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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs August 1, 2023

IN RE AMAYZHA L.

Appeal from the Juvenile Court for Davidson County
No. PT269646 Sheila Calloway, Judge

No. M2023-00044-COA-R3-PT

This is an appeal of the termination of a father’s parental rights. The Tennessee Department of Children’s Services (“DCS”) filed a petition in the Juvenile Court for Davidson County (“Juvenile Court”) seeking the termination of the parental rights of Horace L. (“Father”) to his minor daughter Amayzha L. (“the Child”). The Juvenile Court found that DCS had established by clear and convincing evidence the following statutory grounds: (1) abandonment by failure to provide a suitable home, (2) persistence of conditions, and (3) failure to manifest an ability and willingness to assume legal and physical custody of or financial responsibility for the Child. Determining that DCS presented insufficient evidence to establish that the Child was removed from Father’s home or physical or legal custody, we reverse the grounds of abandonment by failure to provide a suitable home and persistence of conditions. We affirm the Juvenile Court’s judgment in all other respects, including the termination of Father’s parental rights.

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

D. MICHAEL SWINEY, C.J., delivered the opinion of the court, in which CARMA DENNIS MCGEE and JEFFREY USMAN, JJ., joined.

James A. Rose, Nashville, Tennessee, for the appellant, Horace L.

Nick Perenich, Nashville, Tennessee, Guardian Ad Litem.

Jonathan Skrmetti, Attorney General and Reporter, and Katherine P. Adams, Assistant Attorney General for the appellee, Tennessee Department of Children’s Services.

OPINION

Background

The Child was born in September 2020 to Sabrina T. (“Mother”) and Father. DCS received a referral the day after the Child’s birth alleging that the Child had been born drug-exposed. The referral alleged that Mother had been drug-screened in the days leading up to the Child’s birth and tested positive for cocaine, opiates, and methadone. According to the referral, Mother reported that she had used heroin and cocaine in the weeks preceding the Child’s birth and that she had begun methadone treatment. Father denied using illegal drugs. The referral reported that the Child had been showing signs of withdrawals and neonatal abstinence syndrome (“NAS”); her “cord test” had revealed exposure to codeine, fentanyl, methadone, morphine, and benzoylecgonine; and her “urine drug screen” had revealed exposure to cocaine and methadone.

While the Child was in the hospital, a Child Protective Services Investigator consulted with Mother and Father, explaining that the Child would be unable to be placed with Father due to “an open charge in Davidson County for Sex Offender Probation Violation and a substantiation for Lack of Supervision with” DCS in 2017. DCS was also concerned that “online records” indicated that Father’s last listed address was “Homeless.” Due to these concerns, the Child was removed to DCS custody in October 2020 pursuant to an emergency protective custody order. However, the Juvenile Court released the Child back to Mother a few weeks later with an order for her to voluntarily place the Child with Bethany Christian Services.

Thereafter, DCS considered the Child’s case an “open non-custodial case” while Mother sought intensive out-patient drug abuse treatment. During a “Precustodial Child and Family Team Meeting” on February 23, 2021, Bethany Christian Services reported that it was no longer in the Child’s best interest for her to be placed with the agency due to Mother’s inconsistent substance abuse treatment. Mother had tested positive for cocaine in January 2021. The coordinator with Bethany Christian Services reported that the contract to provide care for the Child would not be extended past February 28, 2021. Again, DCS chose not to place the Child with Father due to his housing issues and his sex offender status, in addition to concerns regarding domestic violence between the parents and allegations that Father had been seen on social media using marijuana. Therefore, “due to continued concerns for substance abuse, lack [of] supervision, and domestic violence, as well as the lack of a viable least drastic alternative,” the Child was removed to DCS custody on February 24, 2021.

On May 10, 2021, the Juvenile Court entered an order adjudicating the Child dependent and neglected. The Juvenile Court also found that the Child was a victim of severe abuse by Mother due to her prenatal drug exposure. With respect to Father, the

Juvenile Court found that he was not a risk to the Child, although his status as a sex offender had contributed to his housing issues.

On April 28, 2022, DCS filed a petition to terminate Father's parental rights.¹ DCS alleged the following grounds for termination: (1) abandonment by failure to provide a suitable home pursuant to Tenn. Code Ann. §§ 36-1-113(g)(1) and -102(1)(A)(ii); (2) persistence of conditions that led to the Child's removal pursuant to Tenn. Code Ann. § 36-1-113(g)(3); and (3) failure to manifest an ability and willingness to assume legal and physical custody of or financial responsibility for the Child pursuant to Tenn. Code Ann. § 36-1-113(g)(14). DCS also alleged that termination of Father's parental rights was in the Child's best interest. The Juvenile Court subsequently appointed Father counsel and the Child a guardian *ad litem* ("GAL").

The Juvenile Court held a trial on December 9, 2022, and announced its oral ruling at a hearing on December 13, 2022. The Court heard testimony from three witnesses: Father; Eugenia Antley, a "family service worker" at DCS assigned to the Child's case; and the Child's foster father ("Foster Father"). At trial, Father testified extensively about his housing issues, employment issues, and repeated positive drug screens. Father testified that he was homeless when the Child was taken into DCS custody in October 2020. He explained that he had lived in various motels from October 2020 until June 2022 when he began renting a house in Smithville, Tennessee.

Father testified that he had difficulty finding stable housing due to his status as a sex offender. Father explained that he was listed on the sex offender registry due to his conviction for sexual battery which he had received when he was seventeen years old. No further explanation was provided. Father stated that he had to leave his house in Smithville in October 2022, four or five months after moving in, as a result of his guilty plea to "attempted violation of the registry." He further explained that he pled guilty to this charge thinking he would be placed on "misdemeanor probation" but was instead placed on "state probation." As a consequence, a probation officer attempted to conduct a home visit a few weeks later, but Father's landlord would not allow the search to take place. As a consequence, Father claimed that he was required to find a new residence. At the time of trial, Father was still homeless and had been staying in a hotel room with his girlfriend, who had paid for the rental of the room. He did not know where he would sleep that night. In the month prior to trial, Father had either slept outside or in a hotel or motel.

Regarding his employment, Father testified that most of his employment history was in the construction business. He lost his job at "Nashville Wire" in October 2020

¹ DCS also sought the termination of Mother's parental rights in its petition. Father's parental rights, however, were the sole subject of the trial, and Mother is not a party to this appeal. We limit our review to termination of Father's parental rights.

and then found employment at “Southern Thrift” in February 2021. He worked there for three months until he was laid off due to the Covid-19 pandemic. He then found employment with “Alpha LLC” in May 2021. He was laid off from Alpha LLC in November 2022, about a month prior to trial.

With respect to his drug screens, both Father and Ms. Antley testified that he had only tested negative for illegal drugs once out of eleven drug screens. In October 2021, Father tested positive for THC. He admitted during his testimony that this positive screen was a result of his smoking marijuana. In November 2021, Father tested positive for THC and cocaine. During his testimony, Father claimed that he did not use cocaine. He attributed his positive screen for cocaine to his purchase and use of a co-worker’s urine. Ms. Antley testified that Father provided to her this explanation at the time as well. She testified that after Father’s admission, drug screens were taken via oral swab or hair follicle.

Father again tested positive for THC in January 2022, February 2022, April 2022, May 2022, twice in June 2022, July 2022, and October 2022. He tested positive for cocaine again in February and October of 2022. Father did not admit to cocaine use but rather testified that cocaine had seeped through the pores of his skin while he was holding Mother’s cocaine for her on one occasion and another time when he was cleaning Mother’s illegal drugs out of his vehicle.² Ms. Antley testified that Father’s results for cocaine in October had been “very high” and that Father had not provided to her at that time the excuse he offered at trial. With respect to THC, Father claimed that other than the time he smoked marijuana in October 2021, all of his positive results were due to his use of Cannabidiol (“CBD”) oil or “Delta 8.” He tested negative for illegal substances in August 2022.

When asked whether he was still using CBD oils, Father responded: “No, ma’am. I’m willing to take a drug test right now.” The Juvenile Court accepted his offer and arranged for a drug screen to be administered during a recess. Father again tested positive for THC. Father attributed the positive result to smoking his “Delta 8 vape pen” that morning. Ms. Antley testified that she had advised him to stop using CBD oils so that he could pass a drug screen, and Father testified that he was told that he was not allowed to use “Delta 8” or “Delta 9.”

² Father testified that he came in contact with cocaine when he was with Mother in December 2021, a few months prior to when he tested positive for cocaine for the second time. He explained: “[Mother] actually escaped from jail, and the police pulled us over, and I took her drugs from her, and I had been sweating on my person for about two hours. And when they got the drugs, it was all melted into -- into my skin and stuff.” Ms. Antley testified that Father did not provide this explanation to her at the time he tested positive.

Ms. Antley further testified that her greatest concern with Father and the possibility of returning the Child to Father, was his drug use. She stated:

I find it very concerning that [Father] has continued to test positive for drugs despite receiving A&D counseling and trying to provide as much support to help him get over that addiction. He continues to use substances, and I don't think that a child -- I don't think that's a safe environment for any child, but especially given the circumstances that she was born into, I especially think that would not be a safe environment for her to be in.

Ms. Antley concluded that despite her good working relationship with Father, it had appeared that he had not been forthcoming with her given that she had learned new things about his drug use for the first time during his trial testimony. Ms. Antley also opined that Father had not demonstrated that he could provide a "long-term, stable home" for the Child. Despite more negative aspects of Father's living situation and behaviors, it was undisputed that Father visited the Child regularly.

Regarding the Child's foster family, Foster Father testified that the Child had been living with him, his wife, and her foster brother since her second removal into DCS custody in February 2021. Foster Father explained that when the Child first came into their care, she had difficulties eating and sleeping due to her exposure to drugs. However, Foster Father stated that the Child had "really progressed" and is now like a "normal two-year-old." Ms. Antley and Foster Father testified that the Child had bonded and become attached to her foster family and had developed a close bond with her foster brother who was only eight months older. Ms. Antley opined that the Child maintained a special bond with her foster parents that she did not have with Father. Foster Father testified that the Child refers to him as "Daddy" and his wife as "Mom" or "Mommy" and that they would like to adopt the Child.

On February 4, 2023, the Juvenile Court entered an order terminating Father's parental rights to the Child. The Juvenile Court determined that DCS had proven by clear and convincing evidence all three statutory grounds alleged in its petition. With respect to Father's positive drug screens, the Court found that his "explanations for his positive drug screens are not credible or sensible and that father does in fact have a drug problem that he needs to address prior to having a child placed in his care." The Court further found that the majority of best interest factors enumerated in Tenn. Code Ann. § 36-1-113(i)(1) weighed in favor of terminating his parental rights. Father has appealed.

Discussion

Although not stated exactly as such, Father raises the following issues on appeal: (1) whether the Juvenile Court erred in finding clear and convincing evidence for the ground of abandonment by failure to establish a suitable home; (2) whether the Juvenile

Court erred in finding clear and convincing evidence for the ground of persistent conditions; (3) whether the Juvenile Court erred in finding clear and convincing evidence for the ground of failure to manifest an ability and willingness to assume custody; and (4) whether the Juvenile Court erred in finding that termination of Father's parental rights was in the Child's best interest.

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.³ *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

³ 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."

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 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. Tennessee Code Annotated 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 grounds⁴ 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

⁴ Tenn. Code Ann. § 36-1-113(g)(1)-(13).

S.W.3d at 254. Although several factors relevant to the best interests analysis are statutorily enumerated,⁵ 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).

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

⁵ Tenn. Code Ann. § 36-1-113(i).

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 conjunction with a best interest determination, 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).

On April 28, 2022, when DCS filed its petition seeking to terminate Father's parental rights, the grounds at issue read as follows:

(g) Initiation of termination of parental or guardianship rights may be based upon any of the grounds listed in this subsection (g). The following grounds are cumulative and nonexclusive, so that listing conditions, acts or omissions in one ground does not prevent them from coming within another ground:

(1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred;

(3)(A) The child has been removed from the home or the physical or legal custody of a parent or guardian for a period of six (6) months by a court order entered at any stage of proceedings in which a petition has been filed in the juvenile court alleging that a child is a dependent and neglected child, and:

(i) The conditions that led to the child's removal still persist, preventing the child's safe return to the care of the parent or guardian, or other conditions exist that, in all reasonable probability, would cause the child to be

subjected to further abuse or neglect, preventing the child's safe return to the care of the parent or guardian;

(ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent or guardian in the near future; and

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

(B) The six (6) months must accrue on or before the first date the termination of parental rights petition is set to be heard;

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

Tenn. Code Ann. § 36-1-113(g) (West July 1, 2021 to June 30, 2022).

The abandonment ground at issue, failure to provide a suitable home, is set out as follows:

(1)(A) For purposes of terminating the parental or guardian rights of a parent or parents or a guardian or guardians of a child to that child in order to make that child available for adoption, "abandonment" means that:

(ii)(a) The child has been removed from the home or the physical or legal custody of a parent or parents or guardian or guardians by a court order at any stage of proceedings in which a petition has been filed in the juvenile court alleging that a child is a dependent and neglected child, and the child was placed in the custody of the department or a licensed child-placing agency;

(b) The juvenile court found, or the court where the termination of parental rights petition is filed finds, that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child's situation prevented reasonable efforts from being made prior to the child's removal; and

(c) For a period of four (4) months following the physical removal, the department or agency made reasonable efforts to assist the parent or parents

or the guardian or guardians to establish a suitable home for the child, but that the parent or parents or the guardian or guardians have not made reciprocal reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date. The efforts of the department or agency to assist a parent or guardian in establishing a suitable home for the child shall be found to be reasonable if such efforts equal or exceed the efforts of the parent or guardian toward the same goal, when the parent or guardian is aware that the child is in the custody of the department[.]

Tenn. Code Ann. § 36-1-102(1)(A)(ii) (West July 1, 2021 to June 30, 2022).

We first address whether the Juvenile Court erred in finding the grounds of abandonment by failure to support and persistence of conditions. Both of these grounds for termination require that the Child be removed from the “home or the physical or legal custody of a parent.” On appeal, Father argues that DCS did not establish that the Child ever lived in his home or that he ever had physical or legal custody of the Child. DCS concedes that it failed to establish that the Child was removed from Father’s home or physical or legal custody, stating: “The Department does not defend the grounds of abandonment by failure to provide a suitable home or persistence of conditions on appeal, as it appears that custody was returned solely to Mother on October 29, 2020.”⁶ We agree that DCS failed to establish this essential element.

Given that the parents were never married, Father never maintained legal custody of the Child absent a court order. *See* Tenn. Code Ann. § 36-2-303 (“Absent an order of custody to the contrary, custody of a child born out of wedlock is with the mother.”). No such order was presented at trial or is present in the record. Although the record is not entirely clear, it does not appear that Father ever had physical custody of the Child either. Father and Mother stayed with the Child while in the hospital after her birth. However, the Child was subsequently removed to DCS custody on October 16, 2020. The Juvenile Court then entered a preliminary hearing order on October 29, 2020, returning the Child to Mother’s legal custody and providing that “Mother shall make the voluntary placement to Bethany Christian [Services].” Therefore, when the Child was returned to DCS custody in February 2021, the Child was removed solely from Mother’s custody. There is simply no indication in the record that the Child was in Father’s physical or legal custody or home at the time of her entry into DCS custody in February 2021. We

⁶ In his appellate brief, the GAL does not concede the ground of persistence of conditions, although he does not squarely address Father’s contention that he never had physical or legal custody of the Child or that the Child was not removed from his home. The GAL concedes the ground of abandonment by failure to provide a suitable home, albeit for a different reason than that provided by DCS.

therefore conclude that DCS failed to meet its burden of proof with respect to the grounds of abandonment by failure to provide a suitable home and persistence of conditions. *See In re Elijah R.*, No. E2020-01520-COA-R3-PT, 2021 WL 2530644, at *11-12 (Tenn. Ct. App. June 21, 2021) (reversing the ground of persistent conditions because the child was not removed from the father’s home or physical custody and because there was no order providing for father’s legal custody of the child, who was born to unmarried parents).

We next address whether the Juvenile Court erred by finding the ground of failure to manifest an ability and willingness to assume custody. Regarding the first prong of our analysis, our Supreme Court has explained that “[i]f a person seeking to terminate parental rights proves by clear and convincing proof that a parent or guardian has failed to manifest either ability or willingness, then the first prong of the statute is satisfied.” *In re Neveah M.*, 614 S.W.3d 659, 677 (Tenn. 2020) (citation omitted). The second prong of the statute requires the court to consider whether 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. *See* Tenn. Code Ann. § 36-1-113(g)(14).

Although the Juvenile Court found that Father had the willingness to assume custody of the Child, the Court determined that he lacked the ability. The Juvenile Court explained:

The Respondent father 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. Respondent father has paid no support towards the care of the child since she entered foster care⁷ and has shown no ability to provide for her needs as he is currently unemployed and homeless. Additionally, Respondent father has not [sic] been unable to effectuate any meaningful change to remedy the conditions that led to the child entering foster care and move towards reunification with the child. Respondent father has been unable to care for himself much less provide for the child. Respondent father also has failed to address his homelessness, unemployment and substance abuse concerns which have greatly impeded his ability to effectuate any change in order to render him a safe and suitable caregiver for the child.

Placing the child in the Respondent father’s legal and physical custody would pose a risk of substantial harm to the physical or

⁷ As conceded by the GAL, no evidence at trial related to Father’s payment of child support or lack thereof. The evidence therefore preponderates against the Juvenile Court’s finding regarding Father’s lack of financial support. Nevertheless, this error is harmless due to the Juvenile Court’s other findings that support the ground of failure to manifest an ability and willingness to assume custody.

psychological welfare of the child. The child is in a pre-adoptive home where she is thriving, safe, and loved. The child was removed from the father at a very young age and has a limited relationship with him, but not a parent-child relationship. Removing the child from the only home she has ever known and placing her with a person who has never provided full time care for her and is not her “mom and dad” would have devastating effects on the child. Additionally, the father has not shown he can care for the child or keep her safe. Placing the child with the father would put her at great risk for ongoing abuse and neglect due to the father’s failure to complete the required services or remedy any of the conditions that led to the child entering foster care. As it stands, if the child were placed with the father, she would potentially be homeless, be without basic necessities, and would be exposed to the father’s drug use.

Despite his willingness and hope to have the child placed in his care, the Respondent father has no ability or means to care for the child or provide her with any kind of permanency or stability. Additionally, father has not been forthcoming about his situation or his struggles with homelessness, housing, his relationship with the child’s mother, or his substances abuse. His explanations regarding his positive drug screens are neither credible or logical to the Court. FSW Antley worked diligently with the father, going above and beyond to assist him and showing him compassion, and has come to learn that father has not been truthful with her on numerous occasions about his circumstances[.] As such, the Court cannot trust the father to be able to work with DCS and the Court on reunifying with his child and truly being able to provide her with the safe and stable environment she needs to thrive. The child has been in a stable environment for one and a half years where she is bonded with her foster parents and foster brother and where she does not have to worry about having a roof over her head when she wakes in the morning or where she will get her next meal. If she were to be placed with the father, there would [be] no guarantee she would have these things and she would be subjected to a substantial risk of harm in the father’s care.

(Paragraph numbering omitted.) On appeal, Father argues that his “compliance with the permanency plan, steady work, continued visitation, and determined efforts to obtain housing are proof that the trial court erred in terminating rights based on this ground.” We respectfully disagree.

We agree that Father diligently visited the Child and made attempts to maintain employment. However, we cannot conclude that the Juvenile Court erred by determining that he failed to demonstrate an ability to assume custody of the Child. From the time of the Child’s first removal in October 2020 until the day of trial on December 9, 2022,

Father only maintained stable housing for four or five months out of more than a two-year period. Other than his stint in his Smithville rental house from June 2022 to October 2022, Father bounced from motel to motel and would sometimes sleep outside. Although Father had maintained employment for much of the Child's stint in DCS custody, he was unemployed at the time of trial. In addition, Father was soliciting his friends and family for money on Facebook a few weeks prior to trial, further demonstrating that he was unable to provide for himself, much less the Child. At trial, Father acknowledged that he was currently unable to take care of the Child.

Moreover, we agree with the Juvenile Court that Father's persistent substance abuse is of great concern and demonstrates an inability to assume custody of the Child. Although Father provided explanations to excuse why he was consistently testing positive for THC and occasionally cocaine, the Juvenile Court did not find his explanations credible. As we have often repeated, we "will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary." *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999). Father has not provided clear and convincing evidence to contradict the Juvenile Court's credibility assessment.

Father provided drug screens nearly every month for a year between October 2021 to October 2022. During that time period, he tested negative for illegal substances only once. Other than his negative drug screen in August 2022, every drug screen was positive for THC, and three drug screens were positive for cocaine. He even tested positive for THC on the day of trial after testifying that he could provide a negative drug screen that day.

We agree with the Juvenile Court that DCS presented clear and convincing evidence that Father failed to manifest an ability to assume custody of the Child, particularly given Father's consistent housing instability and substance abuse issues. *See In re Daniel B.*, No. E2019-01063-COA-R3-PT, 2020 WL 3955703, at *7 (Tenn. Ct. App. July 10, 2020) (affirming the juvenile court's finding of this ground in part because "Mother had done nothing to address her substance abuse issues or her homelessness."); *In re Josiah T.*, No. E2019-00043-COA-R3-PT, 2019 WL 4862197, at *10 (Tenn. Ct. App. Oct. 2, 2019) (affirming this ground in part due to the mother's homelessness and relapse into illegal drug use, notwithstanding her recent efforts).

We also find that DCS presented clear and convincing evidence to support the second prong, whether placing the Child in Father's custody would pose a risk of substantial harm to the Child's welfare. Placing the Child in Father's physical or legal custody would present a risk of substantial harm to the Child given his housing instability and substance abuse issues. *See In re Anari E.*, No. M2020-01051-COA-R3-PT, 2021 WL 1828500, at *17 (Tenn. Ct. App. May 7, 2021) ("Given Father's unabashed drug use, as well as his continual failure to achieve stability, an unacceptable risk of harm would inhere were the Children returned to Father's care."). At the time of trial, Father had

been staying in a hotel room paid for by his girlfriend. The day of trial was their last night in the hotel, and Father did not know where he would spend the night next. This type of unstable living situation, in addition to Father's illegal drug use, would certainly pose a threat of substantial harm to the Child.

In contrast, the Child's foster family has provided her with a stable environment since February 2021. Her foster parents cared for her as she struggled to eat and sleep properly due to her prenatal drug exposure. The Child has a strong bond and attachment to her foster parents and foster brother. Based upon the testimony of Foster Father, Ms. Antley, and even Father, it is evident that the Child's foster family provides her with a safe, stable, and loving home. To remove her from her foster family to whom she has grown attached, the only family she has ever known, and to place her in Father's custody would pose a risk of substantial harm to the Child's welfare. *See In re Jeremiah B.*, No. E2022-00833-COA-R3-PT, 2023 WL 2198864, at *11 (Tenn. Ct. App. Feb. 24, 2023) ("removing the Child from the stability of his foster home would contribute to the risk of substantial harm to his welfare"). We therefore agree with the Juvenile Court that DCS presented clear and convincing evidence to establish this statutory ground.

Having concluded that DCS established at least one statutory ground for termination of Father's parental rights, we now consider the Juvenile Court's determination that termination of Father's parental rights was in the Child's best interest. On April 28, 2022, when DCS filed its termination petition, the statutory best interest factors read as follows:

- (i)(1) In determining whether termination of parental or guardianship rights is in the best interest of the child, the court shall consider all relevant and child-centered factors applicable to the particular case before the court. Those factors may include, but are not limited to, the following:
 - (A) The effect a termination of parental rights will have on the child's critical need for stability and continuity of placement throughout the child's minority;
 - (B) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological, and medical condition;
 - (C) Whether the parent has demonstrated continuity and stability in meeting the child's basic material, educational, housing, and safety needs;
 - (D) Whether the parent and child have a secure and healthy parental attachment, and if not, whether there is a reasonable expectation that the parent can create such attachment;
 - (E) Whether the parent has maintained regular visitation or other contact with the child and used the visitation or other contact to cultivate a positive relationship with the child;
 - (F) Whether the child is fearful of living in the parent's home;

- (G) Whether the parent, parent's home, or others in the parent's household trigger or exacerbate the child's experience of trauma or post-traumatic symptoms;
- (H) Whether the child has created a healthy parental attachment with another person or persons in the absence of the parent;
- (I) Whether the child has emotionally significant relationships with persons other than parents and caregivers, including biological or foster siblings, and the likely impact of various available outcomes on these relationships and the child's access to information about the child's heritage;
- (J) Whether the parent has demonstrated such a lasting adjustment of circumstances, conduct, or conditions to make it safe and beneficial for the child to be in the home of the parent, including consideration of whether there is criminal activity in the home or by the parent, or the use of alcohol, controlled substances, or controlled substance analogues which may render the parent unable to consistently care for the child in a safe and stable manner;
- (K) Whether the parent has taken advantage of available programs, services, or community resources to assist in making a lasting adjustment of circumstances, conduct, or conditions;
- (L) Whether the department has made reasonable efforts to assist the parent in making a lasting adjustment in cases where the child is in the custody of the department;
- (M) Whether the parent has demonstrated a sense of urgency in establishing paternity of the child, seeking custody of the child, or addressing the circumstance, conduct, or conditions that made an award of custody unsafe and not in the child's best interest;
- (N) Whether the parent, or other person residing with or frequenting the home of the parent, has shown brutality or physical, sexual, emotional, or psychological abuse or neglect toward the child or any other child or adult;
- (O) Whether the parent has ever provided safe and stable care for the child or any other child;
- (P) Whether the parent has demonstrated an understanding of the basic and specific needs required for the child to thrive;
- (Q) Whether the parent has demonstrated the ability and commitment to creating and maintaining a home that meets the child's basic and specific needs and in which the child can thrive;
- (R) Whether the physical environment of the parent's home is healthy and safe for the child;
- (S) Whether the parent has consistently provided more than token financial support for the child; and
- (T) Whether the mental or emotional fitness of the parent would be detrimental to the child or prevent the parent from consistently and effectively providing safe and stable care and supervision of the child.

- (2) When considering the factors set forth in subdivision (i)(1), the prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest.
- (3) All factors considered by the court to be applicable to a particular case must be identified and supported by specific findings of fact in the court's written order.
- (4) Expert testimony is not required to prove or disprove any factor by any party.
- (5) As used in this subsection (i), "parent" includes guardian.

Tenn. Code Ann. § 36-1-113(i) (West July 1, 2021 to June 30, 2022).

With regard to making a determination concerning a child's best interest, the Tennessee Supreme Court has instructed:

When conducting the best interests analysis, courts must consider nine statutory factors listed in Tennessee Code Annotated section 36-1-113(i). These statutory factors are illustrative, not exclusive, and any party to the termination proceeding is free to offer proof of any other factor relevant to the best interests analysis. *In re Carrington H.*, 483 S.W.3d at 523 (citing *In re Audrey S.*, 182 S.W.3d 838, 878 (Tenn. Ct. App. 2005)). Facts considered in the best interests analysis must be proven by "a preponderance of the evidence, not by clear and convincing evidence." *In re Kaliyah S.*, 455 S.W.3d at 555 (citing *In re Audrey S.*, 182 S.W.3d at 861). "After making the underlying factual findings, the trial court should then consider the combined weight of those facts to determine whether they amount to clear and convincing evidence that termination is in the child's best interest[s]." *Id.* When considering these statutory factors, courts must remember that "[t]he child's best interests [are] viewed from the child's, rather than the parent's, perspective." *In re Audrey S.*, 182 S.W.3d at 878. Indeed, "[a] focus on the perspective of the child is the common theme" evident in all of the statutory factors. *Id.* "[W]hen the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child. . . ." Tenn. Code Ann. § 36-1-101(d) (2017).

Ascertaining a child's best interests involves more than a "rote examination" of the statutory factors. *In re Audrey S.*, 182 S.W.3d at 878. And the best interests analysis consists of more than tallying the number of statutory factors weighing in favor of or against termination. *White v. Moody*, 171 S.W.3d 187, 193-94 (Tenn. Ct. App. 2004). Rather, the facts and circumstances of each unique case dictate how weighty and relevant each statutory factor is in the context of the case. *See In re Audrey S.*, 182

S.W.3d at 878. Simply put, the best interests analysis is and must remain a factually intensive undertaking, so as to ensure that every parent receives individualized consideration before fundamental parental rights are terminated. *In re Carrington H.*, 483 S.W.3d at 523. “[D]epending upon the circumstances of a particular child and a particular parent, the consideration of one factor may very well dictate the outcome of the analysis.” *In re Audrey S.*, 182 S.W.3d at 878 (citing *White v. Moody*, 171 S.W.3d at 194). But this does not mean that a court is relieved of the obligation of considering all the factors and all the proof. Even if the circumstances of a particular case ultimately result in the court ascribing more weight—even outcome determinative weight—to a particular statutory factor, the court must consider all of the statutory factors, as well as any other relevant proof any party offers.

In re Gabriella D., 531 S.W.3d 662, 681-82 (Tenn. 2017).⁸

Father argues that the following factors establish that terminating his parental rights was not in the Child’s best interest:

1. Secure parental attachment (subsection D).
2. Whether a parent has maintained regular visitation with the child and used the visitation to cultivate a positive relationship with the child (subsection E).
3. Adjustment of circumstance, conduct, or conditions by the parent (subsection J).
4. Whether the parent has taken advantage of available programs, services, or community resources to assist in making a lasting adjustment of circumstances, conduct, or conditions (subsection K).
5. A sense of urgency in seeking custody of the child (subsection M).

The evidence related to these factors does not support Father’s contention.

Although it is undisputed that Father took full advantage of every opportunity for visitation with the Child, we cannot conclude that the evidence demonstrated that the Child had a secure parental attachment to Father. The Juvenile Court found that Father and the Child did not “have a secure and healthy parental attachment,” despite the fact that the Child was “friendly” with Father during visits and enjoyed her visits with Father. The Juvenile Court rightly found that this relationship did not compare to the parental

⁸ In *In re Gabriella D.*, a prior version of the best interest factors was in effect. However, we believe the Tennessee Supreme Court’s analysis applies to the amended version of Tenn. Code Ann. § 36-1-113(i), as well.

attachments that the Child had developed with her foster parents. The testimony at trial demonstrated that the Child viewed her foster mother and foster father as her parents. Ms. Antley testified that she had observed the Father's visits with the Child and concluded that the Child did not have a special bond with Father in the way that she had with her foster parents.

Regarding the other factors put forth by Father, the evidence supports the Juvenile Court's findings that Father failed to make a lasting adjustment of circumstance, conduct, or conditions and failed to act with urgency in seeking custody of the Child. At the time of trial, Father's circumstances were basically unchanged from his circumstances when the Child was placed in DCS custody. Father had not established a suitable home for the Child. Furthermore, the evidence established that Father did not act with urgency, particularly with respect to his illegal drug use. Although there was evidence that Father took advantage of some services, such as completing an alcohol and drug assessment, Father's efforts were undermined by his failure to be honest with Ms. Antley about his drug use. Father was not forthcoming to Ms. Antley about his illegal drug use and continued to test positive for THC as recently as the date of trial and cocaine as recently as two months prior to trial.

Father further argues that he "overcame numerous obstacles to achieving reunification", "maintained steady employment", and "stepped up to find housing." Nevertheless, the fact remains that Father did not have housing or employment at the time of trial and consistently tested positive for illegal drugs. Despite Father's best efforts, we emphasize that the "child's best interests must be viewed from the child's, rather than the parent's, perspective." *In re Audrey S.*, 182 S.W.3d 838, 878 (Tenn. Ct. App. 2005). Considering the Child's best interest, we, like the Juvenile Court, place great weight on the fact that Father had two years to establish suitable and stable housing and cease his use of marijuana and cocaine, yet did not do so.

Concerning other relevant factors, we conclude that the Juvenile Court correctly considered DCS's reasonable efforts in favor of termination of Father's parental rights. Ms. Antley testified that she provided Father a list of housing resources and attempted to help Father request rent assistance with DCS. She testified that DCS provided Father with an alcohol and drug assessment, psychosexual assessment, and parenting assessment. In addition, DCS provided regular supervised visitation for Father. In Ms. Antley's estimation, she offered Father "a lot of resources" and "tried to help out the best [she could] to help get him at a point to where we hoped reunification could be possible." However, Ms. Antley opined that given her experience with the case, she did not believe that Father had demonstrated an ability to provide the Child with a "long-term, stable home."

We also agree with the Juvenile Court's weighing of factors related to the Child's relationship with her foster family. The Court noted the following: (1) the Child could

“immediately be adopted by her foster parents who are the only parents the child has ever known”; (2) the Child was “in a foster home where she is loved and thriving”, the “only home the child has ever known”; (3) the Child was greatly bonded with her foster brother; (4) removal from her foster home would be “devastating” for the Child; and (5) although the Child was “friendly” with Father during visitation and enjoyed her visitation with him, the Child recognized her foster parents as her mother and father, having lived with them nearly her entire life. The evidence does not preponderate against these findings.

Although Father does not raise this as an issue, the GAL has conceded that the Juvenile Court incorrectly found that Father had failed to provide more than token financial support. Based upon our review of the record, we agree with the GAL that there was insufficient evidence related to Father’s payments of child support or lack thereof. We therefore conclude that the Juvenile Court incorrectly weighed this factor in favor of termination. However, such error is ultimately harmless given the many other factors that weigh in favor of the Juvenile Court’s decision to terminate Father’s parental rights.

Upon careful review of the record, we cannot conclude that the Child’s best interest is served by waiting in foster care while Father addresses his issues, particularly when he already had two years to find stable housing and stop using illegal drugs. We agree with the Juvenile Court that clear and convincing evidence established that termination of Father’s parental rights was in the Child’s best interest.

Conclusion

The judgment of the Juvenile Court is affirmed in part and reversed in part. We reverse the Juvenile Court’s finding of the grounds of abandonment by failure to provide a suitable home and persistence of conditions. We affirm the remainder of the Juvenile Court’s judgment, including the termination of Father’s parental rights. This cause is remanded to the Juvenile Court for collection of the costs below. The costs on appeal are assessed against the Appellant, Horace L., and his surety, if any.

D. MICHAEL SWINEY, CHIEF JUDGE