IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 11, 2023 Session

IN RE EMARIE E.

Appeal from the Circuit Court for Knox County
No. 151922 Gregory S. McMillan, Judge

No. E2022-01015-COA-R3-PT

In this termination of parental rights case, Appellants, Mother and stepfather, filed a petition to terminate Appellee Father's parental rights on the grounds of abandonment by failure to support and failure to visit. Father asserted the absence of willfulness as an affirmative defense. At the close of proof on grounds, the trial court orally found that abandonment by failure to support was not shown, but abandonment by failure to visit was proven. At the close of all proof, the trial court reconsidered its oral ruling on grounds and determined that Father's failure to visit was not willful. In its written order, the trial court found that grounds for termination had not been proven and that, even if grounds existed, termination of Father's parental rights was not in the child's best interest. Discerning no error, we affirm.

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

KENNY ARMSTRONG, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J., and THOMAS R. FRIERSON, II, J., joined.

Nicholas D. Bunstine, Knoxville, Tennessee, for the appellants, Rachel C. and Jonathan C.[1]

Shelley S. Breeding, Madeline S. Copes, and Megan S. Lowe, Knoxville, Tennessee, for the appellee, Nicholas E.

[1] In cases involving minor children, it is the policy of this Court to redact the parties' names to protect their identities.

OPINION

I. BACKGROUND

Appellants are the biological mother ("Mother") and stepfather ("Stepfather," and together with Mother, "Appellants") of Emarie E. (the "Child"), who was born in May 2014. Mother and Emarie's father, Appellee Nicholas E. ("Father"), divorced in August 2015, and Mother was designated Emarie's primary residential parent. Father's child support obligation was set at $654.00 per month.

In September 2017, Father was found in contempt for failure to provide health insurance for Emarie and for failing to pay her medical bills. The court also determined that Father was in arrears on child support in the amount of $9,718.00, and assessed interest in the amount of $565.79. Because Father had relocated to Washington (State), the trial court amended the parenting plan to grant Father parenting time one weekend per month in Emarie's residential county. The modified plan provided that holiday parenting time would follow the regular schedule but that Father would have parenting time on New Year's Day, Father's Day, Thanksgiving in even years, and on Father's birthday. It also required Father to notify Mother at least 30 days prior to his visits. The trial court continued Father's child support obligation of $654.00 per month and awarded Mother $3,500.00 in attorney's fees.

Mother and Stepfather married in 2019. In July 2021, they filed a petition to terminate Father's parental rights and for adoption. In their petition, Appellants alleged hat Father had not exercised visitation with Emarie since the summer of 2017, and had failed to support the Child from 2016 until May 2021, when child support was ordered to be paid through wage garnishment. They prayed for termination of Father's parental rights on the ground of abandonment for failure to support and/or visit and submitted that termination of Father's parental rights was in Emarie's best interest.

In his answer, Father denied Appellants' allegations. In October 2021, Father filed a motion for *pendente lite* visitation and communication with Emarie. In his motion, Father asserted that he had paid child support regularly since January 2021 and that Mother had "ignored" his repeated requests to communicate with Emarie by telephone. Father also filed a petition for criminal contempt, in which he alleged that Mother willfully violated the September 2017 parenting plan by not allowing him to communicate with Emarie by telephone. Father alleged 41 instances of contempt from June 21, 2021 through September 23, 2021.

On November 10, 2021, Mother filed a petition for civil and criminal contempt, in which she alleged forty-two counts of contempt, including that Father had not paid the child support arrearage, interest, medical bills, or attorney's fees that were awarded by the court in 2017. Mother also alleged contempt based on her assertion that Father had paid

the correct amount of child support only six times in the previous 48 months (March 2018; May 2020; March 2021; April 2021; June 2021; and July 2021). Mother further asserted that Father had not requested his co-parenting time since entry of the court's September 2017 order. Mother also filed a counter-petition to Father's petition for visitation, wherein she sought suspension of Father's visitation. In her counter-petition, Mother asserted that Father had not visited with Emarie, who was then seven years old, for more than four years. She also asserted that Father had not paid child support for approximately five years until a wage-assignment garnishment forced him to comply; Mother stated that Father owed support of approximately $40,000. Following a hearing on November 12, 2021, the trial court dismissed the parties' respective petitions for contempt and denied Father's motion for visitation.

On November 16, 2021, Father filed an amended answer to add the affirmative defense of absence of willfulness under Tennessee Code Annotated section 36-1-102(1)(I). In his amended answer, Father asserted that, in March 2019, his mother texted Mother "to coordinate" the purchase of airplane tickets for Emarie to visit Father in June 2019, "only to have Mother respond that 'until the [child] support resumes and he takes responsibility, we will not continue communication.'" Father also asserted that he was unable to visit Emarie in 2020 due to the Covid-19 pandemic and that, in January 2021, he texted Mother to "ask[] for Mother's civility and willingness to allow Father to be part of the child's life[.]" Father alleged that Mother did not respond and asserted that he called Mother once in February 2021 to speak with Emarie. Father also stated that he texted Mother in May 2021 and asked her to wish the Child a happy birthday. Father asserted that he spoke to Mother in June 2021, and Mother refused his request to visit the Child. He claimed that he texted and/or called Mother on June 21, 23, 24, 25, 26 and that Mother "finally responded" and informed him that she would allow Emarie to decide whether she wanted to communicate with Father. Father stated that he contacted Mother on June 27 and June 30 to ask to speak with Emarie. Father also asserted that he did not abandon the Child by failing to pay child support because child support had been paid in three of the four months immediately preceding the filing of Mother's petition to terminate his parental rights.

At the outset of the December 1, 2021 hearing, the trial court granted Father's request to bifurcate the hearing on grounds from the hearing on best interest.[2] At the conclusion of Appellants' proof on December 1, the trial court determined that Appellants failed to prove abandonment by failure to support because Father paid child support during the four months preceding the filing of the petition. It was undisputed that Father did not visit the Child during this period.

[2] The trial court's decision to bifurcate the grounds hearing from the best interest hearing was not error because a trial court's best-interest analysis is distinct and separate from its determination of grounds in a termination of parental rights case. ***In re Neveah M.***, 614 S.W.3d 659, 674 (Tenn. 2020) (citations omitted).

The court heard proof on Emarie's best interest over five days in January and March 2022. At the conclusion of the hearing, the trial court stated that it had reconsidered its December 1 oral ruling on the issue of grounds. By written order entered on April 12, 2020, the trial court found that there was no basis to terminate Father's parental rights on the ground of abandonment by failure to support or failure to visit. The trial court further held that, even if grounds existed, termination of Father's parental rights was not in the Child's best interest. Appellants filed a motion to reconsider, set aside, or amend the judgment, which the trial court denied on June 28, 2022. Appellants filed a timely appeal to this Court.

II. ISSUES

Appellants present the following issues for review, as stated in their brief:

I. When considering Respondent-Appellee's defense that his abandonment of Emarie was not willful:

A. Did the trial court fail to apply the burden of proof established in T.C.A. §36-1-102(1)(I)?

B. Did the trial court fail to apply T.C.A. §36-1-102(1)(E)?

C. Does the evidence preponderate against the trial court's finding that Respondent-Appellee's abandonment of Emarie was not willful?

II. Is a finding that termination of Respondent-Appellee's parental rights is in Emarie's best interest supported by a preponderance of the evidence?

III. After ruling that the trial would be bifurcated, is the trial court's reversal of its ruling on grounds, without notice to the Petitioners-Appellants, and the Guardian Ad Litem, at the end of the best interest proof, so unfair as to require a new trial?

III. STANDARD OF REVIEW

It is well-settled that:

A parent's right to the care and custody of [his or] her child is among the oldest of the judicially recognized fundamental liberty interests protected by the Due Process Clause of the federal and state constitutions. ***Troxel v. Granville***, 530 U.S. 57, 65 (2000); ***Stanley v. Illinois***, 405 U.S. 645, 651

> (1972); ***In re Angela E.***, 303 S.W.3d 240, 250 (Tenn. 2010); ***In re Adoption of Female Child***, 896 S.W.2d 546, 547-48 (Tenn. 1995); ***Hawk v. Hawk***, 855 S.W.2d 573, 578-79 (Tenn. 1993). But parental rights, although fundamental and constitutionally protected, are not absolute. ***In re Angela E.***, 303 S.W.3d at 250. "'[T]he [S]tate as *parens patriae* has a special duty to protect minors. . . .' Tennessee law, thus, upholds the [S]tate's authority as *parens patriae* when interference with parenting is necessary to prevent serious harm to a child." ***Hawk***, 855 S.W.2d at 580 (quoting ***In re Hamilton***, 657 S.W.2d 425, 429 (Tenn. Ct. App. 1983)); ***see also Santosky v. Kramer***, 455 U.S. 745 (1982); ***In re Angela E.***, 303 S.W.3d at 250.

In re Carrington H., 483 S.W.3d 507, 522-23 (Tenn. 2016) (footnote omitted).

Termination of parental rights proceedings are governed by statute in Tennessee, ***In re Kaliyah S.***, 455 S.W.3d 533, 541 (Tenn. 2015), and the statutes identify "those situations in which the state's interest in the welfare of a child justifies interference with a parent's constitutional rights by setting forth grounds on which termination proceedings can be brought." ***In re Jacobe M.J.***, 434 S.W.3d 565, 568 (Tenn. Ct. App. 2013) (quoting ***In re W.B.***, Nos. M2004-00999-COA-R3-PT, M2004-01572-COA-R3-PT, 2005 WL 1021618, at *7 (Tenn. Ct. App. Apr. 29, 2005) (citing Tenn. Code Ann. § 36-1-113(g))) (internal quotation marks omitted).

Tennessee Code Annotated section 36-1-113 governs the termination of parental rights. It provides, in pertinent part:

> (c) Termination of parental or guardianship rights must be based upon:
>
> (1) A finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and
>
> (2) That termination of the parent's or guardian's rights is in the best interests of the child.

Tenn. Code Ann. § 36-1-113(c). Therefore, every termination of parental rights case requires the trial court "to determine whether the parent has engaged in a course of action or inaction that constitutes one of the statutory grounds for termination[,]" and whether termination of the parent's rights is in the child's best interest. ***In re Donna E.W.***, No. M2013-02856-COA-R3-PT, 2014 WL 2918107, at *2 (Tenn. Ct. App. June 24, 2014). "Because the stakes are so profoundly high[ ]" in a termination of parental rights case, the statute "requires persons seeking to terminate a . . . parent's parental rights to prove the statutory grounds for termination by clear and convincing evidence." ***In re Audrey S.***, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005). This Court has observed that "[t]his heightened burden of proof minimizes the risk of erroneous decisions." ***Id.*** (citations omitted).

If the trial court determines that clear and convincing evidence supports grounds for termination in light of its factual findings, the court "should then consider the combined weight of those facts to determine whether they amount to clear and convincing evidence that termination is in the child's best interest." ***In re Kaliyah S.***, 455 S.W.3d at 555. The party petitioning for the termination of parental rights bears the burden of demonstrating that termination is in the best interest of the child by clear and convincing evidence. ***In re Angela E.***, 303 S.W.3d 240, 250 (Tenn. 2010).

We review the trial court's findings of fact *de novo* on the record with a presumption of correctness. Tenn. R. App. P. 3; ***In re Carrington H.***, 483 S.W.3d at 524 (citations omitted). However, "[i]n light of the heightened burden of proof in termination proceedings . . . [we] must make [our] own determination as to whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, amount to clear and convincing evidence of the elements necessary to terminate parental rights." ***In re Carrington H.***, 483 S.W.3d at 524 (citation omitted). However, when the trial court has seen and heard witnesses, we give great deference to any findings that are based on the court's assessment of witness credibility. ***In re M.L.P.***, 228 S.W.3d 139, 143 (Tenn. Ct. App. 2007) (citation omitted). We will not reverse a finding based on witness credibility unless the record contains clear and convincing evidence to contradict it. ***Id.*** A trial court's conclusion that clear and convincing evidence supports termination of parental rights is a conclusion of law that we review *de novo* with no presumption of correctness. ***In re Carrington H.***, 483 S.W.3d at 524 (citation omitted). "This standard of review is consistent with the standard of review for mixed questions of law and fact." ***In re Taylor B.W.***, 397 S.W.3d at 112-113 (citing ***Starr v. Hill,*** 353 S.W.3d 478, 481–82 (Tenn. 2011) ("Although a presumption of correctness attaches to the trial court's findings of fact, we are not bound by the trial court's determination of the legal effect of its factual findings[.]").

IV. ANALYSIS

A. TRIAL COURT'S REVERSAL OF ITS ORAL RULING

We begin with Appellants' third issue, *i.e.*, whether the trial court's reconsideration of its oral ruling on grounds constitutes reversible error. "'It is well-settled that a trial court speaks through its written orders—not through oral statements contained in the transcripts[.]'" ***Williams v. City of Burns***, 465 S.W.3d 96, 119 (Tenn. 2015) (quoting ***Anil Constr. Inc. v. McCollum,*** No. W2013-01447-COA-R3-CV, 2014 WL 3928726, at *8 (Tenn. Ct. App. Aug. 7, 2014) (citing ***Conservatorship of Alexander v. JB Ptnrs.***, 380 S.W.3d 772, 777 (Tenn. Ct. App. 2011))) (footnote and additional citations omitted); ***In re Adoption of E.N.R.***, 42 S.W.3d 26, 31 (Tenn. 2001). Additionally, an oral ruling—even if considered a valid order—is an interlocutory order that is "subject to revision at any time prior to 'entry of the judgment adjudicating all the claims and the rights and liabilities of all the parties.'" ***Frank Rudy Heirs Assocs. v. Sholodge, Inc.***, 967 S.W.2d 810, 813 (Tenn.

Ct. App. 1997) (quoting Tenn. R. Civ. P. 54.02.). In short, "[a] judgment must be reduced to writing in order to be valid. It is inchoate, and has no force whatever, until it has been reduced to writing and entered on the minutes of the court, and is completely within the power of the judge . . . ." ***Broadway Motor Co. v. Pub. Fire Ins. Co***., 12 Tenn. App. 278, 280, 1930 WL 1696, *2 (Tenn. Ct. App. Sept. 20, 1930), *perm. app. denied* (Tenn. Jan. 17, 1931). A trial court may reconsider the proof and the applicable law and "amend its judgment at any time before the judgment becomes final." ***In re Taylor B.W.***, 397 S.W.3d 105, 112 (Tenn. 2013) (citation omitted). Accordingly, "[w]e do not review the court's oral statements, unless incorporated in a decree. . . ." **Steppach v. *Thomas***, 346 S.W.3d 488, 522 (Tenn. Ct. App. 2011) (quoting ***Shelby v. Shelby***, 696 S.W.2d 360, 361 (Tenn. Ct. App. 1985)). Because the trial court's oral ruling on grounds was subject to revision and of no force or effect until it was reduced to writing, the trial court's reconsideration of its oral ruling on grounds was not error.

B. GROUNDS FOR TERMINATION OF FATHER'S PARENTAL RIGHTS

The trial court held that Appellants' failed to prove that Father abandoned the Child by either failure to support or failure to visit. Tenn. Code Ann. § 36-1-113(g)(1). In their brief, Appellants state that they "only appeal the determination of the ground of abandonment by failure to visit." Although only one ground must be proven by clear and convincing evidence, the Tennessee Supreme Court has held that "appellate courts must review a trial court's findings regarding all grounds for termination and whether termination is in a child's best interest, even if a parent fails to challenge these findings on appeal." ***In re Carrington H.***, 483 S.W.3d at 511. Accordingly, we will review the trial court's findings as to both abandonment by failure to support and abandonment by failure to visit, as well as its findings on best interest.

Tennessee Code Annotated section 36-1-102(1)(A)(i) defines the ground of abandonment as follows:

> (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 or parents or the guardian or guardians of the child who is the subject of the petition for termination of parental rights or adoption, that the parent or parents or the guardian or guardians either have failed to visit or have failed to support or have failed to make reasonable payments toward the support of the child[.]

Section 36-1-102(1)(D) provides that, as used in the foregoing statute, "failed to support" or "failed to make reasonable payments toward such child's support" means

> the failure, for a period of four (4) consecutive months, to provide monetary support or the failure to provide more than token payments toward the

> support of the child. That the parent had only the means or ability to make small payments is not a defense to failure to support if no payments were made during the relevant four-month period.

Tenn. Code Ann. § 36-1-102(1)(D). "For purposes of this subdivision (1), 'token support' means that the support, under the circumstances of the individual case, is insignificant given the parent's means. Tenn. Code Ann. §36-1-102(1)(B).

Turning to the record, in its April 12, 2022 order, the trial court found:

> Exhibit 37 is a summary of Father's child support payments due and the payments made since the date of the parties' divorce in 2015. Between the parties' divorce in 2015 and February 2021, Father's payments were sporadic and *de minimus*. The largest payments in March 2018 and May 2020 appear to have resulted from Father's tax return being intercepted. In December 2020, there was a payment of $479.85; in January 2021, no payment; then after February 2021, payments were made in all but two months. For the four months relevant to failure to support, Father paid support in three of the four months. For that period, Father's child support obligation (notwithstanding a payment due on a previously determined arrearage) was $3,308.00. Father paid more than this child support in the relevant four months. (Payments in March through June total $3,469.58). There is no basis to terminate Father's parental rights based upon failure to pay child support.

We agree with the trial court. Appellants filed their petition to terminate Father's parental rights in July 2021; accordingly, the relevant four-month period is March through June of 2021. From the record, Father made the following support payments during this period: (1) March 2021 $734.54; (2) April 2021 $1,974.23; (3) May 2021 $0; (4) June 2021 $760.81. Although Father missed his May 2021 payment, as noted by the trial court, Father paid more than his obligation in April 2021, and his payments for the relevant period totaled $3,469.58, which was more than his $3,308.00 obligation. As such, the trial court correctly held that Appellants failed to meet their burden to show that Father abandoned the Child by failure to support.

The trial court also held that Appellants failed to meet their burden to show that Father abandoned Emarie by failure to visit during the relevant four-month period, *i.e.*, the four months immediately preceding the filing of the petition to terminate his parental rights.[3] Concerning whether a parent "failed to visit," Tennessee Code Annotated section

[3] Appellants assert that the trial court erred by shifting the burden of proof on the issue of willfulness to them, and by failing to "consider whether [Father] could have participated in even one visit as required by T.C.A. §36-1-102(1)(E)." Although the trial court ultimately held that Appellants failed to

36-1-102(1)(E) defines that term as "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). The statute also clarifies "[t]hat [whether] the parent had only the means or ability to make very occasional visits is not a defense to failure to visit if no visits were made during the relevant four-month period[.]" Tenn. Code Ann. § 36-1-102(1)(E).

Here, the trial court found that, "The evidence established that Father has not seen [Emarie] since the summer of 2018." Although it is undisputed that Father did not visit the Child during the relevant four-month period, as noted above, in his answer, Father raised the affirmative defense that his failure to visit was not willful because Mother "interfered with and thwarted [his] attempted visitation with [Emarie]." As provided in Tennessee Code Annotated section 36-1-102(1)(I):

> [I]t shall be a defense to abandonment for failure to visit or failure to support that a parent or guardian's failure to visit or support was not willful. The parent or guardian shall bear the burden of proof that the failure to visit or support was not willful. Such defense must be established by a preponderance of evidence. The absence of willfulness is an affirmative defense pursuant to Rule 8.03 of the Tennessee Rules of Civil Procedure.

Whether a parent's failure to visit was willful is a question of law which we review *de novo* with no presumption of correctness. ***In re Adoption of Angela E.***, 402 S.W.3d 636, 640 (Tenn. 2013) (citation omitted); ***In re Kendall K.***, No. M2021-01463COA-R3-PT, 2022 WL 10331612, at *5 (Tenn. Ct. App. Oct. 18, 2022). "Failure to visit is willful when a parent is aware of the duty to visit, can visit, and with no justifiable excuse makes no attempt to visit." ***In re Mattie L.***, 618 S.W.3d 335, 348 (Tenn. 2021). "Failure to visit is not willful if it is the result of coercion." ***Id.*** at 350.

As we have repeatedly noted:

> [W]illfulness in the context of termination proceedings does not require the same standard of culpability as is required by the penal code, nor does it require that the parent have acted with malice or ill will. ***In re Audrey S.***, 182 S.W.3d at 863; ***see also In re S.M.***, 149 S.W.3d 632, 642 (Tenn. Ct. App. 2004). Rather, a parent's conduct must have been willful in the sense that it consisted of intentional or voluntary acts, or failures to act, rather than accidental or inadvertent acts. ***Id.*** Willful conduct is the product of free will rather than coercion. ***Id.*** A person acts willfully if he or she is a free agent,

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meet their burden of proof to show that Father abandoned the Child by failure to visit, as discussed *infra,* from the trial court's order, it is clear that the court applied the correct standard and found that, although it is undisputed that Father failed to visit Emarie in the relevant four-month period, he met his burden to show that his failure to visit was not willful.

> knows what he or she is doing, and intends to do what he or she is doing. ***Id.*** at 863-64. "Failure to visit or support a child is 'willful' when a person is aware of his or her duty to visit or support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so." ***Id.*** at 864 (citing ***In re M.J.B.***, 140 S.W.3d [643,] 654 [(Tenn. Ct. App. 2004)]).

In re Morgan R., No. E2021-01206-COA-R3-PT, 2022 WL 1792431, at *3-4 (Tenn. Ct. App. June 2, 2022) (quoting ***In re J.G.H., Jr.***, No. W2008-01913-COA-R3-PT, 2009 WL 25020003, at *15 (Tenn. Ct. App. Aug. 17, 2009)).

In its April 2022 order, the trial court acknowledged that the four months preceding Mother's petition is the applicable period of review. However, the court reviewed the relevant period after considering the historical context of the parties' interactions. The trial court found:

> Father and Mother's relationship was strained in 2017 and 2018. Mother's communications with Father during that period clearly establish that she believes Father has failed to fulfill his obligations to pay child support and exercise his time with [Emarie] Father's communications likewise evidence his anger at having to pay child support, his unhappiness with how little time he sees [the Child], and his belief that Mother took advantage of him by not providing the divorce and post-divorce court with information regarding his true income. In the summer of 2018, Father and his then girlfriend had a son, T.E. Despite the parents' hostility toward each other, Father's mother remained in contact with [Emarie] and Mother through Spring Break in 2019, when Father's mother and other family requested and received co-parenting time with [the Child] in Knoxville. As Exhibit 34, Mother introduced a summary of Father's requests for contact with [the Child] since September 17, 2017. Exhibit 34 states Father made no attempts to communicate with Mother or [Emarie] in 2020. The evidence does not support Mother's testimony. Father testified that he made attempts throughout 2020 to contact [Emarie]. To a limited extent, Exhibit 16 establishes that Father sent texts to Mother in 2020.
>
> Despite knowing that Father exercised co-parenting time with [Emarie] after his parents brought [the Child] to Washington in the summer of 2018, Mother stated after Spring Break in 2019 that Father's parents would not be granted that opportunity in the future because it was Father's responsibility to arrange to spend time with [the Child]. She further stated that neither Father nor Father's parents would have time with [Emarie] "until the child support" was worked out. Father testified that prior to 2021 he was told by Mother that, until he paid child support, he could not speak with [Emarie]. Exhibits 16 and 37 substantiate Father's testimony.
>
> Father began paying child support in December 2020. (Exhibit 37).

> Exhibit 16 establishes that on January 9, 2021, Father texted Mother "Now that you're getting regular child support payments can we try to work on being civil and letting me a part of [Emarie's] life[?]" Mother did not respond to this text. On February 1, 2021, Father texted "So you're not going to respond to my message? I'm trying to make a change here, and you're refusing to include my daughter in my life?" On the same day, Father requested that Mother provide him with the name of her attorney. On February 7, 2021, Father texted "I would like to talk to my child tomorrow." Again, there is no response by Mother.

Although the trial court "acknowledge[d] that [the foregoing] texts were outside the relevant four-month period of March through June 2021," the court ultimately found that,

> [w]ithin the relevant four-month period, Father did make efforts. The history above provides context for why the [c]ourt does not find Father's efforts to be token and/or a willful failure to visit and maintain contact. Father testified that he did not exercise Spring Break in 2021 due to his limited financial resources and the difficulties with travel, the time needed to travel, and the three-hour time change between Tennessee and Washington. Father texted Mother on [Emarie's] birthday . . . and asked that Mother tell her Happy Birthday from him. The parties were talking about co-parenting time and related issues as evidenced by the text from Father to Mother on June 21, 2021 asking "[c]an we talk again tomorrow?" Mother failed to respond, and Father texted Mother on June 22 and June 23 asking to discuss re-establishing contact between [the Child] and Father. At some point between June 23 and June 27, 2021, he stated "I want to talk to my daughter." He repeated that message on June 27, 2021 and June 30, 2021. Mother did not respond to these texts. On July 2, 2021, the petition to terminate Father's rights was filed.

Based on the foregoing findings, the trial court concluded:

> It was clear from Mother's testimony that she and Stepfather contemplated terminating Father's parental rights prior to the petition being filed in July 2021. In looking at whether Father's failure to exercise co-parenting time was a basis for terminating his parental rights, the [c]ourt relied on ***In re: Mattie L.***,618 S.W.3d 335 (Tenn. 2021).[4] The [c]ourt finds

[4] Appellants argue that ***In re Mattie L.***, the case upon which the trial court relied, was decided prior to 2018, when the General Assembly shifted the burden of proof on the question of willfulness. Although the definition of willfulness discussed above remains applicable, the question in this case is whether Father carried his burden to demonstrate that his failure to visit Emarie from March through June 2021 was not willful. As discussed, during the relevant four-month period, Father attempted to speak to the Child by phone beginning in mid-June 2021, but his efforts were thwarted by Mother.

that, as in ***Mattie L***.[,] Father had been told that until child support was paid, he would not be permitted to see or contact with [the Child]. Once child support began to be paid, Father made efforts to re-establish contact. His failure to appear and demand co-parenting time is excusable because of the distance between the parties' homes, and his inability to know where Mother and child lived. The [c]ourt finds that Mother refused to respond to Father's efforts to open a dialogue in the months preceding the termination petition in furtherance of her desire to proceed with a termination of Father's parental rights. Mother's actions were intentional to ensure that rather than token co-parenting or contact with Father there was none. The [c]ourt does not find by clear and convincing evidence that Father has abandoned [the Child].

The Court makes this finding despite Mother's testimony that her refusal to engage was due to her concern about [Emarie's] negative reaction (upset and crying) when asked if she wanted to speak to Father and that [Emarie] basically did not know who Father was. The Court finds that, based upon the testimony of Father, his mother, and Mother's mother, [the Child] knows who her father is and is aware that she has a half-brother and extended family in Washington. [Emarie] receives presents from Father on holidays (Halloween and Easter for example), birthday and Christmas presents, and she received randomly timed gifts [] during 2020 while Covid-19 restrictions were in place. Mother disputed that Father was responsible for these various gifts, but Father and his mother testified credibly[,] and the Court finds that he was responsible for selecting and including gifts for [Emarie] within the packages his mother mailed.

As the trial court found, in 2017 and 2018, Mother and Father engaged in a barrage of hostile texts concerning Father's failure to pay support and Mother's failure to allow Father contact with the Child. However, by January 2021, Father had resumed his child support payments and began texting Mother to arrange contact with Emarie. Mother ignored Father's texts, including those he sent during the relevant four-month period, to-wit:

Sunday May 9, 2021 [from Father to Mother]: Happy Mother's Day. Tell Emarie I said happy birthday and that I sent a card please.

[No response from Mother]

Monday June 21, 2021 [from Father to Mother]: Can we talk again tomorrow?

[No response from Mother]

Tuesday June 22, 2021 [from Father to Mother]: Hello?

[No response from Mother]

Wednesday June 23, 2021 [from Father to Mother]: Rachel, l would like to talk again sometime. Let me know when you have a moment.

[No response from Mother]

Wednesday, June 23, 2021, 7:55 p.m [from Father to Mother]: Okay, I guess I'll try again tomorrow.

[No response from Mother]

Thursday, June 24, 2021 [from Father to Mother]: Let me know when you're available to talk today.

[No response from Mother]

Friday, June 25, 2021 [from Father to Mother]: Hey, can we talk yet? Let me know when you have some time to talk please.

[No response from Mother]

Saturday, June 26, 2021 [from Father to Mother]: I am trying to be involved with Emarie. Please get in touch with me.

Saturday, June 26, 2021 [from Mother to Father]: As I stated on our previous phone conversation, you haven't tried to be involved with Emarie for over 2 years now. Now that you've made a few child support payments you're trying to reach out. Also as I mentioned, this is not only confusing but detrimental to Emarie's mental health since you've been so absent and she has adjusted to a life without you. When I've spoken to her about you she gets very upsets and has even asked me not to talk to her about it anymore. I'll let you know if she changes her mind. So there isn't anything else to discuss at this time.

These texts clearly show that Mother was unwilling to engage with Father concerning his requests for contact with the Child. While we concede that Father's efforts to visit and communicate with the Child historically have been sporadic, he has made efforts. Furthermore, as set out in its context above, the trial court found that "Mother's testimony that her refusal to engage was due to her concem about [Emarie's] negative reaction (upset and crying) when asked if she wanted to speak to Father and that [Emarie] basically did

not know who Father was" to be not credible. However, the trial court found Father and Grandmother's testimony credible. As noted above, when the trial court has seen and heard witnesses, we give great deference to any findings that are based on the court's assessment of witness credibility. ***In re M.L.P.***, 228 S.W.3d at 143 (citation omitted). We will not reverse a finding based on witness credibility unless the record contains clear and convincing evidence to contradict it. ***Id.*** There is no such evidence here. Within the relevant four-month time period, Father made numerous efforts to engage with Mother for the purpose of seeing or talking with Emarie. Mother largely ignored Father's attempts to communicate and then definitively denied him access to the Child. A "parent who attempts to visit and maintain a relationship with the child, but is 'thwarted by the acts of others and circumstances beyond their control,' cannot be found to have willfully abandoned the child." ***In re Jaylah W.***, 486 S.W.3d 537, 551 (Tenn. Ct. App. 2015), *perm. app. denied* (Tenn. Feb. 1, 2016) (quoting ***In re Adoption of A.M.H.***, 215 S.W.3d 793, 810) (Tenn. 2007). From the totality of the circumstances, and in view of the trial court's credibility findings, we conclude that Father met his burden to show that his failure to visit during the relevant four-month period was not willful.

Having affirmed the trial court's holding that Father did not abandon the Child either by failure to support or failure to visit, the trial court's best interest analysis is not dispositive here. However, because the trial court addressed Emarie's best interest, we will review those findings.

C. BEST INTEREST

Section 36-1-113(i)(1) contains a non-exclusive list of factors applicable to the court's best-interests analysis. The statute provides:

> (i)(1) In determining whether termination of parental or guardianship rights is in the best interest of the child, the court shall consider all relevant and child-centered factors applicable to the particular case before the court.

At the time of the filing of the petition to terminate Father's parental rights, those factors included, but were not limited to, the following:

> (A) The effect a termination of parental rights will have on the child's critical need for stability and continuity of placement throughout the child's minority;
>
> (B) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological, and medical condition;
>
> (C) Whether the parent has demonstrated continuity and stability in meeting the child's basic material, educational, housing, and safety needs;

(D) Whether the parent and child have a secure and healthy parental attachment, and if not, whether there is a reasonable expectation that the parent can create such attachment;

(E) Whether the parent has maintained regular visitation or other contact with the child and used the visitation or other contact to cultivate a positive relationship with the child;

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(H) Whether the child has created a healthy parental attachment with another person or persons in the absence of the parent;

(I) Whether the child has emotionally significant relationships with persons other than parents and caregivers, including biological or foster siblings, and the likely impact of various available outcomes on these relationships and the child's access to information about the child's heritage;

(J) Whether the parent has demonstrated such a lasting adjustment of circumstances, conduct, or conditions to make it safe and beneficial for the child to be in the home of the parent, including consideration of whether there is criminal activity in the home or by the parent, or the use of alcohol, controlled substances, or controlled substance analogues which may render the parent unable to consistently care for the child in a safe and stable manner;

(K) Whether the parent has taken advantage of available programs, services, or community resources to assist in making a lasting adjustment of circumstances, conduct, or conditions;

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(M) Whether the parent has demonstrated a sense of urgency in establishing paternity of the child, seeking custody of the child, or addressing the circumstance, conduct, or conditions that made an award of custody unsafe and not in the child's best interest;

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(O) Whether the parent has ever provided safe and stable care for the child or any other child;

(P) Whether the parent has demonstrated an understanding of the basic and specific needs required for the child to thrive;

(Q) Whether the parent has demonstrated the ability and commitment to creating and maintaining a home that meets the child's basic and specific needs and in which the child can thrive;

(R) Whether the physical environment of the parent's home is healthy and safe for the child;

(S) Whether the parent has consistently provided more than token financial support for the child; and

(T) Whether the mental or emotional fitness of the parent would be detrimental to the child or prevent the parent from consistently and effectively providing safe and stable care and supervision of the child.

The statutory factors are not exclusive but "illustrative . . . and any party to the termination proceeding is free to offer any other factor relevant to the best[-]interests analysis." ***In re Gabriella D.***, 531 S.W.3d 662, 681 (Tenn. 2017) (citation omitted). Whether termination is in the child's best interest must be "'viewed from the child's, rather than the parent's, perspective.'" ***Id.*** (quoting ***In re Audrey S.***, 182 S.W.3d at 878). "[W]hen the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child[.]" ***Id.*** (quoting Tenn. Code Ann. § 36-1-101(d) (2017)). The court's "'focus on the perspective of the child is the common theme' evident in all of the statutory factors." ***In re Neveah M.***, 614 S.W.3d 659, 679 (Tenn. 2020) (quoting ***In re Audrey S.***, 182 S.W.3d at 878).

The trial court's best-interest analysis requires "more than a 'rote examination' of the statutory factors." ***In re Neveah M.***, 614 S.W.3d at 679 (quoting ***In re Audrey S.***, 182 S.W.3d at 878). Further, it "consists of more than tallying the number of statutory factors weighing in favor of or against termination." ***Id.*** (citing ***White v. Moody***, 171 S.W.3d 187, 193-94 (Tenn. Ct. App. 2004)). Although the court must consider all the statutory factors and other relevant proof, some factors may weigh more heavily than others in light of the circumstances surrounding the particular child and parent. ***Id.*** (quotation omitted). Indeed, the trial court "may appropriately ascribe more weight – even outcome determinative weight – to one statutory factor or rely upon fewer than all of the statutory factors." ***Id.*** (citation omitted).

The trial court's factual findings relevant to the best-interest analysis must be supported by a preponderance of the evidence. ***In re Kaliyah S.***, 455 S.W.3d at 555 (citation omitted). Additionally, the court must determine whether the combined weight

of the facts amounts to clear and convincing evidence that termination of parental rights is in the child's best interest. ***Id.*** (citation omitted). As noted above, we review the trial court's best-interest analysis under the standard of review applicable to mixed questions of fact and law. ***In re Taylor B.W.***, 397 S.W.3d at 112-113. We will affirm the trial court's factual findings unless they are unsupported by a preponderance of the evidence. ***In re Neveah M.***, 614 S.W.3d at 674 (citations omitted). Whether the court's factual findings amount to clear and convincing evidence that termination of parental rights is in the child's best interest is a question of law that we review *de novo* with no presumption of correctness. ***Id.*** (citations omitted).

In this case, the trial court reviewed the foregoing statutory factors. With respect to factors A and B, the court found that Emarie "is stable in Mother's home with Stepfather and her younger sibling[,]" and that terminating Father's parental rights would have "minimal" effect on Emarie. The court determined that Father's "record of performance" with respect to factor C was "minimal," but that "provided an opportunity to meet them during co-parenting time, Father can and will meet the requirements of factor (C)."

With respect to factor D, the trial court stated that it "[could] not determine that Father and [Emarie] have a secure attachment." However, the court found that "nothing indicate[d] that their attachment has ever been or will be unhealthy." The court found:

> Based upon the testimony of Father as to the activities he engages in, the interest he has expressed in choosing gifts that are age and interest appropriate for [Emarie], and the attachment that [Emarie] has to his mother and extended family, the [c]ourt finds that [Emarie's] attachment with Father, although attenuated, can and will be strengthened.

With respect to factor E, the trial court found: "Factor (E) clearly would favor termination based upon Father's actions from 2018 through 2020. His actions in 2021, however Mother may minimize them, weigh against termination."

Concerning factor H, the trial court stated: Emarie "has created a healthy parental attachment with Stepfather; but the Court does not find that attachment to be threatened by a continuing relationship with Father." The court found that factors I, J, K and T weighed against terminating Father's parental rights. The court found:

> Father had significant mental health and substance abuse issues in the past. Despite knowing about these, Mother has, in the past, allowed Father extensive co-parenting time while [Emarie] was non-verbal and would have been entirely dependent upon Father to meet her nutritional, physical, and emotional needs. Father's testimony established that he is now sober, has received therapy, and no longer suffers from the issues that once plagued him.

Concerning factor M, the trial court found that this factor did not weigh in Father's favor because Father "ha[d] not been aggressive about addressing his failure to pay child support or in pursuing his co-parenting time." With respect to factors O and P, the trial court found they were "neutral or slightly in favor of Father." The court found:

> In addition to what he has done for and with [Emarie], Father has another child, T.E. Father and T.E.'s mother lived together for a period of time during which he maintained housing and provided for T.E.'s needs. Father does not currently pay child support for T.E. Father testified he has a good relationship with T.E.'s mother and that he works with her to ensure she has what she needs for T.E., and that he exercises co-parenting time with T.E.

The trial court determined that factors Q and R did not favor Father. The court found:

> [Father] has had multiple residences in Washington over the past several years. Where Father is living currently would provide a safe and secure place to visit, but the number of people and the limited living space is not ideal and would not provide [Emarie] with her own space during an extended co-parenting visit.

The court also determined that factor S, "other than the four months immediately preceding the filing of the petition to terminate Father's parental rights, greatly favors termination." The court stated:

> During the pendency of this matter, Father's child support arrearage has continued to grow. Father did not seem to have any desire or feel any urgency to address the situation. While he attempted to explain his failure to pay the correct amount of child support during the pendency of this case, Father's testimony and his choices about how he spent money on himself seemed cavalier to this [c]ourt.

For many of the reasons discussed above, the evidence does not preponderate against the trial court's factual findings on best interest. From the totality of the circumstances, we agree with the trial court that the facts do not amount to clear and convincing evidence that termination of Father's parental rights is in the Child's best interest. As both this Court and the Tennessee Supreme Court have explained:

> Clear and convincing evidence is proof which "establishes that the truth of the facts asserted is highly probable[ ] and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence." ***In re Keri C.***, 384 S.W.3d 731, 744 (Tenn. Ct. App. 2010)

> (quoting ***In re Audrey S.***, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005)). "It produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established." ***Id.*** (quoting ***In re Audrey S.***, 182 S.W.3d at 861). This standard of proof "ensures that the facts are established as highly probable, rather than as simply more probable than not." ***In re Carrington H.***, 483 S.W.3d at 522.

In re Mattie L., 618 S.W.3d 335, 341-42 (Tenn. 2021). Here, the evidence does not establish a high probability that termination of Father's parental rights is in the Child's best interest.

V. CONCLUSION

The trial court's order is affirmed, and the case is remanded for further proceedings as may be necessary and are consistent with this Opinion. Costs of the appeal are taxed to the Appellants, Rachel C. and Jonathan C., for all of which execution may issue if necessary.

S/ Kenny Armstrong
KENNY ARMSTRONG, JUDGE