

FILED

02/01/2023

Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs December 1, 2022

IN RE CLARA A.

**Appeal from the Juvenile Court for Knox County
No. 183062 Timothy E. Irwin, Judge**

No. E2022-00552-COA-R3-PT

Mother appeals the trial court's termination of her parental rights on the ground of severe child abuse. Mother also appeals the trial court's determination that termination of her rights was in the best interest of the child. Concluding that clear and convincing evidence was presented of both the ground for termination and that termination was in the child's best interest, we affirm the trial court's judgment in all respects.

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

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which THOMAS R. FRIERSON, II and JEFFREY USMAN, JJ., joined.

Mary Ward, Knoxville, Tennessee, for the appellant, Michelle A.

Jonathan Skrmetti, Attorney General and Reporter; and Clifton Wade Barnett, Assistant Attorney General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

This case involves the termination of Respondent/Appellant Michelle A.'s¹ ("Mother") parental rights to her daughter, Clara A, born in August 2015.²

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 A separate petition to terminate the parental rights of the child's father was filed based on his own incarceration and drug use. The petition against the father was heard alongside this case. The father's rights to the minor child were terminated by the trial court. This appeal concerns only the termination of Mother's

Although the termination in this case occurred in June 2022, Mother's involvement with child services organizations began years earlier. In 2018, the child was placed in the custody of the State of Kentucky's Department of Family and Health after Mother was arrested on a theft by deception charge. The child, then just two and a half years old, witnessed Mother's arrest. When Mother was released on probation in August 2018, the child was eventually returned to her custody.

Roughly a year later, on July 19, 2019, Mother was arrested in Knox County, Tennessee, initially for her involvement with a series of vehicle and equipment thefts by the child's father. The arrest came after a thirty-minute police chase during which Mother drove a stolen vehicle at speeds up to eighty-five miles per hour, with the child unclothed and unrestrained in the car. Mother eventually pleaded guilty to four charges: two counts of felony theft, one count of felony evading arrest, and one count of misdemeanor child abuse/neglect/endangerment. Mother was sentenced to three years in prison.

Following a finding by the trial court that the child was dependent and neglected due to the incarceration of both parents, the child was placed into the custody of Petitioner/Appellee the Tennessee Department of Children's Services ("DCS") on August 8, 2019. The child was then placed with a foster mother ("Foster Mother"), with whom she remained throughout the course of this case. A permanency plan was created by DCS in December 2019, establishing requirements to be met by Mother. The plan required Mother to complete an alcohol and drug assessment and follow all recommendations; submit to random drug screens; complete a mental health assessment and follow all recommendations; complete parenting education; obtain and maintain appropriate housing; comply with all court orders; pay child support; maintain regular contact with DCS; obtain a legal source of income; have transportation; be law abiding; and consistently participate in visitation.

Mother remained incarcerated in the Knox County jail until February 2020, when she was transferred to the Tennessee Prison for Women. Although granted parole on June 19, 2020, Mother was briefly transferred to the Loudon County jail and eventually released on July 10, 2020. DCS filed its petition to terminate Mother's rights on July 7, 2020, and served Mother on July 11, 2020. The petition alleged abandonment by incarcerated parent, substantial noncompliance with a permanency plan, persistence of conditions, and severe child abuse as grounds for termination. By order of August 5, 2020, the trial court granted Mother therapeutic visitation with the child.³

Then, in October 2020, Mother became aware of an outstanding warrant for her arrest in Pike County, Kentucky for a violation of probation resulting from the 2018

parental rights. Thus, this Opinion will only address the father's involvement in the history of this case as it relates to Mother's rights to the child.

³ The therapeutic visitation with Mother was recommended by the child's guardian ad litem.

charges. After turning herself in to the authorities in that state, Mother remained incarcerated until October 1, 2021. Following this most recent release from incarceration, Mother was able to resume therapeutic visitation with the child. Mother's parole was scheduled to end in April 2022.

This case was first heard August 4, 2021, and then, after a series of continuations requested by Mother due to her continued incarceration, on April 4, 2022. The majority of the testimony came from Mother and Foster Mother. Mother was asked to recount her criminal history.⁴ She also described the car chase that led to the child being placed in DCS custody. Mother admitted that while she normally drove with the child in a car seat, the child had only been laying down in the back seat while she evaded the police. Mother also claimed to not know that the child's father had stolen the vehicle used in the police chase, although she acknowledged having reason to believe that he had completed the thefts that resulted in her felony charges.⁵ Mother admitted that she was still married to the child's father at the time of trial, but said that "the marriage is over," and that she intended to file for divorce. Mother explained that she has had time to think about her mistakes and the victims of them, including the child. Mother admitted that she had made a series of bad decisions but stated that she is "not that person anymore[.]" Mother testified to writing the child weekly letters and regularly sending cards, books, and gifts to the child while incarcerated. Mother stated that the visitation with the child was going well and that she and the child have a good bond.

Mother also testified to the efforts she undertook while incarcerated in order to regain custody of the child. Specifically, Mother participated in faith-, recovery-, and trauma-focused counseling programs and attended both group and individual therapy. Although Mother testified that she had not used drugs for several years, Mother attended both Narcotics Anonymous and Alcoholics Anonymous meetings while in the Knox County jail, in an effort to prevent relapse. Mother also submitted to an alcohol and drug assessment and full mental health assessment in December 2019 or January 2020. It was recommended that she have therapy with a PhD-level therapist. After her most recent release from incarceration, Mother began therapy with a PhD-level therapist on March 16, 2022, and attended a peer-support counseling group. Mother also took a job-readiness class in November 2019, a parenting class in September 2020 as required by the permanency plan, and an elective financial class.

Mother testified that she was employed by a temporary employment agency, working full-time as an administrative assistant at a church, and part-time as a cashier at a

⁴ Prior to the child's birth, Mother spent two years in federal prison after stealing gift cards to a large retail chain. Three years after her release, Mother received another two-year sentence because she violated her probation by failing to timely pay restitution. Mother testified that, at the time of trial, roughly \$180,000.00 remained to be paid.

⁵ The child's father had also been involved in the events leading to Mother's 2018 theft by deception charges in Kentucky.

department store. Four days prior to the second day of trial, Mother signed a three-month lease for a one-bedroom apartment, although she had not yet fully furnished or moved into the apartment. Mother also provided evidence of her vehicle registration and insurance. Mother testified that as of April 2022, she had only three more months of probation, total, to serve.

Foster Mother also testified. She explained that her household consists of herself, the child, and another young foster child.⁶ The child has her own room in Foster Mother's home. Foster Mother testified to the therapy schedule of the child. When she first came into Foster Mother's care, the child received therapy "constantly every week[.]" With time, the frequency diminished to every other week and eventually once a month. When visitation with Mother began, the counselor's recommendation was to revert to biweekly counseling sessions. Foster Mother testified that the child began having "some potty accidents" since the start of visitation with Mother, wetting herself at school and at night, despite not having any accidents since the beginning of her time with Foster Mother. The child also participated in speech therapy. The child expressed to Foster Mother that she had seen violence in the relationship between her father and Mother.

Foster Mother described the child's memory of the police chase as being based primarily in fright and guilt. Specifically, Foster Mother testified that the child said "that she really felt guilty about a white van that was taken, she felt responsible because she laid in the back seat and she knew it wasn't theirs." When asked what else the child remembers about the car chase, Foster Mother explained that the child "remembers her mom being scared, she was scared, the police were chasing them, she was not in a car seat, she wasn't wearing clothes. That wasn't the first time not in a car seat."

During her testimony, Foster Mother explained that Mother regularly sent the child cards or letters, which Foster Mother read to the child while she colored. Once a note was read to the child, it was put into a folder with others sent by Mother. Foster Mother stated that the child has constant access to this collection but does not request to revisit the notes. Sometimes the child will color pictures to send to Mother.

Foster Mother also described the relationship between the child and herself. Without instruction by Foster Mother, the child began calling Foster Mother "mom" shortly after being placed in her custody, which was reported to DCS. The child has expressed to Foster Mother her desire to remain in Foster Mother's care and her fear that she would have to leave. Foster Mother's testimony was that the child knows that Mother birthed her and has expressed that she likes visiting with Mother, but that the child believes Foster Mother is her "real mom" and Mother is her "other mom." Foster Mother testified that if the child

⁶ At the August 2021 hearing, Foster Mother was fostering an infant boy. That child was reunited with his family in January 2022. By the April 2022 hearing, an infant girl was placed in Foster Mother's care.

became eligible for adoption, she would readily adopt the child.

The DCS social worker assigned to the case and a therapist contracted by DCS to assist with visitation between Mother and the child also testified. The child's individual therapist was not called to testify. At the end of the hearing, the trial court found that there had been severe child abuse and that terminating Mother's rights was in the child's best interest.⁷ The trial court issued its final order terminating Mother's rights on June 3, 2022. Therein, the trial court stated that "[Mother] severely abused the minor child by knowingly exposing her to a situation that could have harmed if not killed the minor child" and that "[t]he combined best interest factors clearly indicate that termination of [Mother's] parental rights is in the best interest of the minor child." Mother timely appealed.

II. ISSUES PRESENTED

Mother raises the following issues on appeal, which are taken from her brief:

1. Whether the Trial Court erred by failing to specify which of the numerous definitions of severe abuse the Trial Court was relying upon to terminate the Mother's parental rights.
2. Whether the Trial Court erred by finding severe abuse against the Mother based on her having pled guilty to the misdemeanor crime of child neglect/abuse/endangerment even though this misdemeanor crime is not included on the list of crimes that will give rise to a finding of severe abuse pursuant to Tenn. Code Ann. § 37-1-102(b)(27).
3. Whether the Trial Court erred by applying the incorrect set of best interest factors.
4. Whether the Trial Court erred by finding that terminating the parental rights of the Mother was in the best interests of her daughter pursuant to Tenn. Code Ann. § 36-1-113(i).

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

⁷ The trial court specifically found that DCS had not met its burden of proving the other grounds by clear and convincing evidence. This finding has not been raised as an issue in this appeal.

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

We first address the sole statutory ground found by the trial court in terminating Mother’s parental rights.⁸ Tennessee Code Annotated section 36-1-113(g)(4) states that a

⁸ Pursuant to the holding of our Supreme Court in *In re Carrington H.*, 483 S.W.3d at 525–26, we 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.” This review is intended to “ensure that fundamental parental rights are not terminated except upon sufficient proof, proper findings, and fundamentally fair procedures.” *Id.* at 525. Thus, “this Court has not interpreted *In re Carrington* to mean that we must also review grounds that the trial court found were not sufficiently proven when the party who sought termination does not challenge that ruling on appeal.” *In re Christopher L.*, No. M2020-01449-COA-R3-PT, 2021 WL 4145150, at *4 n.6 (Tenn. Ct. App. Sept. 13, 2021) (citing *In re Gabriel B.*, No. W2017-02514-COA-R3-PT, 2018 WL 3532078, at *2 n.5, *4 (Tenn. Ct. App. July 23, 2018) (limiting review on appeal to “each ground for termination that the trial court found the Department

person's parental rights may be terminated on the ground that the parent "has been found to have committed severe child abuse, as defined in § 37-1-102" under a prior court order or by the court hearing the petition to terminate. The version of section 37-1-102 that was in effect at the time DCS's petition was filed defined severe child abuse as follows:

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

(ii) 'Serious bodily injury' shall have the same meaning given in § 39-15-402(c);

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

(C) The commission of any act towards the child prohibited by § 39-13-309, §§ 39-13-502 – 39-13-504, § 39-13-515, § 39-13-522, § 39-13-527, § 39-13-531, § 39-13-532, § 39-15-302, § 39-15-402, or § 39-17-1005 or the knowing failure to protect the child from the commission of any such act towards the child;

(D) Knowingly allowing a child to be present within a structure where the act of creating methamphetamine, as that substance is identified in § 39-17-408(d)(2), is occurring; or

(E) Knowingly or with gross negligence allowing a child under eight (8) years of age to ingest an illegal substance or a controlled substance that results in the child testing positive on a drug screen, except as legally prescribed to the child[.]

Tenn. Code Ann. § 37-1-102(b)(27) (2019).⁹

established by clear and convincing evidence" but omitting analysis of another ground that the trial court found was not proven where DCS did not challenge that ruling on appeal)). Here, DCS has made no such challenge. Therefore, we will not discuss the grounds of abandonment by incarcerated parent, substantial noncompliance with a permanency plan, and persistence of conditions that were not found by the trial court.

⁹ The current version of this statute adds an additional prohibitory section to those within subsection (C), as well as adding a subsection (F), involving knowingly allowing a child to be in a structure with certain prohibited substances present and accessible to the child. Neither party asserts that the revised version of the definition is applicable in this case, so we will use the 2019 version of section 37-1-102(b)(27) throughout this Opinion.

Mother first argues that the trial court committed reversible error in failing to establish which definition of severe abuse it used as a ground for termination. It is true that on some occasions, this Court has held that a trial court's failure to specify the definition of severe abuse it relied upon mandated vacatur. For example, in *In re S.S.-G.*, the trial court based its termination of the father's parental rights on a finding that he had "sexually abused the child . . . pursuant to T.C.A. § 37-1-602 and that this sexual abuse constitute[d] severe abuse pursuant to T.C.A. § 37-1-102(b)(2[1]) which constitute[d] grounds for termination of parental rights[.]" No. M2015-00055-COA-R3-PT, 2015 WL 7259499, at *10 (Tenn. Ct. App. Nov. 16, 2015). Because "child sexual abuse" and "severe child abuse" were both set out by statutes containing numerous definitions, this Court was "unable to conduct meaningful appellate review of the trial court's decision." *Id.* at *11. Concluding that "[w]here the statute provides several possible definitions for a ground, the trial court must specify the exact definition that it relies upon in reaching its ultimate conclusion[.]" we vacated the termination of the father's parental rights on the ground of severe child abuse. Similarly, in *In re L.F.*, the trial court made the general statement that one parent "sexually abused" the child and the other parent "failed to protect" the child. No. M2020-01663-COA-R3-PT, 2021 WL 3782130, at *12 (Tenn. Ct. App. Aug. 26, 2021). We determined that it was unclear on which definition of severe abuse the trial court relied, and reversed the finding of severe child abuse as a ground for terminating the parent's rights. *Id.* (not vacating the termination of parental rights because there were alternative grounds proven by clear and convincing evidence).

The failure to cite the specific definition of severe abuse at issue, however, is not always fatal. In *In re Kailey A.*, the trial court did not specify which definition of severe child abuse applied to the two pairs of children before finding grounds to terminate the parental rights of the mother. No. E2021-00801-COA-R3-PT, 2022 WL 773617, at *9–10 (Tenn. Ct. App. Mar. 14, 2022). This Court looked to the allegations and the evidence against the mother to determine which definition applied to each child before considering whether severe abuse had been proven. *Id.* Although the trial court did not provide the definition it relied upon, we determined that the trial court's findings sufficiently implicated a specific definition of severe abuse to allow for meaningful appellate review, and affirmed the finding of grounds for termination. *Id.*; see also *In re Rufus C.*, No. M2021-01538-COA-R3-PT, 2022 WL 4126245, at *15 (Tenn. Ct. App. Sept. 12, 2022), *perm. app. denied* (Tenn. Dec. 12, 2022) (concluding that "a logical conclusion reached by the [trial court] based upon the evidence" was sufficient to sustain the ground of severe child abuse, even when the trial court failed "to specifically identify which definition of severe child abuse it relied upon"); *In re K.H.*, No. W2008-01144-COA-R3-PT, 2009 WL 1362314, at *9–10 (Tenn. Ct. App. May 15, 2009) (concluding that the trial court's failure to specify statutory ground (g)(4) was "not fatal in and of itself if the remainder of the order [was] sufficiently specific" and allowed this Court to "glean" that the ground of severe child abuse was the one on which the trial court relied).

From our review, the trial court's order falls in the latter category. Specifically, the

trial court stated that:

[Mother] severely abused the minor child by knowingly exposing her to a situation that could have harmed if not killed the minor child. [The child] is severely abused because [Mother] placed the child in the back of a car and ran from the police during a high-speed chase. The minor child was not quite four years old, naked, and unrestrained in the van. [Mother] drove for approximately thirty minutes at maximum speeds of eighty-five miles per hour. The high-speed chase was ceased due to law enforcement barricading the vehicle on the side and the front of the van. Further, on January 22, 2020, [Mother] plead guilty to child abuse/neglect/endangerment due to the said high speed chase involving the minor child. It is lucky the child is not dead.

When considered in conjunction with DCS’s assertion that “[Mother] committed severe child abuse against the child . . . by knowingly exposing the child to neglect[,]” the evidence and allegations clearly suggest which definition of severe abuse is at issue—subsection (A). Indeed, as DCS points out, only this definition of severe abuse tracks the proof presented in this case and the trial court’s findings. *See* Tenn. Code Ann. § 37-1-102(b)(27)(A) (defining severe child abuse as “[t]he knowing exposure of a child to or the knowing failure to protect a child from abuse or neglect that is likely to cause serious bodily injury or death”). No qualified expert testified at trial. *See* Tenn. Code Ann. § 37-1-102(b)(27)(B). None of the crimes in subsection (C) were alleged. *See* Tenn. Code Ann. § 37-1-102(b)(27)(C). Nor were any allegations made that the child had been exposed to illegal or controlled substances. *See* Tenn. Code Ann. § 37-1-102(b)(27)(D), (E). So, the trial court’s failure to expressly specify the subsection it relied upon does not prevent review in this particular case.

Mother next asserts that it was improper for the trial court to use her conviction of child abuse/neglect/endangerment as a basis for finding severe child abuse. It is true that the trial court mentioned Mother’s conviction in its findings as to severe abuse. However, there is no indication that the trial court’s finding of severe abuse was based *solely* on Mother’s conviction. Instead, it appears that the conviction, along with the extensive testimony about the event and its effects on the child, were part of the constellation of facts that the trial court considered in finding severe abuse.¹⁰ Nor is there any indication the trial court viewed the conviction as proof of severe abuse under Tennessee Code Annotated section 37-1-102(b)(27)(C), which considers the commission of acts prohibited by certain statutes sufficient to establish severe abuse.¹¹ It therefore appears that it was the events

¹⁰ On the second day of trial, the trial court noted that there “[was] not a severe child abuse order in the file”, and asked counsel for DCS if she “plann[ed] on proving the severe abuse in the body of the proof.” And DCS did not simply present Mother’s conviction as its lone evidence of severe child abuse. Instead, Mother was questioned extensively about the events of that day and Foster Mother testified to the child’s understanding of what had happened.

¹¹ And, as misdemeanor child abuse/neglect/endangerment is not listed in subsection 37-1-

underpinning the charge and subsequent conviction that the trial court relied upon in finding evidence of severe abuse, not the conviction itself. Thus, in this case we determine that the trial court did not err in considering Mother’s conviction.

We therefore proceed to the merits of the trial court’s finding of severe child abuse. When reviewing a trial court’s independent finding of severe abuse by clear and convincing evidence, we must “distinguish between the specific facts found by the trial court and the combined weight of those facts.” *In re S.S.*, No. E2021-00761-COA-R3-PT, 2022 WL 1151424, at *8 (Tenn. Ct. App. Apr. 19, 2022) (quoting *In re Walter B.*, No. M2020-00069-COA-R3-PT, 2020 WL 7422070, at *4 (Tenn. Ct. App. Dec. 18, 2020) *perm. app. denied* (Tenn. Mar. 9, 2021)). The underlying facts, including whether the parent’s conduct was “knowing” as required by certain definitions within section 37-1-102(b)(27), “need only be established by a preponderance of the evidence.” *In re Walter B.*, 2020 WL 7422070, at *4 (quoting *In re S.J.*, 387 S.W.3d 576, 592 (Tenn. Ct. App. 2012)). When those facts are proven, we are to examine “the combined weight of all of those facts, to see if they clearly and convincingly show severe child abuse.” *Id.*

Other than her contention that the trial court’s judgment lacked specificity and improperly relied upon her conviction, Mother offers no argument against the trial court’s finding that the child was exposed to “abuse or neglect that is likely to cause serious bodily injury or death.” Tenn. Code Ann. § 37-1-102(b)(27)(A). A preponderance of the evidence presented supports this factual finding: the child, then just shy of her fourth birthday, was unclothed and unrestrained in the back of a stolen vehicle during a police chase that lasted approximately thirty minutes and reached speeds up to eighty-five miles per hour. Mother does not deny the facts of the police chase or the risk it posed to the child. Fortunately, here the child suffered no physical harm from the perilous situation in which she was placed, but that does not reduce the risk of harm she faced.¹² *See, e.g., In Matter of M.J.J.*, No. M2004-02759-COA-R3-PT, 2005 WL 873305, at *8 (Tenn. Ct. App. Apr. 14, 2005) (noting that “the healthy development of the child in this case does not diminish the severity of the harm to which the child was exposed”).

Nor does Mother argue that the child’s exposure to abuse or neglect was done unknowingly. As relevant to severe child abuse, “a parent’s conduct is considered to be knowing . . . ‘when he or she has actual knowledge of the relevant facts and circumstances or when he or she is either in deliberate ignorance of or in reckless disregard of the information that has been presented to him or her.’” *In re Kailey A.*, 2022 WL 773617, at *9 (quoting *In re Samaria S.*, 347 S.W.3d 188, 206 (Tenn. Ct. App. 2011)). In cases involving injuries inflicted on children, “there is often no witness to the injury other than the parent or caregiver,” and so “the knowing element can and often must be gleaned from

102(b)(27)(C), such reliance may have been misplaced.

¹² Indeed, the child’s ongoing participation in therapy indicates that significant mental harm was suffered by the child during the ordeal.

circumstantial evidence[.]” *In re Walter B.*, 2020 WL 7422070, at *4 (internal quotations omitted). Here, Mother testified that while she normally drove with the child in a car seat, the child was only laying down in the back seat as Mother attempted to evade the police. And the Information to which Mother pleaded guilty after the police chase included the charge that she “did knowingly expose [the child] to neglect, which resulted in imminent danger to [the child].” Thus, Mother chose to engage in behavior that any reasonable person would conclude subjected the child to a great risk of harm. *Cf. Dattel Family Ltd. P’ship v. Wintz*, 250 S.W.3d 883, 892 (Tenn. Ct. App. 2007) (“This Court . . . is not required to check common sense at the courthouse door.”). These facts clearly and convincingly establish that Mother knowingly exposed the child to abuse or neglect likely to cause a serious bodily injury. As the trial court found, it was little more than luck that the child did not suffer injuries as a result of Mother’s poor choices. So the trial court did not err in finding Mother’s parental rights were subject to termination based upon severe child abuse.

B. Best Interest

Because we have determined that a statutory ground for terminating Mother’s parental rights exists, we must now decide if DCS has proven, by clear and convincing evidence, that termination of Mother’s rights is in the child’s best interest. Tenn. Code Ann. § 36-1-113(c)(2); *White v. Moody*, 171 S.W.3d 187, 192 (Tenn. Ct. App. 1994). “A finding that at least one ground for termination of parental rights exists does not necessarily require that a parent’s rights be terminated.” *In re Alleigh B.*, No. M2020-00116-COA-R3-PT, 2021 WL 1626340, at *4 (Tenn. Ct. App. Apr. 27, 2021) (citing *In re Audrey S.*, 182 S.W.3d at 877), *perm. app. denied* (Tenn. July 23, 2021). Because some parental misconduct is redeemable, “Tennessee’s termination of parental rights statutes recognize the possibility that terminating an unfit parent’s parental rights is not always in the child’s best interests.” *In re Audrey S.*, 182 S.W.3d at 877. Therefore, the interest of the child is the touchstone of our analysis. *See id.* at 878. “[W]hen the interests of the parent and the child conflict, courts are to resolve the conflict in favor of the rights and best interest of the child.” *In re Nevada N.*, 498 S.W.3d 579, 607 (Tenn. Ct. App. 2016) (citing Tenn. Code Ann. § 36-1-101(d)).

Like with the grounds for termination, the factual findings made during a 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 then consider the combined weight of those facts to determine whether they amount to clear and convincing evidence that termination is in the child’s best interest.” *Id.* (citations omitted). When considering whether terminating a parent’s rights to a child is in the child’s best interest, a trial court must consider the factors enumerated in Tennessee Code Annotated section 36-1-113(i).

In this case, the trial court considered the best interest factors contained in section 36-1-113(i), as it was amended on April 22, 2021. *See* 2021 Tenn. Laws Pub. Ch. 190 (S.B.

205), eff. April 22, 2021. Under this version of the statute, courts are to consider a non-exclusive list of twenty best interest factors. We note that the termination petition in this case was filed by DCS on July 7, 2020, well before the effective date of this amendment. However, “the amended statute applies only to petitions for termination filed on or after April 22, 2021.” *In re Riley S.*, No. M2020-01602-COA-R3-PT, 2022 WL 128482, at *14 n.10 (Tenn. Ct. App. Jan. 14, 2022) *perm. app. denied* (Tenn. Mar. 17, 2022).

Mother argues that the trial court erred in considering the amended factors and asks that the findings be reversed and the matter dismissed or remanded. However, this Court has held that a trial court’s reliance on the newer factors is not generally reversible error “because the old factors are essentially contained within the new factors.”¹³ *In re Bralynn A.*, No. M2021-01188-COA-R3-PT, 2022 WL 2826850, at *9 (Tenn. Ct. App. July 20, 2022) (citing *In re Da’Moni J.*, No. E2021-00477-COA-R3-PT, 2022 WL 214712, at *23 (Tenn. Ct. App. Jan. 25, 2022), *perm. app. denied* (Tenn. Apr. 1, 2022)), *perm. app. denied* (Tenn. Aug. 12, 2022). We therefore “follow Mother’s lead to consider the best interest factors that Mother asserts are controlling in this case.”¹⁴ *Id.* They are as follows:

- (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 parents or guardian’s home is

¹³ Indeed, this was this trial court’s rebuttal to the guardian ad litem’s remarks that the filing date of the termination petition required use of the older factors.

¹⁴ DCS points out that Mother did not object to the trial court’s use of the newer factors at trial. Accordingly, DCS opposes this assignment of error. But, looking to our decision in *In re Bralynn*, DCS also follows Mother’s lead in relying on the factors in effect at the time the petition was filed in its discussion of the child’s best interest.

healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i) (2019).

A finding that each of the enumerated factors favors termination is not necessary for a trial court to conclude 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 at 667. Likewise, 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. Although in some circumstances "the consideration of one factor may very well dictate the outcome of the analysis," *id.*, 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).

We recognize the effort Mother has exerted in an attempt to regain custody of her daughter. Indeed, the trial court's refusal to find clear and convincing evidence of either substantial noncompliance with a permanency plan or persistence of conditions illustrate that Mother had made significant strides in the tasks set by DCS for her to complete. Once a ground for termination has been found, however, our analysis shifts to an exclusive focus on the best interest of the child at issue, from his or her perspective. *In re Marr*, 194 S.W.3d 490, 499 (Tenn. Ct. App. 2005). 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).

To that end, we note that while incarcerated, Mother took a number of classes aimed toward trauma and recovery, parenting, and finances. Since her release, Mother has secured employment, a driver's license, transportation, and vehicle insurance. *See* Tenn. Code Ann. § 36-1-113(i)(1). Mother also completed a mental health assessment and participated in group and individual therapy in compliance with the reasonable requirements set out in the permanency plan established by DCS. *See* Tenn. Code Ann. § 36-1-113(i)(2). Since her release from her most recent incarceration, Mother has continued with counseling and she

has begun seeing a PhD-level therapist as directed. *See* Tenn. Code Ann. § 36-1-113(i)(2), (8). Thus, Mother has apparently cleared some of the classic stumbling blocks faced by individuals attempting to retain their parental rights.

It is the timing of Mother's efforts, however, that gives this Court pause. The majority of the classes and therapy participated in by Mother occurred during her incarceration. And Mother was incarcerated for much of the time the child was in DCS custody, so she has had little opportunity to show lasting results from the classes and counseling outside the controlled environment of confinement. Similarly, Mother's efforts to comply with the other aspects of the permanency plan set by DCS occurred only after the start of trial: Mother's vehicle registration was issued November 2021, three months after the first day of trial, and Mother's vehicle insurance became effective February 2022, another three months later. To be sure, taking classes, attending therapy, and having employment and transportation are no small feats. Unfortunately for Mother, the bulk of these changes came too closely to the time of trial for them to persuasively establish any lasting change or otherwise evince a sense of continued stability. *See, e.g., In re M.A.P.*, No. E2014-02413-COA-R3-PT, 2016 WL 369399, at *10 (Tenn. Ct. App. Jan. 29, 2016) (concluding that mother "ha[d] not made 'lasting adjustments'" when mother "obtained employment about one month before trial and new housing about one month after" and "also failed to make progress on her mental health issues"). This is especially true in this case where the child had been removed and returned to Mother on at least one other occasion, only for Mother to return to a life of criminality in such a way that she involved her child in her crimes. Thus, factors (1), (2), and (8) neither favor nor disfavor termination.¹⁵

Similarly, Mother has made some effort to establish a safe and healthy home by confronting her past criminality and the negative influence of the child's father. Mother testified that her marriage to the child's father "is over[.]" And by the second day of trial, Mother had secured a three-month lease on a one-bedroom apartment. *See* Tenn. Code Ann. § 36-1-113(i) (7). These are certainly stepping stones on the way to the change in circumstances contemplated by the statutory best interest factors. However, even these changes do not persuade us that Mother's life has wholly changed. The child's father

¹⁵ This Court has previously explained that when no evidence is presented regarding a best interest factor, that factor weighs against termination. *See, e.g., In re Kailyn B.*, No. E2021-00809-COA-R3-PT, 2022 WL 9577148, at *15 (Tenn. Ct. App. Oct. 17, 2022) (finding factor (8) to weigh against termination when no proof was presented regarding the parent's mental health, despite the trial court's finding that the factor was inapplicable) (citations omitted). That is not the issue in this case. Here, proof was put on regarding factors (1), (2), and (8), and as discussed, *supra*, factor (7), but the proof establishing the positive aspect of the factors was evenly matched by the proof of the negative. *See In re Josie G.*, No. E2021-01516-COA-R3-PT, 2022 WL 4241987, at *18–19 (Tenn. Ct. App. Sept. 15, 2022) (finding factor (6) to weigh against termination where DCS presented no evidence the mother caused physical harm to the child, but finding factor (7) to "weigh[] neither for nor against termination" where DCS presented no evidence that the mother's home was unsafe, but the testimony made the mother's future housing situation appear uncertain). On balance, these factors are neutral in our consideration of the child's best interest.

played a significant role in Mother's 2018 theft by deception charges in Kentucky and the thefts that lead to Mother's 2019 arrest in Tennessee. And although Mother has distanced herself from the child's father, Mother did not testify that she had actually begun the divorce process against him. Moreover, Mother's three-month lease was signed only four days before the second day of trial. The child's room would not have been ready if the trial court had granted Mother immediate custody of the child. So factor (7) weighs neither for or against termination.

On the other hand, several factors weigh heavily in favor of termination. Mother has severely abused the child and otherwise exposed her to consistent criminal behavior—the child had already personally witnessed Mother's arrest twice by the age of four. The child remembers the violence between her parents. The child remembers the police chase where she was frightened, undressed, and unrestrained in the back of a vehicle she knew didn't belong to her family. *See* Tenn. Code Ann. § 36-1-113(i)(6). The child continues to suffer from emotional issues related to Mother's poor choices. Factor (6) clearly weighs in favor of termination.

By all accounts, Mother consistently sent letters or cards to the child while incarcerated, and attended weekly or biweekly visits with the child when she was released. *See* Tenn. Code Ann. § 36-1-113(i)(3). However, Mother's release from incarceration in 2020 was so brief, and her release in 2021 so close to the time of trial, that Mother was unable to progress beyond supervised, therapeutic visits with the child. Perhaps most troubling, the child has shown significant distress at being reintroduced to visits with Mother. *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). In fact, the child seems to have serious concerns about being reintroduced to Mother and having to leave Foster Mother's care: since restarting visitation with Mother, the child's therapy sessions have had to become more frequent and the child has suffered more than a few "accidents" where she has wet herself at school and at the foster home. And while the relationship between Mother and the child has improved somewhat since Mother's most recent release from incarceration, the child has developed a significant bond with and love for Foster Mother since being placed in her care in August 2019. *See* Tenn. Code Ann. § 36-1-113(i)(4). The child has indicated to Foster Mother and the social worker on more than one occasion that she wants to stay with Foster Mother. We therefore agree that a change in caretakers would negatively affect the child. *See* Tenn. Code Ann. § 36-1-113(i) (5).¹⁶ Factors (3), (4), and (5), therefore, also weigh in favor of termination.

¹⁶ Mother asserts that this factor cannot be considered because no qualified expert testified to the effect a change of caretakers would have on the child. Respectfully, no expert testimony is required to conclude that, as the child has already shown distress when restarting visitation with Mother, removing her from Foster Mother's care and placing her with Mother full-time would be traumatizing. *See In re Antonio J.*, No. M2019-00255-COA-R3-PT, 2019 WL 6312951 (Tenn. Ct. App. Nov. 25, 2019) (affirming a trial court's finding that the detrimental effects of a change in caretakers favored termination, without requiring

Overall, we acknowledge Mother's efforts, such that many of the factors in this case do not weigh heavily in favor of either position. However, as we have previously explained,

Ascertaining a child's best interests does not call for a rote examination of each of Tenn. Code Ann. § 36-1-113(i)'s nine factors and then a determination of whether the sum of the factors tips in favor of or against the parent. 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.

In re Audrey S., 182 S.W.3d at 878 (citing *White*, 171 S.W.3d at 194). In this case, several factors appear to neither favor nor disfavor termination of Mother's rights based on the steps she has taken to regain custody of the child. But that neutrality carries little weight when compared to the strength of the child's distress at the idea of returning to Mother's care. Here, the child is now in a safe and stable home that is pre-adoptive. She is bonded to Foster Mother and has shown serious anxiety regarding a change in custody, due to Mother's choices that both put the child in danger and removed Mother from the child's life for significant periods of time. Under these circumstances, Mother's actions simply come "too little, too late" to establish that the child would not be better off if Mother was not a part of her life. *In re Michael*, No. M2015-02497-COA-R3-PT, 2016 WL 7486361, at *16 (Tenn. Ct. App. Oct. 6, 2016) (collecting cases). 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."). Thus, we must affirm the trial court's overall conclusion that terminating Mother's parental rights serves the child's best interest.

V. CONCLUSION

The judgment of the Knox County Juvenile Court is affirmed, and this cause is remanded for further proceedings consistent with this Opinion. Costs of this appeal are taxed to Appellant, Michelle A., for which execution may issue, if necessary.

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

expert proof of same at trial, where a child regressed in his potty training after beginning therapeutic visitation with the mother).