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Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 8, 2022 Session

IN RE J.S.¹ ET AL.

Appeal from the Juvenile Court for Sumner County
No. 21-TPR-1 David Howard, Judge

No. M2022-00142-COA-R3-PT

A Father appeals the termination of his parental rights, asserting his due process rights were violated as a result of failure to timely appoint counsel in both dependency and neglect proceedings and termination proceedings. The juvenile court terminated Father's rights for abandonment, under several statutory provisions relating to putative fathers, and for failure to manifest an ability and willingness to care for the child, and the court determined that termination was in the child's best interest. We conclude that any issue regarding the appointment of counsel in the dependency and neglect proceedings is not properly before this court and that Father's due process rights were not violated in the termination proceedings. Because the Department of Children's Services does not defend the abandonment ground on appeal, we reverse this basis for termination. We also reverse the trial court's conclusion that clear and convincing evidence established a risk of substantial physical or psychological harm to the child. Nevertheless, the evidence presented supports in a clear and convincing manner multiple statutory grounds for termination and that termination is in the child's best interest. Accordingly, the judgment terminating Father's parental rights is affirmed.

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

JEFFREY USMAN, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and W. NEAL MCBRAYER, J., joined.

Anthony Daher, Gallatin, Tennessee, for the appellant, R.S.

Jonathan Skrmetti, Attorney General and Reporter; Kathryn A. Baker, Senior Assistant Attorney General; and Courtney J. Mohan, Assistant Attorney General, for the appellee,

¹ It is the policy of this Court to protect the privacy of children in parental termination cases by avoiding the use of full names.

OPINION

I.

The Sumner County Juvenile Court terminated the parental rights of R.S. as to child S.S. Having heard testimony from and about R.S., the trial court found R.S. to be a person who may have had good intentions but who consistently failed to follow through on obligations and repeatedly blamed others for his own failings. The trial court found R.S.'s blame-shifting explanations for his failure to meet obligations to be lacking in credibility.

S.S. was born in July of 2015. R.S. was incarcerated at the time and remained so until December 2016 as a result of involvement with drugs. R.S. adamantly insisted that he had not been a user but instead a seller of cocaine. During the first year and half of S.S.'s life, her contact with R.S. was limited to telephone calls. R.S. was not listed on S.S.'s birth certificate, and he did not register with the putative father registry. He explained that he initially took no action to establish his parentage of S.S. because in his view it was unnecessary, as it was known that S.S. was his child.

In October of 2016, S.N.S. ("Mother") was arrested in connection with drug and weapons charges. This resulted in S.S. going to live with her maternal grandmother. In the initial months following R.S.'s release from prison, he did not take any steps to establish his parentage or to gain custody of S.S. R.S. did visit with S.S. during these months as result of her maternal grandmother bringing S.S. to visit R.S.

After Mother's release in 2017, she and S.S. moved in with R.S. They would live with R.S. for approximately two years. During this time, R.S. took no action to establish legal parentage. Mother had a serious drug abuse problem when she moved out of R.S.'s home with S.S. As a result, R.S. indicated that he was concerned about S.S. Questioned as to what steps he took to protect S.S. given his serious concerns about Mother's drug use, R.S. indicated that he could do little because he did not know where Mother had taken S.S. R.S. testified that he did not know where S.S. was for several months stretching from the time Mother left with S.S. during the summer of 2019 until late October of 2019 when he was contacted by S.S.'s maternal grandmother. Apparently, S.S. had been residing not far away in Nashville, with her maternal grandmother, once again, rather than Mother.

The maternal grandmother reached out to R.S., who started visits with S.S. R.S., however, again took no action to establish parentage or gain custody of the child. S.S. was instead left to reside with her maternal grandmother. This status quo, however, would only exist for another month. In late November 2019, the Department of Children's Services

(“DCS”)² interviewed S.S.’s elder brother J.S. The two children, S.S. and J.S., have different biological fathers. During the course of the interview, J.S. made allegations of physical and psychological abuse against the maternal grandmother. Allegations included, among other claims, that his grandmother was beating him with extension cords resulting in blood on the walls, wrapping her hands around his throat and asking him if wanted to live, and brandishing and threatening to kill J.S. with a knife. DCS found marks and scars on J.S. The maternal grandmother’s boyfriend denied knowing the full extent of the abuse inflicted by grandmother but indicated that he believed that the grandmother “did not want to deal with the kids anymore.” On November 26, 2019, the court issued an emergency protective custody order concluding that there was probable cause to believe that the children were dependent and neglected and placing the children into the State’s custody. The two children have remained in the State’s custody, sharing the same foster homes, since that time.

The children’s grandmother alerted R.S. that the preliminary hearing in dependency and neglect proceedings relating to S.S. as well as J.S. would be held on November 27, 2019. R.S. was present at the hearing. R.S., whose parentage of S.S. still had not been established, indicated that he was apprised by the judge that he would need to get DNA testing completed. R.S. testified that he went straight to the clerk’s office and submitted a petition for DNA testing. R.S. indicated that he submitted several such petitions but that the clerk’s office denied his petitions because he lacked information regarding Mother, notably her address and social security number. No such petition from R.S. was admitted into evidence in these proceedings.

On January 6, 2020, the court entered an Amended Preliminary Hearing Order,³ which expressly directed R.S. and S.S. to “undergo genetic testing to determine whether [R.S.] is the Father of the minor child.” In response, R.S. again failed to promptly undergo such testing. In fact, R.S. did not have DNA taken for testing until July 2021, approximately 20 months after R.S. was first directed by the court to obtain such testing. The testing finally occurred after R.S. contacted DCS on May 20, 2021, indicating that he had tried to establish paternity through the Sumner County Child Support Office. A DCS employee informed R.S. that she would be happy to assist him in obtaining testing and submitted a request for funding for precisely that purpose. As of early June, DCS had not heard anything in response from R.S., who was often difficult to reach. A DNA sample was finally taken in July of 2021 through assistance from DCS. The results became available in September 2021 and confirmed R.S.’s biological parentage of S.S.

² DCS is used in this opinion not only in reference to the Department itself but also refers to testimony offered by employees of the Department in their official capacity.

³ A previous order, entered December 13, 2019, appears to conflate the hearing in this matter with a different case involving dependency and neglect.

R.S. blames DCS for the delay in DNA testing. DCS offers a different narrative, one in which R.S. failed to communicate with DCS and failed to seek assistance from DCS with regard to obtaining DNA testing. DCS indicates that its employees struggled to even locate R.S. Instead of R.S.'s version in which DCS failed him, DCS presents a rendition of events in which DCS was ready and willing, and in fact sought to help, but R.S. failed to communicate and take necessary actions. Testimony from DCS employees was clear that DCS would have helped R.S. to get tested in November of 2019 if R.S. had actually sought assistance, but that R.S. failed to communicate and to act to get the DNA testing completed.

The trial court found DCS's rendition of events more convincing than R.S.'s version. The trial court concluded that the ability to obtain testing was within R.S.'s control and that DCS could and would have assisted R.S. in overcoming obstacles but that he failed to take the necessary actions to seek help. The trial court was unimpressed with R.S.'s blame-shifting and failure to more aggressively seek DNA testing while S.S. was instead left in the care of foster parents. Just as R.S. had twice left S.S. in her grandmother's care, he again left her in the care of others while failing to take action to parent S.S.

The trial court had conducted on February 26, 2020, a hearing to determine if S.S. and her older brother J.S. should be considered dependent and neglected children under Tennessee law. R.S. attended this hearing. At this point, R.S. still had not obtained DNA testing to establish his parentage of S.S. In a written order entered on April 15, 2020, the trial court concluded that both children were dependent and neglected under Tennessee law and that it was in the best interests of the children to remain in DCS custody. With regard to R.S., who still as of April 2020 had not yet established parentage of S.S., the trial court directed him to "apply in writing for visitation and/or custody of" S.S.

When S.S. was first put into foster care, R.S. was not permitted in-person visitation because he had not established paternity, having not obtained DNA testing, but he did have visits with S.S. by telephone using FaceTime. R.S. insists that these were regular calls, suggesting they occurred as often as once or twice a week, but DCS disputes this, contending R.S.'s calls with S.S. were "very sporadic." As of August 2020, several months after having been directed to file a written petition for visitation and/or custody, and despite offers of assistance with the petition from DCS, R.S. still had not filed a petition seeking visitation or custody. At this point, DCS informed R.S. that, without filing a petition and establishing paternity, he would not be permitted to continue to have telephonic contact with S.S. As noted above, R.S. did not have a DNA sample taken until July of 2021, with the results not available until September of 2021. R.S. did not follow up on trial court's April 2020 order directing him to file a petition seeking visitation with S.S. until November of 2021, approximately 20 months after the order was issued.

Apparently after the DNA testing results had been returned in September of 2021 but prior to the filing of the visitation petition on November 10, 2021, DCS did provide

contact information to reinstate telephonic visitation between R.S. and S.S., but R.S. did not follow through on regular phone calls. DCS established a time for FaceTime calls from R.S. to S.S. on Sundays at 6 p.m. R.S. apparently made no calls to S.S. in the two months leading up to the parental termination proceedings in December 2021. He offered as explanations for his failure to call that he had been sick and also noted that he was in church at the time set for the phone calls. He blamed DCS for the lack of telephonic communication with S.S. There is no indication that R.S. requested to move the phone calls to another time that did not conflict with his church attendance or made DCS aware of this problem.

After he was confirmed as S.S.'s biological father in September of 2021, R.S. underwent an evaluation with DCS, and DCS recommended sixteen hours of parenting classes. R.S. attended two parenting classes in November 2021. According to R.S.'s testimony, there was some difficulty scheduling the other classes due to his illness with the flu and a trip out of town for Thanksgiving. He asserted that the educator never tried to contact him after the second session. DCS employees offered a very different rendition of events. DCS offered testimony and documentary evidence that the parenting class educator made multiple attempts to contact R.S. and that R.S. was not compliant in returning calls. According to the educator's report, R.S. did not respond to repeated attempts to set up other sessions, including text messages, calls, and unannounced visits. The educator observed that R.S. appeared genuinely ill during one visit but reported that R.S. generally did not respond to the attempts to contact him.

As noted above, in November of 2019, S.S. had been taken into DCS custody in connection with its conclusion that the maternal grandmother was psychologically and physically abusive. During the more than two years between this date and the parental termination proceedings, R.S. indicated that he was financially able to pay child support to meet S.S.'s needs but failed to do so. He explained that he did not know that he was supposed to pay child support. R.S. also indicated that he tried to go to a child support office multiple times, but it was closed due to Covid. Because the office was closed, R.S. indicated he called the office. R.S. stated no one answered the phone and that he did not leave a voicemail message. For Christmas and S.S.'s birthday, R.S. did provide via DCS some gifts such as two pairs of shoes, some clothing, and a variety of flavored Chapsticks.

In February of 2021, DCS filed a petition to terminate the parental rights of R.S., Mother, and the fathers of S.S.'s two brothers.⁴ The petition stated that Mother had "named [R.S.] as the father" of S.S. The petition sought termination of parental rights as to R.S. based on abandonment through failure to visit. It also sought termination based on grounds applicable to putative fathers under Tennessee Code Annotated section 36-1-113(g)(9), including a failure to make reasonable and consistent payments for support, a failure to

⁴ In June 2020, Mother gave birth to another child, who has also joined his siblings in foster care.

seek reasonable visitation or to visit, a failure to file a petition for paternity after notice, a failure to manifest a willingness and ability to take custody, and an allegation that placing S.S. with father would pose a risk of substantial harm to her physical or psychological welfare. The petition also alleged that R.S. failed to manifest a willingness and ability to assume custody under Tennessee Code Annotated section 36-1-113(g)(14), asserting that placing S.S. with R.S. would pose a risk of substantial harm to her physical or psychological welfare. The petition asserted that termination would be in the best interest of S.S.

After the filing of the termination petition, DCS moved to serve the respondents with the petition by publication in August 2021, and in September, it moved to ascertain service and to appoint counsel to the respondents as needed. An order appointing counsel for R.S. was entered on October 22, 2021.

The termination hearing took place on December 20, 2021, and R.S. was the only parent of the three children in attendance. R.S. testified that he held a GED and that he was currently enrolled in an online school studying business administration. He was qualified to do construction and maintenance, and he was currently working approximately thirty hours per week at his cousin's janitorial service. R.S. lived in a three-bedroom, two-bath apartment with his girlfriend and her teenage son and young adult daughter. He had an informal custody and child support arrangement for a son from another relationship with the child's mother. R.S.'s girlfriend and R.S. testified that they both maintained employment, that they would be able to provide all necessities for another child, and that they had room for S.S. in their home. R.S.'s girlfriend testified that she had overheard R.S. exercising telephone visitation, that S.S. was "a joy," and that R.S. was happy when speaking with S.S. R.S. acknowledged that he used marijuana about once every two months while out with friends and stated he "probably" would not test positive that day.

A DCS employee testified that R.S. was willing to parent S.S. "[a]s of now" but that she believed his willingness was "just because of the petition filed." In her view, R.S.'s willingness to take the child was a recent phenomenon. She felt uncertain if he would be able to meet S.S.'s needs. She questioned R.S.'s seriousness about establishing a relationship with the child, noting that he did not complete the required parental education classes. She also indicated that his failure to take any steps to establish paternity between November 2019 and May 2021 contributed to her concern regarding his willingness to parent the child.

A DCS employee, who had met with S.S. once a month between March and December 2021, testified that S.S. knew who R.S. was but that they had no real relationship. She felt it would "most definitely" be harmful to move the child. She noted S.S. was in a good, stable, safe home. S.S. was especially bonded with her younger brother, and the DCS employee was concerned about separating them. Another DCS employee testified that S.S. had a strong relationship with her current and former caregivers and that

she continued to see her former caregivers frequently, in an “extended-family bond.” This DCS employee said that she would be concerned to have S.S. separated from her younger brother and that disrupting the continuity of her current home would be psychologically harmful.

The juvenile court terminated R.S.’s parental rights to S.S. on the basis that he had abandoned S.S. through a failure to visit. *See* Tenn. Code Ann. § 36-1-113(g)(1) (effective Mar. 6, 2020, to Apr. 21, 2021). The court also applied certain grounds related to putative fathers, namely that R.S.’s provision of child support had not been reasonable or consistent, that he failed to seek or establish reasonable visitation, that he failed to manifest an ability and willingness to assume legal and physical custody, that placing the child in his custody would pose a risk of substantial harm to the psychological welfare of the child, and that he failed to establish paternity. *See* Tenn. Code Ann. § 36-1-113(g)(9)(A)(ii), (g)(9)(A)(iii), (g)(9)(A)(iv), (g)(9)(A)(v), (g)(9)(A)(vi). The court also found that he had not manifested an ability or willingness to personally assume legal and physical custody and that placing the child with him would pose a risk of substantial harm to the physical and psychological welfare of the child. *See* Tenn. Code Ann. § 36-1-113(g)(14). The court concluded generally that it “did not find [R.S.] to be a credible witness” and “did not find much of the Father’s testimony to be credible.” After having determined that termination was in the best interest of S.S., the Sumner County Juvenile Court terminated R.S.’s parental rights.

II.

R.S.’s argument in his briefing before this court is entirely focused on his contention that his constitutional due process rights were violated by the trial court failing to timely appoint counsel in the dependency and neglect proceedings and in the termination proceedings. Indigent parents in dependency and neglect and parental termination proceedings do have a right to counsel. Tenn. Code Ann. §§ 37-1-126(a)(2)(B)(i) & (ii); Tenn. Sup. Ct. R. 13, § 1(c), (d)(2)(B). We conclude, however, that any argument regarding lack of counsel during the dependency and neglect proceedings is not properly before this Court and that R.S.’s due process rights were not violated during the termination proceedings.

Insofar as R.S.’s argument in appealing the Sumner County Juvenile Court’s decision to terminate his parental rights as to S.S. advances a claim of a due process violation in the dependency and neglect proceedings, this contention is being raised in the wrong appeal. The Tennessee Supreme Court addressed a similar argument in *In re Carrington H.*, wherein the mother whose parental rights had been terminated sought appellate relief on the basis that appointed counsel had provided ineffective assistance at both the dependency and neglect and termination proceedings. 483 S.W.3d 507, 521 (Tenn. 2016). The Tennessee Supreme Court analyzed counsel’s performance during the termination proceedings and concluded that the mother had not shown she was denied a fundamentally fair hearing. *Id.* at 535-36. The Court, however, declined to address the

assertion that counsel provided inadequate representation in the dependency and neglect proceedings. *Id.* at 536. Noting that “[d]ependency and neglect proceedings are separate and distinct from proceedings to terminate parental rights,” the Court concluded that the appeal involved only claims that arose from the termination proceedings and that “any assertion regarding counsel’s allegedly deficient representation in the earlier dependency and neglect proceeding is not properly before us in this appeal.” *Id.* (citing *In re L.A.J., III*, No. W2007-00926-COA-R3-PT, 2007 WL 3379785, at *6 (Tenn. Ct. App. Nov. 15, 2007) (rejecting a claim that the failure to appoint counsel at the dependency and neglect proceedings resulted in the father’s inaction during the four years the child was in State custody, reasoning that the dependency and neglect proceedings were separate)). This Court has consistently applied this understanding in declining to address a wide variety of purported due process violations that were asserted to have occurred in the dependency and neglect proceedings in the context of appeals from parental termination decisions. *See, e.g., In re John A.*, No. E2020-00449-COA-R3-PT, 2021 WL 32001, at *4-5 (Tenn. Ct. App. Jan. 4, 2021) (collecting cases). Accordingly, R.S.’s claim regarding lack of counsel at the dependency and neglect proceedings is not properly before us.

R.S. did have representation in the termination proceedings, but he contends that the assignment of counsel was untimely and thus constituted a due process violation. The termination petition seeking to terminate the parental rights of R.S., Mother, and the fathers of S.S.’s siblings was filed in February 2021. R.S. contacted DCS in May 2021 to establish himself as the biological father, and he was served with the termination petition on June 7, 2021.⁵ R.S. gave a DNA sample in July 2021. The record reveals that the various parents of the three children had not been served with the petition as of August 2021, and an order for service by publication was entered at that time. R.S. was established as the biological father in early September, and DCS moved to ascertain service and to appoint counsel for any indigent respondents on September 27, 2021. A hearing was held on October 21, 2021, during which R.S. requested and was granted the appointment of counsel. R.S. filed a motion for visitation shortly thereafter. In short, it appears that no action was taken in the termination proceeding between the filing of the petition and the appointment of counsel to represent R.S., save actions related to attempts to serve the various parents of the three children. In addition, there is no indication that R.S.’s counsel did not have adequate time to prepare for the termination proceedings, which occurred in December 2021. Accordingly, we cannot say that R.S. was denied a fundamentally fair hearing due to any delay in the appointment of counsel in the termination proceedings.

⁵ DCS correctly notes that the Return of Service identifies the document served as a petition for dependency and neglect but that the Affidavit of Service completed by the same process server indicates a petition to terminate parental rights was served. Father does not assert that he was not served with the termination petition.

III.

R.S. does not advance any arguments directly challenging the Sumner County Juvenile Court's findings as to the various grounds for termination of his parental rights or the best interest finding. Nevertheless, "in an appeal from an order terminating parental rights[,] the Court of Appeals must review the trial court's findings as to each ground for termination and as to whether termination is in the child's best interests, regardless of whether the parent challenges these findings on appeal." *In re Carrington H.*, 483 S.W.3d at 525-26. Likewise, this court must "review the trial court's findings of fact and conclusions of law as to each ground for termination, even though the statute only requires the finding of one ground to justify terminating parental rights." *Id.* at 525 (quoting *In re Angela E.*, 303 S.W.3d 240, 251 n.14 (Tenn. 2010)). Accordingly, although R.S. does not challenge the bases for termination, we review the trial court's determinations. This court applies the versions of the parental termination statutes in effect on the date the petition was filed. *See In re Braxton M.*, 531 S.W.3d 708, 732 (Tenn. Ct. App. 2017) (holding "that the version of the statute in effect at the time of the petition's filing controls this action").

Parents have a fundamental constitutional interest in the care and custody of their children, *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007), and this interest is "far more precious than any property right," *In re Carrington H.*, 483 S.W.3d at 522 (quoting *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982)). "[P]ublic policy strongly favors allowing parents to raise their biological or legal children as they see fit, free from unwarranted governmental interference." *In re Bernard T.*, 319 S.W.3d 586, 597 (Tenn. 2010). However, a parent's rights are not absolute and may be terminated on clear and convincing evidence that statutory grounds for termination exist and that termination is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c)(1), (2); *In re Adoption of Angela E.*, 402 S.W.3d 636, 639 (Tenn. 2013).

We review the trial court's findings of fact related to parental termination de novo on the record, giving the findings a presumption of correctness unless the evidence preponderates otherwise. *In re Bernard T.*, 319 S.W.3d at 596; *see* Tenn. R. App. P. 13(d). The grounds for termination and the determination that termination is in the child's best interest must be established by clear and convincing evidence, that is, evidence that "enables the fact-finder to form a firm belief or conviction regarding the truth of the facts" and which "eliminates any serious or substantial doubt about the correctness of these factual findings." *In re Bernard T.*, 319 S.W.3d at 596; *see* Tenn. Code Ann. § 36-1-113(c). Given the heightened burden of proof to be overcome in termination proceedings, "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 Carrington H.*, 483 S.W.3d at 524. We review de novo with no presumption of correctness the trial court's legal conclusion regarding whether the evidence sufficiently supports termination to meet this standard. *Id.*

A. Grounds for Termination

The juvenile court found that R.S. had abandoned S.S. through a failure to visit under Tennessee Code Annotated section 36-1-113(g)(1), but DCS does not defend this ground on appeal, and accordingly, we reverse this basis for termination.⁶ The juvenile court also relied on several grounds related to putative fathers. A putative father is “a biological or alleged biological father of a child who, at the time of the filing of the petition to terminate the parental rights of such person” meets one of the criteria in Tennessee Code Annotated section 36-1-117(c), has not been excluded as the biological father, and is not a legal parent. Tenn. Code Ann. § 36-1-102(44) (effective Mar 6, 2020, to June 30, 2021). R.S. was not a legal parent at the time of the filing of the petition. *See* Tenn. Code Ann. § 36-1-102(29)(A), (B). DNA testing showing a biological relationship between a father and a child does not alone establish a father as a legal parent. Tenn. Code Ann. § 36-1-102(29)(B) (providing that DNA testing alone does not establish a man as the legal parent of a child); *In re Bernard T.*, 319 S.W.3d at 598. Tennessee Code Annotated section 36-1-117(c) provides that when a putative father has not filed to establish paternity and has not established paternity, but meets one of the statutory criteria, the putative father’s parental rights can only be terminated by surrender, parental consent, waiver of interest, or termination proceedings under Tennessee Code Annotated section 36-1-113. While R.S. did not register with the putative father registry, was not on the birth certificate, was not openly living with the child at the commencement of the proceeding, and had not entered a permanency plan acknowledging paternity, DCS observes that he satisfied the criterion that:

The biological father has claimed to the child’s biological mother, or to the petitioners or their attorney, or to the department, a licensed child-placing agency, or a licensed clinical social worker who or that is involved in the care, placement, supervision, or study of the child that the biological father believes that the biological father is the father of the child....

⁶ This court has previously reversed findings of grounds for termination when the party seeking termination did not defend the grounds on appeal. *See In re Jayce D.*, No. M2021-00539-COA-R3-PT, 2022 WL 817605, at *12 (Tenn. Ct. App. Mar. 18, 2022), *perm. app. denied* (Tenn. June 8, 2022) (reversing a trial court’s findings regarding one ground for termination when DCS did not defend the ground on appeal); *In re Jaylan J.*, No. W2019-02025-COA-R3-PT, 2020 WL 7861378, at *12 (Tenn. Ct. App. Dec. 22, 2020); *In re Colton B.*, No. M2018-01053-COA-R3-PT, 2018 WL 5415921, at *6 (Tenn. Ct. App. Oct. 29, 2018) (citing cases in which a ground for termination was reversed or vacated when the party seeking termination did not defend the ground on appeal); *In re Zane W.*, No. E2016-02224-COA-R3-PT, 2017 WL 2875924, at *7 (Tenn. Ct. App. July 6, 2017) (holding that mandatory review under *Carrington* “has never been construed to require this Court to also consider the grounds sustained by the trial court and thereafter conceded or waived by the non-parent on appeal”); *see also In re Carrington H.*, 483 S.W.3d at 525 (providing that the rationale for requiring review of all grounds for termination is to “ensure that fundamental parental rights are not terminated except upon sufficient proof, proper findings, and fundamentally fair procedures”).

Tenn. Code Ann. § 36-1-117(c)(3) (effective Mar. 6, 2020, to July 14, 2021). R.S. testified that from the time S.S. was born, he was “sure that she was [his] child” and that “[e]veryone knew she was [his] child.” Mother and S.S. lived with R.S. for a period of time. The trial court found that R.S. was instructed at the initial hearing that, as a putative father, he needed to have genetic testing to establish himself as the biological parent, and the record contains two separate court orders filed toward the beginning of the dependency and neglect proceedings instructing R.S. to establish parentage. An affidavit filed by a DCS employee noted that in September 2020, she had “been in close contact with putative father, [R.S.]” and that she had “offered him advice on filing his petition several times.” R.S. acknowledges in his brief that he “was held out as the father by himself.” The evidence supports the inference that R.S. claimed to DCS and Mother that he was the biological father, and that he was accordingly a putative father at the time of the filing of the petition. *See In re C.T.*, No. E2021-01336-COA-R3-PT, 2022 WL 2236147, at *6 (Tenn. Ct. App. June 22, 2022) (concluding that father who was not a legal parent but had admitted he had known the child was his since the time the mother was pregnant was a putative father).

Under Tennessee Code Annotated section 36-1-113(g)(9), the parental rights of a person who is a putative father at the time of the filing of the termination petition may be terminated on one or more of the following grounds:

...

- (ii) The person has failed, without good cause or excuse, to make reasonable and consistent payments for the support of the child in accordance with the child support guidelines promulgated by the department pursuant to § 36-5-101;
- (iii) The person has failed to seek reasonable visitation with the child, and if visitation has been granted, has failed to visit altogether, or has engaged in only token visitation, as defined in § 36-1-102;
- (iv) The person has failed to manifest an ability and willingness to assume legal and physical custody of the child;
- (v) Placing custody of the child in the person’s legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child; or
- (vi) The person has failed to file a petition to establish paternity of the child within thirty (30) days after notice of alleged paternity, or as required in § 36-2-318(j), or after making a claim of paternity pursuant to § 36-1-117(c)(3);

Tenn. Code Ann. § 36-1-113(g)(9).

1. Reasonable and Consistent Payments

The court found that R.S. had, without good cause or excuse, failed to make reasonable and consistent payments for child support, noting that although R.S. had provided some gifts, clothing, and “maybe” school supplies, this financial support was not reasonable or consistent. Tenn. Code Ann. § 36-1-113(g)(9)(A)(ii). The “without good cause or excuse” standard is a lower hurdle than the willfulness required under abandonment as delineated in factor (g)(1). *See In re Kierani C.*, No. W2020-00850-COA-R3-PT, 2021 WL 4057222, at *21 (Tenn. Ct. App. Sept. 3, 2021). R.S. testified that he was financially able to support the child but had not made monetary payments because he had not been told he was required to do so. The court noted that under the statutory subsection defining abandonment, “[e]very parent who is eighteen (18) years of age or older is presumed to have knowledge of a parent’s legal obligation to support” a child. Tenn. Code Ann. § 36-1-102(1)(H). We conclude that clear and convincing evidence supports the trial court’s finding regarding this factor.

2. Reasonable Visitation

The trial court also found that R.S. had failed to seek or engage in reasonable visitation. Tenn. Code Ann. § 36-1-113(g)(9)(A)(iii). While R.S. testified that he consistently exercised video visitation at the prior foster home, he acknowledged he had not exercised visitation during the approximately two months immediately before the termination hearing.⁷ R.S. introduced screenshots from video visits with S.S. that were taken while she was in the first foster home. A DCS employee testified that R.S. had not visited S.S. during the four months prior to the filing of the petition, that he had not filed a petition for visitation or to establish paternity prior to the termination petition, and that DCS would have allowed visitation had he established himself as the biological father through DNA testing. Another DCS employee testified that R.S. had engaged in “some phone calls at the previous caregiver, but it was very sporadic” and was not consistent. She testified that the “current foster parent had also indicated that there had not really been any contact after the move.” R.S. conceded having not made calls during the two months preceding the termination hearing after S.S. moved to a new foster home. Insofar as there is a conflict in testimony between DCS’s rendition that R.S.’s visitation had been sporadic

⁷ We note that this court recently concluded that there was no statutory prohibition on a putative father’s ability to “repent” of the failure to support or visit his child under (g)(9)(A)(ii) or (iii) through actions taken after the filing of the petition. *In re Kierani C.*, 2021 WL 4057222, at *23-25. The statute was amended in 2022 to clarify that a putative father’s visitation or support after the filing of the petition could not rectify a ground for termination. 2022 Tennessee Laws Pub. Ch. 937 § 14 (effective July 1, 2022); Tenn. Code Ann. § 36-1-113(g)(9)(C) (2022). In the instant case, there are no allegations that R.S. attempted to rectify any defects regarding visitation or support after the filing of the petition.

and R.S.’s testimony that visitation was consistent, the trial court stated that it “did not find [R.S.] to be a credible witness,” and we defer to a trial court’s findings regarding witness credibility. *In re Nevada N.*, 498 S.W.3d 579, 591 (Tenn. Ct. App. 2016) (observing that when the “resolution of an issue in a case depends upon the truthfulness of witnesses, the trial judge, who has had the opportunity to observe the witnesses and their manner and demeanor while testifying, is in a far better position than this Court to decide those issues”).

In concluding that R.S. failed to seek reasonable visitation, the juvenile court found that the “sole impediment” to R.S.’s visitation was R.S.’s failure to establish paternity. The court found that R.S. failed to remove this impediment, noting that R.S. did not contact DCS for genetic testing until May 2021, approximately a year and a half after he was first told to establish paternity and approximately nine months after a DCS employee informed him that he could not have video visitation unless he took further steps. The record supports the court’s findings in this regard. We conclude that the juvenile court did not err in concluding that this ground was established by clear and convincing evidence.

3. Willingness and Ability to Assume Custody and Risk of Substantial Harm

The juvenile court found three related grounds for termination — Tennessee Code Annotated section 36-1-113(g)(9)(A)(iv) & (v) and Tennessee Code Annotated section 36-1-113(g)(14) — to be established by the evidence presented. In considering the juvenile court’s findings and conclusions as to these related grounds for termination, it is important to consider their similarities and variances. As noted above, Tennessee Code Annotated section 36-1-113(g)(9)(A)(iv) and (v) are grounds for the termination of parental rights of putative fathers. Factor (g)(14), however, applies to a “parent or guardian.” Tenn. Code Ann. § 36-1-113(g)(14). A parent includes “any biological, legal, [or] adoptive parent.” Tenn. Code Ann. § 36-1-102(37). While the definition of putative father is linked to the “time of the filing of the petition to terminate,” the Legislature has not chosen to put any temporal limitations on the definition of “parent.” Tenn. Code Ann. § 36-1-102(37), (44); *see* Tenn. Code Ann. § 36-1-113(g)(9) (applying the factor to those who are putative fathers “at the time of the filing of a petition to terminate” or adopt).

In terms of the substance of these measures, as noted above, Tennessee Code Annotated section 36-1-113(g)(9)(A)(iv) and (v) provide as separate grounds for termination the following:

- (iv) The person has failed to manifest an ability and willingness to assume legal and physical custody of the child;
- (v) Placing custody of the child in the person’s legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child;

Tennessee Code Annotated section 36-1-113(g)(14) provides that

A parent or guardian has failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility of the child, and placing the child in the person's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child.

Considering these statutory measures, factor (g)(14) contains language similar to (g)(9)(A)(iv) and (v), but combines the two (g)(9) factors and requires proof of both to support termination under (g)(14). Under the statutory language, in addition to being a putative father as discussed above, R.S. is also a "parent." Because of the similarity in language we proceed to analyze the application of (g)(14) and (g)(9)(A)(iv) and (v) together. See *In re Ni'Kaiya R.*, No. E2021-00517-COA-R3-PT, 2021 WL 5917990, at *3 (Tenn. Ct. App. Dec. 15, 2021) (concluding that "both grounds applicable to parents generally and to putative fathers specifically are appropriate in this case" when father was established as the biological parent after the filing of the petition).

The juvenile court found under the grounds applicable to putative fathers that R.S. had failed to manifest an ability or willingness to assume legal and physical custody of S.S. Tenn. Code Ann. § 36-1-113(g)(9)(A)(iv). The court found that R.S., by failing to establish paternity, never took the necessary steps to assume legal or physical custody of S.S. Finding that R.S. blamed others for his lack of action in establishing paternity, the court concluded there was no good cause for him to have failed to establish paternity.

Applying the similar language in Tennessee Code Annotated section 36-1-113(g)(14), the juvenile court likewise found that R.S. had not manifested an ability or willingness to personally assume legal and physical custody and that there was clear and convincing evidence that placing the child with him would pose a risk of substantial harm to the physical and psychological welfare of the child. The court relied in part on the evidence that R.S. was aware of Mother's substance abuse and that he did not take any action but permitted the child to remain with Mother. The court stated that the "constant refrain" of the proceedings was R.S.'s "lack of involvement," citing the inconsistent visitation and R.S.'s failure to file a motion for visitation. The court reiterated that R.S. had not provided financial support and that he failed to complete parenting classes. The court found that R.S. was employed, had a home, had a stable relationship, and had "put his criminal past behind him." The court nevertheless concluded that R.S. did not manifest an ability or willingness to take custody based on his nearly two-year delay in seeking to establish paternity, his failure to pursue custody or visitation during that time, his failure to complete the education classes, his failure to provide financial support, and his failure to protect his child.

In order to prove the first prong of (g)(14) or the grounds in (g)(9)(A)(iv), DCS had

to show that R.S. lacked either a willingness or an ability to assume legal and physical custody. See *In re Neveah M.*, 614 S.W.3d 659, 677 (Tenn. 2020) (party seeking termination need not show both a lack of willingness and ability); see also *In re Ahleigha C.*, No. E2020-01683-COA-R3-PT, 2021 WL 3401021, at *8 n.9 (Tenn. Ct. App. Aug. 4, 2021) (applying the standards used in (g)(9)(A)(v) to (g)(14) based on the similarity of the language). “Ability focuses on the parent’s lifestyle and circumstances,” while willingness revolves around a parent’s attempts “to overcome obstacles” preventing the parent from assuming custody. *In re Serenity W.*, No. E2018-00460-COA-R3-PT, 2019 WL 511387, at *6 (Tenn. Ct. App. Feb. 8, 2019). The trial court found that R.S.’s lifestyle and circumstances were not inappropriate for the care of a child.

R.S. professes a willingness to take custody of his child, and he was the only parent present at the termination proceedings. However, a parent’s express desire to reunite with the child is insufficient to establish a willingness to assume custody. See *In re Nicholas C.*, No. E2019-00165-COA-R3-PT, 2019 WL 3074070, at *17 (Tenn. Ct. App. July 15, 2019). On the contrary, “[w]hen evaluating willingness, we look for more than mere words.” *In re Zaylee W.*, No. M2019-00342-COA-R3-PT, 2020 WL 1808614, at *5 (Tenn. Ct. App. Apr. 9, 2020) (quoting *In re Ayden S.*, No. M2017-01185-COA-R3-PT, 2018 WL 2447044, at *7 (Tenn. Ct. App. May 31, 2018), *overruled on other grounds by In re Neveah M.*, 614 S.W.3d at 677). This court may instead consider “whether a parent has attempted ‘to overcome the obstacles that prevent them from assuming custody or financial responsibility for the child.’” *In re Jaxx M.*, No. E2018-01041-COA-R3-PT, 2019 WL 1753054, at *9 (Tenn. Ct. App. Apr. 17, 2019) (quoting *In re Cynthia P.*, No. E2018-01937-COA-R3-PT, 2019 WL 1313237, at *8 (Tenn. Ct. App. Mar. 22, 2019)). A failure to make efforts to overcome such obstacles “can undercut a claim of willingness.” *Id.* Here, the trial court found that R.S.’s inaction over the course of almost two years belied his professed willingness to take custody of S.S. R.S. failed to establish paternity over an extended period of time, and he failed to complete the lone requirement set by DCS, attending parenting classes, despite strenuous efforts from the educator to facilitate his completion of these courses. We conclude that the trial court did not err in finding that this prong of factor (g)(14) and factor (g)(9)(A)(iv) were established by clear and convincing evidence. See *In re Ni’Kaiya R.*, 2021 WL 5917990, at *6 (father’s inaction, including failure to establish paternity until after the filing of the petition, showed a lack of willingness or ability to assume custody).

Relevant to Tennessee Code Annotated section 36-1-113(g)(9)(A)(v) and the second prong of (g)(14), the court found that removing S.S. from her current placement would pose a risk of substantial physical or psychological harm, noting she had an ongoing strong bond with her brothers and with her current and former caregivers and that R.S. had done little to establish a relationship with her. The court stated that “she understands the people on whom she can depend, and her parents are not part of that.” A substantial risk of harm requires “a real hazard or danger that is not minor, trivial, or insignificant” and requires the harm to be more than a “theoretical possibility” but to be “sufficiently probable

to prompt a reasonable person to believe that the harm will occur more likely than not.” *Ray v. Ray*, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001); see *In re Maya R.*, No. E2017-01634-COA-R3-PT, 2018 WL 1629930, at *8 (Tenn. Ct. App. Apr. 4, 2018).

At the hearing, a DCS case worker testified that S.S. knew who R.S. was but that she had no depth of relationship with him. S.S. had recently been moved to a new foster home and had a positive relationship with her current and former caregivers and with her brothers, especially her younger brother. A DCS case worker and case manager testified that in their opinion, it would be harmful to move the child. Appellate courts have previously upheld a finding that a risk of substantial harm existed based on the absence of a relationship between the parent and the child. *In re: Braelyn S.*, No. E2020-00043-COA-R3-PT, 2020 WL 4200088, at *17 (Tenn. Ct. App. July 22, 2020) (noting that father conceded that reintroducing himself to the child after five years would be difficult for the child, and concluding that visitation with a “virtual stranger” would create a sufficient probability of harm); *In re F.N.M.*, No. M2015-00519-COA-R3-PT, 2016 WL 3126077, at *13 (Tenn. Ct. App. Apr. 11, 2016) (concluding there was a risk of substantial psychological harm when father had no relationship with the child and when the petitioners demonstrated through lay and expert testimony that they had a significant bond and that removal would be detrimental).

However, we note that in these cases, the party seeking termination introduced significant evidence regarding the child’s current situation and the effect separation from current caregivers would have on the child.⁸ Here, the evidence introduced by DCS largely consisted of conclusory statements that removal would be harmful. A DCS case worker, who had met with S.S. once per month between March and December 2021, testified that she felt it would be psychologically harmful to move the child. Another DCS employee, who became the supervisor of the children’s caseworker in September 2020, stated she would “have concerns” about S.S. being separated from her brothers and caregivers, that moving her would be psychologically harmful, but noted that the above-referenced case worker would be in the best position to answer any questions regarding R.S.’s relationship with the child. S.S. was not continuously in the same foster home but had been moved to

⁸ See, e.g., *In re Neveah M.*, 614 S.W.3d at 677-78 (testimony from both foster parents, foster mother’s sister, and DCS worker established close and long-term bond with current placement and potential psychological harm); *In re F.N.M.*, No. M2015-00519-COA-R3-PT, 2016 WL 3126077, at *12 (Tenn. Ct. App. Apr. 11, 2016) (psychologist testified regarding child’s secure bond with petitioners and the adverse effects of removal); *In re Antonio J.*, No. M2019-00255-COA-R3-PT, 2019 WL 6312951, at *9 (Tenn. Ct. App. Nov. 25, 2019) (substantial risk of harm was established when children were taken into custody at a young age, mother had no contact with them for an extended time, one child suffered nightmares from a fear of placement with mother, and mother’s living situation, while appropriate, was temporary); *State v. C.H.H.*, No. E2001-02107-COA-R3-CV, 2002 WL 1021668, at *9 (Tenn. Ct. App. May 21, 2002) (concluding that child was at risk of substantial psychological harm when she had lived with same foster parents for two years due to father’s delay, viewed the foster parents as her only parents, was attached to siblings in the same home, and when father disregarded the child’s current relationships).

a new home within two months of the hearing, although she maintained contact with the former caregivers. Neither her current nor her former caregivers testified to provide any specifics regarding her circumstances or much detail in terms of the relationships developed. See *In re Ahleigha C.*, 2021 WL 3401021, at *9 (concluding that, although proof of a strong bond between the child and a foster family can support this prong, the proof in the record, consisting only of a statement that the child was in a consistent foster home and referred to her foster parents as parents, was insufficient). We conclude that in this case, the petitioners introduced only “minimal proof in the record regarding the Child’s current circumstances.” *Id.* As in *Ahleigha C.*, in the absence of further proof, a determination that the extent of the harm entailed in removing the child from her current placement would be substantial appears too speculative. *Id.*; see *In re Joshua M.*, No. E2021-01527-COA-R3-PT, 2022 WL 4666232, at *10 (Tenn. Ct. App. Oct. 3, 2022) (concluding that petitioners who asserted mother was consuming drugs but provided no evidence failed to establish a substantial risk of harm); *In re E.C.*, No. E2016-02582-COA-R3-PT, 2017 WL 2438574, at *9 (Tenn. Ct. App. June 6, 2017) (reversing a finding that placing the child with father would pose a risk of substantial harm when the only evidence supporting the finding was that father was incarcerated).

The court made no finding that R.S.’s home was inappropriate for S.S. but appeared to rely exclusively on psychological harm of the separation from the support network of her then still new foster placement and prior foster placement in finding Tennessee Code Annotated section 36-1-113(g)(9)(A)(v) and the second prong of (g)(14) to be established. In parental termination cases, the petitioner bears a heightened burden of proof, and must demonstrate the grounds by evidence that “enables the fact-finder to form a firm belief or conviction regarding the truth of the facts” and “eliminates any serious or substantial doubt about the correctness of the[] factual findings.” *In re Bernard T.*, 319 S.W.3d at 596; see *In re Carrington H.*, 483 S.W.3d at 522. The evidence presented does point toward harm in detaching S.S. from the existing relationships within the foster structure. However, the evidence presented as to these relationships is too thin, too conclusory, to support the conclusion that substantial harm would result at a clear and convincing level. Accordingly, we conclude the grounds for termination delineated in Tennessee Code Annotated section 36-1-113(g)(9)(A)(v) and Tennessee Code Annotated section 36-1-113(g)(14) have not been established.

4. Petition to Establish Paternity

A putative father’s parental rights may also be terminated if he “failed to file a petition to establish paternity of the child within thirty (30) days after notice of alleged paternity ... or after making a claim of paternity pursuant to § 36-1-117(c)(3).” Tenn. Code Ann. § 36-1-113(g)(9)(A)(vi). Notice is “the written statement to a person who is believed to be the biological father or possible biological father of the child.” Tenn. Code Ann. § 36-1-113(g)(9)(B)(i). However, “actual notice of alleged paternity may be proven to have been given to a person by any means and by any person or entity.” Tenn. Code Ann. § 36-

1-113(g)(9)(B)(i). R.S. testified that he had always believed himself to be S.S.'s father. R.S. had telephone contact with S.S. during the first two years of her life, and S.S. and Mother lived with R.S. for a period of approximately two years. The court found that R.S. indicated he "knew" he was the biological parent from early in the child's life and that R.S. was aware that from the time of the preliminary hearing in November 2019 that he needed to establish paternity. The court concluded that he did not follow through on doing so until at the earliest May 2021. Although R.S. testified that he attempted to file multiple petitions related to paternity, the trial court found R.S.'s testimony generally not credible, and it found that he "started the process" after the filing of the termination petition. We defer to the trial court's credibility determinations. *In re Navada N.*, 498 S.W.3d at 591. We conclude that clear and convincing evidence establishes that R.S. failed to file a petition to establish paternity within thirty days of notice of paternity or of making a claim of paternity under § 36-1-117(c)(3) above.

As addressed above, the record establishes that multiple termination grounds relied on by the trial court under Tennessee Code Annotated section 36-1-113(g)(9), including subsections (g)(9)(A)(ii), (iii), (iv), and (vi), were established by clear and convincing evidence. Therefore, we review the trial court's best interest determination.

B. Best Interest Determination

When a parent has been found to be unfit by establishment of at least one statutory ground for termination of parental rights, as here, the interests of parent and child diverge, and the focus shifts to what is in the child's best interest. *In re Audrey S.*, 182 S.W.3d 838, 877 (Tenn. Ct. App. 2005). The trial court found termination to be in S.S.'s best interest. "Facts considered in the best interests analysis must be proven by 'a preponderance of the evidence, not by clear and convincing evidence.'" *In re Gabriella D.*, 531 S.W.3d 662, 681 (Tenn. 2017) (quoting *In re Kaliyah S.*, 455 S.W.3d 533, 555 (Tenn. 2015)). The court, however, must determine whether the sum of the proof amounts to clear and convincing evidence that termination is in the child's best interest. *Id.* The statutory best interest factors in Tennessee Code Annotated section 36-1-113(i) are "illustrative, not exclusive," and the court must not merely "tally[]" the statutory factors but analyze the weight and relevance under the facts and circumstances of the case. *Id.* at 681, 682.

The nonexclusive factors relevant to the best interest analysis are laid out in Tennessee Code Annotated section 36-1-113:

(i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

(1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best

interest to be in the home of the parent or guardian;

(2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;

(3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

(4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;

(5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol, controlled substances or controlled substance analogues as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

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

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

Tenn. Code Ann. § 36-1-113(i) (effective Mar. 6, 2020, to Apr. 21, 2021).

In examining the best interest of the child, the court found under section (i)(1) that R.S. had failed to make “such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home,” in particular by failing to establish paternity and failing to visit after he was established as the biological father. Tenn. Code Ann. § 36-1-113(i)(1). The court acknowledged R.S.'s “relatively stable home,” gainful employment, and lack of criminal activity (save the occasional use of marijuana), but it concluded his interest in fatherhood arose only after the filing of the

petition. The trial court did not articulate any concerns regarding the child's safety in the R.S.'s home, *see In re Braelyn S.*, 2020 WL 4200088, at *20 (concluding that the record did not establish that adjustments to father's circumstances were necessary to make it safe for the child to be in the father's home); *In re Jaylan J.*, 2020 WL 7861378, at *25 (mother adjusted circumstances to make home safe when the evidence showed no concerns regarding the well-being of children currently in the home and no concerns about violence, criminal behavior, or substance abuse), but it did find that R.S.'s lack of a substantial relationship with the child did not make placement with R.S. in the child's best interest. The record supports this finding.

The court next found that R.S., by failing to establish paternity and failing to complete parenting class, "failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible." Tenn. Code Ann. § 36-1-113(i)(2). R.S. was instructed to complete sixteen hours of parenting class, and he did not complete the requirement despite his awareness that the termination hearing was looming on the horizon. R.S. also failed to engage in regular visitation after establishing that he was S.S.'s biological father. The record supports the conclusion that he failed to make lasting adjustments despite efforts from social services agencies and that lasting adjustment in this regard does not reasonably appear possible.

The court found R.S. had not maintained regular visitation with S.S., and it questioned the depth of the relationship and R.S.'s sincerity in pursuing it, given his lack of consistent effort. Tenn. Code Ann. § 36-1-113(i)(3), (4). The record supports the factual finding that R.S. did not maintain regular visitation and that he did not establish any depth of relationship with the child. This court has previously held that "the lack of a meaningful relationship provides the greatest insight regarding the best interests of the child." *In re Braelyn S.*, No. 2020 WL 4200088, at *19. Accordingly, these factors weigh in favor of termination.

The court considered the "effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition." Tenn. Code Ann. § 36-1-113(i)(5). In finding that a change of caretakers would have a detrimental effect, the court noted that the children were doing well and had positive relationships with their current foster parents and long-term relationships with the former foster parents. Although noting no objections to R.S.'s living environment, the court found that separating S.S. from her brothers and moving to the home of a R.S. "who has only recently become involved" would be detrimental. Although we concluded above there was insufficient proof to establish by clear and convincing evidence that a change in custody would create a risk of substantial physical or psychological harm to the child, the best interest factor does not require a finding of substantial harm. Tenn. Code Ann. § 36-1-113(i)(5); *see In re Ella H.*, No. M2020-00639-COA-R3-PT, 2021 WL 119150, at *7 (Tenn. Ct. App. Jan. 13, 2021) (citing *In re Jaydin A.*, No. M2018-02145-COA-R3-PT, 2019 WL 6770494, at

*8 (Tenn. Ct. App. Dec. 12, 2019) for the proposition that, even in the absence of other proof, common sense dictates that removing a child from a stable home and placing the child with a parent with whom the child has no meaningful relationship is detrimental). Even in the absence of the proof exploring the depths of S.S.'s existing established relationships, the record, nevertheless, adequately supports the more limited conclusion of the juvenile court that a change would be detrimental.

While noting that there had never been any allegations of abuse by R.S., the court found that R.S.'s inaction in failing to protect his child from abuse and neglect rendered applicable Tenn. Code Ann. § 36-1-113(i)(6) (considering “[w]hether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household”). The record supports the conclusion that R.S. knew Mother had a serious substance abuse problem. When Mother left with S.S. for a period of several months, R.S. took no meaningful action to protect S.S. who was in the care and custody of Mother who had a severe drug abuse problem. S.S. instead ended up living in the home of the maternal grandmother who engaged in physical and psychological abuse directed towards S.S.'s older sibling. R.S. left S.S. in this home which ultimately resulted in S.S.'s placement into State custody. *See In re Jeremiah S.*, No. W2019-00610-COA-R3-PT, 2020 WL 1951880, at *13 (Tenn. Ct. App. Apr. 23, 2020), *perm. app. denied* (Tenn. Dec. 10, 2020) (noting in analysis that mother's failure to protect children from father's severe abuse under this factor weighed in favor of termination).

The court determined that DCS failed to demonstrate that the physical environment of R.S.'s home was inappropriate or that there were concerns with his physical or emotional health. Tenn. Code Ann. § 36-1-113(i)(7), (8). The court noted that R.S. had a home, was in a stable relationship, and was employed. While lodging a “caveat” that R.S. acknowledged some marijuana use a few times a year outside the home, the court determined that DCS did not adequately support the conclusion that R.S.'s home or lifestyle were inappropriate so as to warrant termination of parental rights. The record supports the conclusion that these factors weigh against termination.

Addressing Tenn. Code Ann. § 36-1-113(i)(9), the juvenile court found R.S. had not provided consistent child support, and it did not credit the assertion that he did not know to provide support. In reaching this conclusion, the court noted that R.S. supported another child and that the court's initial protective custody order had noted the obligation to support. Tenn. Code Ann. § 36-1-113(i)(9). The evidence supports the trial court's finding.

We conclude that the trial court did not err in concluding that the weight of the factors supported termination to be in S.S.'s best interest by clear and convincing evidence. In particular, the lack of a meaningful relationship with the child weighs heavily in favor of termination. *See In re Braelyn S.*, No. 2020 WL 4200088, at *19. Because DCS

established both grounds for termination and that termination was in the child's best interest, we affirm the decision to terminate R.S.'s parental rights.

IV.

For the aforementioned reasons, we reverse the finding that DCS proved by clear and convincing evidence that R.S.'s parental rights should be terminated due to abandonment or that removing the child from her current placement would pose a risk of substantial physical or psychological harm. We affirm, however, the juvenile court's conclusions as to the other grounds for termination, the juvenile court's best interests conclusion, and the ultimate decision of the juvenile court to terminate R.S.'s parental rights. Costs of this appeal are taxed to the appellant, R.S., for which execution may issue if necessary.

JEFFREY USMAN, JUDGE