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IN THE SUPREME COURT OF TENESSEE
AT NASHVILLE
September 28, 2022 Session

IN RE MARKUS E.

Appeal by Permission from the Court of Appeals
Circuit Court for Davidson County
No. 16D2220 Philip E. Smith, Judge

No. M2019-01079-SC-R11-PT

In this appeal, we address the standards for severe child abuse as a ground for termination of parental rights. The statute defining severe child abuse includes "knowing" failure to protect a child from abuse or neglect likely to cause serious injury or death. Tenn. Code Ann. § 37-1-102(b)(22)(A)(i) (Supp. 2016). The statutes do not define "knowing." We hold that, for severe child abuse, a person's conduct is considered "knowing," and a person is deemed to "knowingly" act or fail to act, when he actually knows of relevant facts, circumstances or information, or when he is either in deliberate ignorance of or in reckless disregard of such facts, circumstances, or information presented to him. Under this standard, the relevant facts, circumstances, or information would alert a reasonable parent to take affirmative action to protect the child. For deliberate ignorance, a parent can be found to have acted knowingly when he has specific reason to know the relevant facts, circumstances, or information but deliberately ignores them. For reckless disregard, if the parent has been presented with the relevant facts, circumstances, or information and recklessly disregards them, the parent's failure to protect can be considered knowing. Here, the trial court terminated the parental rights of the parents of an infant who suffered over twenty rib fractures, in part for knowing failure to protect the child. The Court of Appeals affirmed. We reverse, holding under the particular circumstances of this case that the proof in the record does not clearly and convincingly show that the parents' failure to protect the child was "knowing."

Tenn. R. App. P. 11 Appeal by Permission; Judgment of the Court of Appeals Reversed; Remanded to the Circuit Court

HOLLY KIRBY, J., delivered the opinion of the court, in which ROGER A. PAGE, C.J., and SHARON G. LEE, JEFFREY S. BIVINS, JJ., joined and SARAH K. CAMPBELL, J., joined in part. SARAH K. CAMPBELL, J., filed a separate concurring opinion.

Nick Perenich (on appeal), Nashville, Tennessee; and Elijah Wilhoite (at trial), Nashville, Tennessee, for the appellant, Mark E.

Rebecca McKelvey Castañeda (on appeal), Nashville, Tennessee; Connie Reguli (on appeal to the Court of Appeals), Brentwood, Tennessee; and Lorraine Wade (at trial), Nashville, Tennessee, for the appellant, Nakesha M.

Jonathan Skrmetti, Attorney General and Reporter; Andrée Sophia Blumstein, Solicitor General; and Jordan K. Crews, Senior Assistant Attorney General, for the appellee, Tennessee Department of Children's Services.

David R. Grimmett (on appeal), Franklin, Tennessee; and Jerice Glanton (at trial), Antioch, Tennessee, guardian ad litem for the child, Markus E.

OPINION

FACTUAL AND PROCEDURAL HISTORY

Defendant/Appellant Mark E. ("Father") and Defendant/Appellant Nakesha M. ("Mother") are the parents of the child at issue in this appeal, Markus E.

On May 24, 2014, Markus was born premature at thirty-one weeks. At birth, he weighed only three pounds and four ounces. He suffered from neonatal Graves' disease, an inherited overactive thyroid condition that caused thrombocytopenia, that is, low platelets in his blood. Markus spent the first three weeks of his life in the neonatal intensive care unit at Vanderbilt Children's Hospital. After that, Father and Mother brought Markus home to live with them in Nashville.

In August 2014, when Markus was a bit over two months old, Mother worked a few days a week and alternating weekends as a psych technician at Middle Tennessee Mental Health Institution. Father worked two jobs, delivering supplies at Vanderbilt during the day and cleaning schools at night.

On days when both parents worked, Father typically dropped Markus off early in the morning at an in-home daycare operated by Carlithia P. ("Daycare Provider"). Markus's maternal grandmother, Nadine M. ("Grandmother"), often picked the child up from daycare and cared for him at her house until Mother picked him up. Thus, during his infancy, Markus had four regular caregivers: Mother, Father, Grandmother, and Daycare Provider.

During the same period, from roughly late July through the end of 2014, Mother took Markus to see several healthcare providers for various issues. In early August 2014, Mother took Markus to a hospital emergency room for an upper respiratory infection, and later that same month she brought him to a hospital emergency room for minor oral bleeding. She brought him to see a pediatric urologist for an inguinal hernia.[1] Mother also brought Markus to follow-up appointments with a pediatric endocrinologist to track his then-stabilized thyroid function.

At some point, the pediatric endocrinologist noticed abnormalities in Markus's skull and referred him to a pediatric plastic surgeon. In mid-September 2014, the plastic surgeon ordered a scan of Markus's head. The scan revealed chronic subdural hematomas, that is, bleeding in the protective layer surrounding his brain.[2] The radiologist thought the skull abnormalities could be related to the underlying hematomas. Regardless, the plastic surgeon told Mother and Father there was no need for more intervention.

On December 2, 2014, Mother took Markus to see a nurse practitioner for follow up from his premature birth. In that appointment, Mother reported that Markus had experienced heavy, labored breathing, congestion, irritability, and would sometimes not take his bottle. The nurse practitioner diagnosed another upper respiratory infection and encouraged Mother to work with their regular pediatrician to address the breathing and feeding issues. A week later, Mother brought Markus to another follow-up appointment with his pediatric endocrinologist, who indicated that the thyroid condition had resolved.

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[1] Relatively common among premature infants, an inguinal hernia occurs when part of the contents of the abdomen (typically fat or a portion of the small intestine) bulges through a weak portion of the abdominal wall in the groin area. *See Inguinal Hernia*, Nat'l Inst. of Diabetes and Digestive and Kidney Diseases, https://www.niddk.nih.gov/health-information/digestive-diseases/inguinal-hernia (last visited Apr. 26, 2023).

[2] This type of hematoma can be associated with childbirth, but the record does not indicate that Markus had such bleeding when he left the hospital.

On Christmas Eve and Christmas Day 2014, Father was out of town at a funeral. During the night on Christmas Eve, Markus woke up coughing and congested. Around 4:00 a.m. on Christmas Day, Mother took Markus to the Vanderbilt Hospital emergency room. The triage nurse confirmed he was moderately congested but said he was not in acute distress. The emergency room attending physician diagnosed Markus with another upper respiratory infection and discharged him.

On January 10, 2015, Mother took Markus to a walk-in clinic at TriStar Centennial Medical Center ("TriStar"). She reported he had been coughing for a couple of days.

To determine whether Markus had bronchitis, providers at TriStar did a chest x-ray. The x-ray revealed a rib fracture. The clinic staff recommended to Mother that she take Markus to Vanderbilt for further evaluation of the child's ribs, and she did.[3]

When Mother took Markus to Vanderbilt, providers there did an initial skeletal survey. This survey revealed nineteen rib fractures. Some of the fractures were acute and others were in various stages of healing.

Once Vanderbilt staff realized the child had multiple rib fractures, they contacted law enforcement and the Tennessee Department of Children's Services ("DCS"). Vanderbilt physicians admitted Markus to the hospital, and he remained at Vanderbilt for several weeks.

While Markus was at Vanderbilt, physicians did a follow-up skeletal survey. This survey showed twenty-two rib fractures. Vanderbilt physicians also took a closer look at the results of the scan done to look for skull abnormalities, four months earlier. The scan showed Markus had some fractured ribs at that time.

Because of these test results, Vanderbilt asked a child abuse specialist, Verena Brown, M.D., to review Markus's case. Dr. Brown first looked at whether there could be a medical cause for the many rib fractures. She ruled out a temporary or permanent bone

[3] TriStar records indicated their providers suspected the rib fracture they discovered was due to non-accidental trauma. The record does not indicate whether they informed Mother of this suspicion when they recommended further testing at Vanderbilt.

weakness, based on the child's past records and more recent testing. Specialists ruled out a bleeding disorder or thyroid issue as a possible cause of the rib fractures.

After eliminating any medical cause for the rib fractures, Dr. Brown concluded that Markus's rib fractures were inflicted injuries, the result of non-accidental trauma. She diagnosed him as an abused child.

Because of Dr. Brown's diagnosis, DCS reached an agreement with Mother and Father for the child's placement upon release from the hospital. They agreed Markus would be placed with Mother's brother and sister-in-law, i.e., the child's uncle and aunt.

While hospitalized, Markus continued to have respiratory problems; some required emergency intervention. Vanderbilt providers also diagnosed Markus with other health conditions, in addition to the rib fractures and subdural hematomas. These included a viral infection, laryngomalacia,[4] and enlarged adenoids that obstructed nearly ninety percent of his airway.

On January 26, 2015, Markus underwent surgery to remove his adenoids. Afterward, his breathing and feeding difficulties improved significantly. Four days later, Markus was discharged from the hospital.

As agreed, upon discharge, Markus was safety-placed with Mother's brother and sister-in-law. Five days later, they contacted DCS to ask them to place Markus elsewhere, citing Mother's hostility towards them and her refusal to abide by the placement rules.

DCS next placed Markus with Mother's aunt, Sherita M., where he remained for a little over two months. In April 2015, DCS received a report of a physical altercation between Mother's aunt and both Mother and Father. The report alleged that Markus sustained scratches on his face during the altercation.

[4] With laryngomalacia, the cartilage around a child's larynx, or voice box, is floppy or prone to collapsing inward when the child inhales. Laryngomalacia can make breathing noisy and labored. Typically, the condition resolves on its own over time. *See When Your Child Has Laryngomalacia*, Vanderbilt Health Encyclopedia, https://healthlibrary.vanderbilthealth.com/Library/Encyclopedia/3,89835 (last visited May 2, 2023).

As a result, DCS took custody of Markus, then around eleven months old, and placed him in a foster home. During the ensuing year, DCS moved Markus to another foster home.

Meanwhile, in June 2015, DCS entered into the first of three permanency plans with Mother and Father, with the stated goal of returning Markus to their care. The plan required both parents to participate in regular visitation, obtain parenting assessments and go to parenting classes as recommended, obtain mental health assessments and follow related recommendations, and to use anger management/coping skills resources. The record does not include documentation on whether Mother and Father completed the plan requirements, although it is undisputed that they participated in regular visitation.

In September 2015, the Juvenile Court for Davidson County ("juvenile court") adjudicated Markus to be a dependent and neglected child.[5] The record does not contain the evidence presented to the juvenile court, but it includes the juvenile court's orders on its findings.

The juvenile court order recounts testimony by Dr. Brown from Vanderbilt, explaining her decision to rule out any underlying medical condition as a cause for Markus's rib fractures and her conclusion that they resulted from non-accidental physical abuse. She opined that this type of rib fracture is typically inflicted by compression, that is, squeezing the child. The order recites Dr. Brown's testimony pointing out that Markus was also diagnosed with chronic subdural hematomas; these were "concerning for inflicted brain trauma," but she could not say definitely that they resulted from abuse. The juvenile

[5] The juvenile court cited the statutory definition of dependency and neglect, which provided, "'Dependent and neglected child' means a child: . . . [w]ho is suffering from abuse or neglect." Tenn. Code Ann. § 37-1-102(b)(12)(G) (2014) (current version at Tenn. Code Ann. § 37-1-102(b)(13)(G) (Supp. 2022)). The statute further stated:

> "Abuse" exists when a person under the age of eighteen (18) is suffering from, has sustained, or may be in immediate danger of suffering from or sustaining a wound, injury, disability or physical or mental condition caused by brutality, neglect or other actions or inactions of a parent, relative, guardian, or caretaker.

Tenn. Code Ann. § 37-1-102(b)(1) (2014).

court's order comments that "[i]nfants do not simply spontaneously fracture twenty two ribs."

The juvenile court order finds Markus to be a dependent and neglected child. The order notes that this finding focuses on the status of the child and does not require the court to determine who inflicted the abuse or neglect. However, by statute, a finding of dependency and neglect requires the court to go further and determine whether the parents committed "severe child abuse." Tenn. Code Ann. § 37-1-129(a)(2) (2014) (current version at Tenn. Code Ann. § 37-1-129(b)(2) (Supp. 2022)).[6]

In looking at that issue, the juvenile court order alludes to testimony by both parents and Grandmother describing a "crackling sound" coming from Markus's rib area. The juvenile court characterized this testimony as "preposterous and contrived" and saw it as "an attempt to cover up" the actual cause of the rib fractures. The juvenile court order concludes that Markus was a victim of severe child abuse, as defined by Tennessee Code Annotated section 37-1-102(b)(21) (2014).[7] The order finds that the perpetrator was either

[6] "If the petition alleged the child was dependent and neglected as defined in § 37-1-102(b)(12)(G), or if the court so finds regardless of the grounds alleged in the petition, the court shall determine whether the parents or either of them or another person who had custody of the child committed severe child abuse." Tenn. Code Ann. § 37-1-129(a)(2) (2014) (current version at Tenn. Code Ann § 37-1-129(b)(2) (Supp. 2022)).

[7] After the dependency and neglect proceeding, but before the termination petition was filed in this case, the referenced definition of severe child abuse was renumbered to appear at Tennessee Code Annotated section 37-1-102(b)(22) (Supp. 2016). Because that provision was in effect at the time the petition in this case was filed, we use that citation in this opinion. *Cf. In re Braxton M.*, 531 S.W.3d 708, 732 (Tenn. Ct. App. 2017) (referring to the version of the parental termination statute in effect at the time of a petition's filing). Effective July 1, 2018, the provision was renumbered again and now appears at Tennessee Code Annotated section 37-1-102(b)(27) (Supp. 2022). Apart from the different number, the following definition is identical in all three versions of the statute:

> "Severe child abuse" means:
>
> (A)(i) The knowing exposure of a child to or the knowing failure to protect a child from abuse or neglect that is likely to cause serious bodily injury or death and the knowing use of force on a child that is likely to cause serious bodily injury or death.
>
> (ii) "Serious bodily injury" shall have the same meaning given in § 39-15-402(d).

Mother or Father, and that one parent willfully failed to protect Markus from the abuse of the other parent.

Both parents sought a de novo appeal of the juvenile court's findings to the Circuit Court for Davidson County.[8] The appeal was assigned to Judge Phillip Robinson.

In April 2016, when Markus was twenty-three months old, he moved to the home of foster parent Anne B. ("Foster Mother"). That is where he has lived during the rest of these proceedings.

Also in April 2016, DCS entered into a revised permanency plan with Mother and Father. The plan maintained a goal of reunifying Markus with the parents, but given the juvenile court's finding of severe abuse and the time the child had been in State custody, it added adoption as an alternate goal. The other requirements of the plan were unchanged from the previous version.

On August 5, 2016, while the appeal of the dependency and neglect order was pending before Judge Robinson, DCS filed in the juvenile court a petition to terminate the parental rights of both Mother and Father. The petition alleged three grounds as to both parents: substantial noncompliance with the permanency plan, persistence of conditions, and severe child abuse.

About a month later, on September 6, 2016, Grandmother filed a petition to terminate Mother and Father's parental rights. Her petition sought full guardianship or, in the alternative, adoption. Grandmother's petition was filed in the Circuit Court for Davidson County, and the case was assigned to Judge Philip Smith.

Tenn. Code Ann. § 37-1-102(b)(22)(A).

As used here, "serious bodily injury" includes "a fracture of any bone." Tenn. Code Ann. § 39-15-402(d) (Supp. 2016).

[8] "Any appeal from any final order or judgment in an unruly child proceeding or dependent and neglect proceeding, filed under this chapter, may be made to the circuit court that shall hear the testimony of witnesses and try the case de novo." Tenn. Code Ann. § 37-1-159(a) (2014 & Supp. 2022).

On November 23, 2016, the juvenile court transferred the DCS termination proceeding to Judge Smith. On January 4, 2017, Judge Robinson transferred the dependency and neglect proceeding to Judge Smith. He also ordered the dependency and neglect appeal to be consolidated with the DCS termination proceeding and Grandmother's companion adoption case, in Judge Smith's court. Thus, all of the related pending proceedings surrounding Markus ended up before Judge Smith (hereinafter "trial court").

On March 31, 2017, DCS entered into a third permanency plan with Mother and Father. Other than references to the pending termination petition, the third parenting plan was like the second.

In May 2017, the trial court undertook the trial on DCS's petition to terminate both parents' parental rights.[9] The trial took place over seventeen non-consecutive days between May 16, 2017 and September 17, 2018.

The trial court heard in-person testimony from several witnesses, including Mother, Father, Grandmother, Daycare Provider, Sherita M. (Mother's aunt), Mother's grandfather, Foster Mother, various DCS employees, and the investigating detective for the Metropolitan Nashville Police Department. Neither side presented in-court medical testimony during the trial. Instead, the parties offered expert testimony by deposition and entered many of Markus's medical records into evidence.

All of the child's caretakers—Mother, Father, Grandmother, and Daycare Provider—testified that they neither injured Markus nor saw any sign he had been harmed. None knew of any accident that could have caused the rib fractures.

In support of its allegation of severe child abuse, DCS relied on the July 13, 2015 deposition of Dr. Brown, a member of Vanderbilt's Child Abuse Response and Evaluation team who is board-certified in child abuse pediatrics. Dr. Brown testified that she treated Markus in January 2015. In her treatment and to prepare for her deposition, Dr. Brown reviewed the child's past medical records from Vanderbilt. She did not review records from providers outside Vanderbilt.

[9]The trial court noted that Grandmother's petition did not satisfy statutory requirements. Grandmother testified she did not actually want the parents' rights terminated; she filed her petition because she wanted to prevent Markus from being adopted by someone else, including Foster Mother.

Dr. Brown testified that she initially had three main concerns about Markus. First, his low growth and developmental issues gave rise to concern about nutritional neglect. Second, the subdural hematomas caused concern about child abuse. Third, the rib fractures were a separate cause for concern about child abuse.

Addressing the first issue, Dr. Brown testified that the fact that Markus's feeding, growth, and development all improved significantly after his adenoid surgery let her rule out nutritional neglect. As to the second concern, Dr. Brown noted that subdural hematomas can be "highly associated with abusive trauma," so the fact that Markus had hematomas was "concerning for somebody hurting him and hurting his brain." However, based on the age and nature of the hematomas, she could not definitively conclude they were caused by abuse.

Dr. Brown then testified at length about her evaluation of Markus's rib fractures. At first, she ruled out any medical cause for the fractures. To do so, she first reviewed the records from Markus's premature birth and conducted further testing. From this, Dr. Brown determined that he had no condition that would cause temporary or permanent bone weakness. She then consulted a hematologist, who ruled out any bleeding disorder. Finally, she reviewed a consult by an endocrinologist who determined that Markus's thyroid issues had nothing to do with his rib fractures.

Dr. Brown then looked at when the fractures occurred. She acknowledged at the outset that dating fractures is "[d]efinitely not an exact science." In explaining the process of arriving at her opinion, Dr. Brown noted that rib fractures in infants typically begin to heal within seven to fourteen days. As they heal, there is noticeable callus formation in the area of the healing bone that is noticeable on an x-ray. When rib fractures are very new, however, they can be "subtle and hard to see." The callus that forms around the injury as the ribs are healing remains visible on x-rays until finally the bone heals completely.

From her review of Markus's medical records, Dr. Brown believed some of the rib fractures were acute, likely less than a week old, when they were discovered in the first x-rays taken at Vanderbilt after the referral from TriStar. The other fractures seemed to be in a later stage of healing and were likely older. Overall, Dr. Brown did not specify the period during which each of the twenty-two rib fractures occurred, but she opined that they were inflicted over time on at least two occasions.

As to how they were inflicted, Dr. Brown testified that rib fractures in infants are typically caused by compression, or squeezing. She commented that it is actually harder to fracture the ribs of an infant than those of an adult. The amount of squeezing force involved to fracture an infant's ribs, she said, would be outside the realm of normal parenting. Other than by squeezing, rib fractures could be inflicted if an adult were to "pounce on a kid's chest, you can punch a kid in the chest." Regardless of the method, she emphasized: "What we do know is that it takes a whole lot of force. I think somebody mentioned, you know, a TV falling on a kid's chest, that sort of thing."

Dr. Brown described how an infant with rib fractures would appear to caregivers. She noted that rib fractures are not necessarily accompanied by external bruising or other observable body damage. The only external indications of rib fractures in a preverbal infant would be crying, fussiness, and perhaps difficulty breathing when the fractures are in the acute stage. Dr. Brown noted that caregivers might not be able to tell the child's fussiness was attributable to rib fractures.

To counter Dr. Brown's expert testimony, Mother and Father offered deposition testimony from Jeffrey Bomze, M.D., a practicing pediatrician for over thirty years.

After reviewing the child's medical records from Vanderbilt and other providers, Dr. Bomze conceded that it was "more than likely" that Markus's rib fractures were caused by non-accidental trauma. He agreed with Dr. Brown that the records did not provide a medical explanation for Markus's rib fractures. Dr. Bomze cautioned, however, that the child's complex medical history "raise[d] suspicion in [his] mind" that the fractures could be explained by some other medical condition not yet diagnosed.

Dr. Bomze pointed out possible discrepancies between Markus's first skeletal survey, taken on January 10, 2015, and the second survey, taken on January 30, 2015. He noted that two or three rib fractures identified in the second skeletal survey were not seen in the first. Dr. Bomze acknowledged that the films from the two skeletal surveys were reviewed by two different radiologists, but he said it was possible that the fractures seen in the second skeletal survey occurred while Markus was hospitalized and not in the care of Mother and Father. Dr. Bomze also noted that Markus had no obvious bruises or injuries.

In addition to the expert testimony, the trial court heard testimony from Mother, Father, and other lay witnesses. Mother and Father were both adamant they never abused Markus, and neither believed that the other parent had done so.

Mother went further and testified that she did not believe Markus's rib fractures were inflicted. Instead, she believed the fractures resulted from some other medical condition, pointing out that Markus had many. Mother testified that, between August 2014 and January 2015, she took Markus to see various doctors on over thirty occasions.[10]

To support her assertion that the rib fractures were caused by a medical condition, Mother testified about the "crackling" sound mentioned in the juvenile court's order. She said that, on more than one occasion, she had heard an audible crackling coming from the area of Markus's ribs. The sound was distinct from the "heavy breathing" and congestion she associated with the child's respiratory issues. According to Mother, when she mentioned the crackling ribs to Markus's healthcare providers, she was told nothing was wrong and the sound was related to Markus being born premature.[11]

Father testified along the same lines. He recalled one occasion when Mother called him at work to tell him about the crackling sound in Markus's rib area. In addition, Father maintained that he heard the crackling sound on at least three occasions. He said Mother took Markus to a physician about the unusual sound and she reported to him afterward that the doctor had dismissed the sound as related to Markus's premature birth.

Both Grandmother and Daycare Provider testified. Both denied any abuse of Markus. None of the witnesses expressed any belief or suspicion that either Grandmother or Daycare Provider had abused the child.

A Nashville police detective who investigated the report of child abuse testified that, after his investigation, he excluded as suspects all persons other than Mother and Father. The officer reasoned that Daycare Provider and other adults had only limited access to Markus during the period in which the fractures likely occurred, and no one observed any

[10] DCS pointed to a lack of documentary support for this assertion.

[11] Markus's medical records do not refer to a "crackling" sound coming from his ribs. The records do, however, describe the child's respiration or breathing sounds as "coarse" or "crackling."

symptoms or changes in behavior after Markus had been at daycare. The officer noted that neither Mother nor Father believed that either Grandmother or Daycare Provider had abused Markus.

The trial court also heard testimony on DCS's contention that Mother's and Father's parental rights should be terminated on the ground of substantial noncompliance with the permanency plans. Both Mother and Father testified that they completed all of the requirements in the plan, as directed. A service provider for DCS testified that both parents completed the parenting plan requirements as to parenting skills and anger management, and that they engaged in regular visitation with the child. However, the parenting plan also required both parents to obtain mental health assessments and follow the recommendations. That requirement was a source of controversy at trial.

Both parents testified that they had difficulty getting their mental health assessments. The provider DCS first recommended refused to accommodate them without a court order, and other options proved too expensive. Eventually, in August 2016, Mother obtained her mental health assessment.

Reportedly, in September 2016, Mother's attorney emailed Mother's mental health assessment to the assigned DCS caseworker. The DCS caseworker, however, said she did not recall receiving either the email or the attached assessment.

On May 11, 2017, five days before the trial began, Mother's counsel filed a copy of her mental health assessment under seal. But Mother's attorney neglected to share the assessment with opposing counsel as part of the pre-trial exchange of potential exhibits required under the trial court's local rule.[12] The DCS caseworker acknowledged that she received Mother's assessment after the trial started. Nevertheless, on the first day of the trial, the trial court excluded Mother's mental health assessment from evidence because Mother's attorney had not complied with the local rule.

In October 2016, Father obtained his mental health assessment from the same provider as Mother, but neither he nor his trial attorney obtained a copy of the assessment until after the trial was underway. Father's counsel provided a copy to DCS and the

[12] Davidson County Local Rule section 29.01 requires opposing counsel to meet or hold a telephone conference at least 72 hours prior to trial "to make available for viewing and to discuss proposed exhibits."

guardian ad litem the day he received it. The trial court admitted Father's mental health assessment into evidence as an exhibit.

On May 30, 2019, the trial court issued a seventy-three-page order on DCS's petition to terminate parental rights. The order concluded that DCS had carried its burden of proof and granted the petition as to both parents.

The trial court's order first addressed the ground of severe abuse.[13] At the outset, the trial court strongly credited Dr. Brown's testimony and found that Markus's rib fractures were non-accidental injuries caused by abuse. The trial court noted that even Dr. Bomze, the parents' expert witness, did not seriously contradict Dr. Brown's conclusion. The trial court commented that the record had "not a scintilla of proof" that Markus's rib fractures were caused by an undiagnosed medical condition, only Dr. Bomze's unsupported suspicion. The trial court noted that neither Mother nor Father questioned the care provided by any other caregiver.

The trial court found that Mother was not a credible witness. It found "many inconsistencies" between Mother's testimony during the trial and her past juvenile court testimony, and concluded that "some of the statements that [Mother] made were mistruths." Overall, the trial court gave "very little weight" to her testimony.

Father fared little better. The trial court found Father "slightly more credible" than Mother. It noted "some inconsistencies" in his testimony and found he exercised "very poor judgment." The trial court said it gave "slightly more weight" to Father's testimony than it gave to Mother's.

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[13] This statutory ground for termination of parental rights states:

> The parent or guardian has been found to have committed severe child abuse as defined in § 37-1-102, under any prior order of a court or is found by the court hearing the petition to terminate parental rights or the petition for adoption to have committed severe child abuse against the child . . . .

Tenn. Code Ann. § 36-1-113(g)(4) (Supp. 2016).

Using strong language similar to that in the juvenile court's order, the trial judge took particular aim at Mother's and Father's testimony about a "crackling sound" in the area of Markus's ribs:

> The Court simply does not believe this testimony. This Court has no serious or substantial doubt that this was simply a cover story created to cover up the true cause or causes of the horrific injuries inflicted on this seven month old child. The Court finds that [Mother] and [Father] are complicit in this attempted cover up.

Based on this finding, the trial court concluded that one or both of the parents must have inflicted the abuse that caused the rib fractures, and that DCS had proven by clear and convincing evidence that Markus suffered "severe child abuse" at the hands of both parents. Thus, it held that DCS had proven the "severe abuse" ground for termination of the parental rights of both Mother and Father.

The trial court next discussed the ground of persistence of conditions.[14] Although it found that one prong of the statutory test had been proven, that Markus could not be

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[14] This ground for termination states:

> 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:
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> (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.

Tenn. Code Ann. § 36-1-113 (g)(3)(A) (2021).

safely returned to the parents' care, it concluded that DCS did not prove the overall ground for termination by clear and convincing evidence as to either parent.[15]

The trial court then addressed the ground of substantial noncompliance with the permanency plans.[16] The trial court found that both parents engaged in regular appropriate visitation and both completed the parenting and anger management requirements in the parenting plan. As to the parenting plan requirement for a mental health assessment, the trial court acknowledged that its decision to exclude Mother's mental health assessment from the evidence was based on noncompliance with a local rule. Still, it emphasized that, under all three parenting plans, Mother repeatedly failed to submit her assessment to either DCS or the guardian *ad litem*. The trial court weighed the mental health assessment more heavily than the other plan requirements, and it characterized Mother's later attempts to complete it as "too little too late."

Because it considered the mental health assessment an "essential" requirement of the parenting plans, the trial court found that Mother's failure to complete the assessment amounted to substantial noncompliance with all three parenting plans. On this basis, it concluded that DCS had established the ground of substantial noncompliance for termination of Mother's parental rights.

Without more explanation, the trial court denied DCS's petition on the ground of substantial noncompliance as to Father.

Having found grounds for termination of the parental rights of both parents, the trial court addressed the second prong, whether termination of parental rights was in the best interest of the child. Tenn. Code Ann. § 36-1-113 (c)(2) (Supp. 2016 & 2021). The trial court noted that Markus was removed from the custody of the parents when he was seven months old. Although both Mother and Father had engaged in regular visitation with

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[15] Neither DCS nor the guardian *ad litem* disputed this conclusion in the Court of Appeals, and it is not at issue in this appeal.

[16] This ground states:

> There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan pursuant to title 37, chapter 2, part 4.

Tenn. Code Ann. § 36-1-113 (g)(2) (2021).

Markus over the three years he was in foster care, the trial court credited Foster Mother's testimony that Markus was unsettled and often angry after the visits. It relied in particular on the potential impact of removing Markus from Foster Mother's care:

> Markus would be removed from the place he knows as home. He would be removed from people that he loves and knows as his family. The Court finds that to remove Markus from [Foster Mother's] home would be catastrophic to his emotional, psychological, and medical conditions.

For these reasons, the trial court found by clear and convincing evidence that termination of parental rights as to both Father and Mother was in Markus's best interest.

Finding both prongs of the statute met, the trial court terminated the parental rights of both Mother and Father.

Both parents appealed the trial court's decision to the Court of Appeals. While the appeal was pending, the intermediate appellate court remanded the case to the trial court several times, to clarify the procedural status for appeal.[17]

Finally, on November 30, 2021, after the remands were resolved and nearly two and a half years after the parents filed their appeal, the Court of Appeals affirmed the trial court's judgment. *In re Markus E.*, No. M2019-01079-COA-R3-PT, 2021 WL 5571818 (Tenn. Ct. App. Nov. 30, 2021), *perm. app. granted* (Tenn. Mar. 23, 2022).

The Court of Appeals found clear and convincing evidence to support the ground of severe child abuse as to both parents. *Id.* at *8. In affirming the trial court's finding, the Court of Appeals emphasized that "[i]dentifying which parent actually applied the force necessary to fracture the child's ribs is not necessary when the facts show, at a minimum, that each parent should have recognized that abuse was occurring." *Id.* (citing *In re E.Z.*,

[17] Mother argued that the trial court's order was not yet final because it did not resolve the de novo appeal of the dependency and neglect proceeding. The Court of Appeals agreed and entered a remand order instructing the trial court to undo the consolidation with the dependency and neglect proceeding, thereby clearing the way for review of the trial court's parental termination order. The Court of Appeals observed that it was inadvisable for the trial court to consolidate the termination of parental rights proceeding with the dependency and neglect proceeding. *See In re M.J.B.*, 140 S.W.3d 643, 651 (Tenn. Ct. App. 2004) (discussing differences between the two proceedings).

E2018-00930-COA-R3-JV, 2019 WL 1380110, at *18 (Tenn. Ct. App. Mar. 26, 2019)). The Court of Appeals also found clear and convincing evidence in the record to support the ground of substantial noncompliance with the permanency plan as to Mother. *Id.* at *7. Finally, the Court of Appeals concluded there was clear and convincing evidence to support the trial court's best-interest determination. *Id.* at *11.

Father sought permission to appeal to this Court, and his application for permission to appeal was adopted and joined by Mother. Both petitions were granted. Father's application raised only one issue: whether Father committed severe abuse against Markus or failed to protect Markus from severe abuse.[18]

Under Tennessee Rule of Appellate Procedure 13(b),[19] we directed the parties to also address these issues: (1) whether the evidence supports the two grounds for termination of parental rights as to the mother; and (2) whether the termination proceeding was fundamentally fair, particularly as to the mother based on the exclusion of her mental health assessment.

After the Court granted permission to appeal to both parents, we appointed Rebecca McKelvey Castañeda as counsel on appeal for Mother.[20]

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[18] Although "separate applications for permission to appeal are not required," Tenn. R. App. P. 13(a), we note that Mother failed to specify issues for which she sought review. We strongly encourage parties who wish to raise additional issues in response to an application to list those issues as "questions presented for review." *See* Tenn. R. App. P. 11(b).

[19] Rule 13(b) states:

> Review generally will extend only to those issues presented for review. The appellate court shall also consider whether the trial and appellate court[s] have jurisdiction over the subject matter, whether or not presented for review, and may in its discretion consider other issues in order, among other reasons: (1) to prevent needless litigation, (2) to prevent injury to the interests of the public, and (3) to prevent prejudice to the judicial process.

Tenn. R. App. P. 13(b).

[20] The Court is grateful to Ms. Castañeda, of the law firm of Stites and Harbison, PLLC, for her service in representing Mother in this appeal.

ANALYSIS

Parents have a fundamental right to the care, custody, and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 651–52 (1972); *In re D.A.H.*, 142 S.W.3d 267, 274 (Tenn. 2004). The United States Supreme Court recognizes that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). "The Tennessee Constitution also gives parents a right of privacy to care for their children without unwarranted state intervention unless there is a substantial danger of harm to the child."[21] *In re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010) (citing *In re Swanson*, 2 S.W.3d 180, 187 (Tenn. 1999)).

The right of a biological parent to the care and custody of his or her child is among the oldest of the judicially recognized liberty interests protected by the federal and state constitutions. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *In re Carrington H.*, 483 S.W.3d 507, 521 (Tenn. 2016); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007); *Hawk v. Hawk*, 855 S.W.2d 573, 578–79 (Tenn. 1993). A parent's right to raise his or her own children is "far more precious than any property right." *In re Carrington H.*, 483 S.W.3d at 522 (quoting *Santosky*, 455 U.S. at 758–59).

While a parent's right is fundamental and superior to the claims of other persons, it is not absolute. *In re Isaiah L.*, 340 S.W.3d 692, 704 (Tenn. Ct. App. 2010). "It continues without interruption only so long as the parent has not relinquished it, abandoned it, or engaged in conduct requiring its limitation or termination." *Id.*; *see also Hawk*, 855 S.W.2d at 580.

No civil action carries graver consequences than a petition to sever family ties irretrievably and forever. *In re Kaliyah S.*, 455 S.W.3d 533, 556 (Tenn. 2015); *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 118–19 (1996); *In re Knott*, 197 S.W. 1097, 1098 (Tenn.

[21] This Court in *In re Angela E.* noted that parents' right of privacy to care for their children "is grounded in article I, section 8 of our state's constitution, which reads 'That 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.'" *In re Angela E.*, 303 S.W.3d at 250, n. 12 (quoting Tenn. Const. art. I, § 8).

1917). "Termination of a person's rights as a parent is a grave and final decision, irrevocably altering the lives of the parent and child involved and 'severing forever all legal rights and obligations' of the parent." *Means v. Ashby*, 130 S.W.3d 48, 54 (Tenn. Ct. App. 2003) (first quoting *Brown v. Rogers*, No. M2000-01277-COA-R3-CV, 2001 WL 92083, at *2 (Tenn. Ct. App. Feb. 5, 2001); then quoting Tenn. Code Ann. § 36-1-113(*l*)(1)).

I. Statutory Framework

In Tennessee, proceedings to terminate parental rights are governed by statute. *In re Kaliyah S.*, 455 S.W.3d at 541; *see Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004). Under Tennessee Code Annotated section 36–1–113(c), to obtain termination of parental rights, a petitioner must prove two elements: (1) one ground for termination, and (2) that termination of parental rights is in the child's best interest. Tenn. Code Ann. § 36-1-113(c); *In re Kaliyah S.*, 455 S.W.3d at 552. The available grounds for termination are listed in Tennessee Code Annotated section 36-1-113(g) and include, pertinent to this appeal, severe abuse and noncompliance with a DCS permanency plan. *See* Tenn. Code Ann. § 36-1-113(g)(2), (4).

Adjudication of a petition to terminate parental rights proceeds in two stages. First, the petitioner must establish at least one of the grounds for termination listed in Tennessee Code Annotated section 36-1-113(g). "If the petitioner establishes grounds for termination, only then does the court determine whether termination is in the best interests of the child." *In re Angela E.*, 303 S.W.3d at 251. In other words:

> The threshold issue in every termination case is whether the parent whose rights are at stake has engaged in conduct that constitutes one of the grounds for termination of parental rights in Tenn. Code Ann. § 36-1-113(g). If the answer is "yes," the trial court must then determine whether the child's interests will be best served by terminating the parent's parental rights. If the answer is "no," the court should proceed no further and should dismiss the termination petition.

In re Adoption of Kleshinski, No. M2004-00986-COA-R3-CV, 2005 WL 1046796, at *16 (Tenn. Ct. App. May 4, 2005) (quoting *In re Adoption of Muir*, No. M2002-02963-COA-R3-CV, 2003 WL 22794524, at *3 (Tenn. Ct. App. Nov. 25, 2003)).

In the proceedings, "[t]he party petitioning for termination carries the burden of making both of these showings." *In re Angela E.*, 303 S.W.3d at 250. This ensures 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.'" *Id.* (quoting *In re Swanson*, 2 S.W.3d at 188).

In this appeal, both Mother and Father argue that the trial court erred in finding that DCS proved both elements. We begin by discussing the standard of review, and then review the evidence of the statutory grounds of termination found by the trial court, namely severe child abuse by both parents, and substantial noncompliance with a permanency plan by Mother.

II. Standard of Review

Because of the profound consequences of a decision to terminate parental rights, a petitioner must prove both elements of termination by clear and convincing evidence. *See* Tenn. Code Ann. § 36-1-113(c)(1); *Santosky*, 455 U.S. at 747–48; *In re Kaliyah S.*, 455 S.W.3d at 552. The heightened burden of proof minimizes the risk of an erroneous decision. *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010).

The clear and convincing evidence standard eliminates any "serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002) (quoting *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992)). Clear and convincing evidence must produce a firm belief or conviction in the fact finder's mind about the truth of the facts to be established. *In re Justice A.F.*, No. W2011-02520-COA-R3-PT, 2012 WL 4340709, at *6 (Tenn. Ct. App. Sept. 24, 2012); *Ray v. Ray*, 83 S.W.3d 726, 733 (Tenn. Ct. App. 2001).

Our Court of Appeals has explained that trial courts apply this standard in a two-step process, distinguishing between the individual underlying facts and the aggregate of those facts:

> Under the clear and convincing evidence standard, it is important to distinguish between the specific facts found by the trial court and the combined weight of those facts. Each specific underlying fact need only be

> established by a preponderance of the evidence. Such specific underlying facts include whether a particular injury suffered by the child was the result of nonaccidental trauma, and whether the caregiver's conduct with respect to the injury was "knowing." Once these specific underlying facts are established by a preponderance of the evidence, the court must step back to look at the combined weight of all of those facts, to see if they clearly and convincingly show severe child abuse.

In re S.J., 387 S.W.3d 576, 591–92 (Tenn. Ct. App. 2012) (internal citations and some quotation marks omitted).

After the trial court finds the individual underlying facts by a preponderance of the evidence, it then considers whether "the combined weight of those facts . . . amount[s] to clear and convincing evidence." *In re Kaliyah S.*, 455 S.W.3d at 555–56 (citing *In re Adoption of Kleshinski*, 2005 WL 1046796, at *17).

To review trial court decisions, appellate courts use a similar two-step process, to accommodate both Rule 13(d) of the Tennessee Rules of Appellate Procedure and the statutory clear and convincing standard. First, appellate courts review each of the trial court's specific factual findings de novo under Rule 13(d), presuming each finding to be correct unless the evidence preponderates against it. *In re Taylor B.W.*, 397 S.W.3d 105, 112 (Tenn. 2013); *In re Justice A.F.*, 2012 WL 4340709, at *7. When a trial court's factual finding is based on its assessment of a witness's credibility, appellate courts afford great weight to that determination and will not reverse it absent clear evidence to the contrary. *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002); *In re Justice A.F.*, 2012 WL 4340709, at *7 (citing *In re M.L.D.*, 182 S.W.3d 890, 894 (Tenn. Ct. App. 2005)).

Second, appellate courts determine whether the combination of all of the individual underlying facts, in the aggregate, constitutes clear and convincing evidence. *In re Taylor B.W.*, 397 S.W.3d at 112; *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005); *In re Justice A.F.*, 2012 WL 4340709, at *7. Whether the aggregate of the individual facts, either as found by the trial court or supported by a preponderance of the evidence, amounts to clear and convincing evidence is a question of law, subject to de novo review with no presumption of correctness. *See In re M.L.P.*, 281 S.W.3d 387, 393 (Tenn. 2009); *see also In re Samaria S.*, 347 S.W.3d 188, 200 (Tenn. Ct. App. 2011). As usual, the appellate

court reviews all other conclusions of law de novo with no presumption of correctness. *In re Angela E.*, 303 S.W.3d at 246.

As an initial matter, Father and Mother urge us to revisit the standard for trial courts in termination of parental rights cases, as well as the standard of review for appellate courts. They suggest that the current standards are insufficiently protective of parental rights.

Specifically, Father contends that allowing trial courts to find individual underlying facts by a preponderance of the evidence is inconsistent with the clear and convincing standard required by the statute. In the same vein, he argues that appellate courts should review whether each underlying fact is supported by clear and convincing evidence.[22]

In response, DCS and the Guardian *ad litem* argue that no change to the current standard of review is needed. Emphasizing that appellate courts are situated differently from trial courts, DCS and the Guardian *ad litem* warn that applying the clear and convincing standard to the individual underlying facts "could force the appellate courts to become finders of fact," the job with which trial courts are tasked.

After careful consideration, we agree with DCS and the Guardian *ad litem*. In doing so, we rely on the language of the governing statute, which states that termination of parental rights must be based on "[a] finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and [t]hat termination of the parent's or guardian's rights is in the best interests of the child." Tenn. Code Ann. § 36-1-113(c). The statute does not say the individual underlying facts must be established by clear and convincing evidence; rather, it says the overall elements—grounds and best interest—must be established by clear and convincing evidence.[23]

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[22] In arguing for these proposed revisions, Father and Mother urge adoption of the standard advocated by Court of Appeals Judge William Cain in his concurring opinion in *In re Z.J.S.*, No. M2002-02235-COA-R3-JV, 2003 WL 21266854, at *18 (Tenn. Ct. App. June 3, 2003) (Cain, J., concurring). Judge Cain reasoned: "It is the *fact* that must be proven by the heightened standard of proof, not the conclusions to be drawn from such fact." *Id.* (emphasis in original). Then-Judge Koch responded for the majority on the same case, pointing out that the Tennessee Supreme Court had long distinguished between individual underlying facts and the combined weight of those facts at both the trial and appellate levels. *Id.* at *10 n.23 (citing *In re Valentine*, 79 S.W.3d at 548–49).

[23] The standard advocated by Father and Mother in this case does not adequately recognize the myriad of individual underlying facts that often go into the ultimate determination of whether a particular

Moreover, contrary to the implication in Father's brief, our research suggests that Tennessee's existing standard of appellate review is *more* stringent than the standard used in termination cases in many other states, not less.[24] We respectfully decline to change the standards for trial courts or appellate courts in cases involving termination of parental rights.

III. Severe Child Abuse

The trial court determined that DCS proved the statutory ground of severe child abuse as to both Mother and Father by clear and convincing evidence. On appeal, both parents contest that finding.[25]

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ground for termination, or the best interest of the child, has been established. *See, e.g.*, *In re Carrington H.*, 483 S.W.3d at 515–20 (describing proof at trial on grounds); *In re Adoption of AMH*, No. W2004-01225-COA-R3-PT, 2005 WL 3132353, at *1–25 (Tenn. Ct. App. Nov. 23, 2005) (describing proof at trial on grounds), *rev'd sub nom. In re Adoption of A.M.H.*, 215 S.W.3d 793 (Tenn. 2007); *In re Justice A.F.*, 2012 WL 4340709, at *3–5 (describing proof at trial on best interest).

[24] A number of states use standards of appellate review for cases involving termination of parental rights such as abuse of discretion, plain error, or other similarly deferential standards. *See*, *e.g.*, *Earls v. Ark. Dep't. of Hum. Servs.*, 544 S.W.3d 543, 548 (Ark. 2018) ("The question on appeal is whether the circuit court's finding that a disputed fact was proved by clear and convincing evidence is clearly erroneous, giving due regard to the opportunity of the circuit court to judge the credibility of the witnesses."); *Powell v. Dep't of Servs. for Child.*, 963 A.2d 724, 731 (Del. 2008) ("[W]e conduct a limited review of the factual findings of the trial court to assure that they are sufficiently supported by the record and are not clearly wrong. This Court will not disturb inferences and deductions that are supported by the record and the product of an orderly and logical deductive process."); *In re A.L.D.*, 263 So.3d 860, 867 (La. 2019) ("An appellate court reviews a district court's findings as to whether parental rights should be terminated according to the manifest error standard."); *T.T.G. v. K.S.G.*, 530 S.W.3d 489, 493 (Mo. 2017) ("[T]he trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence . . . . Appellate courts should exercise the power to set aside a decree or judgment on the ground that it is 'against the weight of the evidence' with caution and with a firm belief that the decree or judgment is wrong." (alteration in original) (quoting *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976) (*en banc*))).

[25] As this case shows, "severe child abuse" can be pertinent in dependency and neglect cases as well as termination of parental rights cases. Here, the juvenile court held that both Mother and Father committed severe child abuse, and that ruling was appealed de novo to the circuit court. In other cases, such a finding by the juvenile court, if not appealed, may itself provide the basis for a petition to terminate parental rights. *See Dep't of Child.'s Servs. v. M.S.*, No. M2003-01670-COA-R3-CV, 2005 WL 549141, at *10 (Tenn. Ct. App. Mar. 8, 2005) ("The most serious consequence of a finding that a parent has

The statute that lists the grounds for termination of parental rights includes severe abuse as a possible ground:

> The parent or guardian has been found to have committed severe child abuse as defined in § 37-1-102, under any prior order of a court or is found by the court hearing the petition to terminate parental rights . . . to have committed severe child abuse against the child who is the subject of the petition . . . .

Tenn. Code Ann. § 36-1-113(g)(4) (Supp. 2016).[26] In turn, Section 37-1-102 defines "severe child abuse" as:

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

Tenn. Code Ann. § 37-1-102(b)(22)(A)(i) (Supp. 2016).

Reliance on severe child abuse as a basis for termination of parental rights has evolved. "Prior to 1977, the primary way to involuntarily terminate the parental rights of a biological parent was to prove that the child had been abandoned." *In re Kaliyah S.*, 455 S.W.3d at 541 (citing Tenn. Code Ann. §§ 36-110; 37-203(a)(2) (1977)). In 1977, the primary statute on termination of parental rights was amended to expand the grounds to

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committed severe child abuse is that such a finding, in and of itself, constitutes a ground for termination of parental rights." (citing Tenn. Code Ann. § 37–1–130(g)(4))). In these proceedings, there was a separate finding of severe abuse in the parental termination case, and it is that holding that is at issue in this appeal. As discussed below, the appeal of the dependency and neglect proceedings is separate and remains pending.

[26] This is the version of the statute in effect at the time pertinent to this case. Effective July 1, 2018, section 36-1-113(g)(4) was amended to provide for termination when a parent has been found to have committed severe child abuse against "any child."

include severe child abuse.[27] *Id.* (citing Tenn. Code Ann. § 37-246(c), (d)(1)–(3) (Supp.1978) (as amended by 1977 Tenn. Pub. Acts ch. 482, § 6)). By that point, the term "severe child abuse" included "knowing" failure to protect a child from abuse or neglect likely to cause "great bodily harm" or death. *See* Tenn. Code Ann. § 37-202 (16) (Supp. 1983).

Over time, the focus of state and federal statutes and regulations on juveniles shifted from family reunification to giving children a permanent home as soon as possible. *In re Kaliyah S.*, 455 S.W.3d at 545. The definition of severe child abuse was revised some, but remained the same in all ways pertinent to this appeal. Specifically, the definition of severe child abuse continued to require the petitioner to prove that the parent's failure to protect was "knowing." *Compare* Tenn. Code Ann. §37-1-102 (19)(A) (Supp. 1984), *with* Tenn. Code Ann. § 37-1-102(b)(22)(A)(i) (Supp. 2016).

We first discuss the meaning of the term "knowing" in this ground for termination of parental rights. After that, we will discuss the two prongs in the statute, knowing exposure of a child to abuse and knowing failure to protect from such abuse.

A. "Knowing" Conduct

The state of mind associated with severe child abuse as defined in section 37-1-102(b)(22)(A)(i) is "knowing."[28] Tenn. Code Ann. § 37-1-102(b)(22)(A)(i) (Supp. 2016). The statutes do not define "knowing." In interpreting this term, we are mindful that "[t]he text of the statute is of primary importance." *Coffee Cnty. Bd. of Educ. v. City of Tullahoma*, 574 S.W.3d 832, 839 (Tenn. 2019) (quoting *Mills v. Fulmarque, Inc.*, 360 S.W.3d 362, 368 (Tenn. 2012)). The words in the statute "must be given their natural and ordinary meaning in the context in which they appear and in light of the statute's general purpose." *Id.* (quoting *Mills*, 360 S.W.3d at 368). We consider "the language of the statute, . . . the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be

[27] At that time, parental rights could be terminated if the parent "committed severe child abuse against the child two (2) or more times" unless the petition was filed by the State and the child was under eleven years old. *See* Tenn. Code Ann. § 37-246 (d)(2) and (4) (Supp. 1983).

[28] Some elements of "severe child abuse" as it is defined in subsection (B) of the same statute omit the "knowing" state of mind. *See In re Samaria S.*, 347 S.W.3d at 205.

accomplished in its enactment." *Spires v. Simpson*, 539 S.W.3d 134, 143 (Tenn. 2017) (quoting *State v. Collins*, 166 S.W.3d 721, 726 (Tenn. 2005)). Our construction must be reasonable in light of the statute's purposes and objectives. *Beard v. Branson*, 528 S.W.3d 487, 496 (Tenn. 2017) (quoting *State v. Turner*, 913 S.W.2d 158, 160 (Tenn. 1995)).

Viewing the severe child abuse provision in context, we note that other grounds for termination of parental rights have historically required a showing of a different state of mind, for example, that the parent's act or failure to act was "willful." *See, e.g.*, Tenn. Code Ann. § 36-1-102(1)(A)(i) (Supp. 2016) (requiring a showing that the parent "willfully" failed to visit or "willfully" failed to support the child).[29] The Court interpreted willfulness to require a showing that the parent had the ability to visit or support, and implied a certain amount of intentionality. *See, e.g.*, *In re Adoption of A.M.H.*, 215 S.W.3d at 810 (holding that the evidence on the parents' failure to visit did not "support a finding that the parents intentionally abandoned" the child); s*ee also Willful*, *Black's Law Dictionary* (11th ed. 2019) ("Voluntary and intentional, but not necessarily malicious"). In contrast, the term "knowing" does not require proof the parent *intended* for the child to suffer abuse or neglect, but instead focuses on the parent's awareness of relevant facts. *See, e.g.*, *Knowing*, *Black's Law Dictionary* (11th ed. 2019) ("Having or showing awareness or understanding; well-informed").

If the term "knowing" indicates awareness, the question is, awareness of what? Our answer to that question must be consonant with the words that surround "knowing" in the statute. *See Wallace v. Metro. Gov't of Nashville*, 546 S.W.3d 47, 52 (Tenn. 2018) ("[B]ecause 'words are known by the company they keep,' we construe them in the context in which they appear . . . ." (quoting *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 526 (Tenn. 2010)))*; United States v. Taylor*, 142 S. Ct. 2015, 2023 (2022) (rejecting an overly abstract definition of the word "threat" based on "our usual rule of statutory interpretation that a law's terms are best understood by 'the company [they] kee[p].'" (alterations in original) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995))).

[29] In 2018, the statute was amended to delete the requirement of a showing of willfulness and instead to provide that "it shall be a defense to abandonment for failure to visit or failure to support that a parent or guardian's failure to visit or support was not willful." 2018 Tenn. Laws Pub. Ch. 875 (H.B. 1856) (current version at Tenn. Code Ann. § 36-1-102(1)(I) (2021 & Supp. 2022)).

Here, the statute uses "knowing" as part of the phrase "knowing failure to protect a child from abuse or neglect." Tenn. Code Ann. § 37-1-102(b)(22)(A)(i) (Supp. 2016). While it surely includes actual awareness of abuse or neglect that has occurred, the phrase "knowing failure to protect a child from abuse or neglect" is not limited to that. The term "protect" means to "defend or *guard against* injury or danger" and to "*keep safe*." *Protect*, *Shorter Oxford English Dictionary* (6th ed. 2007) (Oxford University Press) (emphasis added). Thus, "protect" includes not only defending but also guarding against danger, *i.e.*, *risk of future injury*. The phrase "failure to protect" is forward-looking; in family law, it means the "refusal or inability of a parent or guardian to *prevent* abuse of a child under his or her care." *Failure (failure to protect*), *Black's Law Dictionary* (11th ed. 2019) (emphasis added). Thus, the term "knowing" as used in "knowing failure to protect a child from abuse or neglect" must include not only awareness of abuse or neglect that has occurred, but also awareness of facts, circumstances, or information indicating that the child is at risk or in danger of suffering abuse or neglect.

In the context of parental termination cases, our Court of Appeals has discussed how the term "knowing" should be interpreted:

> It is also important to understand the threshold for finding that a parent or caregiver's conduct was "knowing." . . . "[K]nowing" conduct by a parent or caregiver is not limited to conduct intended to cause injury:
>
> > The term "knowing" as used in Section 37–1–102(b)(23) is not defined by statute. . . . [T]he term has been described as follows:
> >
> > > We consider a person's conduct to be "knowing," and a person to act or fail to act "knowingly," when he or she has actual knowledge of the relevant facts and circumstances or when he or she is either in deliberate ignorance of or in reckless disregard of the information that has been presented to him or her.

In re S.J., 387 S.W.3d at 592 (quoting *In re Samaria S.*, 347 S.W.3d at 206) (emphasis and internal citations omitted). "Persons act 'knowingly' when they have specific reason to know the relevant facts and circumstances but deliberately ignore them." *In re R.C.P.*, No. M2003-01143-COA-R3-PT, 2004 WL 1567122, at *7 (Tenn. Ct. App. July 13, 2004); *see also In re H.L.F.*, 297 S.W.3d 223, 237 (Tenn. Ct. App. 2009) ("By deliberately and recklessly ignoring Father's pedophilic interests, Mother knowingly failed to protect Heather from being raped by Father. . . .").

This interpretation of "knowing" traces back to *In re R.C.P.*, 2004 WL 1567122 at *7, in which then-Judge Koch adopted a definition articulated by the West Virginia Supreme Court in *West Va. Dep't. of Health & Hum. Res. ex rel Wright v. Doris S.*, 475 S.E.2d 865 (W. Va. 1996). The West Virginia court explained that the statutory term "knowingly" as used in the West Virginia definition of child abuse[30] "does not require that a parent actually be present at the time the abuse occurs, but rather that the parent was presented with sufficient facts from which he/she could have and should have recognized that abuse occurred." *Id.* at 878–79. Thus, the evidence is generally required to show the parent was presented with facts, circumstances, or information that would alert a reasonable parent to take affirmative action to protect the child. *See id. See also R.S. v. Dep't of Child.*, 831 So. 2d 1275, 1278 (Fla. Dist. Ct. App. 2002) ("In order for the father to have failed to protect, there must have been evidence that he had the capability to prevent the abuse. This by necessity requires proof that he knew or should have known of the mother's conduct and resulting injury to" the child)[31]; *In re P.N.T.*, 580 S.W.3d 331, 355 (Tex. App. 2019) ("A child is endangered when the environment creates a potential for danger that the parent is aware of but consciously disregards.").

Applying Tennessee's severe child abuse statute, our intermediate appellate court has found "knowing" failure to protect even absent proof that the parent was actually aware that abuse or neglect had occurred. Under this standard, the requisite awareness is of facts,

[30] Now found at W. Va. Code § 49-1-201(1)(A), the statute the West Virginia court was interpreting referred to "[a] parent, guardian, or custodian who knowingly or intentionally inflicts, attempts to inflict, or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home."

[31] In Florida, the statute requires that the parent either "engaged in egregious conduct or had the opportunity and capability to prevent and knowingly failed to prevent egregious conduct that threatens the life, safety, or physical, mental, or emotional health" of the children. Fla. Stat. § 39.806(1)(f) (2001).

circumstances, or information that would have triggered a reasonable parent's duty to take affirmative action to protect the child from abuse or neglect. If the parent has been presented with such facts, circumstances, or information and recklessly disregards them, the parent's failure to protect can be considered knowing.[32] *See, e.g.*, *In re Samaria S.*, 347 S.W.3d at 206–07 (proof supported finding that intellectually-challenged mother had enough ability to recognize the importance of facts presented to her and appreciate the risk of abuse or neglect to her children, and thus supported finding that her neglect was knowing); *In re Aleksandree M.M.*, No. M2010-01084-COA-R3-PT, 2010 WL 3749423, at *3 (Tenn. Ct. App. Sept. 27, 2010) (while there was no evidence the mother saw the boyfriend's sexual abuse of daughter, proof showed mother ignored risk implicit in incidents such as her boyfriend's lewd comments about young girls in mother's presence, and his request for permission to "court" mother's daughter); *In re Estrella A.*, No. M2022-00163-COA-R3-PT, 2022 WL 17091958, at *7 (Tenn. Ct. App. Nov. 21, 2022) (mother had been abused by her own father, knew his propensity toward sexual abuse, was warned to prohibit contact between maternal grandfather and her children, and yet still lived with children in sister's home with grandfather and exposed children to risk of abuse).

Similarly, a parent's failure to protect can be considered knowing if the parent was deliberately ignorant, as where the parent avoids actual knowledge of the abuse or neglect but is aware of facts, circumstances, or information that would put a reasonable parent on notice of the risk and the need to protect the child. *See, e.g.*, *In re Tamera W.*, 515 S.W.3d 860, 875 (Tenn. Ct. App. 2016) (father would often leave the home when mother began beating children); *In re S.J.*, 387 S.W.3d at 593 (mother ignored admonition by healthcare provider that infant was underweight and needed to be examined by a physician, did not take the child to be seen by a physician, and continued to starve the child); *In re Caleb J.B.W.*, No. E2009-01996-COA-R3-PT, 2010 WL 2787848, at *6 (Tenn. Ct. App. July 14, 2010) (when mother noticed child's injuries after leaving him in care of her boyfriend, she chose to believe her boyfriend's explanation that child fell while they were playing).

[32] "Intention cannot exist without foresight, but foresight can exist without intention. For a man may foresee the possible or even probable consequences of his conduct and yet not desire them to occur; none the less if he persists on his course he knowingly runs the risk of bringing about the unwished result." *Reckless*, *Black's Law Dictionary* (11th ed. 2019) (quoting J.W. Cecil Turner, *Kenny's Outlines of Criminal Law* 28 (16th ed. 1952)).

An additional consideration counsels in favor of adopting the Court of Appeals' longstanding interpretation of "knowing"—the prior-construction canon. Under this canon, "[i]f a word or phrase [in a statute] has been authoritatively interpreted by the highest court in a jurisdiction, or has been given a uniform interpretation by inferior courts or the responsible agency, a later version of that act perpetuating the wording is presumed to carry forward that interpretation." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012) (*Reading Law*). In that circumstance, the word or phrase "has acquired . . . a technical legal sense . . . that should be given effect in the construction of later-enacted statutes." *Id.* at 324.[33] The prior-construction canon is well accepted in Tennessee. *See, e.g.*, *Walker v. Bobbitt*, 88 S.W. 327, 329 (Tenn. 1905) ("It is a rule well established, and perhaps universally accepted by courts and text-writers, that where a statute has received a judicial interpretation, and it is re-enacted, it will be presumed the Legislature intended it should have the same construction which was given to the earlier statute."); *Miller v. Kennedy*, 51 S.W.2d 1000, 1002 (Tenn. 1932) ("The rule is sometimes stated that the judicial construction which had theretofore been placed upon a statute forms a part of the re-enactment.").

Tennessee's statute on severe child abuse has included "knowing failure to protect" since the late 1970s. The Court of Appeals adopted the prevailing definition of "knowing"

[33] The prior-construction canon should not be confused with the legislative-inaction or legislative-acquiescence doctrine. Under that doctrine, the legislature's "failure to 'express disapproval of a judicial construction of a statute is persuasive evidence of legislative adoption of the judicial construction.'" *Thompson v. Memphis City Sch. Bd. of Educ*., 395 S.W.3d 616, 629 (Tenn. 2012) (citations omitted); *see also Brown v. Tenn. Title Loans, Inc*., 328 S.W.3d 850, 858 (Tenn. 2010) ("nonaction by a legislative body ... may become significant where proposals for legislative change have been repeatedly rejected.") (citations omitted). Our cases have sometimes appeared to conflate the two. *See, e.g.*, *Hamby v. McDaniel*, 559 S.W.2d 774, 776 (Tenn. 1977) ("[T]he fact that the legislature has not expressed disapproval of a judicial construction of a statute is persuasive evidence of legislative adoption of the judicial construction, especially where the law is amended in other particulars, or where the statute is reenacted without change in the part construed."). The legislative inaction doctrine has been the subject of some opprobrium. *See, e.g.*, *Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616, 672 (1987) (Scalia, J. dissenting) (noting it is "impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice."); *Reading Law*, *supra*, at 326 (explaining that, although "[t]he bar may well have relied on" earlier judicial interpretations that the legislature failed to correct, those interpretations "are not the law" until they are "implicitly adopted in a subsequent statute"). The legislative inaction doctrine is not at issue in this case.

in its 2004 decision in *In re R.C.P.*, and since then the intermediate appellate court has consistently applied that interpretation of the term. In 2011, the General Assembly amended the definition of "severe child abuse" to its current form. *See* Act of May 16, 2011, ch. 314, § 3, 2011 Tenn. Pub. Acts 756. It made only minor revisions not pertinent here,[34] and left intact the phrases "knowing exposure" and "knowing failure to protect." And it did so after the Court of Appeals had issued at least eight opinions interpreting "knowing" in a uniform manner.[35] This is "significant enough" for the bar to "justifiably regard the point as settled law." *Reading Law*, at 325. These circumstances are a textbook example for application of the prior-construction canon. It further supports adoption of the Court of Appeals' well-established interpretation.

Thus, the Court of Appeals' interpretation of the term "knowing," as used in the statutory definition of severe child abuse in Tennessee Code Annotated section 37-1-102(b), aligns with the text, purposes, and objectives of the statute, and it is "based on good sound reasoning." *Beard*, 528 S.W.3d at 496 (quoting *Scott v. Ashland Healthcare Ctr., Inc.*, 49 S.W.3d 281, 286 (Tenn. 2001)). Under the prior-construction canon, we may presume that our legislature, by re-enacting the statute in 2011 without changing the language at issue here, "intended it should have the same construction which was given to the earlier statute" by our Court of Appeals. *Walker*, 88 S.W. at 329. This interpretation comports with our directive to construe statutes "with the saving grace of common sense." *State ex rel. Maner v. Leech*, 588 S.W.2d 534, 540 (Tenn. 1979).

Accordingly, we agree with the Court of Appeals and hold that, in the context of severe child abuse, a person's conduct is considered "knowing," and a person is deemed to "knowingly" act or fail to act, when "he or she has actual knowledge of the relevant facts and circumstances or when he or she is either in deliberate ignorance of or in reckless disregard of the information that has been presented to him or her." *In re S.J.*, 387 S.W.3d at 592 (citing *In re R.C.P.*, 2004 WL 1567122, at *7). Under this standard, the relevant facts, circumstances, or information would alert a reasonable parent to take affirmative

[34] The legislature merely substituted the term "serious bodily injury" for "great bodily harm." *Compare* Tenn. Code Ann. § 37-1-102(b)(23)(A) (2010), *with id.* § 37-1-102(b)(23)(A)(i) (Supp. 2011).

[35] *See e.g.*, *In re N.T.B.*, 205 S.W.3d 499, 506–08 (Tenn. Ct. App. 2006); *In re M.A.C.*, No. M2007-01981-COA-R3-PT, 2008 WL 2787763, at *7 (Tenn. Ct. App. July 17, 2008); *In re H.L.F.*, 297 S.W.3d at 235–37; *In re Aleksandree M.M.*, 2010 WL 3749423, at *3–4; *In re Caleb J.B.W.*, 2010 WL 2787848, at *5–7; *In re Samaria S.*, 347 S.W.3d at 206; *In re Nirvanna S.*, No. E2010-01358-COA-R3-JV, 2011 WL 684196, at *5–8 (Tenn. Ct. App. Feb. 28, 2011).

action to protect the child. For deliberate ignorance, persons can be found to have acted knowingly "when they have specific reason to know" the relevant facts, circumstances, or information "but deliberately ignore them." *In re R.C.P.*, 2004 WL 1567122, at *7. For reckless disregard, if the parent has been presented with the relevant facts, circumstances, or information and recklessly disregards them, the parent's failure to protect can be considered "knowing."

B. Severe Child Abuse by Commission or Omission

"Severe abuse" encompasses two different forms of severe child abuse, both equally culpable. One involves commission and the other involves omission. The commission form is defined as "exposure of a child" to "abuse or neglect that is likely to cause serious injury or death," or the "use of force on a child that is likely to cause serious bodily injury or death." Tenn. Code Ann. § 37-1-102(b)(22)(A)(i) (Supp. 2016). The omission form is defined as "failure to protect a child" from such abuse, neglect, or use of force. *Id.* Severe child abuse can be either or both.[36]

Sometimes when a child suffers abuse while in the custody of both parents, the evidence shows that one parent inflicted the abuse and the other parent failed to protect the child from it. For example, in *In re H.L.F.*, 297 S.W.3d at 236–37, the father subjected all

[36] On this point, Tennessee's statute on termination of parental rights is typical, as many states recognize knowingly or willfully allowing the use of force on a child, as well as actually using such force, as equal grounds for termination of parental rights. *See*, *e.g.*, Fla. Stat. Ann. 39.806(1)(f) ("The parent or parents engaged in egregious conduct or had the opportunity and capability to prevent and knowingly failed to prevent egregious conduct"); 705 Ill. Comp. Stat. Ann. 405/2-3(2) (responsible party "[I]nflicts, causes to be inflicted, or allows to be inflicted upon such minor physical injury, by other than accidental means"); Ky. Rev. Stat. Ann. § 625.090(2)(b) ("That the parent has inflicted or allowed to be inflicted upon the child, other than by accidental means, serious physical injury"); La. Child. Code Ann. Art. 1003(1)(a) ("The infliction or attempted infliction, or as a result of inadequate supervision, the allowance or toleration of the infliction or attempted infliction of physical or mental injury"); Okla. Stat. Ann. tit. 10A § 1-1-105(36)(c) ("Heinous and shocking neglect includes, but is not limited to . . . an act or failure to act by a parent that results in the death or near death of a child or sibling, serious physical or emotional harm, sexual abuse, sexual exploitation, or presents an imminent risk of serious harm"); S.C. Code Ann. § 63-7-20(6)(a)(i) ("inflicts or allows to be inflicted upon the child physical or mental injury or engages in acts or omissions which present a substantial risk of physical or mental injury to the child"); Tex. Fam. Code Ann. § 161.001(b)(1)(E) ("engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child").

of the children to various forms of active abuse; he engaged in sexual abuse with some of the children while the others witnessed it.[37] In that case, there was no evidence that the mother participated in the abuse or actually saw it. *Id.* Still, she was well aware of the father's prurient sexual interest in minors, and the father's sexual abuse of his daughter was known by the three other children in the home as well as other children who visited the home. *Id.* Under those circumstances, the appellate court called it "inconceivable" that the mother would not "recognize that abuse . . . had occurred or that it was highly probable that severe child abuse would occur." *Id.* at 237. Thus, the appellate court concluded that the mother had engaged in the "omission" form of severe abuse by knowingly failing to protect her children from the father's abuse. *Id.*

Even so, when a child is in the custody of both parents, the structure of the statute does not necessarily require the trial court to determine which parent "expos[ed]" the child to "abuse or neglect that is likely to cause serious bodily injury or death" or "use[d] force on a child that is likely to cause serious bodily injury or death," or whether both parents did. Tenn. Code Ann. § 37-1-102(b)(22)(A)(i) (Supp. 2016). The definition of "severe abuse" is in the disjunctive; a parent may be found to have committed severe abuse if the proof shows the parent *either* knowingly inflicted the abuse *or* knowingly failed to protect from the abuse. *Id.*

The reason for this statutory structure is apparent; abuse is often perpetrated on children too young to say which parent inflicted it, and often both parents deny any abuse occurred. Our Court of Appeals described this common scenario:

> This case presents a textbook example of the confluence of circumstances that are presented with unfortunate regularity in cases of alleged child abuse. A preverbal infant or child sustains serious injuries, the only witnesses to the injuries are the parents or caregivers who maintain that the injuries result from an innocent misunderstanding or inexplicable mystery, and testimony by medical personnel whose role is to opine as to the most likely cause of the child's injuries, not to identify the perpetrator.

[37] This case discusses severe child abuse in the context of dependency and neglect proceedings. It involves the same statutory definition of severe abuse, and the standards of proof are the same. Tenn. Code Ann. § 37-1-102(b)(22)(A)(i) (Supp. 2016).

In re S.J., 387 S.W.3d at 591. Thus, it may not be possible to determine which parent inflicted the abuse, or if both parents did. In such cases, both parents may be found to have committed severe abuse if the proof shows that at least one of them must have knowingly inflicted the abuse and the other must have knowingly failed to protect from the abuse.

For example, in *In re E.Z.*, 2019 WL 1380110, at *16, while the child was in the custody of both parents, he suffered "not one but a series of injuries," including three broken bones, a bruised penis, and a torn frenulum. The undisputed medical evidence showed the injuries "were non-accidental in origin." *Id.* Both parents denied any abuse. The trial court found: "[B]oth parents know which of them harmed this child. The parent who harmed the child knows that he or she caused the injuries. The other parent knows that he or she did not, and that it must have been the other parent." *Id.* Despite this, the trial court declined to find either parent committed severe abuse. It explained that even though the injuries occurred while in the parents' care, the trial court could not, "due to each parent's claimed ignorance of how [the child] received any of his injuries, find one or the other responsible." *Id.* at *17.

The intermediate appellate court rejected this reasoning:

> Mother's and Father's denials, by themselves, are not dispositive of anything. [The child's] injuries fit within the definition of serious bodily harm necessary to sustain a finding of severe child abuse. . . . We need not identify which parent physically applied the violent force necessary to inflict the injuries on [the child] because, in view of the medical evidence, other facts as found by the Trial Court, and the Trial Court's credibility determinations, there were sufficient facts presented to Mother and Father from which, at a minimum, each could have and should have recognized that severe child abuse had occurred or that it was highly probable to occur and that the other parent was the abuser.

Id. at *18. The intermediate appellate court held that the evidence clearly and convincingly showed that "Father or Mother subjected [the child] to severe child abuse with the other's knowledge." *Id.* at *19. Thus, while the statute requires an individualized finding that each parent committed severe child abuse, the trial court is not always required to figure out which parent did what.

The catch in this situation is that the proof must show—as to both parents—that even if they didn't actually inflict the injuries to the child, they must have *knowingly* failed to protect the child. In other words, the proof must show both parents had "actual knowledge of" the relevant facts, circumstances or information or were "either in deliberate ignorance of or in reckless disregard of" relevant facts, circumstances, or "information that ha[d] been presented to him or her." *In re S.J.*, 387 S.W.3d at 592 (quoting *In re Samaria S.*, 347 S.W.3d at 206). *See, e.g.*, *In re H.L.F.*, 297 S.W.3d at 237 (referring to facts showing that severe abuse had occurred "or that it was highly probable that severe child abuse would occur."). The petitioner needs to show, as to both parents, that they were aware of facts, circumstances, or information that would alert a reasonable parent to take affirmative action to protect the child. Thus, even if it cannot be determined which was the "perpetrator" parent, both can be held responsible for having knowingly failed to protect the child.

That is the situation here. The trial court found there was no medical cause for Markus's rib fractures and they were non-accidental in nature. It found that the rib fractures must have been inflicted by either Mother or Father. These findings were affirmed by the Court of Appeals. However, neither the trial court nor the Court of Appeals made an individualized finding on which parent, or that both, actually inflicted the child's injuries. There is no evidence in the record that would permit such a determination.

It is clear that Mother and Father both failed to protect Markus from injury. However, to affirm a finding of severe child abuse as to both parents, the evidence in the record must show that the failure to protect was "knowing" as to both.[38] We focus, then, on the proof in the record as to both parents: what did they know and when did they know it?[39]

[38] There could be a case in which the proof shows that one parent had knowledge of relevant facts and circumstances of which the other parent was not aware. That is not the situation in this case, so we need not address it.

[39] A question made famous by a son of Tennessee. *See* https://scottcounty.com/sons-daughters-of-scott-county/howard-h-baker-jr/ (last visited May 1, 2023).

Father and Mother stress there is no *direct* evidence they knew of the fractures to Markus's ribs and failed to protect him, only circumstantial evidence. That the evidence in this case is circumstantial is of no moment. As our Court of Appeals has observed:

> In child abuse cases, the parent or caregiver may deny that the injury was purposefully inflicted, and where the injuries are inflicted on preverbal infants and children, there is often no witness to the injury other than the parent or caregiver. The "knowing" element can and often must be gleaned from circumstantial evidence, including but not limited to, medical expert testimony on the likelihood that the injury occurred in the manner described by the parent or caregiver.

In re S.J., 387 S.W.3d at 592. We have rejected any suggestion that circumstantial evidence is inferior to or less probative than direct evidence. *See State v. Dorantes*, 331 S.W.3d 370, 381 (Tenn. 2011) (citing 2A Charles Alan Wright & Peter J. Henning, *Federal Practice & Procedure* § 411 (2009)); *cf.* 7 Tenn. Prac. Pattern Jury Instr. T.P.I.- Crim. 42.03(a) (2022) ("Do not assume that direct evidence is always better than circumstantial evidence. According to our laws, direct evidence is not necessarily better than circumstantial evidence. Either type of evidence can prove a fact if it is convincing enough."). Circumstantial or not, evidence is evidence, and we consider it all.

Here, the trial court emphatically rejected the testimony from Mother and Father about hearing a "crackling sound" near Markus's ribs. The trial court characterized the parents' testimony as "a cover story," an "attempted cover up" in which both parents were "complicit." On appeal, we defer to the trial court's credibility determination about the parents' testimony on this issue. *Jones v. Garrett*, 92 S.W.3d at 838. It can be reasonably inferred that the trial court found that the parents' testimony about the "crackling sound" was knowingly false and offered with intent to deceive.

Still, the inference from this testimony can only take us so far. The parents' lack of credibility is relevant but not sufficient. It tells us that the parents were untruthful about what they knew before the TriStar x-rays revealed a rib fracture. But it does not tell us what the parents actually knew or when they knew it. *Cf. Dep't of Child.'s Servs. v. H.A.C.*, No. M2008-01741-COA-R3-JV, 2009 WL 837709, at *4 (Tenn. Ct. App. Mar. 26, 2009) ("But, other than the dubious explanations she gave regarding the possible causes of the child's injuries, there is no evidence in the record to support a finding that Mother knowing

exposed her child to abuse . . . ."); *In re N.B.-A*, 224 A.3d 661, 672 (Pa. 2020) ("[S]uspicions are not a substitute for clear and convincing evidence. . . . [A]lthough we are troubled by Mother's initial false statements . . . those statements in and of themselves are insufficient to establish, under a clear and convincing evidence standard, that, prior to the time she made those statements, Mother knew or should have known of a danger posed to Child . . . .") (internal quotation marks and citation omitted). We look further, then, at the "relevant facts and circumstances" known to Mother and Father. *See In re R.C.P.*, 2004 WL 1567122 at *7.

The record shows that Markus had many physical challenges other than the rib fractures. He was born premature and had several conditions related to his premature birth, including an inguinal hernia, an inherited overactive thyroid condition, and a related blood condition, thrombocytopenia. Markus had skull abnormalities and subdural hematomas. He had frequent breathing, congestion, and feeding issues. After Markus was admitted to Vanderbilt, physicians there diagnosed him with a viral infection, an abnormality of the cartilage around his larynx called laryngomalacia, and enlarged adenoids that obstructed his airway.

Sometimes, evidence of multiple unexplained injuries to a child can point to abuse by the custodial parents. *See, e.g.*, *In re S.J.*, 387 S.W.3d at 594 (agreeing with the trial court's decision not to credit the mother's "assertion that her children's numerous injuries were simply the result of 'a ridiculously bad stream of luck.'"); *In re N.T.B.*, 205 S.W.3d at 507 (finding knowing failure to protect where "[t]he Child's injuries, which occurred while the Child was very young, were multiple, very serious, inflicted on separate occasions with great force, and not self-inflicted or accidentally inflicted."); *In re E.Z.*, 2019 WL 1380110, at *17 (after child suffered three broken bones, a bruised penis, and a torn frenulum, the appellate court observed that "[t]he bottom line is Mother and Father could or would do nothing to prevent these injuries that kept cropping up.").

That is not the case here. The trial court did not find, nor does the evidence indicate, that Markus's other physical issues were non-accidental, inflicted injuries. In saying that, we pause at Markus's subdural hematomas. Although the pediatric plastic surgeon who discovered the subdural hematomas did not suspect abuse, child abuse specialist Dr. Brown did.[40] She testified that such hematomas can be "highly associated with abusive trauma"

[40] Dr. Brown indicated that her knowledge of Markus's rib fractures informed her concern that the subdural hematomas were also non-accidental.

and were "concerning for somebody hurting him and hurting his brain." However, after considering them closely, she said she could not testify that Markus's hematomas were caused by abuse. Thus, in this record, no evidence shows that any of Markus's physical conditions other than the rib fractures can be attributed to abuse.

Against this backdrop, we consider what Mother and Father would have observed about Markus's rib fractures before the first was spotted on the TriStar x-ray on January 10, 2015. Dr. Brown described in her testimony how a child with rib fractures would appear to caregivers. "In the beginning when a fracture is caused," she said, "they're going to be fussy and in pain." Because rib fractures are not necessarily accompanied by external bruising or other identifiable body damage, the source of the pain, even from an acute or recent injury, may not be obvious:

> A. You're not going to necessarily know what they're fussy from. So it—with rib fractures, it is fairly common for parents who—or for people, caretakers who don't know that they have fractures to—that's not going to be their natural assumption. So there would have been a time when he was probably fussier than usual but it may have been hard for a caretaker—they wouldn't jump to the conclusion that he had rib fractures, I guess, is what I'm trying to say.
>
> Q. Would you expect there to be any particular symptomology when he was picked up or grabbed around his torso area, for instance, if he had fractured ribs?
>
> A. There can be, and—but some kids with rib fractures are, you know, if they're generally calmer babies anyway, you know, you can determine, oh, gosh, I'm picking him up this way, this is a little bit weird that he's crying. But a lot of babies, you just aren't going to be able to tell the difference between fussiness from another cause and fussiness from a rib fracture.
>
> Q. Would you expect difficulty breathing to be associated with rib fractures, multiple rib fractures for a seven-month-old?

> A. Certainly, in the acute stage, because of pain. Again, though, Markus did have laryngomalacia, so he, at baseline, had some difficulty with that.

Dr. Brown's testimony indicates that a caregiver of Markus who did not inflict the injuries would have noticed, at most, fussiness, crying, and perhaps some difficulty breathing.

One would expect reasonable parents to notice persistent fussiness, crying, and breathing difficulties, and to seek medical attention. In this record, Mother and Father did both. Even crediting the trial court's finding that Mother's testimony was not credible, it is undisputed in the record that Mother took Markus to see several healthcare providers during the relevant period, and that Father relied on Mother to do so.[41]

In September 2014, Markus was seen by a pediatric plastic surgeon, who took a scan of his skull to diagnose the cause of the child's skull abnormalities. In December 2014, Mother took Markus to see a nurse practitioner and reported heavy, labored breathing, congestion, irritability, and feeding issues. A week later, Mother brought Markus to a follow-up appointment with his pediatric endocrinologist for his thyroid condition. Early on Christmas Day 2014, Mother took Markus to the Vanderbilt Hospital emergency room for coughing and congestion. Finally, on January 10, 2015, Mother took Markus to TriStar, reporting continued coughing. TriStar x-rayed Markus's chest only to determine if he had bronchitis. Instead, it revealed a rib fracture.

All of these medical providers examined and treated Markus. Until the TriStar x-ray, none recognized or suspected rib fractures or injury. None of Markus's medical records document visible signs of injury. In addition, Grandmother and Daycare Provider both cared for Markus during the relevant period. Both testified they never saw or heard anything to cause them to suspect Markus was injured or in pain.

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[41] The fact that parents take a child to see medical providers is relevant but not determinative. For example, in *In re E.Z.*, the mother argued against termination of her parental rights by pointing out that she sought medical attention for the child's numerous injuries. 2019 WL 1380110, at *17. The appellate court was unmoved, observing: "That a parent complicit in child abuse afterwards seeks medical attention for the abused child once the injury is noticed by a third party does not absolve that parent of responsibility." *Id.* In the case at bar, the trial court did not find that Markus's parents only took Markus for medical attention once others pointed out injuries, nor would the evidence support such a finding.

With benefit of hindsight, we can see that at least some of Markus's fussiness, congestion, breathing difficulties, and feeding issues were likely caused by his rib fractures. Hindsight, however, is not the proper lens. We look at what the non-perpetrating parent knew or must have known before discovery of the abuse by authorities. In the specific circumstances in this case, even Dr. Brown acknowledged that Markus's other physical conditions, such as laryngomalacia, could have obfuscated the signs of rib fracture detailed in her expert testimony.

In cases where our appellate courts have upheld a finding of knowing failure to protect from severe abuse, there was proof that the non-perpetrating parent was presented at the time with facts, circumstances, or information showing that the child had been, or was likely to be, subjected to abuse or neglect. *See, e.g.*, *In re E.Z.*, 2019 WL 1380110, at *17 ("[B]ased on the medical evidence presented at trial, we do not believe Mother could have missed B.G.'s reaction to being hurt so badly."); *In re Samaria S.*, 347 S.W.3d at 207 ("The records and the undisputed testimony describe an infant whose appearance was shocking, with no fat whatsoever under his skin, skin hanging over his bones, and in respiratory distress."); *In re R.C.P.*, 2004 WL 1567122, at *8 ("[T]he record contains evidence that proves clearly and convincingly that M.A.F. deliberately and recklessly disregarded the information she had regarding B.J.'s prurient interest in sex that made it likely that he would sexually abuse R.C.P.").

Absent such proof, a finding of "knowing" failure to protect will not stand. Courts in sister states with a comparable "knowing" state-of-mind requirement have held that the state-of-mind element was not proven where an infant's injuries were not perceptible and there was no history of harmful conduct by the other parent. For example, in *In re Adner G.*, 925 A.2d 951 (R.I. 2007), the Supreme Court of Rhode Island found clear error in a trial court's determination that the parents either abused their infant child or knowingly let that abuse happen. The Rhode Island Court based its holding in part on testimony indicating that the infant's older injuries were neither visible nor detectable, and in fact were not discovered by "any of the doctors who examined the infant during the first seven weeks of her life." *Id.* at 960.

In a Michigan case involving a child who died from blunt force trauma to the head, the appellate court held that a mother's parental rights as to her surviving children could not be terminated for severe abuse or failure to protect. *In re Brown/White*, No. 359038, 2022 WL 2188473, at *1 (Mich. Ct. App. June 16, 2022). The child was in the care of both

parents and the evidence indicated the injury was inflicted by one of them. *Id.* at *3. However, no external injuries were visible and, even though the child suffered severe internal injuries, there was nothing in the record showing that the non-abuser parent could have detected them. *Id.* at *4. Thus, even though the evidence allowed for an inference that either the mother or father inflicted the abuse, the finding of severe abuse as to the appellant mother was reversed because there was "nothing to suggest that the non-abuser parent was aware of the need to protect the child from the abuser." *Id.*[42]

In a Florida case, *R.S. v. Dep't of Child. & Fams.*, the evidence showed that the mother inflicted severe abuse on the child, and the question on appeal centered on the father's failure to protect. 831 So.2d at 1278. Florida's intermediate appellate court reversed the trial court's termination of the father's parental rights where competent medical evidence showed the child's injuries were "only identifiable after the doctors examined the CAT scans and the MRI." *Id.* The evidence showed the "only outward sign was that [the infant] was irritable, which was easily attributable to recent inoculations the baby had received. In short, there was no evidence that the father witnessed the abuse or that he knew or should have known of the child's injuries as they were not visibly discernible." *Id.* The appellate court's assessment was blunt: "The evidence in this case as regards to the father is neither substantial nor competent. It simply doesn't exist." *Id.* at 1279.

This case is similar. Here, the trial court made no finding on which parent inflicted Markus's rib fractures, or if both parents did. In this posture, the finding of severe child abuse may be affirmed only if the proof shows that both parents' failure to protect Markus was "knowing," i.e., both were aware of facts, circumstances, or information that would alert a reasonable parent to take affirmative action to protect the child, and yet they failed to act. We find no such proof in this record.

We must conclude that the evidence in the record does not clearly and convincingly show that the failure of Mother and Father to protect Markus from the non-accidental rib fractures was "knowing." Tenn. Code Ann. § 37-1-102(b)(22)(A)(i) (Supp. 2016) (definition of severe child abuse). We reverse the holding of the trial court and the Court of Appeals as to this ground for termination of parental rights as to both Mother and Father.

[42] The Michigan appellate court affirmed the termination of the mother's parental rights on a different ground. *Id.* at *4–5.

This holding pretermits the issues raised on appeal regarding the trial court's findings that Markus's injuries were caused by non-accidental trauma, that one of the parents inflicted those injuries, and that the parents were complicit in a "cover up." *Cf. In re Jamie B.*, No. M2016-01589-COA-R3-PT, 2017 WL 2829855 at *7 (Tenn. Ct. App. June 30, 2017) (declining to reach additional arguments raised in a parental termination case after reversing on a dispositive issue).

IV. Substantial Noncompliance

In addition to severe abuse, the trial court terminated Mother's parental rights based on substantial noncompliance with the permanency plan, specifically, with the plan requirement that she obtain a mental health assessment.[43] In this appeal, Mother offers two challenges to this holding. First, she asserts that DCS did not sufficiently establish the ground, even assuming the trial court's exclusion of her mental health assessment was proper. Second, she argues that the trial court's decision to exclude her mental health assessment from evidence resulted in a fundamentally unfair proceeding in violation of her constitutional rights.

The trial court stated that its decision was based on Mother's delay in obtaining the mental health assessment, as well as noncompliance with a local rule that required parties to confer and exchange such potential exhibits before trial. Five days before the trial began, Mother's counsel filed a copy of her mental health assessment under seal, but neglected to share it with opposing counsel as required by the local rule. Five days later, on the first day of the trial, the trial court excluded Mother's mental health assessment from evidence.

Although the trial court indicated that its decision was based in part on Mother's delay in obtaining the mental health assessment, the record shows Mother and Father both completed their mental health assessments with the same providing agency, in roughly the same time frame. The only difference was that neither Father nor his trial attorney obtained a copy of his assessment until the trial was underway, so Father's counsel provided a copy to opposing parties as soon as he got it. As to Father, the trial court admitted his mental

[43] The statute provides: "There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan pursuant to title 37, chapter 2, part 4." Tenn. Code Ann. § 36-1-113(g)(2) (Supp. 2016).

health assessment into evidence and declined to hold that DCS had proven the ground of substantial noncompliance.

Under these circumstances, it makes little sense to hold that Mother's delay in obtaining the assessment constitutes clear and convincing evidence of substantial noncompliance but Father's does not. We must hold that Mother's delay in obtaining the mental health assessment is also not enough to clearly and convincingly establish substantial noncompliance with the permanency plan.

That leaves Mother's failure to follow the local rule. At the outset, we recognize that local trial courts are empowered to enact and enforce local rules, consistent with general law. *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 35 (Tenn. 2007). Local rules play an important role in our state's judicial system. Moreover, decisions regarding the admission or exclusion of evidence are rightly entrusted to the sound discretion of the trial courts, and we review such decisions with a presumption they are correct. *White v. Beeks*, 469 S.W.3d 517, 527 (Tenn. 2015).

In rare circumstances, otherwise valid exclusions of evidence under recognized rules may implicate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *State v. Flood*, 219 S.W.3d 307, 315–16 (Tenn. 2007) (citing *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *State v. Brown*, 29 S.W.3d 427, 431 (Tenn. 2000)). For this reason, we asked the parties to address whether the trial court's exclusion of Mother's mental health assessment impacted the fundamental fairness of the proceeding. Nevertheless, we consider constitutional issues only if they are necessary to resolve the case. *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995) ("[U]nder Tennessee law, courts do not decide constitutional questions unless resolution is absolutely necessary for determination of the case and the rights of the parties."). In this case, it is not.

The statute on the substantial noncompliance ground for termination states: "There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan pursuant to title 37, chapter 2, part 4[.]" Tenn. Code Ann. § 36-1-113(g)(2) (Supp. 2016). To terminate parental rights based on the ground of substantial noncompliance, the court must find that the requirements the parent allegedly did not satisfy were "reasonable and [we]re related to remedying the conditions that necessitate[d] foster care placement." Tenn. Code Ann. § 37-2-403(a)(2)(C) (2014 &

Supp. 2022). Interpreting both of these statutes, we have observed that the noncompliance must be:

> "[o]f real worth and importance." In the context of the requirements of a permanency plan, the real worth and importance of noncompliance should be measured by both the degree of noncompliance and the weight assigned to that requirement. Terms which are not reasonable and related are irrelevant, and substantial noncompliance with such terms is irrelevant.

In re Valentine, 79 S.W.3d at 548–49 (alteration in original) (quoting *Substantial*, *Black's Law Dictionary* 1428 (6th ed. 1990)). "Trivial, minor, or technical deviations" are not enough to establish substantial noncompliance. *In re M.J.B.*, 140 S.W.3d 643, 656 (Tenn. Ct. App. 2004). Whether factually-established noncompliance is "substantial" for purposes of the parental termination statute presents a question of law, which this Court reviews de novo with no presumption of correctness. *See In re D.L.B.*, 118 S.W.3d 360, 365 (Tenn. 2003).

The trial court held that the mental health assessment was a reasonable requirement and was "directed toward remedying the conditions which caused the removal and placement." The Court of Appeals affirmed this finding, commenting that "the mental health assessment was essential to addressing concerns over Mother's ability to care for Markus and to keep him safe." *In re Markus E.*, 2021 WL 5571818, at *7. Mother does not dispute that the mental health assessment requirement was directed toward key information about Mother that would help DCS in providing services and help keep Markus safe.

However, the question of whether Mother did not substantially comply with that requirement presents a closer call. While the trial court was well within its rights to exclude the mental health assessment from evidence, this does not mean DCS proved substantial noncompliance with the permanency plan. This is particularly true where it is undisputed that Mother followed every other requirement of the plan. Regardless of whether the mental health assessment was admitted into evidence, DCS as petitioner bore the burden of proving each and every fact underlying the ground for termination. Here they were required to prove Mother's noncompliance with the *plan*, not her noncompliance with a local rule.

On compliance with the plan, the record is inconclusive at best. We know Mother obtained a mental health assessment; the DCS caseworker acknowledged in testimony that, after the trial began, she received and reviewed the assessment. Mother's counsel told the trial court she emailed the DCS caseworker on September 1, 2016, and attached the assessment.[44] The DCS caseworker acknowledged the address in the lawyer's email was her correct email address, but said she did not recall receiving either the email or the attachment before trial.

Thus, the record on this point is a mishmash. We are mindful that the burden of proof on any ground for termination is on the petitioner, here, the State. Under all of these circumstances, we cannot conclude that the State established this ground for termination by clear and convincing evidence. Therefore, we reverse this ground for termination as to Mother. This conclusion pretermits Mother's constitutional arguments.

Our holding as to the grounds for termination of the parental rights of both Mother and Father pretermits the issue of the best interest of the child. We reverse the termination of parental rights as to both Mother and Father.

IV. Aftermath

As our Court of Appeals has observed, "[A] decision not to grant a petition to terminate parental rights does not mean that custody of the child is returned to the respondent parent." *In re J.R.P.*, No. M2012-02403-COA-R3-JV, 2013 WL 4477860, at *10 (Tenn. Ct. App. Aug. 19, 2013).[45] "The issue before us is confined to whether, under

[44] Mother's counsel made this assertion in court but did not testify. DCS argued that both the lawyer's email and the attachment were inadmissible hearsay, so the trial court declined to admit either into evidence. The email was admitted for identification only. In line with her lawyer's assertion, Mother testified that she completed the mental health assessment requirement in 2016; the trial court did not specifically comment on Mother's credibility on this assertion, but of course the trial court generally found Mother's testimony not credible.

[45] In that case, the respondent mother gave birth to her son, a special-needs child conceived as a result of rape, when she was thirteen years old. *In re J.R.P.*, 2013 WL 4477860, at *1 n.1. The appellate court held it had not been proven that termination of her parental rights was in the best interest of the child, but it did not determine custody of the child. *Id.* at *10.

the circumstances of this case," the evidence supports a decision "to completely terminate the parent-child relationship." *Id.*

Here, the dependency and neglect proceedings as to Markus, uncoupled from the parental rights termination case, remain pending below. There is some overlap between the two, particularly insofar as "severe child abuse" can be pertinent in dependency and neglect cases as well as termination of parental rights cases. Still, dependency and neglect proceedings are "separate proceeding[s] involving different goals and remedies. . . ." *In re M.J.B.*, 140 S.W.3d at 651. "The primary purpose of a dependent-neglect proceeding is to provide for the care and protection of children whose parents are unable or unwilling to care for them. The sole purpose of the termination proceeding . . . is to sever irrevocably the legal relationship between biological parents and their children." *Id.*

The difference between the two is of particular significance here. Our holding on severe child abuse in this appeal centers on the proof as to whether the parents' failure to protect Markus from non-accidental rib fractures was "knowing." As pointed out by the juvenile court in the dependency and neglect proceedings for Markus, dependency and neglect proceedings focus on the status of the child, and do not require a specific "knowing" state of mind on the part of the parent or custodian.[46] This is because parents have a duty to provide, and children have a corresponding right to be provided, a safe environment free from abuse or neglect. Here, it is undisputed that Markus's many rib fractures occurred when he was in the custody of Mother and Father.

We recognize as well that Markus has been living in foster care since 2015. Such passage of time complicates any proceedings regarding children. "No one-dimensional statement of the applicable legal rules can resolve this particular case. Real world complexity steals into the equation when we consider, as we must, that events and lives have not stood still while this . . . dispute has been in the courts." *Gorski v. Ragains*, No. 01A01-9710-GS-00597, 1999 WL 511451, at *4 (Tenn. Ct. App. July 21, 1999). These

[46] The definition of dependency and neglect contained at the pertinent time in Tennessee Code Annotated § 37-1-102(b)(12)(G) provided, "'Dependent and neglected child' means a child: . . . who is suffering from abuse or neglect." Tenn. Code Ann. § 37-1-102(b)(12)(G) (2014). The statute further stated that abuse exists when a child "is suffering from, has sustained, or may be in immediate danger of suffering from or sustaining a wound, injury, disability or physical or mental condition caused by brutality, neglect or other actions or inactions of a parent, relative, guardian, or caretaker." Tenn. Code Ann. § 37-1-102(b)(1) (2014).

cases involve not simply "rights," but the life and well-being of an innocent child. Nevertheless, as a court of law, we must apply the statutes as written.

CONCLUSION

For the reasons stated herein, we reverse the decisions of the trial court and the Court of Appeals terminating the parental rights of both Mother and Father. Costs on this appeal are assessed to the Department of Children's Services.

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HOLLY KIRBY, JUSTICE