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

IN RE JORDAN P.

Appeal from the Circuit Court for Bradley County
No. V-20-580 J. Michael Sharp, Judge

No. E2022-00499-COA-R3-PT

Father appeals the trial court's termination of his parental rights. After reviewing the record, we conclude that there was clear and convincing evidence provided at trial to support the ground of abandonment by failure to visit, but not the ground of substantial noncompliance with a permanency plan. We also conclude that the trial court failed to make appropriate findings of fact and conclusions of law with regard to the ground of failure to manifest a willingness and ability to assume custody or financial responsibility of the child. Thus, we (1) affirm the trial court's finding that the ground of abandonment by failure to visit was established, (2) reverse the trial court's finding that the ground of substantial noncompliance was established, and (3) vacate the trial court's finding that the ground of failure to manifest was established. We also affirm the trial court's finding that terminating Father's parental rights was in the best interest of the child.

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

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J. and JEFFREY USMAN, J., joined.

Wilton Marble, Cleveland, Tennessee, for the appellant, Rudy P.L.

Jonathan Skrmetti, Attorney General and Reporter; Erica M. Haber, Assistant Attorney General; for the appellee, State of Tennessee, Department of Children's Services.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

This appeal stems from the termination of the parental rights of Rudy P.L.[1] ("Father") to the minor child Jordan A.P., born in 2013, (individually, "the child"). The parental rights of Jordan's mother, Brittany P. ("Mother"), were also terminated as to Jordan and two other minor children, Joseph C.A. and Jeremiah I.A. (together with Jordan, "the children").[2]

In July 2019, the children were found to be dependent and neglected by the Bradley County Juvenile Court ("the juvenile court"). The finding came after DCS received a referral for drug-exposed children and found that Mother was abusing her hydrocodone prescription and sharing the medication with Father; both parents tested positive for opiates and oxycodone. DCS first attempted to have the children's maternal grandmother, Lisa K. ("Grandmother"), come into the home to take care of the children while Mother and Father obtained drug and alcohol assessments. The children were eventually moved into Grandmother's home. On July 9, the juvenile court found that there was probable cause to believe that the children were dependent and neglected based on the parents' failure to provide a safe and suitable home. Pursuant to the juvenile court's order, the children were placed in the temporary care and custody of Grandmother. Father was directed to complete an alcohol and drug assessment and follow all recommendations, submit to random drug screenings and pill counts, submit a clean hair follicle drug screen, take medication as prescribed, and refrain from taking the medication of other persons. Mother and Father were granted only supervised visitation.

However, DCS quickly learned that Grandmother was allowing unsupervised visits with the children. Another dependency and neglect petition was filed by DCS on July 22, 2019, to have the children removed from Grandmother's custody. Finding that there was reasonable cause to believe the children were dependent and neglected based on Grandmother's failure to be protective of the children and that DCS had made reasonable efforts to prevent removal, the juvenile court granted DCS temporary custody of the children. Mother and Father waived the January 16, 2020 adjudicatory hearing, and the juvenile court found that it was in the children's best interest to remain in DCS custody. At this point, the children were placed in a foster home where they have remained consistently throughout the course of this matter. The children were deemed dependent and neglected by order of February 18, 2020.

An initial permanency plan was created in August 2019, with the goal of returning the children to the parents' custody. Father's responsibilities involved submitting to

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

[2] Jordan is the product of the marriage between Mother and Father. Joseph and Jeremiah were born to Mother prior to the marriage. Adrian R. is the putative father of both Joseph and Jeremiah. Adrian's rights to Joseph and Jeremiah were also terminated. Neither Mother nor Adrian appealed the termination of their parental rights. Thus, Father's relationship with and rights to Jordan are the subject of this appeal, and we will discuss the facts relating to Mother, Adrian, Joseph, and Jeremiah only to the extent necessary.

random drug screens and pill counts; obtaining an alcohol and drug assessment and following all recommendations; signing all required releases; resolving all legal issues and not obtaining any additional issues; refraining from associating with known drug users or dealers; maintaining stable housing and providing DCS with proof of the same; completing parenting classes; paying child support as ordered; providing DCS with proof of a driver's license and a reliable transportation plan; maintaining contact with DCS; providing DCS with proof of legal income; and maintaining visitation with the children. Pursuant to a January 6, 2020, order, Father was required to pay $50.00 per month in child support. DCS petitioned the juvenile court for an order of contempt on February 21, 2020, based on Father's failure to comply with the child support order. However, the petition was voluntarily dismissed after Father began paying the ordered support.

During the pendency of the case, the children disclosed that there had been domestic violence in the home and that Father had physically abused them. A new permanency plan was developed May 6, 2020, and Father was required to complete domestic violence and anger management classes as well as his responsibilities from the initial plan. The juvenile court found that the requirements were reasonably related to the goal of returning custody of the children to their parents and that DCS was making reasonable efforts to assist, but that Father was not in substantial compliance with the plan.

At the July 16, 2020, permanency hearing, Mother testified that Father did not want to be involved in regaining custody of the children and that she would be taking care of the permanency plan responsibilities. The juvenile court found that Father was not in substantial compliance with the permanency plan. Beginning May 2020, DCS started allowing only video visitation. Mother was arrested on July 31, 2020 and remained incarcerated until January 23, 2021.

On November 16, 2020, DCS filed a petition for termination of the parental rights of Father to the child in the Bradley County Circuit Court ("the trial court"). The petition alleged as grounds for termination against Father: (1) abandonment by failure to visit, (2) persistent conditions, (3) substantial noncompliance with a permanency plan, and (4) failure to assume custody or financial responsibility. Eventually, DCS voluntarily struck the ground of persistent conditions.

At the July 15, 2021 permanency hearing, the juvenile court found that, other than visiting with the child, Father had not completed his responsibilities under the permanency plan and was not in substantial compliance. However, the juvenile court also noted that the child did not want to continue visiting with Father and the child's therapist had agreed that continuing visitation was not in the child's best interest. In its July 29, 2021 order, the juvenile court found that the permanency plan was reasonably related to the reasons the children came into custody and in the children's best interest. The juvenile court also noted

that a new permanency plan with the goal of adoption, rather than reunification, was being developed.[3] The juvenile court granted DCS's motion to suspend Father's visitation.

The trial court held the termination hearing in this matter on September 29 and November 17, 2021. Father was assisted in testifying by a translator. Father testified that he did not really attempt to fulfill his obligations under the permanency plans until more than a year after the children were placed into DCS custody. Instead, he relied on Mother's efforts to regain custody and focused on paying child support and seeing the children. Only when he was injured did Father "have the time" to work on the other requirements set out in the permanency plan.[4] Later, Father explained that he "grew up in a country where men work and women take care of the children," and so he thought he was being a good father by providing for the family. Father also testified that he did not attempt to work on the permanency plan requirements on his own after Mother was incarcerated because he and Mother had promised to not separate the children. However, at trial, Father testified that he was only concerned with custody of Jordan, despite being involved in the lives of Jeremiah and Joseph since they were very young, based on his separation from Mother.

By trial, Father had provided a copy of a lease[5], driver's license, insurance, and registration. Father testified that he had completed a parenting class, a child abuse prevention class, and an alcohol and drug assessment, but it did not appear that DCS had proof of the same.[6] At the time of trial, Father was receiving Worker's Compensation payments based on an on-the-job injury that prevented him from working. Father testified that he realized he was missing a domestic violence class when it became known that the child abuse prevention class he had taken would not suffice for that requirement. Father testified that he was arrested in Kentucky in February 2021 for driving with a suspended license. Father's testimony was that his insurance had lapsed and his license was suspended, but he had taken care of the arrest. Father was living with his girlfriend and her eight-year-old child.[7] Neither Mother nor Father had filed for divorce by the time of trial, although both testified that they were interested in pursuing one.

Father testified that before he started working out of state in 2016, he and the child had been very united and would spend quality time together. However, the two became

[3] This plan does not appear in the record. Thus, the operative permanency plan is the plan developed in May 2020 and ratified by the juvenile court in July 2020 that is in the record. *See* ***In re T.N.L.W.***, No. E2006-01623-COA-R3-PT, 2007 WL 906751, at *4 (Tenn. Ct. App. Mar. 26, 2007) (noting that "when DCS is relying on substantial noncompliance with the permanency plan as a ground for termination of parental rights, it is essential that the plan be admitted into evidence").

[4] At the time of trial, Father was receiving Worker's Compensation payments and expected to be out of work for another five months.

[5] The lease appears to have been provided on the second day of trial.

[6] Father testified that he and Mother had taken the required courses together, although he did not remember the names or timing of the classes. Mother submitted proof of an anger management course and a child abuse prevention and parenting skills course. The record contains no certificates of completion for Father for these classes.

[7] The lease listed only Father, his brother, and the child, however.

estranged when he was around less because of his job, and the child stopped sharing the details of his life. Father testified that he and Mother "had arguments like normal couples" but that she would have called the police if there had been domestic violence. Father testified that he was in charge of discipline for the children as Mother was "softer and sweeter[.]" He explained that he did not hit the boys in a way to hurt them, but "correct[ed] them in normal ways," by hitting their rear ends with his hand and sometimes with a belt. Father testified that he learned in the child abuse prevention class that hitting children was something done only when a person loses control. However, Father did not state that he would not discipline the children in this way again.

Regarding visitation, Father testified that when he was working out of state he would visit the children every two weeks. Father's testimony was that he visited with the child three times in person in 2021 and a few times via video in 2020 when Mother spoke to the children. Father testified that he called to set up visits "many times" after Mother was incarcerated but was told by DCS that he was not allowed his own visitation. His last visit with the child was in May 2021, prior to the suspension of visitation based on the recommendation of the child's therapist. Father stated that he was told to attend therapy in order for his visitation to be reinstated, but that he was not given an opportunity to go and had not sought out therapy independently. Father stated that he would do what he had to do to make sure he could take care of the child if his rights were not terminated, to rehabilitate his relationship with Jordan.

Samantha Walker, the foster care worker for the children, also testified. She testified that, prior to January 2020, Father had not completed any steps on the permanency plan other than visitation with the children and that she had not received any documentation regarding his progress by June 2020.[8] Ms. Walker also stated that the children had disclosed to her that Father had physically abused them, which resulted in the addition of anger management and domestic violence classes to Father's permanency plan requirements. Ms. Walker testified that Father was not drug screened after the children were taken into DCS custody because he was only available during visits with the children and DCS prefers not to screen during visitation. According to Ms. Walker's testimony, the children were bonded with their foster family, who they had been with for over two years. The children received both individual and family therapy.

Ms. Walker testified that while Mother was incarcerated, Father did not visit the children. She testified that after May 2020, visitation was conducted via video. However, Ms. Walker stated that Father did not request any visits until December 2020, after the termination petition had been filed. Visitation was set up and Father visited by video with

[8] In an April 6, 2020 affidavit, Ms. Walker noted that both Mother and Father had completed the required alcohol and drug assessment. However, no evidence of Father's assessment is in the record, and Father's completion of this step was not mentioned in Ms. Walker's July 2021 affidavit regarding the parents' progress.

the child regularly until visitation was suspended in July 2021 based on the recommendation of the child's therapist. At trial, Ms. Walker testified that Father had not completed the permanency plan requirements such that DCS could begin returning custody of the children. By her assessment, Father still needed to complete a domestic violence class and those living with Father needed to be checked by DCS to ensure it was appropriate for the child to live in the house.[9] Ms. Walker testified that the main reason for the removal of the children, drug use by Mother and Father, was "still an outstanding issue[.]"

The children's foster mother, Wendy R. ("Foster Mother") also testified. She stated that her family was "definitely" bonded with the children and would adopt the child and his half-siblings if they became available. Foster Mother described how the children came to her angry, scared, and upset. The children began receiving individual and group therapy and all three were diagnosed with PTSD and anxiety and/or depression. Foster Mother testified that it would take the children a couple days after visiting with Mother or Father to "get back on track" and that the children did not ask about Mother or Father after visitation was suspended. Foster Mother explained that the children do not want to talk about their trauma, and so they just live day by day.

The trial court entered its final order terminating Father's parental rights to Jordan on March 25, 2022. Therein, the trial court found that DCS had proven the grounds of abandonment by failure to visit, substantial noncompliance with a permanency plan, and failure to assume custody or financial responsibility by clear and convincing evidence. The trial court also found that DCS established by clear and convincing evidence that terminating Father's parental rights was in the best interest of the child. On March 30, 2022, the trial court granted DCS's motion requesting full guardianship of the children. Father filed his notice of appeal on April 21, 2022.

II. ISSUES PRESENTED

On appeal, Father asks this Court to review the following issues, which are taken directly from his brief:

> 1. Did the trial court err in finding that the ground of abandonment-failure to visit *(T.C.A. 36-1-113(g)(1))* had been proven by clear and convincing evidence?
> 2. Did the trial court err in finding that the ground of substantial non-compliance *(T.C.A. 36-1-113(g)(2))* had been proven by clear and convincing evidence?
> 3. Did the trial court err in finding that the ground of failure to manifest an ability and willingness to assume custody *(T.C.A. 36-1-113(g)(14))* had been

[9] Ms. Walker's July 2021 affidavit indicated that Father had completed a parenting class and an anger management class.

proven by clear and convincing evidence?
4. Did the trial court err in finding, by clear and convincing evidence, that termination was in the best interests of the children?

III. STANDARD OF REVIEW

Parental rights are "among the oldest of the judicially recognized fundamental liberty interests protected by the Due Process Clauses of the federal and state constitutions." ***In re Carrington H.***, 483 S.W.3d 507, 521 (Tenn. 2016) (collecting cases). In Tennessee, termination of parental rights is governed by statute, which identifies "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.***, Nos. M2004-00999-COA-R3-PT, M2004-01572-COA-R3-PT, 2005 WL 1021618, at *7 (Tenn. Ct. App. Apr. 29, 2005)). "[P]arents are constitutionally entitled to fundamentally fair procedures in parental termination proceedings." ***In re Carrington H.***, 483 S.W.3d at 511. These procedures include "a heightened standard of proof—clear and convincing evidence." ***Id.*** at 522 (citation omitted); *accord* ***In re Addalyne S.***, 556 S.W.3d 774, 782 (Tenn. Ct. App. 2018) ("Considering the fundamental nature of a parent's rights, and the serious consequences that stem from termination of those rights, a higher standard of proof is required in determining termination cases.").

Thus, a party seeking to terminate a parent's rights must prove by clear and convincing evidence (1) the existence of at least one of the statutory grounds in section 36-1-113(g), and (2) that termination is in the child's best interest. ***In re Valentine***, 79 S.W.3d 539, 546 (Tenn. 2002). "Clear and convincing evidence enables the fact-finder to form a firm belief or conviction regarding the truth of the facts, and eliminates any serious or substantial doubt about the correctness of these factual findings." ***In re Carrington H.***, 483 S.W.3d at 522. The standard "ensures that the facts are established as highly probable, rather than as simply more probable than not." ***Id.*** (citing ***In re Audrey S.***, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005); ***In re M.A.R.***, 183 S.W.3d 652, 660 (Tenn. Ct. App. 2005)).

In termination cases, appellate courts review a trial court's factual findings de novo and accord these findings a presumption of correctness unless the evidence preponderates otherwise. *See* Tenn. R. App. P. 13(d); ***In re Carrington H.***, 483 S.W.3d at 523–24. "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 (citation omitted).

IV. ANALYSIS

A. Grounds for Termination

The trial court found that three grounds existed for terminating Father's parental rights: abandonment by failure to visit, substantial noncompliance with a permanency plan, and a failure to manifest a willingness and ability to assume custody. Although only one ground need be proven by clear and convincing evidence for a parent's rights to be subject to termination, "the Tennessee Supreme Court has instructed this Court to review each ground relied upon by the trial court to terminate parental rights in order to prevent 'unnecessary remands of cases.'" ***In re Bobby G.***, No. E2021-01381-COA-R3-PT, 2022 WL 2915535 (Tenn. Ct. App. July 25, 2022) (quoting ***In re Angela E.***, 303 S.W.3d 240, 251 n.14 (Tenn. 2010)); *see also* ***In re Carrington H.***, 483 S.W.3d at 525–26 (holding that "in an appeal from an order terminating parental rights the Court of Appeals must 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"). We therefore review each ground in turn.

1. Abandonment by Failure to Visit

Tennessee Code Annotated section 36-1-113(g)(1) provides abandonment by a parent as a ground for the termination of parental rights and, in turn, Tennessee Code Annotated section 36-1-102 defines the term "abandonment." At the time the termination petition was filed, abandonment was defined, in pertinent part, as follows:

> For purposes of terminating the parental or guardian rights of a parent . . . of a child to that child in order to make that child available for adoption, "abandonment" means that:
>
> > (i) 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 . . . of the child who is the subject of the petition for termination of parental rights or adoption, that the parent . . . either [has] failed to visit or [has] failed to support or [has] failed to make reasonable payments toward the support of the child[.]

Tenn. Code Ann. § 36-1-102(1)(A) (2020).[10] That section further provided that a failure to visit consists of "the failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation[.]" Tenn. Code Ann. § 36-1-102(1)(E). "Token visitation" was defined as visitation that, "under the circumstances of the individual case, constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child[.]"

[10] The termination statute has since been amended. Neither party argues that the amended version should apply. We refer to the version of the statute in place at the time the termination petition was filed throughout this Opinion.

Tenn. Code Ann. § 36-1-102(1)(C). The parent's failure to conduct more than token visitation within the relevant four-month period may not be rectified by resuming visitation subsequent to the filing of a termination petition. Tenn. Code Ann. § 36-1-102(1)(F). A parent may raise as an affirmative defense that the failure to perform more than token visitation was not willful. Tenn. Code Ann. § 36-1-102(1)(I). In that case, the parent bears the burden of proving the absence of willfulness by a preponderance of the evidence. ***Id.*** Here, the four-month period at issue spans from July 16, 2020 through November 15, 2020. The trial court found that Father was capable of visiting the child but chose not to visit during this time.

Father argues that DCS failed to make reasonable efforts to arrange visitation for him while Mother was incarcerated and that this failure should be considered pursuant to the "under the circumstances of the case" language within the token visitation definition. Father acknowledges, however, that "proof of reasonable efforts is not a precondition to termination of the parental rights of the respondent parent." ***In re Kaliyah S.***, 455 S.W.3d 533, 555 (Tenn. 2015). Indeed, although DCS's reasonable efforts to reunify the family remain relevant to the trial court's analysis of the child's best interest, the extent of DCS's efforts is not an essential element that must be proven prior to terminating a parent's rights unless specifically included in the definition of the ground for termination.[11] ***Id.*** (citing ***In re B.S.G.***, No. E2006-02314-COA-R3-PT, 2007 WL 1514958, at *9 (Tenn. Ct. App. May 24, 2007)). Thus, whether DCS expended reasonable effort to ensure that Father continued visiting with the child after Mother's incarceration is not relevant to our review of the abandonment by failure to visit ground for termination.[12]

Read in its best light, Father's argument seems to be that his failure to visit was not willful but was caused by DCS's failure to independently set up visitation for him. An absence of willfulness, however, must be raised as an affirmative defense pursuant to Tennessee Rule of Civil Procedure 8.03. ***In re Brylan S.***, No. W2021-01446-COA-R3-PT, 2022 WL 16646596, at *6 (Tenn. Ct. App. Nov. 3, 2022) (citing Tenn. Code Ann. § 36-1-102(1)(I)). But Father neglected to raise the issue of willfulness either in a response to DCS's termination petition or at any point prior to trial. Nor does Father allege that a willfulness defense was tried by consent. *See* ***Renken v. Renken***, No. M2017-00861-COA-R3-CV, 2019 WL 719179, at *4 (Tenn. Ct. App. Feb. 20, 2019) ("When issues not raised by the pleadings are tried by consent, 'they shall be treated in all respects as if they had been raised in the pleadings.'" (quoting Tenn. R. Civ. P. 15.02)). As a result, Father has waived this issue. ***In re Brylan S.***, 2022 WL 16646596, at *6 (citing ***Pratcher v. Methodist Healthcare Memphis Hosps.***, 407 S.W.3d 727, 735 (Tenn. 2013) (stating that "[a]s a

[11] *See* ***id.*** at 523–24 n. 29, 31 (noting that the ground for termination of abandonment by failure to provide a suitable home does include a requirement that DCS make reasonable efforts to assist the parent to establish such a home).

[12] We do note that DCS's efforts appear to have dropped off significantly after Mother was incarcerated. Because DCS was not required to provide reasonable efforts in order to prove this ground, we will instead discuss its efforts in the best interest analysis.

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)).

All parties agree that Father was visiting the child with Mother regularly prior to July 2020. By the time of the four-month period, however, Father was exercising no visitation. Specifically, the children's case worker testified that Father had no visits with the child from July through November 2020. Ms. Walker stated that although she had contact with Father during this time, he did not request any visitation. Indeed, Father admitted that he stopped working the permanency plan, including his obligation to visit, once Mother was incarcerated, based on their intention to keep the children together and his understanding that his main role was to provide for the family. Thus, even if we accept Father's argument that willfulness was at issue, Father has not met his burden to show that his failure to visit was somehow thwarted by the actions of another or otherwise not the product of his own voluntary choice not to exercise visitation. *See* ***In re Audrey S.***, 182 S.W.3d at 863 (holding that "[c]onduct is 'willful' if it is the product of free will rather than coercion" and that a failure to visit "is not excused by another person's conduct unless the conduct actually prevents the person with the obligation from performing his or her duty, or amounts to a significant restraint of or interference with the parent's efforts to support or develop a relationship with the child"). Thus, to the extent that willfulness is at issue in this case, we cannot conclude that Father met his burden to show a lack of willfulness so as to excuse his failure to visit during the relevant period.

It is true that Father did request visitation later in this case, but only after DCS filed its termination petition in November 2020. Father then resumed visitation until June 2021, when the child's therapist concluded that a suspension of visits was in the child's best interest. Yet a resumption of visitation after the termination petition is filed does not rectify the failure to visit during the relevant period. ***In re Ni'Kaiya R.***, No. E2021-00517-COA-R3-PT, 2021 WL 5917990 (Tenn. Ct. App. Dec. 15, 2021) (citing Tenn. Code Ann. § 36-1-102(1)(F)). As such, there is clear and convincing evidence to support the trial court's termination of Father's parental rights on the ground of abandonment by failure to visit.

2. Substantial Noncompliance with Permanency Plan

Tennessee Code Annotated section 36-1-113(g) provides that parental rights may be terminated if "[t]here has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan pursuant to title 37, chapter 2, part 4[.]" Tenn. Code Ann. § 36-1-113(g)(2). According to the cited section, "[a] trial court must find that the requirements of a permanency plan are 'reasonable and related to remedying the conditions which necessitate foster care placement.'" ***In re Valentine***, 79 S.W.3d at 547 (citing Tenn. Code Ann. § 37-2-403(a)(2)(C)). The statute is clear that "noncompliance is not enough to justify termination of parental rights; the noncompliance

must be substantial." ***Id.*** at 548. As such, "'[t]rival, minor, or technical' deviation from the permanency plan's requirements does not qualify as substantial noncompliance." ***In re Yancy N.***, No. M2021-00574-COA-R3-PT, 2022 WL 17986782, at *6 (Tenn. Ct. App. Dec. 29, 2022) (quoting ***In re M.J.B.***, 140 S.W.3d 643, 656 (Tenn. Ct. App. 2004)). Accordingly, to succeed in proving this ground, DCS must demonstrate both: (1) "that the requirements of the permanency plan are reasonable and related to remedying the conditions that caused the child to be removed from the parent's custody in the first place" and (2) "that the parent's noncompliance is substantial in light of the degree of noncompliance and the importance of the particular requirement that has not been met." ***In Re Aniyah W.***, No. W2021-01369-COA-R3-PT, 2023 WL 2294084, at *7 (Tenn. Ct. App. Mar. 1, 2023) (quoting ***In re M.J.B.***, 140 S.W.3d at 656–57). Determining whether a parent has substantially complied with a permanency plan, therefore, "involves more than merely counting up the tasks in the plan to determine whether a certain number have been completed and 'going through the motions' does not constitute substantial compliance.'" ***In re Carrington H.***, 483 S.W.3d at 537 (quoting ***In re Valentine***, 79 S.W.3d at 547). Instead, the "real worth and importance of noncompliance should be measured by both the degree of noncompliance and the weight assigned to that requirement. Terms which are not reasonable and related are irrelevant, and substantial noncompliance with such terms is irrelevant." ***In re Valentine***, 79 S.W.3d at 548. Similarly, the focus of our review is on "the parent's efforts to comply with the plan, not the achievement of the plan's desired outcomes." ***In re Yancy N.***, 2022 WL 17986782, at *6 (citing ***In re B.D.***, No. M2008-01174-COA-R3-PT, 2009 WL 528922, at *8 (Tenn. Ct. App. Mar. 2, 2009)).

Father first takes issue with the fact that the trial court did not make a finding that the permanency plan requirements were reasonably related to remedying the conditions that led to the children being placed in DCS custody. Although the juvenile court determined that the requirements of the permanency plan were reasonably related to the conditions that required DCS involvement when ratifying the plan, the trial court made no such findings within its final order. Generally, "this finding must be made in conjunction with the determination of substantial noncompliance under [section] 36-1-113(g)(2)." ***In re Valentine***, 79 S.W.3d at 547. Because the trial court made no findings, our review of the reasonableness of Father's responsibilities under the permanency plan is de novo. ***Id.***

The permanency plan responsibilities can be condensed into four main categories: (1) drug assessment and screening; (2) parenting, domestic violence, and anger management classes; (3) stable housing, income, and transportation; and (4) visitation and child support. "Conditions necessitating foster care placement may include conditions related both to the child's removal and to family reunification." ***Id.*** Here, the children were removed based on the parents' drug use and later claims of domestic violence and child abuse by Father. Thus, requirements (1) and (2) relate to the conditions leading to the child's removal and (3) and (4) relate to family reunification. We conclude that these requirements were reasonable and related to remedying the conditions necessitating foster care placement. Because both parties seem to agree that Father did not fully comply with

the permanency plan's requirements, we must determine whether his noncompliance was substantial "in light of the degree of noncompliance and the importance of the particular requirement that has not been met." ***In re M.J.B.***, 140 S.W.3d at 656–57.

There is no question that, by the time of trial, Father had provided his driver's license, lease[13], and proof of insurance and registration. There is no indication that, after DCS's petition for contempt was voluntarily dismissed, Father stopped paying child support. And as discussed, *supra*, Father visited with the child before and after the termination petition was filed, until visitation was suspended in the best interest of the child. Thus, the only plan requirements at issue are the drug assessment and screening, and the parenting, domestic violence, and anger management classes. [14]

The trial court found that Father failed to substantially comply with the tasks and responsibilities of the permanency plan. Specifically, the trial court found that Father did not work on or complete any of the steps required by the permanency plan within the first year of the case, based on his testimony that he believed Mother would regain custody. The trial court noted that Father testified that he had completed domestic violence and anger management classes and the alcohol and drug assessment. But the trial court stated that "if [Father] completed these classes he did so well after the filing of the petition to terminate parental rights[,]" and "no credible proof or evidence" existed in the record of any assessment.

Unfortunately for the ease of our review, the record does not contain any certificates of class completion or reports from Father's drug assessment or screenings. We therefore turn to the testimony of Father and the children's case worker, Ms. Walker, to determine Father's compliance. Father testified that he completed the same classes as Mother, namely the child abuse prevention and parenting skills class and the anger management class, for both of which DCS has certificates of completion in Mother's name. In relation to attending a parenting class, Ms. Walker's July 2021 affidavit stated that "[Mother] and [Father] have accomplished this step on her [sic] plan on 5/30/21." The same affidavit indicated that the

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[13] At trial, Ms. Walker testified that a barrier to reunifying Father and the child and allowing the child to live in the house was having the other adults on the lease or living in the house undergo DCS's checks. The permanency plan required that anyone in the home over eighteen years of age submit to random drug screenings. Thus, other than making DCS aware of the other adults in the house by providing the lease earlier, there is no action Father could have taken to further satisfy this requirement.

[14] DCS concedes in its appellate brief that:

> By trial, Father had completed a parenting / child abuse prevention class, attended most of the [family meetings with DCS], sporadically advised [Ms.] Walker about changes in his contact information, provided [Ms.] Walker with a weekly lease (on the date of trial, with Jordan's and his brother's name on it, who had not been verified), obtained income through Workers' Compensation, provided copies of driver's license, insurance and registration. However, he had not completed a domestic violence class or alcohol and drug assessment.

"[p]arents have provided DCS with a certificate of completion of anger management classes." Thus, it appears that Father completed both the parenting class and anger management class requirements. Indeed, DCS concedes as much in its appellate brief.

Father also testified that he completed the drug and alcohol assessment, and that although he received no recommendations, he recognized that he wanted to limit his alcohol consumption.[15] In Ms. Walker's April 2020 affidavit, she stated that both Mother and Father had done an alcohol and drug assessment and signed the necessary releases. Ms. Walker's July 2021 affidavit did not contain any reference to Father's assessment. At trial, however, Ms. Walker stated that an alcohol and drug assessment remained an outstanding requirement for Father.

Often, when a permanency plan requires a parent provide proof of completing a requirement, we credit the testimony of DCS caseworkers that the requirement was not completed when no proof is provided. There are two problems applying the general rule in this case. First, the permanency plan simply requires that Father "obtain an alcohol and drug assessment and follow all recommendations." Providing DCS with proof of his completion of the assessment was not designated as an obligation in the statement of Father's responsibilities. And "it is axiomatic that noncompliance with a permanency plan's statement of responsibilities requires that the alleged noncompliance be based on a requirement *in* the statement of responsibilities." ***In re Nakayia S.***, No. M2017-01694-COA-R3-PT, 2018 WL 4462651, at *4 (Tenn. Ct. App. Sept. 18, 2018). Second, the evidence presented by DCS here was equivocal about whether Father had completed the assessment. Specifically, while an affidavit was submitted into evidence indicating that Father had indeed completed this requirement, later testimony was that he had not. Because the evidence from DCS was contradictory and thus unclear, we find that the evidence preponderates against the trial court's finding that DCS met its burden of showing that Father did not complete the alcohol and drug assessment as required by the plan.[16]

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[15] Father's testimony regarding his drinking habits was somewhat unclear:

> A: I don't know the address [of where the alcohol and drug assessment took place] but I have to go back to take classes on how to drink less or not drink at all.
> Q: So was that the recommendation that you do some outpatient treatment?
> A: They didn't recommend anything. I asked them because I drink and I'd like to stop.
> Q: How much do you drink?
> A: Now that I'm not working I take three or four beers.
> Q: Daily or --
> A: In five days I would say three.

Even taking the testimony in the worst light for Father, Father appeared to testify that he drinks three or four beers three times a week.

[16] DCS argues in its appellate brief that even if we accept that Father did complete the alcohol and drug assessment, his failure to provide proof thereof requires a finding that he was substantially noncompliant. This argument lacks merit because providing DCS with proof of the assessment is simply not one of

The admitted lack of drug screenings is also not evidence of noncompliance under the particular circumstances of this case. Ms. Walker testified that, because he was working out of state, Father was available for drug screenings only when he came to visit the children. However, DCS chose not to conduct the screenings at that time, to avoid interrupting the visitation. As the permanency plan required that Father "submit to random drug screens by [DCS]" and not that he provide the results from an independently-completed screening, it appears that there is no evidence that Father did not complete this step. *See* ***In re Nakayia S.***, 2018 WL 4462651, at *4. Simply put, Father did not fail or refuse to submit to any drug screen offered to him. This requirement of the permanency plan was therefore met.

The remaining requirement is the domestic violence class added to the permanency plan after the children disclosed Father's physical violence. Father testified that he thought he had completed the class, but Ms. Walker testified consistently that the class requirement remained outstanding. In this regard, Father again questions whether DCS provided reasonable efforts to assist Father. His explanation for his failure to complete the domestic violence class is that Ms. Walker did not inform him that the child abuse prevention class did not satisfy the domestic violence permanency plan requirement. *See* ***In re Abbigail C.***, 2015 WL 6164956, at *20 (concluding that the father's noncompliance was not substantial when "nothing in the [p]ermanency [p]lan put Father on notice of DCS's requirements for an acceptable parenting class"). However, "this Court has previously explained: '[t]he termination statute regarding the ground of substantial noncompliance with the requirements of a permanency plan contains no requirement that DCS expend reasonable efforts to assist a parent in complying with the permanency plan requirements.'" ***In re J'Khari F.***, No. M2018-00708-COA-R3-PT, 2019 WL 411538, at *10 (Tenn. Ct. App. Jan. 31, 2019) (quoting ***In re Skylar P.***, No. E2016-02023-COA-R3-PT, 2017 WL 2684608, at *7 (Tenn. Ct. App. June 21, 2017) (citing Tenn. Code Ann. § 36-1-113(g)(2))). Thus, DCS's failure to inform Father that the child abuse prevention class did not satisfy his domestic violence requirement does not excuse his failure to complete the required class. Clearly domestic violence training is important, especially in cases where there have been accusations of spousal violence and child abuse. However, the record does not show that Father has been involved in further domestic violence situations. Indeed, Father described learning in the child abuse prevention class that he needs to work on not losing control and turning to violence. In light of the other completed requirements, we conclude that Father's failure to complete a domestic violence course does not amount to substantial noncompliance with the permanency plan in this particular case.

Overall, this ground hinges on the ability of DCS to prove that Father failed to substantially comply with reasonable requirements set out in the permanency plan. We are faced in this case with a dearth of evidence to show that Father did not complete his

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Father's responsibilities under the permanency plan.

requirements. It is true that Father has not provided proof beyond his testimony that some of the requirements were completed. But the DCS's own evidence was contradictory at times and focused on tasks not actually set out in the permanency plan at others. It appears that Father provided child support and the required documentation, and visited with the child semi-consistently. The testimony does not clearly contradict Father's contention that he completed two out of three classes, and submitted to a drug and alcohol assessment and random drug screening. Therefore, it appears that the only requirement Father did not at least arguably complete is the domestic violence class, which he believed would be covered by the child abuse prevention course.

The trial court found that, based on this record, Father was not in substantial compliance with the permanency plan. We agree that the timing of Father's efforts gives us some pause. Generally, when a parent waits to put in effort to comply with his or her permanency plan requirements until after the termination petition is filed, this effort is deemed "too little, too late." *See* ***In re Savannah F.***, No. E2015-02529-COA-R3-PT, 2016 WL 4547663, at *16 (Tenn. Ct. App. Aug. 31, 2016) (noting that although the parents had "made some effort to change their circumstances in the months and weeks leading up to trial, their efforts are simply 'too little, too late.'" (citing ***In re K.M.K.***, No. E2014-00471-COA-R3-PT, 2015 WL 866730, at *6 (Tenn. Ct. App. Feb. 27, 2015) (holding that father's efforts after the termination petition was filed were "too little, too late"); ***In re A.W.***, 114 S.W.3d 541, 546 (Tenn. Ct. App. 2003) (holding that mother's improvement only a few months prior to trial was "[t]oo little, too late"))). However, unlike the ground of abandonment, there is no indication in the statute defining substantial noncompliance that efforts made after the filing of the petition do not remedy prior inactivity. *See* Tenn. Code Ann. § 36-1-113(g)(2). So we have held that "[i]mprovements in compliance are construed in favor of the parent." ***In re Abbigail C.***, No. E2015-00964-COA-R3-PT, 2015 WL 6164956, at *20 (Tenn. Ct. App. Oct. 21, 2015) (citing ***In re Valentine***, 79 S.W.3d at 549). Moreover, for substantial noncompliance with a permanency plan to support the termination of a parent's rights, the noncompliance must be *substantial*. ***In re Valentine***, 79 S.W.3d at 548. And although Father waited "too late" to begin working on the permanency plan to be fully compliant, we cannot say that Father is in substantial noncompliance for having done "too little."

Importantly, the clear and convincing standard requires that "any serious or substantial doubt about the correctness of these factual findings" be eliminated. ***In re Carrington H.***, 483 S.W.3d at 522. Although it is a close call, the evidence before us simply does not rise to this level. Based on DCS's failure to provide competent evidence of Father's substantial noncompliance with the permanency plan requirements, we reverse the trial court's finding that this ground was proven by clear and convincing evidence. *See* ***State Dep't of Children's Servs. v. P.M.T.***, No. E2006-00057-COA-R3-PT, 2006 WL 2644373, at *8 (Tenn. Ct. App. Sept. 15, 2006) (reversing the trial court's finding that there was clear and convincing evidence of substantial noncompliance where there was "an absence of evidence" showing that the parents failed to comply with specific requirements).

3. Failure to Manifest an Ability or Willingness to Assume Custody

The trial court also determined that Father failed to manifest an ability and willingness to assume custody or financial responsibility of the child under Tennessee Code Annotated section 36-1-113(g)(14). Parental rights may be terminated where:

> 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 person's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child[.]

Tenn. Code An. § 36-1-113(g)(14). The ground contains two distinct elements that must be proven by clear and convincing evidence. First, DCS must prove that the parent has not manifested *both* an ability and a willingness to personally assume legal and physical custody of the child—thus, if DCS can show that Father has failed to evince either his ability *or* his willingness to assume custody of the child, this prong is met. ***In re Brylan S.***, No. W2021-01446-COA-R3-PT, 2022 WL 16646596 (Tenn. Ct. App. Nov. 3, 2022) (citing ***In re Neveah M.***, 614 S.W.3d 659, 677 (Tenn. 2020) ("If a person seeking to terminate parental rights proves by clear and convincing proof that a parent or guardian has failed to manifest either ability or willingness, then the first prong of the statute is satisfied.")). Then, DCS must prove that placing the child in the parent's custody poses "a risk of substantial harm to the physical or psychological welfare of the child." Tenn. Code Ann. § 36-1-113(g)(14).

We begin our analysis of this ground with the trial court's consideration of the second prong, as it proves dispositive. In its final order, the trial court simply stated: "The court finds that placing these children with [Father] would pose a risk of substantial harm to the physical or psychological welfare of the child." However, the termination statute explicitly requires courts terminating parental rights to "enter an order that makes specific *findings of fact* and conclusions of law[.]" Tenn. Code Ann. § 36-1-113(k) (emphasis added); *see also* Tenn. R. Civ. P. 52.01 ("In all actions tried upon the facts without a jury, the court shall find the facts specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment."). Making appropriate findings of fact and conclusions of law "facilitate[s] appellate review and promote[s] just and speedy resolution of appeals." ***In re Audrey S.***, 182 S.W.3d at 861.

In termination cases, a trial court's failure to comply with section 36-1-113(k) and provide proper findings and conclusions not only affects the standard of review, "[i]t affects the viability of the appeal." ***In re Disnie P.***, No. E2022-00662-COA-R3-PT, 2023 WL 2396557, at *13 (Tenn. Ct. App. Mar. 8, 2023) (quoting ***In re Zoey L.***, No. E2019-01702-COA-R3-PT, 2020 WL 2950549, at *2 (Tenn. Ct. App. June 3, 2020)). Indeed, appellate courts "may not conduct de novo review of the termination decision in the

absence of such findings." ***In re Charles B.***, No. W2020-01718-COA-R3-PT, 2021 WL 5292087, at *9 (Tenn. Ct. App. Nov. 15, 2021) (quoting ***In re Carrington H.***, 483 S.W.3d at 523). "[W]e may not 'soldier on' to make our own findings of fact relative to this ground" like we might with other types of cases. ***In re Alexis S.***, No. E2018-01989-COA-R3-PT, 2019 WL 5586820, at *9 (Tenn. Ct. App. Oct. 29, 2019); *see also* ***In re S.M.***, 149 S.W.3d 632, 639 (Tenn. Ct. App. 2004) (stating that the absence of specific findings fatally undermines the validity of a termination order).

Here, the trial court has provided a single sentence containing a bare conclusion of law. No findings of fact underpin the trial court's conclusion regarding the second prong of this ground. This does not amount to the "[m]eticulous compliance with the mandates of Tenn. Code Ann. § 36-1-113(k) [that is] required by appellate courts." ***In re Maria B.S.***, No. E2011-01784-COA-R3-PT, 2012 WL 1431244, at *3 (Tenn. Ct. App. Apr. 25, 2012) (quoting ***In re MEI***, No. E2004-02096-COA-R3-PT, 2005 WL 2346978, at *3 (Tenn. Ct. App. Sept. 26, 2005)). Without such findings, we are left to wonder what facts formed the basis of the trial court's conclusion that returning the child to Father's 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). As such, we vacate the trial court's order in relation to the ground of failure to manifest an ability and willingness to assume custody of the child. *See* ***In re Haley S.***, No. M2017-00214-COA-R3-PT, 2018 WL 1560078 (Tenn. Ct. App. Mar. 29, 2018) (vacating the trial court's determinations regarding grounds where it failed to make sufficient findings of fact and conclusions of law).

Generally, when a trial court fails to make appropriate findings and conclusions as directed by statute, the remedy is to for this Court to remand the matter for the filing of a more detailed final order. ***Id.*** (remanding the matter with instruction that the trial court make appropriate findings and conclusions); ***In re Alexis S.***, 2019 WL 5586820, at *11 (remanding to the trial court when one ground was vacated for lack of sufficient findings and conclusions and the two remaining grounds were reversed). But we have previously concluded that, where another ground for termination has been affirmed, the interest of judicial economy would be better served by simply vacating the ground and continuing with our review, rather than remanding the case. *See* ***In re Disnie P.*** 2023 WL, at *14 (citing ***In re Kamyiah H.***, No. M2021-00834-COA-R3-PT, 2022 WL 16634404, at *7 (Tenn. Ct. App. Nov. 2, 2022) (vacating the ground of failure to manifest an ability and willingness to parent due to a lack of sufficient findings but concluding it was not necessary to remand the case for additional findings because other grounds existed to support termination of the mother's parental rights); ***In re Ralph M.***, No. E2021-01460-COA-R3-PT, 2022 WL 3971633, at *16–17 (Tenn. Ct. App. Sept. 1, 2022) (vacating the persistence of conditions ground due to insufficient findings of fact but declining to remand for additional findings because "other grounds exist[ed]")). As we have determined that there was clear and convincing evidence of the ground of abandonment by failure to visit, we do not remand this matter to the trial court for additional findings and conclusions regarding this ground.

B. Best Interest

Because we have determined that at least one statutory ground has been proven for terminating Father's parental rights, we must now decide if DCS has proven, by clear and convincing evidence, that termination of Father's rights is in the child's best interest. Tenn. Code Ann. § 36-1-113(c); ***White v. Moody***, 171 S.W.3d 187, 192 (Tenn. Ct. App. 1994). The factors that courts should consider in ascertaining the best interest of child include, but are not limited to, the following:

> (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.

T.C.A. § 36-1-113(i) (2016).[17] "This list is not exhaustive, and the statute does not require a trial court to find the existence of each enumerated factor before it may conclude that

[17] The current version of this statute includes eleven additional factors to be considered. Tenn. Code Ann. § 36-1-113(i)(1) (2022). Neither party asserts that the revised version of the statute is applicable in this

terminating a parent's rights is in the best interest of a child." ***In re M.A.R.***, 183 S.W.3d at 667 (citations omitted). Similarly, determining a child's best interest does not entail simply conducting "a rote examination" of each factor and then totaling the number of factors that weigh for or against termination. ***In re Audrey S.***, 182 S.W.3d at 878. Instead, the "relevancy and weight to be given each factor depends on the unique facts of each case. Thus, depending upon the circumstances of a particular child and a particular parent, the consideration of one factor may very well dictate the outcome of the analysis." ***Id.*** (citing ***White***, 171 S.W.3d at 194).

Moreover, "courts must remember that the child's best interests are viewed from the child's, rather than the parent's, perspective." ***In re Gabriella D.***, 531 S.W.3d 662, 681 (Tenn. 2017) (quoting ***In re Audrey S.***, 182 S.W.3d at 878). Thus, "[w]hen the best interest 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." Tenn. Code Ann. § 36-1-101(d). Indeed, "the focus of the best interest analysis is not to punish a parent for his or her historically bad behavior" or to reward a parent for his or her good behavior; "instead, the focus must center on what is best for the child[ ] at present and in the future." ***In re Gabriella D.***, No. E2016-00139-COA-R3-PT, 2016 WL 6997816, at *22 (Tenn. Ct. App. Nov. 30, 2016) (Stafford, J., dissenting), *rev'd* 531 S.W.3d 662 (Tenn. 2017).

Here, the trial court determined that terminating Father's parental rights was in the child's best interest. Specifically, the trial court found that Father (1) had not made changes in his conduct or circumstances to make it safe for the child to return to his custody; (2) had not made a lasting adjustment after reasonable efforts by DCS; (3) had not established a meaningful relationship with the child; (4) had abused or neglected the child; (5) had abused drugs and/or alcohol; and (6) had a mental or emotional state that would prevent him from effectively parenting the child. The trial court also found that a change in caretakers would be detrimental to the child's wellbeing and that placing the child with Father would not provide stability nor permanency in the child's life.

We start with the factors most in Father's favor. No proof was put on at trial regarding how Father's mental or emotional state prevented him from providing safe and stable care and supervision for the child. *See* Tenn. Code Ann. § 36-1-113(i)(8). Nor was there proof that, after the petition for contempt was voluntarily dismissed, Father was not consistently paying child support as ordered by the juvenile court. And although DCS's petition for contempt indicated that Father owed some arrearage based on his initial failure to pay, its voluntary dismissal of the petition indicated that Father was "in compliance with the order by meeting his/her full obligation." *See* Tenn. Code Ann. § 36-1-113(i)(9). Thus, factors (8) and (9) weigh against terminating Father's rights. *See, e.g.*, ***In re Jayda J.***, No. M2020-01309-COA-R3-PT, 2021 WL 3076770, at *28 (Tenn. Ct. App. July 21, 2021) (holding that because no evidence was presented as to a factor, the factor weighed against

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case, so we will refer to the factors in place at the time the petition was filed. We use the 2016 version of section 36-1-113(i) throughout this Opinion.

termination); ***In re Taylor B.W.***, 397 S.W.3d 105, 113 (Tenn. 2013) (affirming the holding that the absence of proof as to a factor meant the factor did not favor termination).

Several factors do not weigh heavily either for or against termination. As we have discussed, Father has made progress towards the completion of the requirements set out in the permanency plan established by DCS. *See* Tenn. Code Ann. § 36-1-113(i)(2). He has attended a parenting class and an anger management class. He has provided proof of stable transportation and income. Father also provided his lease for a four-bedroom house and indicated that he was interested in drinking less. *See* Tenn. Code Ann. § 36-1-113(i)(7). These are certainly important steps on the way to the change in circumstances contemplated by the statutory best interest factors. *See* Tenn. Code Ann. § 36-1-113(i)(1).

However, we have concerns about whether Father's efforts amount to a true change in circumstances. At trial, Father testified that although he expected to be out of work for another five months based on his on-the-job injury, he remained employed by the same company. Thus, once Father healed, he would likely resume working out of state for months at a time.[18] Father did not explain how he planned to take care of the child while away for such long periods of time. This is particularly concerning as Father had previously taken a hands-off approach to parenting and left it up to Mother to take care of the children while he worked. Without more, we are unable to say that Father has exhibited such a change in circumstance to make it safe and in the child's best interest for custody to be restored. *See* Tenn. Code Ann. § 36-1-113(i)(1).

Certainly, Father testified that he would "do what [he has] to do" to regain custody of the child. Yet, despite knowing that his visitation would be reinstated if he attended therapy, Father made no attempts to seek out therapy on his own.[19] Nor did Father complete the domestic violence course required by the permanency plan. Moreover, Father did not begin working on many of the permanency plan requirements that he did complete until more than a year after the children were placed in DCS custody. Several responsibilities required by the plan were completed only shortly prior to trial. This again raises the issue of "too little, too late." *See, e.g.*, ***In re Savannah F.***, 2016 WL 4547663, at *16. While Father's delays may not have been enough to demonstrate that his noncompliance with the permanency plans was substantial, they are relevant to the best interest analysis due to *effects* caused by Father's delays. Based on the timing of Father's provision of his lease, DCS was unable to conduct checks into the other persons potentially living in the house with the child. Similarly, Father did not provide any evidence of following through on his intent to limit his drinking. *See* Tenn. Code Ann. § 36-1-113(i)(7). Thus, we are unable to conclude that any adjustment Father has made will be lasting. *See* Tenn. Code Ann. § 36-1-113(i)(2). Because there is both positive and negative proof regarding factors (1), (2),

[18] Father testified that he would "go to one state for four or five months and then [go] to another," living in that state while working there and returning to visit every two weeks.

[19] Attending therapy was not a requirement set out in the permanency plans in the record.

and (7), these factors weigh neither for nor against termination. *See* ***In re Clara A.***, No. E2022-00552-COA-R3-PT, 2023 WL 1433624 at *10 n.15 (Tenn. Ct. App. Feb. 1, 2023) (citing ***In re Josie G.***, No. E2021-01516-COA-R3-PT, 2022 WL 4241987, at *18–19 (Tenn. Ct. App. Sept. 15, 2022)) (describing the difference between factors where no proof has been provided and factors that prove neutral based on the balancing of the evidence).

Finally, there are a few factors that weigh strongly for termination of Father's parental rights. The juvenile court found that the children were dependent and neglected while in the care of the parents, and the children disclosed that Father hit them. *See* Tenn. Code Ann. § 36-1-113(i)(6). And Father himself admits that he does not have a meaningful relationship with the child. *See* Tenn. Code Ann. § 36-1-113(i)(4). While he and the child were close at one point, after Father began regularly working out of state, the relationship dwindled. The relationship further worsened once the children were brought into DCS custody. While we acknowledge that Father maintained visitation with the child before and after Mother's incarceration, we cannot say that the visitation was a positive experience for the child.[20] *See* Tenn. Code Ann. § 36-1-113(i)(3). Foster Mother testified that the children would take a couple days to "get back on track" after visiting with the parents. The trial court's July 2021 permanency hearing order noted that the child did not want to continue visiting with Father and that Father's visitation with the child was suspended by recommendation of the child's therapist. *Cf.* ***In re Harley K.***, No. E2021-00748-COA-R3-PT, 2022 WL 1154140, at *11 (Tenn. Ct. App. Apr. 19, 2022) (noting that factor (3) favored termination where the visits that the parent did have with the child negatively impacted the child's mental health and behavior). At this point, there is very little relationship between Father and the child, meaningful or otherwise. *See* ***In re Braelyn S.***, No. E2020-00043-COA-R3-PT, 2020 WL 4200088, at *19 (Tenn. Ct. App. July 22, 2020) ("In our view, the lack of a meaningful relationship provides the greatest insight regarding the best interests of the child."). Additionally, the child is in a pre-adoptive home with two of his siblings. He has been placed continuously with this family since 2019. Foster Mother and Ms. Walker testified to the bond between the child and the foster family. We must conclude that a change in caretakers would have a significantly negative effect on the wellbeing of the child. *See* Tenn. Code Ann. § 36-1-113(i)(5). Accordingly, factors (3), (4), (5), and (6) weigh heavily in favor of termination.

[20] We also note that, after Mother's incarceration, DCS's efforts regarding Father seemed to wane. Ms. Walker testified that she had some contact with Father during this time. And Ms. Walker's April 2020 affidavit noted that video visits were being set up with Mother and the children. Yet no mention was made of efforts made to assist Father in maintaining visitation once all visits were conducted via video. *See* ***In re Kaliyah S.***, 455 S.W.3d at 555 (holding that "in a termination proceeding, the extent of DCS's efforts to reunify the family is weighed in the court's best-interest analysis"). While this lack of effort by DCS might sometime be construed in Father's favor, any leeway it might have granted is outweighed by both Father's admission that he voluntarily stopped working toward reunification when he no longer had Mother's efforts to rely upon and the negative impact of the visitation that did eventually occur.

Children deserve stability. ***In re Da'Vante M.***, No. M2017-00989-COA-R3-PT, 2017 WL 6346056, at *15 (Tenn. Ct. App. Dec. 12, 2017) ("Children deserve stability and an opportunity to move on from their present limbo."). While Father has taken some steps to show his willingness to be in the child's life, he has not shown that he is able to provide consistency and effectively parent the child. Here, Father has not been a consistent presence in this child's life for some years, even before the removal. Simply put, Father took a backseat to parenting his child and now asks to be placed in the driver's seat years later. Fortunately, the child is now in a stable, loving home with his other siblings. While Father's actions here do not mandate the level of censure that we unfortunately see in too many cases, there can be little dispute that the child's life is not improved by Father's involvement in it. We therefore affirm the trial court's finding that terminating Father's parental rights was in the child's best interest.

V. CONCLUSION

The decision of the Circuit Court of Bradley County is affirmed, and this cause is remanded to the trial court for all further proceedings as may be necessary and consistent with this Opinion. Costs of this appeal are taxed to Appellant Rudy P.L., for which execution may issue if necessary.

S/ J. Steven Stafford
J. STEVEN STAFFORD, JUDGE