

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs September 1, 2022

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IN RE PIPER N.

**Appeal from the Chancery Court for Shelby County
No. CH-16-0703 JoeDae L. Jenkins, Chancellor**

No. W2021-01185-COA-R3-PT

This appeal arose from a termination of parental rights proceeding where a mother’s parental rights were terminated on several statutory grounds. The original adoption petition contained no grounds for termination of the parents’ rights, and therefore, the Trial Court used the four months prior to the amended petition, which included grounds for termination, for purposes of the abandonment grounds. We affirm the trial court’s use of this time period before the amended petition. We hold that the record is insufficient for us to conduct a meaningful appellate review in this case and that the trial court failed to make sufficient findings of fact on the grounds of abandonment by failure to visit, abandonment by failure to financially support, and mental incompetence based on the statutory authority in effect at the time of the filing of the amended petition alleging grounds for termination. These grounds are vacated and remanded to the trial court to allow the trial court to develop a proper record from which this Court can conduct a meaningful appellate review and to make sufficient findings of fact and conclusions of law, pursuant to Tenn. Code Ann. § 36-1-113(k). The amended petition seeking termination of parental rights was filed prior to the 2018 statutory amendments of the relevant termination statutes. Because the Child was never adjudicated as dependent and neglected, we reverse the ground of persistent conditions under the statute in effect when the amended petition was filed. Additionally, the statutory ground located at Tenn. Code Ann. § 36-1-113(g)(14) was not pled in the termination petition and was not tried by express or implied consent; therefore, we reverse this ground as to the termination of the mother’s parental rights.

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

D. MICHAEL SWINEY, C.J., delivered the opinion of the court, in which ANDY D. BENNETT and KENNY W. ARMSTRONG, JJ., joined.

P. Craig Grinstead, Memphis, Tennessee, for the appellant, Danielle N.

W. Ray Glasgow, Memphis, Tennessee, for the appellees, Robert F. and Betty F.

OPINION

Background

The minor child, Piper N. (“the Child”), was born to Danielle N. (“Mother”) in 2015. Shortly after the Child’s birth, the Department of Children’s Services (“DCS”) received a referral for a drug exposed infant. DCS filed a petition in Shelby County Juvenile Court (“Juvenile Court”) in September 2015, seeking temporary legal custody of the Child and requesting that the Child be adjudicated as dependent and neglected. At that time, the Juvenile Court entered an *ex parte* protective custody order, awarding temporary custody of the Child to DCS. After being ordered into DCS custody, the Child was placed with the foster parents, Christie J. and William J. (collectively, “Foster Parents”). In March 2016, the Juvenile Court entered an order reflecting that DCS voluntarily dismissed its petition. The Child was returned to the custody of Mother at that time.

In April 2016, Betty F. and Robert F. (“Petitioners”) filed a petition for adoption in the Shelby County Chancery Court (“Trial Court”). The petition form stated that “all required surrenders and assents must be filed with this petition.” However, no surrender of Mother’s parental rights was attached to the petition. In the original petition, no grounds were alleged seeking to terminate the parental rights of the parents to the Child. Thereafter, Mother changed her mind regarding the adoption, and the adoption proceeding stalled in the Trial Court.

For a while, Mother stayed on Petitioners’ property but left at some point. Christie J. (“Foster Mother”) testified that Mother’s paramour subsequently contacted her to retrieve the Child. As a result, Foster Mother filed a petition for custody in the Juvenile Court, alleging that the Child was dependent and neglected. The action in the Juvenile Court was allegedly suspended due to the pendency of the adoption in the Trial Court. The Child remained in the physical custody of Foster Parents from June 2016 until February 2017. In February 2017, Mother retrieved the Child from Foster Parents. Foster Mother testified that she had kept the Child in her home for periods of time after Mother picked the Child up from her. Petitioners also alleged that Mother dropped the Child off with them for days at a time.

On April 24, 2017, Petitioners filed an “Emergency Ex Parte Petition for Protective Custody Order,” seeking emergency custody of the Child. In the petition, Petitioners alleged that Mother was homeless and unemployed and that she had brought the Child to Petitioners’ home “with signs of both neglect and physical abuse.” Petitioners also made allegations regarding medical neglect. On the same day, the Trial Court entered an *ex parte*

order removing custody of the Child from Mother and placing custody with Petitioners. A hearing was scheduled for May 8, 2017, at which time the Trial Court granted a motion by Mother to have counsel appointed to represent her in the proceedings. In Mother's affidavit of indigency, she stated that she was unemployed. The hearing before the court was continued at that time without a specific date set.

On June 19, 2017, Petitioners filed an "Amended Petition for Termination of Parental Rights and Petition for Adoption," wherein Petitioners included as grounds for the termination of Mother's parental rights the general ground of abandonment without specifying how the Child was abandoned, persistent conditions, and mental incompetence. In the petition, Petitioners stated that delay in the proceedings had occurred due to the "incapacity of the petitioners' original attorney through circumstances beyond his control."

In July 2017, Mother filed a motion requesting the Trial Court to schedule the preliminary hearing in this matter. Mother also requested that the Trial Court set visitation to allow her to visit the Child, alleging that since the *ex parte* petition was granted, "Petitioners have prevented or severely restricted Mother's ability to see and visit [the Child]." The Trial Court entered an order granting Mother's motion to set the preliminary hearing, which was scheduled for August 2017.

Petitioners filed a response in opposition to Mother's visitation motion arguing that Mother had not requested visitation except for the Child's birthday and that they had not allowed Mother to remove the Child from their home due to the visitation order requiring her visitation to be supervised. According to Petitioners' response, visitation with Mother "is likely to endanger the child's physical or emotional health," and Mother had abused and neglected the Child. Petitioners requested that all visitation be prohibited until Mother can show that there is no reasonable likelihood that abuse will recur or, alternatively, that the requirement of supervision remain in place for her visits. Petitioners also filed a separate motion asking the Trial Court to schedule a trial for the termination petition.

Following a hearing in August 2017, the Trial Court continued Mother's preliminary hearing and her motion for visitation. Mother's preliminary hearing and motion for visitation were rescheduled to September 2017 for a status conference. In September 2017, Mother filed an answer to the amended petition to terminate her parental rights, denying that her rights should be terminated, that grounds existed to terminate her rights, or that termination of her parental rights was in the Child's best interest. Mother also filed an answer in response to the petition seeking the *ex parte* protective custody order, requesting a hearing be scheduled and denying the substantive allegations against her other than she was unemployed. The Trial Court granted another continuance of the hearing in December 2017 at the request of Mother's counsel "due to the inability of his client to appear via teleconference or otherwise." Mother's preliminary hearing was rescheduled for January 2018 for a status hearing. Mother was incarcerated in August 2017 for aggravated assault and received a sentence of three years.

Mother's preliminary hearing was to occur in January 2019, and the Trial Court ordered that Mother be transported for the preliminary hearing and the termination trial set for two days later. Petitioners filed a motion to continue the January 2019 trial due to newly asserted defenses presented by Mother in her pre-trial brief. The Trial Court granted the continuance and rescheduled the trial for September 2019. In its order, the Trial Court stated that the preliminary hearing requested by Mother would be heard on the same day as the termination trial.

In June 2019, Mother filed a second motion seeking unsupervised visitation with the Child or, alternatively, supervised visitation by a third party at a neutral site. Petitioners filed a response asking that the motion be denied and that Mother's visitation remain the same. The Trial Court held a hearing on Mother's motion. The Trial Court found that her motion should be denied "as a matter of law pursuant to Tenn. Code Ann. § 36-1-116(f)(2), which states, 'Actions suspended by this section, regardless of the stage of adjudication, shall not be heard until final adjudication of the action for termination of parental rights or adoption regarding the same child, even if such adjudication of the termination of parental rights or adoption will render the custody, guardianship, or visitation action moot.'" The termination trial was scheduled for February 2021, but another continuance motion was filed by Foster Parents due to a death in the family of their attorney. The trial was subsequently scheduled for June 2021.

The Trial Court conducted a trial on June 29, June 30, and July 1, 2021.¹ The Child was five years old at the time of trial. No court reporter was present for the trial; however, the proceedings were audio recorded and later transcribed for appeal purposes. The transcripts in this matter appear to be missing admission of three exhibits into evidence during trial, as well as Mother's testimony on direct examination and a portion of Betty's testimony. Following the trial, Petitioners filed a summary of Mother's criminal history and a summary of juvenile court records regarding the Child and the Child's siblings. Petitioners also filed a motion requesting to amend the pleadings to conform to the evidence presented during trial by adding as a statutory ground for termination of Mother's parental rights the termination ground located at Tenn. Code Ann. § 36-1-113(g)(14).

In August 2021, Foster Parents filed an emergency petition seeking injunctive relief in order to protect the Child's safety and welfare that included allegations against Petitioners. The petition alleged that Petitioners had been in contact with an inmate in Shelby County that had been convicted of statutory rape and was registered as a violent sex offender. The petition further alleged nutritional neglect toward the Child, as well as

¹ At trial, the Trial Court granted Foster Parents' motion to intervene in the adoption proceeding. Additionally, a separate adoption petition for two siblings of the Child was also heard, and Mother surrendered her parental rights to those children prior to trial. That termination action regarding the siblings has not been appealed to this Court.

physical, psychological, and educational abuse. Foster Parents requested that the Trial Court award them custody of the Child. Petitioners filed an answer to the petition, denying the substantive allegations against them.

Following a hearing on Foster Parents' emergency petition, the Trial Court entered an order in August 2021, finding that the Child appeared to be in good health and not malnourished. However, the Trial Court found that testimony during this hearing from the petitioner, Betty F., "was less than credible at times" and that audio recordings "revealed somewhat alarming statements that make it difficult to accept her testimony as forthright." The Trial Court found that these conversations on the audio recording were greatly concerning to the court but that they were "trash talk" and not dispositive regarding whether the Child had been exposed to an immediate risk of irreparable harm with Petitioners. The Court found that an "overriding" concern was that the Child had spent a majority of her life with Petitioners and appeared to be comfortable in their care. The Trial Court, therefore, found that no new threat of harm existed to cause the court to remove the Child from Petitioners' home.

In September 2021, the Trial Court entered an order granting Petitioners' petition to terminate Mother's parental rights. Regarding the abandonment grounds for termination of parental rights, the Trial Court found that the relevant four-month period was the time immediately preceding the amended termination petition. The Trial Court further found regarding grounds for the termination of Mother's parental rights as follows:

Although there was some limited visitation during this time period, it was token in nature. (See Tenn. Code Ann. § 36-1-102(1)(C)). One such visit was when Piper was taken to visit Mother at a house where drugs were being used. [Betty F.] referred to it as a crack house. The other visitation was when Mother became violent with Piper for dropping chocolate in her lap (Testimony of Betty [F.]).

The testimony indicated that Mother sparingly and inconsistently visited Piper at either [Foster Parents'] home or at [Petitioners'] home. [Foster Parents] and [Petitioners] clearly and convincingly testified to the effect that such visitation was scant and insufficient to establish a meaningful relationship with the child. The visits were therefore token visits within the meaning of Tennessee Code Annotated § 36-1-102(1)(C).

During the period of time between February 18, 2017 and June 19, 2017, while Mother argues that she was gainfully employed and could have provided support for Piper, there is no evidence that she provided financial support to [Foster Parents], [Petitioners] or anyone else.

The Juvenile Court records provide no insight on what, if any, progress Mother made regarding elimination of the conditions which gave rise to the removal of Piper. The record indicates that the Petition to Adjudicate Dependency and Neglect, For Temporary Legal Custody, and Ex Parte Order was dismissed at the request of the Department on March 17, 2016 and on the same date indicated the Department would proceed against Mother on a separate referral regarding the child.

However, it is clear, and this Court is convinced, from the testimony adduced that the child was ferried from [Foster Parents'] care and custody to [Maternal Grandmother], onto Paula [R.], onto [Betty F.] until she was finally left with [Betty F.] Upon the trial of this matter, Mother did not evidence a stable home environment, did not provide any evidence of completion of an alcohol and drug abuse program, evidence of participation in an ongoing program for alcohol and drug abusers, evidence of gainful employment or evidence that she was competent to care for the child. Instead, the evidence is clearly to the contrary. According to Mother's testimony, her intent is to prevent the adoption of the child by [Petitioners] because [Petitioners] did not keep their agreement to adopt Piper immediately after her birth; and, Mother instead favors an adoption by [Foster Parents]. Mother currently lives with her boyfriend. During the pendency of this proceeding, she surrendered at least three (3) other children. Mother had also contemplated allowing a truck driver to adopt Piper, but that option did not work out. Mother has not evidenced the ability and stability to establish a parent-child relationship with Piper and the competence to care for her and her particular needs given the circumstances of her birth and the attendant defects. Mother has not participated in Piper's care and treatment.

[Foster Mother] also testified that Mother ferried the child between her and [Petitioners] from March 2016 through July 2016. [Foster Mother] stated that she ultimately filed a petition for dependency and neglect against Mother because Mother was unable to care for Piper. Apparently, Mother had overdosed on drugs and the boyfriend brought Piper to [Foster Parents]. [Foster Mother] maintains that she kept Piper through February 2017. She also stated that she thought that Mother had a "strong hand with Killian and Piper." According to [Paula R.], Mother was unable to properly feed Piper through the feeding tube and Piper became malnourished and had to be hospitalized at Le Bonheur Children's Hospital. The same conditions continue and pose a serious threat to Piper's well-being.

Petitioners argue that [Mother] is incompetent to adequately provide for the further care and supervision of Piper as [Mother's] mental condition is presently so impaired and is likely to remain so that it is unlikely that Mother

will be able to assume the care of, and responsibility of, the child in the near future and that the termination of Mother's parental rights is in the best interest of Piper. Mother testified that she has bipolar disorder and depression diagnoses and that she is not under active treatment or on medication. Also, [Maternal Grandmother] testified that Mother has mental problems. She further doubted that Mother could ever be a fit mother because she would leave Piper and other children unattended for long periods of time, hours and days. She would often leave Piper without notice during the night. She would hurt the children when she became frustrated, hitting them and cussing at them. [Betty F.] testified that Mother threatened Piper with a box cutter. This violent nature is well documented and is a threat to the well-being of Piper. The Court concludes that Mother is incompetent under T.C.A. § 36-1-113(g)(8) and that it is in Piper's best interest to terminate Mother's parental rights.

It appears, clearly and convincingly, that from her actions and inactions Mother lacks the ability and willingness to personally assume legal and physical custody or financial responsibility of Piper, and placing her in the legal and physical custody of Mother would pose a risk of substantial harm to Piper's psychological welfare. Mother has not evidenced gainful employment or the possession of a stable home environment. The child has now been in the custody of [Petitioners] for almost all of her life and has established a bond with them, while no relationship exists with Mother. Serious harm to Piper's emotional and psychological well-being could result from placing her in Mother's custody. The Court, having reviewed and established all of the facts for termination, believes that, by clear and convincing evidence, Mother is incapable of assuming the care and physical custody of Piper and is not capable of maintaining financial responsibility for her well-being within the meaning of T.C.A. § 36-1-113(g)(14).

* * *

3. [Mother] has abandoned [the Child] as abandonment is defined in T.C.A. § 36-1-102(1)(A)(i), in that [Mother] has failed to visit [the Child] for four (4) consecutive months immediately preceding the filing of the Amended Petition for Termination of Parental Rights and Petition for Adoption.

4. [Mother] has abandoned [the Child] as abandonment is defined in T.C.A. § 36-1-102(1)(A)(i), in that [Mother] has failed to support [the Child] for four (4) consecutive months immediately preceding the filing of the Amended Petition for Termination of Parental Rights and Petition for Adoption.

5. Grounds for termination of [Mother's] parental rights exist under T.C.A. § 36-1-113(g)(3) in that [the Child] was removed from the custody of [Mother] for more than six months by court order from September 18, 2015 to March 17, 2016 and:

(A) The conditions that led to . . . Piper's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent her safe return to the care of the Mother still persist;

(B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the Mother in the near future;

(C) The continuation of the parent and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home; and

(D) [Mother] has failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility of [the Child] and placing the child in legal and physical custody of [Mother] would pose a risk of substantial harm to her psychological welfare, pursuant to T.C.A. § 36-1-113(g)(14).

(Internal footnotes omitted.) Mother timely appealed.

Discussion

Although not stated exactly as such, Mother raises the following issues on appeal: (1) whether the Trial Court erred by upholding the protective custody order; (2) whether the Trial Court erred by not dismissing the termination petition as being "statutorily expired"; (3) whether the Trial Court utilized the correct four-month period for purposes of the abandonment grounds; (4) whether the Trial Court erred in finding by clear and convincing evidence that Mother abandoned the Child by failing to visit and financially support her; (5) whether the Trial Court erred in finding by clear and convincing evidence that persistent conditions existed; (6) whether the Trial Court erred in finding by clear and convincing evidence that Mother was mentally incompetent; (7) whether the Trial Court erred in finding by clear and convincing evidence that termination of Mother's parental rights was in the Child's best interest; and (8) whether the Trial Court erred by finding that grounds existed to terminate Mother's parental rights in the consolidated case regarding the Child's siblings after Mother had already surrendered her parental rights to those children.

As our Supreme Court has instructed regarding the standard of review in parental rights termination cases:

A parent's right to the care and custody of her child is among the oldest of the judicially recognized fundamental liberty interests protected by

the Due Process Clauses of the federal and state constitutions.² *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (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, 747, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *In re Angela E.*, 303 S.W.3d at 250. “When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it.” *Santosky*, 455 U.S. at 759, 102 S.Ct. 1388. “Few consequences of judicial action are so grave as the severance of natural family ties.” *Id.* at 787, 102 S.Ct. 1388; see also *M.L.B. v. S.L.J.*, 519 U.S. 102, 119, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996). The parental rights at stake are “far more precious than any property right.” *Santosky*, 455 U.S. at 758-59, 102 S.Ct. 1388. Termination of parental rights has the legal effect of reducing the parent to the role of a complete stranger and of “severing forever all legal rights and obligations of the parent or guardian of the child.” Tenn. Code Ann. § 36-1-113(l)(1); see also *Santosky*, 455 U.S. at 759, 102 S.Ct. 1388 (recognizing that a decision terminating parental rights is “*final* and irrevocable”). In light of the interests and consequences at stake, parents are constitutionally entitled to “fundamentally fair procedures” in termination proceedings. *Santosky*, 455 U.S. at 754, 102 S.Ct. 1388; see also *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 27, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981) (discussing the due process right of parents to fundamentally fair procedures).

Among the constitutionally mandated “fundamentally fair procedures” is a heightened standard of proof – clear and convincing evidence. *Santosky*, 455 U.S. at 769, 102 S.Ct. 1388. This standard minimizes the risk of unnecessary or erroneous governmental interference with fundamental parental rights. *Id.*; *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010). “Clear and convincing evidence enables the fact-finder to

² U.S. Const. amend. XIV § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law”). Similarly, article 1, section 8 of the Tennessee Constitution states “[t]hat no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.”

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 Bernard T.*, 319 S.W.3d at 596 (citations omitted). The clear-and-convincing-evidence standard ensures that the facts are established as highly probable, rather than as simply more probable than not. *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).

Tennessee statutes governing parental termination proceedings incorporate this constitutionally mandated standard of proof. Tenn. Code Ann. section 36-1-113(c) provides:

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.

This statute requires the State to establish by clear and convincing proof that at least one of the enumerated statutory grounds³ for termination exists and that termination is in the child’s best interests. *In re Angela E.*, 303 S.W.3d at 250; *In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). “The best interests analysis is separate from and subsequent to the determination that there is clear and convincing evidence of grounds for termination.” *In re Angela E.*, 303 S.W.3d at 254. Although several factors relevant to the best interests analysis are statutorily enumerated,⁴ the list is illustrative, not exclusive. The parties are free to offer proof of other relevant factors. *In re Audrey S.*, 182 S.W.3d at 878. The trial court must then determine whether the combined weight of the facts “amount[s] to clear and convincing evidence that termination is in the child’s best interest.” *In re Kaliyah S.*, 455 S.W.3d 533, 555 (Tenn. 2015). These requirements ensure that each parent receives the constitutionally required “individualized determination that a parent is either unfit or will cause substantial harm to his or her child before the fundamental right to the care and custody of the child can be taken away.” *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999).

³ Tenn. Code Ann. § 36-1-113(g)(1)-(13).

⁴ Tenn. Code Ann. § 36-1-113(i).

Furthermore, other statutes impose certain requirements upon trial courts hearing termination petitions. A trial court must “ensure that the hearing on the petition takes place within six (6) months of the date that the petition is filed, unless the court determines an extension is in the best interests of the child.” Tenn. Code Ann. § 36-1-113(k). A trial court must “enter an order that makes specific findings of fact and conclusions of law within thirty (30) days of the conclusion of the hearing.” *Id.* This portion of the statute requires a trial court to make “findings of fact and conclusions of law as to whether clear and convincing evidence establishes the existence of each of the grounds asserted for terminating [parental] rights.” *In re Angela E.*, 303 S.W.3d at 255. “Should the trial court conclude that clear and convincing evidence of ground(s) for termination does exist, then the trial court must also make a written finding whether clear and convincing evidence establishes that termination of [parental] rights is in the [child’s] best interests.” *Id.* If the trial court’s best interests analysis “is based on additional factual findings besides the ones made in conjunction with the grounds for termination, the trial court must also include these findings in the written order.” *Id.* Appellate courts “may not conduct de novo review of the termination decision in the absence of such findings.” *Id.* (citing *Adoption Place, Inc. v. Doe*, 273 S.W.3d 142, 151 & n.15 (Tenn. Ct. App. 2007)).

B. Standards of Appellate Review

An appellate court reviews a trial court’s findings of fact in termination proceedings using the standard of review in Tenn. R. App. P. 13(d). *In re Bernard T.*, 319 S.W.3d at 596; *In re Angela E.*, 303 S.W.3d at 246. Under Rule 13(d), appellate courts review factual findings de novo on the record and accord these findings a presumption of correctness unless the evidence preponderates otherwise. *In re Bernard T.*, 319 S.W.3d at 596; *In re M.L.P.*, 281 S.W.3d 387, 393 (Tenn. 2009); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007). In light of the heightened burden of proof in termination proceedings, however, the reviewing court must make its own determination as to whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, amount to clear and convincing evidence of the elements necessary to terminate parental rights. *In re Bernard T.*, 319 S.W.3d at 596-97. 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 M.L.P.*, 281 S.W.3d at 393 (quoting *In re Adoption of A.M.H.*, 215 S.W.3d at 810). Additionally, all other questions of law in parental termination appeals, as in other appeals, are reviewed de novo with no presumption of correctness. *In re Angela E.*, 303 S.W.3d at 246.

In re Carrington H., 483 S.W.3d 507, 521-24 (Tenn. 2016) (footnotes in original but renumbered). In combination with a best interest finding, clear and convincing evidence supporting any single ground will justify a termination order. *E.g.*, *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

Mother argues on appeal that the Trial Court erred because it failed to dismiss the adoption petition and subsequent amended petition as being defective. Even if the first petition was defective, the amended petition alleged statutory grounds to terminate Mother's parental rights and stated that the delay in the adoption proceedings was due to the "incapacity of the petitioners' original attorney through circumstances beyond his control." Mother denied this statement in her answer to the petition but failed to raise an issue before the Trial Court asking that the termination action be dismissed due to the extended duration of the adoption and termination action. Therefore, we hold that this issue is waived on appeal.

The Trial Court used the four-month period immediately preceding the amended petition, instead of the original petition, when making its findings on the abandonment grounds in this matter. Mother argues on appeal that the Trial Court utilized an incorrect four-month period. We disagree. An amended petition may serve as the triggering date for calculation of the determinative four-month period if the amended petition is separate and distinct. *In re Ava M.*, No. E2019-01675-COA-R3-PT, 2020 WL 2560932, at *14 (Tenn. Ct. App. May 20, 2020). In this case, the amended petition is separate and distinct from the original petition in that the first complaint contained no grounds for the termination of Mother's parental rights. Petitioners included grounds for termination only in the amended petition. Therefore, the four months prior to the amended petition is the correct determinative period when the abandonment grounds were first alleged in the amended petition. As such, the Trial Court correctly determined the determinative four-month period to be prior to the amended termination petition.

The Trial Court terminated Mother's parental rights on two grounds of abandonment. Tenn. Code Ann. § 36-1-113(g)(1) (2017) provides abandonment by a parent as a ground for termination of parental rights. We note that the amended petition in this action was filed on June 19, 2017. At that time, the statute in effect defining abandonment provided as follows in pertinent part:

- (i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading 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 willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child[.]

Tenn. Code Ann. § 36-1-102(1)(A)(i) (2017).

Although our General Assembly subsequently removed the words “willful” and “willfully” from the definition of abandonment in 2018 and instead provided as an affirmative defense that the parent’s failure to visit or support was not willful, the amended statute was not in effect at the time of the petition’s filing in this matter. *See* Tenn. Pub. Acts, Ch. 875, § 2 (H.B. 1856); *see also* Tenn. Code Ann. § 36-1-102(1)(A)(i) and -102(1)(I) (2021). Therefore, the burden was on Petitioners in this matter to prove that any abandonment by Mother concerning her failure to visit or support the Child was willful. *See In re Gabriel B.*, No. W2017-02514-COA-R3-PT, 2018 WL 3532078, at *4 n.7 (Tenn. Ct. App. July 23, 2018) (determining that the statutory change of removing the word “willful” in the definition of abandonment shall not be applied retroactively because the change “is substantive rather than procedural or remedial.” (citing *In re D.A.H.*, 142 S.W.3d 267, 273 (Tenn. 2004))).

In this case, the Trial Court made no finding that Mother’s failure to visit the Child during the relevant four-month period was willful. The Trial Court also did not specifically find that Mother’s failure to support was willful. The Trial Court noted that Mother had argued she was gainfully employed and able to support the Child. Noting Mother’s argument that she was gainfully employed is not the same as a finding by the Trial Court on that issue. A trial court’s setting out what testimony and evidence was presented without more is not equivalent to findings of fact by the trial court on these issues. The record before this Court is incomplete and does not demonstrate that Mother was employed during the four months prior to June 2017. We note that the record before us on appeal is incomplete as it is lacking portions of Betty F.’s and Mother’s testimonies. Consequently, there is little evidence in the record regarding Mother’s willfulness in her failure to visit and financially support the Child during the relevant four-month time period. We, therefore, vacate the Trial Court’s findings of the grounds of abandonment by failure to visit and abandonment by failure to support the Child for the termination of Mother’s parental rights.

As previously stated, the statutes effective in June 2017 are relevant to the present matter, which includes the earlier statute defining the ground of persistent conditions. This Court has previously held that the version of Tenn. Code Ann. § 36-1-113(g)(3) in effect prior to 2018 “applies as a ground for termination of parental rights only where the prior court order removing the child from the parent’s home was based on a judicial finding of dependency, neglect, or abuse.” *In re Audrey S.*, 182 S.W.3d 838, 874 (Tenn. Ct. App. 2005). Therefore, it is a threshold requirement under the previous version of the persistent conditions ground that the Child has been adjudicated as dependent and neglected. *See In re Elijah R.*, No. E2020-01520-COA-R3-PT, 2021 WL 2530644, at *10 (Tenn. Ct. App. June 21, 2021) (“[T]he previous version [of the persistent conditions ground] applied only if a juvenile court had adjudicated the child dependent and neglected . . .”). In this case, the dependency and neglect action filed by DCS was voluntarily dismissed by DCS without

a finding of dependency and neglect. Also, the dependency and neglect action filed by Foster Mother was stayed due to the pendency of the adoption action. There is no evidence in the record that the Child was ever adjudicated by any court as a dependent and neglected child. Therefore, the threshold requirement has not been met, and we reverse this ground for the termination of Mother's parental rights.

Regarding the ground of mental incompetence, the Trial Court failed to make the necessary findings of fact for this ground. The Trial Court simply concluded that Mother was incompetent and that termination of Mother's parental rights was in Piper's best interest. However, pursuant to subsection (i) of the statute, in order to terminate parental rights on this ground, a trial court must find that the parent is incompetent to adequately provide further care and supervision for the child because the parent's mental condition is presently so impaired and is likely to remain so impaired that the parent is unlikely to be able to assume or resume care and responsibility for the child in the near future. Tenn. Code Ann. § 36-1-113(g)(8)(B)(i). Although the Trial Court found that termination of Mother's parental rights was in the Child's best interest, pursuant to Tenn. Code Ann. § 36-1-113(g)(8)(B)(ii), the Trial Court failed to make sufficient findings to comply with subsection (i). The Trial Court did not find that Mother's mental condition was presently so impaired and likely to remain so impaired that it was unlikely she would be about to assume or resume care of the Child in the near future. Additionally, these required findings were inhibited by the insufficiency of the record before us. Although there is an abundance of evidence that Mother has made bad decisions and utilized bad judgment, the evidence that Mother is mentally incompetent and unable to care for the Child is lacking in the record before us. We, therefore, vacate the Trial Court's finding regarding this statutory ground for the termination of Mother's parental rights and remand for sufficient findings of fact and conclusions of law.

The insufficient findings of fact and conclusions of law, as required by Tenn. Code Ann. § 36-1-113(k), alone would be sufficient to vacate the foregoing grounds for the termination of Mother's parental rights. However, the record is also incomplete and insufficient for us to conduct a meaningful review of the statutory grounds for termination and the best interest analysis. From the record before us, it appears that there was no court reporter present during trial. Much of the testimony was recorded and later transcribed in preparation for this appeal; however, portions of the testimony before the Trial Court were not included in the record transmitted to this Court. In other types of civil cases, we assume that in the absence of a sufficient factual record that, if the evidentiary record had been preserved, the evidence would have supported the trial court's findings of fact. *See Reid v. Reid*, 388 S.W.3d 292, 295 (Tenn. Ct. App. 2012). However, this is a parental termination action involving constitutional rights, and Mother was indigent during trial. In termination of parental rights cases where the parent is indigent, this Court has held that the trial court must ensure that a sufficiently complete record is created and available on appeal for a parent seeking to appeal the termination of his or her parental rights. *See In re Connor B.*, 603 S.W.3d 773, 785 (Tenn. Ct. App. 2020) (internal citations omitted); *In*

re Adoption of J.D.W., No. M2000-00151-COA-R3-CV, 2000 WL 1156628, at *4 (Tenn. Ct. App. Aug. 16, 2000). This matter is remanded for the Trial Court to develop a sufficiently complete record of all evidence, consisting of either a verbatim transcript or a statement of evidence detailing the evidence presented during trial to support the Trial Court's findings of fact and conclusions of law. We caution the Trial Court and parties that only in extremely rare circumstances will a statement of evidence in a parental termination action be sufficiently complete to allow for proper appellate review. *See In re Connor B.*, 603 S.W.3d 773, 785 (Tenn. Ct. App. 2020) (internal citations omitted); *L.D.N. v. R.B.W.*, No. E2005-02057-COA-R3-PT, 2006 WL 369275, at *5 (Tenn. Ct. App. Feb. 17, 2006).

Upon remand, the Trial Court may conduct any hearings it deems necessary to develop a sufficient record. If such a record is available, the Trial Court may enter its judgment on the termination petition based on the previous hearing conducted in June and July 2021. However, if a transcript or a detailed statement of the evidence is not possible for whatever reason, the Trial Court shall conduct a new trial. If Mother continues to be indigent during the new trial, the Trial Court "shall ensure the availability of a record of trial evidence and events which is sufficiently complete to allow an appellate court to review the evidence in accordance with applicable standards." *See In re Adoption of J.D.W.*, 2000 WL 1156628, at *4.

Although Mother has not raised an issue regarding the ground located at Tenn. Code Ann. § 36-1-113(g)(14), we note that the Trial Court made findings of fact and conclusions of law concerning this statutory ground for the termination of Mother's parental rights in its written judgment. To the extent that the Trial Court found the statutory ground of Tenn. Code Ann. § 36-1-113(g)(14) as a ground to terminate Mother's parental rights, we reverse the Trial Court's ruling because the statute was not pled in the amended termination petition and it was not tried by implied or express consent by Mother. "An essential purpose of a pleading is to give notice of the issues to be tried so that the opposing party will be able to prepare for trial." *Abshure v. Methodist Healthcare-Memphis Hosps.*, 325 S.W.3d 98, 103 (Tenn. 2010). The unpled statutory ground was not tried by implied or express consent. As to section 36-1-113(g)(14), Mother's attorney stated to the Trial Court that Petitioners had not included those allegations in the petition to terminate Mother's rights, and Petitioners' attorney acknowledged that the termination petition had not been amended prior to trial to include this ground. Springing this ground on Mother at trial without prior notice is unfair and tantamount to trial by ambush. Therefore, this ground must be reversed. Because all of the grounds for termination have been vacated or reversed, we also vacate the Trial Court's findings regarding the best interest factors and remand for the Trial Court's reconsideration following the finding of a statutory ground sufficient to terminate Mother's parental rights.

Mother argues that the Trial Court erred by "upholding the protective custody order." In a previous court order, the Trial Court stated that the hearing on the *ex parte*

protective custody order would be tried alongside the termination of parental rights petition. However, the Trial Court does not appear to address the hearing regarding the protective custody order in its judgment, other than its finding that custody should be awarded to Petitioners. Because we have vacated the Trial Court's judgment terminating Mother's parental rights, we instruct the Trial Court to conduct a hearing on the *ex parte* protective custody order entered, which removed custody from Mother, immediately upon remand to the Trial Court.

Mother raises an issue regarding the Trial Court's finding of grounds to terminate her parental rights in a companion case regarding siblings of the Child wherein Mother executed a surrender of her parental rights. Even if the Trial Court erred in this regard, any error was harmless. The separate case regarding the termination of Mother's parental rights to the siblings is not on appeal in this case.

Conclusion

The Trial Court's judgment terminating Mother's parental rights is affirmed in part, vacated in part, and reversed in part. This matter is remanded to the Trial Court for further proceedings consistent with this Opinion. Costs on appeal are taxed half to the appellant, Danielle N., and half to the appellees, Betty and Robert F.

D. MICHAEL SWINEY, CHIEF JUDGE