenn. Code Ann. § 36-1-113(i)(1)(N). The children initially came into DCS custody because Mother neglected them and was unable to provide for their nutritional and medical needs—both children were diagnosed with “failure to thrive.” *See* Tenn. Code Ann. § 36-1-113(i)(1)(C), (P), (Q) (“Whether the parent has demonstrated continuity and stability in meeting the child’s basic material . . . and safety needs[,]” “[w]hether the parent has demonstrated an understanding of the basic and specific needs required for the child to thrive[,]” and “[w]hether the parent has demonstrated the ability and commitment to creating and maintaining a home that meets the child’s basic and

specific needs and in which the child can thrive.”). In addition, Mother has failed to protect another of her children from the physical abuse of a boyfriend who was looking after the child while Mother was working, and Mother allowed a man who abused her as a child to be around her children. Therefore, factor (N) weighs heavily in favor of termination.

Mother argues that because she has custody of her two subsequently born children, she should regain custody of Noah and Rickey. *See* Tenn. Code Ann. § 35-1-113(i)(1)(I), (O) (“Whether the child has emotionally significant relationships with persons . . . including biological . . . siblings[,]” and “[w]hether the parent has ever provided safe and stable care for the child or any other child[.]”). We commend Mother for regaining custody of the child that was removed from her care after her abusive boyfriend broke the child’s rib, and we acknowledge that she has been able to parent her youngest child without DCS interference. Nevertheless, we must consider the best interest factors from the perspective of Noah and Rickey rather than from Mother’s perspective. *See* Tenn. Code Ann. § 36-1-101(d) (“In all cases, when the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child”); *see also In re Audrey S.*, 182 S.W.3d at 878. Noah and Rickey have no relationship with their biological siblings or with Mother. Indeed, there was no evidence that Noah and Rickey are aware of their biological siblings. Furthermore, it is speculative as to whether Mother will be able to safely care and provide for four children. Therefore, we find that factors (I) and (O) are neutral and do not weigh in favor of or against termination. We also note that the record shows that Mother did not diligently provide child support payments for the children, even though she testified she was working. *See* Tenn. Code Ann. § 36-1-113(i)(1)(S) (“Whether the parent has consistently provided more than token financial support.”).

Having analyzed all⁶ of the best interest factors and the clear preference in the factors for consistency and stability for the children at an early date, we agree with the trial court’s conclusion that the combined weight of the proven facts amounts to clear and convincing evidence that termination of Mother’s parental rights is in the best interest of the children.

CONCLUSION

We affirm the trial court’s findings that grounds exist for terminating Mother’s parental rights. We likewise affirm the trial court’s determination that termination of Mother’s parental rights is in the best interest of the children. We affirm the termination

⁶ The remaining factors, Tenn. Code Ann. § 36-1-113(i)(1)(J), (L), (R), and (T) are neutral because the record contains little evidence relating to these factors.

of Mother's parental rights. Costs of this appeal are assessed against the appellant, Rebecca B., for which execution may issue if necessary.

/s/ Andy D. Bennett
ANDY D. BENNETT, JUDGE