

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 1, 2023

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IN RE LEAH T.

Appeal from the Chancery Court for Rutherford County
No. 20CV-1606 J. Mark Rogers, Judge

No. M2022-00839-COA-R3-PT

In this case involving a petition to terminate the mother’s parental rights to her child and to allow the petitioners to adopt the child, the trial court determined that three statutory grounds for termination had been proven by clear and convincing evidence. The trial court further determined that the petitioners had provided clear and convincing evidence that termination of the mother’s parental rights was in the child’s best interest. The mother has appealed the best interest determination. Upon our review, we affirm the trial court’s finding as to the statutory grounds of abandonment through failure to support, abandonment through failure to visit, and severe abuse of the child’s sibling. However, having determined that under the facts of this case, the trial court erred in applying the statutory best interest factors applicable to the initial termination petition rather than those applicable to the amended petition, we reverse the trial court’s best interest finding and remand for reconsideration applying the amended best interest factors contained in Tennessee Code Annotated § 36-1-113(i) (Supp. 2022).

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

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ARNOLD B. GOLDIN, J., joined.

Daniel L. Graves, II, Murfreesboro, Tennessee, for the appellant, Ziqurra R.

Marjorie A. Bristol, Goodlettsville, Tennessee, for the appellees, Robert D. and Gwendolyn D.

OPINION

I. Factual and Procedural Background

On September 22, 2020, Robert D. (“Foster Father”) and Gwendolyn D. (“Foster Mother”) (collectively, “Petitioners”) filed a petition in the Rutherford County Chancery Court (“trial court”) seeking to terminate the parental rights of Ziqurra R. (“Mother”) to her child, Leah T. (“the Child”), and to allow Petitioners to adopt the Child.¹ The Child was approximately five and one-half years of age at that time. According to Petitioners, the Child had resided with them since August 11, 2015.

Petitioners averred that before the Child was placed in their physical custody, she had lived with her parents, Mother and Anthony T. (“Father”). The Child was reportedly removed from her parents’ custody because she had suffered multiple injuries, including subdural hematomas and a traumatic brain tissue injury, while in the parents’ care. Petitioners indicated that a hearing was conducted by the Davidson County Juvenile Court (“juvenile court”) on April 14, 2016, wherein expert medical testimony demonstrated that the Child’s injuries were caused by inflicted rather than accidental trauma. Petitioners further averred that both parents had admitted to engaging in a physical altercation within a week of when the Child’s injuries occurred, during which Mother was pushed or fell while holding the Child. The juvenile court granted Gwendolyn D. permanent guardianship of the Child on September 6, 2017, and the parents were subsequently ordered to pay child support to her.

Petitioners initially alleged the following statutory grounds in support of terminating Mother’s parental rights: (1) abandonment through failure to visit, (2) abandonment through failure to support, (3) persistence of the conditions leading to removal of the Child, and (4) failure to manifest an ability and willingness to assume legal and physical custody of or financial responsibility for the Child. Petitioners claimed that Mother had not visited the Child since June 2018 and had not made a support payment since September 2019. Petitioners also propounded that Mother suffered from a mental health imbalance, financial instability, and relationship difficulties. Petitioners averred that Mother was unable to manage the demands of parenting a child and that placing the Child in her custody would pose a risk to the Child’s physical or psychological welfare.

Petitioners attached copies of various documents from the juvenile court proceedings, including the juvenile court’s April 14, 2016 order determining that the Child had suffered “mixed density subdural hematomas on both sides of her brain” as

¹ The trial court terminated the parental rights of the Child’s biological father, Anthony T., on December 22, 2020. Because the father has not appealed that ruling, we will confine our analysis to the grounds alleged with regard to Mother.

well as “brain tissue injury to both her right and left side of the brain.” The juvenile court concluded, predicated upon medical proof, that the Child had been abused. The juvenile court explained that expert medical proof also had established that the Child would suffer cognitive deficits and seizures as a result of her injuries. The juvenile court therefore determined the Child to be “dependent, neglected and abused” although the court was unable to find with certainty that Mother was the abuser. In its 2017 order granting guardianship of the Child to Foster Mother, the juvenile court declined to order visitation between Mother and the Child, stating that Mother needed to demonstrate that she was compliant with mental health treatment and had a safe, stable residence free from domestic violence.

On November 23, 2020, Petitioners filed a motion for default judgment, asserting that Mother had failed to file a response to the petition despite having been served with process on September 28, 2020. In support, Petitioners attached a copy of the executed summons. On December 7, 2020, the trial court conducted a hearing on the motion, during which Mother appeared and sought court-appointed counsel. In turn, Mother filed an affidavit of indigency that same day. The court appointed counsel for Mother on December 22, 2020.

On February 8, 2021, Mother filed an answer to the petition, denying that statutory grounds existed sufficient to terminate her parental rights. Subsequently, on February 24, 2021, Mother filed a motion seeking temporary visitation with the Child. Mother asserted in her motion that she had informally sought visitation from Petitioners but that her requests had been denied or postponed indefinitely.

On March 31, 2021, Petitioners filed a motion seeking to amend their petition to allege the following additional statutory grounds for termination of Mother’s parental rights: (1) severe abuse of the Child by Mother; (2) severe abuse of the Child’s sibling, Amaria, by exposing that child to illicit drugs in utero; and (3) Mother’s mental incompetence. Petitioners alleged that Mother had a history of mental instability and drug abuse. Petitioners attached copies of documents from the juvenile court pertaining to Amaria, including a dependency and neglect petition, a permanency plan, and various orders. Petitioners also filed a response in opposition to Mother’s motion for visitation and a motion to suspend Mother’s visitation with the Child.

On May 11, 2021, the trial court entered an order of partial guardianship, appointing Petitioners as the Child’s guardians and legal custodians. In this order, the court recited that Mother was in agreement with the appointment. The court concomitantly granted Petitioners permission to amend their petition by adding the additional grounds for termination as referenced above. The court also entered a protective order directing that all information and documents disclosed during the proceedings would not be used or disseminated to anyone outside the proceedings. In addition, the court denied Mother’s motion seeking visitation with the Child, stating that

Mother had “failed to comply with the requirements to obtain visitation as set forth by the Juvenile Court of Davidson County.”²

The trial court conducted a bench trial spanning May 4 and 5, 2022. On May 24, 2022, the court entered a memorandum opinion, finding that multiple statutory grounds for termination had been pled and tried: (1) abandonment through failure to visit, (2) abandonment through failure to support, (3) persistence of the conditions leading to the Child’s removal, (4) failure to manifest an ability and willingness to assume legal and physical custody of or financial responsibility for the Child, (5) severe child abuse of a sibling, and (6) Mother’s mental incompetence. However, the court determined that clear and convincing evidence supported only the following grounds: (1) abandonment through failure to visit, (2) abandonment through failure to support, and (3) severe abuse of the Child’s sibling. The court also concluded that termination of Mother’s parental rights was in the Child’s best interest following its consideration of the nine statutory best interest factors found in Tennessee Code Annotated § 36-1-113(i) (Supp. 2020). The court accordingly terminated Mother’s parental rights to the Child and granted Petitioners’ request to adopt the Child. Mother timely appealed.

II. Issue Presented

Mother presents two issues for this Court’s review, which we have combined into one issue and restated as follows:

Whether the trial court erred by finding that Petitioners had presented clear and convincing evidence that the termination of Mother’s parental rights was in the Child’s best interest, particularly by declining to attach significant weight to Mother’s adjustment of circumstances.

Petitioners have raised no additional issues on appeal.

III. Standard of Review

In a termination of parental rights case, this Court has a duty to determine “whether the trial court’s findings, made under a clear and convincing standard, are supported by a preponderance of the evidence.” *In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006). The trial court’s findings of fact are reviewed *de novo* upon the record, accompanied by a presumption of correctness unless the evidence preponderates against those findings. *See* Tenn. R. App. P. 13(d); *see also In re Carrington H.*, 483 S.W.3d

² The trial court appears to reference the 2017 guardianship order, in which the juvenile court declined to order visitation between Mother and the Child, stating that Mother needed to demonstrate that she was compliant with mental health treatment and maintained a safe, stable residence free from domestic violence.

507, 523-24 (Tenn. 2016); *In re F.R.R., III*, 193 S.W.3d at 530. Questions of law, however, are reviewed *de novo* with no presumption of correctness. See *In re Carrington H.*, 483 S.W.3d at 524 (citing *In re M.L.P.*, 281 S.W.3d 387, 393 (Tenn. 2009)). The trial court’s determinations regarding witness credibility are entitled to great weight on appeal and shall not be disturbed absent clear and convincing evidence to the contrary. See *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002).

“Parents have a fundamental constitutional interest in the care and custody of their children under both the United States and Tennessee constitutions.” *Keisling v. Keisling*, 92 S.W.3d 374, 378 (Tenn. 2002). It is well established, however, that “this right is not absolute and parental rights may be terminated if there is clear and convincing evidence justifying such termination under the applicable statute.” *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)). As our Supreme Court has explained:

The parental rights at stake are “far more precious than any property right.” *Santosky [v. Kramer]*, 455 U.S. [745,] 758-59 [(1982)]. Termination of parental rights has the legal effect of reducing the parent to the role of a complete stranger and of [“]severing forever all legal rights and obligations of the parent or guardian of the child.” Tenn. Code Ann. § 36-1-113(1)(1); see also *Santosky*, 455 U.S. at 759 (recognizing that a decision terminating parental rights is “*final* and irrevocable”). In light of the interests and consequences at stake, parents are constitutionally entitled to “fundamentally fair procedures” in termination proceedings. *Santosky*, 455 U.S. at 754; see also *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty, N.C.*, 452 U.S. 18, 27 (1981) (discussing the due process right of parents to fundamentally fair procedures).

Among the constitutionally mandated “fundamentally fair procedures” is a heightened standard of proof—clear and convincing evidence. *Santosky*, 455 U.S. at 769. This standard minimizes the risk of unnecessary or erroneous governmental interference with fundamental parental rights. *Id.*; *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010). “Clear and convincing evidence enables the fact-finder to form a firm belief or conviction regarding the truth of the facts, and eliminates any serious or substantial doubt about the correctness of these factual findings.” *In re Bernard T.*, 319 S.W.3d at 596 (citations omitted). The clear-and-convincing-evidence standard ensures that the facts are established as highly probable, rather than as simply more probable than not. *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005); *In re M.A.R.*, 183 S.W.3d 652, 660 (Tenn. Ct. App. 2005).

* * *

In light of the heightened burden of proof in termination proceedings, however, the reviewing court must make its own determination as to whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, amount to clear and convincing evidence of the elements necessary to terminate parental rights. *In re Bernard T.*, 319 S.W.3d at 596-97.

In re Carrington H., 483 S.W.3d at 522-24. “[P]ersons seeking to terminate [parental] rights must prove all the elements of their case by clear and convincing evidence,” including statutory grounds and the best interest of the child. *See In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010).

Petitioners have not raised any issues regarding the trial court’s determinations that they failed to prove by clear and convincing evidence the statutory grounds of persistence of the conditions leading to the Child’s removal, Mother’s mental incompetence, and Mother’s failure to manifest an ability and willingness to assume legal and physical custody of or financial responsibility for the Child. Although our Supreme Court has instructed that this Court “must review the trial court’s findings as to each ground for termination and as to whether termination is in the child’s best interests, regardless of whether the parent challenges these findings on appeal,” *In re Carrington H.*, 483 S.W.3d at 525-26, this Court has not interpreted this instruction “to mean that this Court must also review grounds that the trial court found were not sufficiently proven when the party who sought termination does not challenge that ruling on appeal,” *In Re Disnie P.*, No. E2022-00662-COA-R3-PT, 2023 WL 2396557, at *5 (Tenn. Ct. App. Mar. 8, 2023) (quoting *In re C.S.*, No. E2019-01657-COA-R3-PT, 2020 WL 2066247, at *3 (Tenn. Ct. App. Apr. 29, 2020)). Accordingly, we will not review the trial court’s findings as to the three statutory grounds that the court determined had not been proven by clear and convincing evidence.

IV. Statutory Grounds for Termination

Tennessee Code Annotated § 36-1-113 (Supp. 2022) lists the statutory requirements for termination of parental rights, providing in relevant part:

- (a) The chancery and circuit courts shall have concurrent jurisdiction with the juvenile court to terminate parental or guardianship rights to a child in a separate proceeding, or as a part of the adoption proceeding by utilizing any grounds for termination of parental or guardianship rights permitted in this part or in title 37, chapter 1, part 1 and title 37, chapter 2, part 4. . . .

* * *

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

The trial court determined that the evidence clearly and convincingly supported the following statutory grounds to terminate Mother's parental rights: (1) abandonment by failure to visit, pursuant to Tennessee Code Annotated §§ 36-1-113(g)(1) and -102(1)(A); (2) abandonment by failure to support, pursuant to Tennessee Code Annotated §§ 36-1-113(g)(1) and -102(1)(A); and (3) severe child abuse involving the Child's sibling, pursuant to Tennessee Code Annotated §§ 36-1-113(g)(4) and 37-1-102(b)(27). We will address each respective ground found by the trial court in turn.

A. Statutory Abandonment

Concerning statutory abandonment, Tennessee Code Annotated § 36-1-113(g)(1) provides, as relevant to this action:

- (g) Initiation of termination of parental or guardianship rights may be based upon any of the grounds listed in this subsection (g). The following grounds are cumulative and nonexclusive, so that listing conditions, acts or omissions in one ground does not prevent them from coming within another ground:
 - (1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred[.]

Regarding the definition of abandonment applicable to this ground, Tennessee Code Annotated § 36-1-102(1) (Supp. 2022) defines abandonment in pertinent part as:

- (A)(i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding, pleading, petition, or any amended petition to terminate the parental rights of the parent or parents or the guardian or guardians of the child who is the subject of the petition for termination of parental rights or adoption, that the parent or parents or the guardian or guardians either have failed to visit or have failed to support or have failed to make reasonable payments toward the support of the child[.]

1. Abandonment by Failure to Support

The trial court determined that Mother had abandoned the Child by failing to support the Child or make reasonable payments toward the Child's support during the four-month statutory period, which it found began on May 21, 2020, and concluded on September 21, 2020, the day before filing of the initial termination petition wherein this ground was alleged.³ However, we note that the commencement of this time period should be May 22, 2020, rendering a statutory determinative period spanning May 22, 2020, through September 21, 2020 ("Determinative Period"). See *In re Joseph F.*, 492 S.W.3d 690, 702 (Tenn. Ct. App. 2016) (explaining that the applicable four-month statutory period preceding filing of the termination petition "began on March 8, 2011, and concluded on July 7, 2011, the day prior to the filing of the termination petition") (citing *In re Jacob C.H.*, No. E2013-00587-COA-R3-PT, 2014 WL 689085, at *6 (Tenn. Ct. App. Feb. 20, 2014)). Because we find that this one-day difference in the beginning of the Determinative Period does not affect our analysis of this statutory ground, we determine the trial court's inclusion of the extra day to be harmless error. See, e.g., *In re Jacob C.H.*, No. E2013-00587-COA-R3-PT, 2014 WL 689085, at *6 (Tenn. Ct. App. Feb. 20, 2014).

In its final order, the trial court enunciated the following specific findings of fact regarding this ground:

As evidenced by Exhibit 7, child support was set by an Order of the Juvenile Court of Davidson County on April 5, 2018. [Mother] was ordered to pay \$363.00 per month to [Foster Mother] beginning on May 1, 2018. Exhibit 6 provides a summary of child support payments made by [Mother]. There are no payments listed for the year of 2020, including during the relevant statutory period. [Mother] testified that she is self-employed as a bathroom attendant at Whiskey Row in downtown Nashville, Tennessee. [Mother] stated that she works this job approximately three times per month or eighteen hours per month. [Mother] estimated her income at around \$900.00 a month, though her income is based on tips and not a salary, so it varies. [Mother] testified that she did not work during the relevant statutory period due to the COVID-19 pandemic. She stated that all bars in Nashville closed due to quarantine during the early stages of the pandemic in March 2020 and remained closed through at least September of 2020. [Mother] testified that during this time

³ Although Petitioners filed a subsequent amended petition, they did not alter or amend the initial termination petition's allegations concerning the abandonment grounds; rather, the amended petition solely added additional statutory grounds for termination. As such, we determine that the trial court properly found that the applicable four-month statutory period would be that period preceding the filing of the initial termination petition. See, e.g., *In re Liberty T.*, No. E2022-00307-COA-R3-PT, 2023 WL 2681897, at *6 (Tenn. Ct. App. Mar. 29, 2023).

she looked online for work and asked around with friends and family to see if anyone knew of a job, but that there was ultimately, “no work to be had.”

This Court finds by clear and convincing evidence that [Mother] did not send the Petitioners any support for Leah during the relevant statutory period nor did she pay child support during the relevant statutory period. While it could be argued that the presence of the COVID-19 pandemic made paying child support difficult for [Mother], [Mother] failed to provide even token support to Petitioners during that time. The lack of any form of monetary support from [Mother] compels this Court to find her to have abandoned Leah by failure to support or pay child support. Therefore, the ground of abandonment by failing to support the child or failing to pay child support for the child is found pursuant to T.C.A. § 36-1-113(g)(1) and T.C.A. § 36-1-201(1)(A)(i).

Tennessee Code Annotated § 36-1-102(1)(D) (Supp. 2022) defines “failed to support” or “failed to make reasonable payments toward such child’s support” as “the failure, for a period of four (4) consecutive months, to provide monetary support or the failure to provide more than token payments toward the support of the child” and provides that the parent’s ability to make only small payments is not a defense “if no payments were made during the relevant four-month period.”

We note that Mother did not raise lack of willfulness as an affirmative defense in her answer to either the initial petition or the amended petition seeking termination of her parental rights. *See* Tenn. Code Ann. § 36-1-102(1)(I) (“The absence of willfulness is an affirmative defense pursuant to Rule 8.03 of the Tennessee Rules of Civil Procedure.”). As such, she waived the absence of willfulness as a defense to the ground of abandonment by failure to support. *See* Tenn. R. Civ. P. 12.08 (specifying that, in general, defenses not raised by motion or answer are waived); *see also In re Ashlynn H.*, No. M2020-00469-COA-R3-PT, 2021 WL 2181655, at *4 (Tenn. Ct. App. May 28, 2021) (finding that a parent who failed to plead the absence of willfulness in his response to the petition to terminate parental rights waived it as a defense to the ground of abandonment by failure to support). Notwithstanding, in a termination case involving a similar circumstance, this Court has previously held that where the petitioners failed to object to evidence presented at trial concerning the parent’s alleged lack of willfulness relative to the ground of abandonment through failure to visit, the defense was deemed to have been tried by implied consent. *See In re Lauren F.*, No. W2020-01732-COA-R3-PT, 2021 WL 5234712, at *8 (Tenn. Ct. App. Nov. 10, 2021).

In *Lauren F.*, the petitioners had alleged that the father’s parental rights should be terminated based on, *inter alia*, abandonment through failure to visit the child. *See id.* at *1. The father did not raise the affirmative defense of the absence of willfulness in his answer or via motion. *Id.* at *2. Moreover, the father did not raise any issue on appeal

concerning the grounds for termination. *Id.* at *5. Despite these deficiencies, this Court determined that the issue of willfulness had been tried by implied consent inasmuch as the petitioners had failed to object to testimony regarding willfulness at trial and had provided testimony concerning “Father’s requests to visit the child and their response to his request[s] at length.” *Id.* at *8. This Court then proceeded to analyze the willfulness issue on appeal. *See id.*; *see also* Tenn. R. Civ. P. 15.02 (“When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.”); *McLemore v. Powell*, 968 S.W.2d 799, 803 (Tenn. Ct. App. 1997) (“Implied consent hinges on the issues that were actually litigated by the parties, and the failure to amend or to request to amend is not dispositive.”).

Similarly, here, Mother failed to raise the affirmative defense of lack of willfulness in her answers or via motion, and she failed to raise any issue whatsoever on appeal concerning this termination ground. However, Mother was questioned by all counsel and allowed to testify at length during the trial concerning her employment situation and alleged lack of income during the Determinative Period. As such, we determine that the issue of willfulness was tried by implied consent. *See In re Lauren F.*, 2021 WL 5234712, at *8. In accordance with our Supreme Court’s directive in *In re Carrington H.*, 483 S.W.3d at 525-26, to “review the trial court’s findings as to each ground for termination . . . regardless of whether the parent challenges these findings on appeal,” and the precedent set by *In re Lauren F.*, *see* 2021 WL 5234712, at *8, we will proceed to analyze the willfulness issue concerning abandonment through failure to support.

With regard to any claim of lack of willfulness, Mother bore the burden of proof by a preponderance of the evidence. *See* Tenn. Code Ann. § 36-1-102(1)(I) (“The parent or guardian shall bear the burden of proof that the failure to visit or support was not willful. Such defense must be established by a preponderance of evidence.”). “Willfulness” has previously been explained in the context of parental termination actions as follows:

Conduct is “willful” if it is the product of free will rather than coercion. Thus, a person acts “willfully” if he or she is a free agent, knows what he or she is doing, and intends to do what he or she is doing.

Failure to visit or support a child is “willful” when a person is aware of his or her duty to visit or support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so. Failure to visit or to support is not excused by another person’s conduct unless the conduct actually prevents the person with the obligation from performing his or her duty, or amounts to a significant restraint of or interference with the parent’s efforts to support or develop a relationship with the child. . . .

The willfulness of particular conduct depends upon the actor's intent. Intent is seldom capable of direct proof, and triers-of-fact lack the ability to peer into a person's mind to assess intentions or motivations. Accordingly, triers-of-fact must infer intent from the circumstantial evidence, including a person's actions or conduct.

In re Audrey S., 182 S.W.3d 838, 863-64 (Tenn. Ct. App. 2005) (citations and footnotes omitted); *see In re Adoption of Angela E.*, 402 S.W.3d 636, 640 (Tenn. 2013) (“A parent cannot be said to have abandoned a child when his failure to visit or support is due to circumstances outside his control.”).

In the case at bar, Mother testified that she was not working during the Determinative Period. Mother explained that her primary employment since November 2019 was as an independently contracted “bathroom attendant” at a bar in downtown Nashville. Mother added that she worked approximately three days per month performing this job. According to Mother, she received no salary for the position and instead received only tips, earning approximately \$900 per month “since the pandemic.” Mother indicated that prior to the COVID-19 pandemic, she earned “a whole lot more” from this same employment.

Mother claimed that during the Determinative Period, the bar where she worked was closed due to the COVID-19 quarantine after March 2020 and she had no source of income. Mother acknowledged that she was neither incarcerated nor physically debilitated during that timeframe. When questioned as to whether she had sought employment elsewhere, Mother articulated that she had “look[ed] online and through friends and families if they heard of any places that was hiring.” Mother also reported that she worked during the month of September 2020, when the quarantine was briefly lifted, but that the bar was shut down for the remainder of that year.

The evidence presented during trial established that Mother had paid no child support whatsoever during the Determinative Period. In fact, Mother acknowledged that she had paid no child support during the entire calendar year 2020 despite reporting that she had worked for at least three to four months during that year. The trial court declined to credit Mother's testimony concerning the absence of willfulness with respect to her failure to pay support during the Determinative Period, reasoning that although “it could be argued that the presence of the COVID-19 pandemic made paying child support difficult for [Mother], [Mother] failed to provide even token support to Petitioners during that time.” *See* Tenn. Code Ann. § 36-1-102(1)(D) (“That the parent had only the means or ability to make small payments is not a defense to failure to support if no payments were made during the relevant four-month period.”).

Our review of the proof demonstrates that Mother never presented any evidence establishing that she was physically incapable of maintaining employment; in fact, Mother conceded that she could return to prior employment with a fast food restaurant or a temporary placement agency at any time she wished. During November and December 2019, when Mother declared that she was making more than \$900 per month, she paid no support. We reiterate that Mother paid no support during the Determinative Period or the entire year of 2020 although Mother claimed to have other employment opportunities available to her. As such, we conclude that Mother was unsuccessful in satisfying her burden of proof by a preponderance of evidence that her failure to support the Child was not willful. We therefore affirm the trial court's determination that clear and convincing evidence was presented to support the ground of abandonment through failure to pay child support.

2. Abandonment by Failure to Visit

The trial court also determined that Mother had abandoned the Child by failing to visit her during the four months preceding the filing of the termination petition. We note that this ground was also alleged in the initial termination petition filed on September 22, 2020. Therefore, the Determinative Period would be the same as was applicable to the ground of abandonment through failure to support.

In its final order, the trial court specified the following, in pertinent part, regarding the statutory ground of failure to visit the Child:

In regards to visitation, [Mother] testified that it had been years since she last visited Leah. [Mother] and [Foster Mother] both testified that the last time [Mother] visited Leah was in June of 2018. Between 2015 and 2019, [Mother] stated she had supervised visitation. She was unsure of the exact number of visits that occurred. Visitation was supervised by Omni Center and took place every Wednesday. There were several photos of these visits presented as Exhibit 11 and identified by [Mother's] testimony. Of these photos, [Mother] testified that the most recent was taken by her sometime in 2018. [Mother] testified she only missed about five visits but could not recall an exact number that she attended. Exhibit 10B, the Permanent Guardianship Order issued by the Juvenile Court of Davidson County on September 11, 2017, describes a finding of multiple instances of [Mother] failing to attend or cancelling scheduled visits. As a result, the Court in that proceeding did not order visitation with [Mother] but encouraged visitation under the discretion of [Foster Mother]. [Mother] stated that since 2018 she did not think she was allowed to visit. There was no evidence presented of [Mother's] visitation with Leah ever being revoked or stayed by a court order.

When asked if she always received a visit when she requested, [Mother] testified that [Foster Mother] sometimes declined, sometimes giving a reason for the declination. [Mother] specifically referenced an instance where [Foster Mother] refused a visit because Petitioners were out of town with Leah. [Foster Mother] clarified this requested visit in her own testimony and explained that she did deny a visit because they were in Franklin, Tennessee.⁴ She stated she was willing to reschedule with [Mother], and informed her of such, but [Mother] never reached back out to her to reschedule the visit. [Mother] also mentioned a situation where at the end of a visit in 2018 at [Foster Mother's] residence she encountered a verbal conflict with [Foster Mother's] daughter and step-daughter. [Mother] testified that she stopped asking for visits with the Petitioners due to conflict with them. She stated she had wanted to use a third party visitation service but did not have the money to do so. Even though there was some reported disagreement between the parties, [Foster Mother] testified that she would never deny a visit if [Mother] had requested one. There is no evidence of bad faith or repeated denial of requested visitation on the part of the Petitioners. [Foster Mother] specifically testified that she would be willing to allow [Mother] to visit whenever she requested to do so.

* * *

[Foster Mother] conclusively testified that there were no phone calls, text messages, or contact of any kind by [Mother] during the relevant statutory period. Further, [Mother] testified that she had never contacted [Foster Mother] by any method, including during the relevant statutory period.

This Court finds by clear and convincing evidence that [Mother] failed to visit during the relevant statutory period. The evidence presented supports the assertion, during the relevant statutory period, that [Mother] did not physically visit Leah nor did she attempt to communicate in any way with Leah or Petitioners. While it could be argued that visitation was impractical or would have been denied due to the COVID-19 pandemic, the Court finds that the totality of the evidence supports the finding of abandonment, especially considering [Mother's] failure to call, text, Facetime, or otherwise contact the Petitioners.

⁴ We note that although no evidence was presented concerning the precise timing of this incident, it was apparent that it had occurred prior to the Determinative Period.

Upon our thorough review of the evidence, we agree that Petitioners clearly established that Mother neither sought nor participated in any visits with the Child during the Determinative Period.

Again, although Mother did not assert lack of willfulness as an affirmative defense to this ground via answer or motion, evidence was presented without objection concerning her stated belief that her request for a visit would be rebuffed. We therefore determine that this issue was tried by implied consent.⁵ However, as the trial court found, Mother presented no proof that her visitation with the Child was ever limited by Petitioners except in one instance when they were traveling out of town. Despite the lack of a court-ordered visitation schedule, Petitioners accommodated Mother's visits with the Child until Mother ceased requesting visits in 2018. Foster Mother testified unequivocally that she would have allowed Mother to visit if Mother had requested to do so, and Foster Mother discussed her efforts to encourage Mother's visits with the Child during the first few years following the Child's removal. Mother admitted that she had not sought a visit with the Child since 2018, and the proof was undisputed that Mother participated in no visits during the Determinative Period (or the entire calendar years of 2019 and 2020) and also had not requested a visit. We therefore affirm the trial court's determination that clear and convincing evidence was presented to support the ground of abandonment through failure to visit.

B. Severe Child Abuse of the Child's Sibling

The trial court determined that Mother had committed severe child abuse against the Child's sibling, Amaria. With regard to this statutory ground, Tennessee Code Annotated § 36-1-113(g)(4) provides:

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 any child[.]

(Emphasis added.) Moreover, Tennessee Code Annotated § 37-1-102(b)(27) (2020) defines "severe child abuse" as, in pertinent part:

(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;

⁵ A complete analysis of trying lack of willfulness by implied consent was presented in the previous section of this Opinion.

- (ii) “Serious bodily injury” shall have the same meaning given in § 39-15-402(c);

- (B) Specific brutality, abuse or neglect towards a child that in the opinion of qualified experts has caused or will reasonably be expected to produce severe psychosis, severe neurotic disorder, severe depression, severe developmental delay or intellectual disability, or severe impairment of the child’s ability to function adequately in the child’s environment, and the knowing failure to protect a child from such conduct;

- * * *

- (E) Knowingly or with gross negligence allowing a child under eight (8) years of age to ingest an illegal substance or a controlled substance that results in the child testing positive on a drug screen, except as legally prescribed to the child[.]

The trial court found as follows concerning the ground of severe child abuse:

Petitioners assert that [Mother] committed severe child abuse against Leah’s sibling, Amaria, by ingesting cocaine and marijuana during her pregnancy and therefore her parental rights should be terminated pursuant to T.C.A. § 36-1-113(g)(4). Section 113(g)(4) states that parental rights may be terminated if the parent has been found to commit severe child abuse against any child. Severe child abuse is defined in T.C.A. § 36-1-102(b)(27). Specifically, Section 102(b)(27)(E) states that it constitutes severe child abuse to knowingly or with gross negligence allow a child under 8 years of age to ingest an illegal substance or a controlled substance that results in the child testing positive on a drug screen. In In Re Benjamin M., the Court of Appeals of Tennessee confirmed that a mother’s ingestion of illegal drugs during pregnancy constitutes severe child abuse (310 S.W.3d 844, 850 (2009)).

Amaria was born to [Mother] and [Father] on June 3, 2017 at Centennial Medical Center in Nashville, Tennessee. Exhibit 2 consists of records of various drug screenings concerning Amaria. According to these records, Amaria’s umbilical cord test came back positive for cocaine and THC on June 6, 2017. Also in Exhibit 2, a coding summary describes Amaria’s condition in her first few days as having respiratory distress, hyperglycemia, neonatal jaundice, hypothermia, and further that the “newborn [is] affected by maternal use of other drugs of addiction.”

Exhibit 2 provides that mother tested positive for THC during her pregnancy on November 8, 2016, March 7, 2017, and March 31, 2017.

* * *

The Court does not find [Mother's] testimony on the issue of drug use during her pregnancy credible. Initially, [Mother] stated she had not used cocaine in 5 or 6 years, which would be prior to Amaria's birth in 2017. She later testified that she stopped taking drugs after she filled out the IPA for Leah in 2015. [Mother] claimed that she wasn't sure how the cocaine got into Amaria's system, but thought it could be through sexual contact with [Father] who was using cocaine at the time. When asked if she asked for a second drug test, [Mother] stated she did not know she could request another test. When asked if she knew that marijuana could be laced with other substances like cocaine, [Mother] stated that she was not aware of that at the time of her pregnancy.

[Mother] also testified that she was not surprised at the positive result for THC because she was smoking marijuana prior to realizing she was pregnant. She testified she knew she was pregnant with Amaria at approximately nine weeks. The record reflects two positive drug tests for [Mother] for THC in March of 2017, on March 7 and March 31, around two months before Amaria's birth. [Mother] opined that she tested positive while pregnant because she was around people who were smoking marijuana when she was pregnant, namely [Father]. [Mother] testified that [Father] told her that it was safe to smoke marijuana while pregnant. She did not discuss marijuana use while pregnant with a doctor. She stated she would not consider herself a drug user.

Based on the evidence presented, this Court finds by clear and convincing evidence that [Mother] ingested illegal drugs during her pregnancy with Amaria and therefore perpetrated severe child abuse as defined by Tennessee statutory law and as interpreted by Tennessee case law. In light of a finding of severe child abuse against any child, this Court finds that Petitioners have established by clear and convincing evidence that [Mother's] parental rights may be terminated according to T.C.A. § 37-1-102(b)(27).

Upon our review of the evidence presented in this matter, we conclude that the trial court's factual findings concerning this ground are supported by the proof.

According to medical records presented as an exhibit at trial, an umbilical cord drug screen performed after Amaria's birth revealed the presence of cocaine and THC.

These records also established that Amaria suffered from respiratory distress and other medical issues immediately following her birth due in part to the illicit drugs present in her system. Amaria also received care in the neo-natal intensive care unit before being discharged to go home with her foster parents.

Mother testified that she had not ingested cocaine during her pregnancy with Amaria although she admitted to having used cocaine in the past. As the trial court noted, Mother's testimony concerning the timing of her last use of cocaine was conflicting. Mother did admit, however, that she had smoked marijuana during the early part of her pregnancy, stating that she had been told by Father that it was safe for her to do so. Although Mother denied having smoked marijuana during the latter part of her pregnancy, Petitioners presented evidence that Mother had failed two drug screens in March 2017, when she was approximately six months pregnant with Amaria, based on the presence of marijuana. Mother's only explanation for these failed drug screens was that she had been in the presence of others who were smoking marijuana. Mother similarly had no explanation for why Amaria would have tested positive for cocaine immediately after her birth except to hypothesize that Mother had somehow unintentionally ingested cocaine through sexual contact with Father.

As the trial court observed, this Court has previously held that the ingestion/use of drugs by a mother during pregnancy can support a finding of severe child abuse. *See In re Benjamin M.*, 310 S.W.3d 844, 850 (Tenn. Ct. App. 2009) (“[W]e hold that the statutory language defining severe child abuse clearly reflects an intent that actions before a child is born can constitute abuse to a child that is born injured by those actions.”). *See also In re P.T.F.*, No. E2016-01077-COA-R3-PT, 2017 WL 2536847, at *5 (Tenn. Ct. App. June 12, 2017) (“This Court has consistently upheld termination of a mother's parental rights on the ground of severe child abuse when she has used drugs during pregnancy.”); *In re Garvin M.*, 2014 WL 1887334, at *5 (“[T]here are numerous cases holding that a mother's use of drugs while pregnant can constitute severe child abuse.”); *In re Shannon P.*, No. E2012-00445-COA-R3-PT, 2013 WL 3777174, at *5 (Tenn. Ct. App. July 16, 2013) (“[T]here is substantial case law supporting a finding of severe child abuse for a parent exposing a child to drugs in utero, whether or not the child actually suffers harm.”); *In re Ethin E.S.*, No. E2011-02478-COA-R3-PT, 2012 WL 1948817, at *8 (Tenn. Ct. App. May 31, 2012) (“[T]his Court has repeatedly held that a mother's prenatal drug use can constitute severe child abuse in termination of parental rights cases.”); *In re Joshua E.R.*, No. W2011-02127-COA-R3-PT, 2012 WL 1691620, at *3 (Tenn. Ct. App. May 15, 2012) (“In light of our prior holdings, and the supreme court and General Assembly's disinclination to overrule them, we continue to hold that prenatal drug abuse may constitute severe child abuse for the purpose of terminating parental rights.”).

Based on the medical evidence establishing Mother's use of cocaine and marijuana during her pregnancy with Amaria, coupled with the health problems Amaria

suffered following her birth, we conclude that the trial court properly determined that clear and convincing evidence supported the statutory ground of severe child abuse of the Child's sibling by Mother. We therefore affirm this ground supporting termination of Mother's parental rights to the Child.

V. Best Interest

When a parent has been found to be unfit by establishment of at least one statutory ground for termination of parental rights, as here, the interests of parent and child diverge, and the focus shifts to what is in the child's best interest. *In re Audrey S.*, 182 S.W.3d at 877; *see also In re Carrington H.*, 483 S.W.3d at 523 ("The best interests analysis is separate from and subsequent to the determination that there is clear and convincing evidence of grounds for termination." (quoting *In re Angela E.*, 303 S.W.3d 240, 254 (Tenn. 2010))). Tennessee Code Annotated § 36-1-113(i) provides a list of factors the trial court is to consider when determining if termination of parental rights is in a child's best interest. This list is not exhaustive, and the statute does not require the court to find the existence of every factor before concluding that termination is in a child's best interest. *See In re Carrington H.*, 483 S.W.3d at 523; *In re Audrey S.*, 182 S.W.3d at 878 ("The relevancy and weight to be given each factor depends on the unique facts of each case."). Furthermore, the best interest of a child must be determined from the child's perspective and not the parent's. *White v. Moody*, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004). We reiterate that the only issues raised by Mother on appeal concern the trial court's best interest analysis.

As a preliminary matter, we address the version of the statutory best interest factors applicable to this action. In the trial court's memorandum opinion, the court cited the nine statutory factors that existed in the version of the statute applicable when the original petition was filed in September 2020, and no issue has been raised on appeal concerning this application. *See Tenn. Code Ann. § 36-1-113(i)* (Supp. 2020). We note, however, that Petitioners filed a motion seeking to amend their original petition to add additional grounds for termination, including the ground of severe child abuse, in March 2021. The trial court entered an order granting Petitioners' request to amend their petition on May 11, 2021, which was after the statute had been amended to implement the twenty best interest factors contained in the version of the statute that became effective in April 2021. *See Tenn. Code Ann. § 36-1-113(i)* (Supp. 2022). In holding that the amended statutory best interest factors should be considered when a termination petition has been filed on or after the effective date of the amendment, this Court has explained, "the statute as amended adds a number of 'additional factors that should be considered, if relevant.'" *In re Alessa H.*, No. M2021-01403-COA-R3-PT, 2022 WL 3332653, at *14 (Tenn. Ct. App. Aug. 12, 2022) (quoting *In re Riley S.*, No. M2020-01602-COA-R3-PT, 2022 WL 128482, at *14 n.10 (Tenn. Ct. App. Jan. 14, 2022)).

Whether the amended version of the statute is applicable here depends upon whether the amended petition was a “separate and distinct petition” from the original. *See In re Ava M.*, No. E2019-01675-COA-R3-PT, 2020 WL 2560932, at *14 (Tenn. Ct. App. May 20, 2020) (quoting *In re P.G.*, No. M2017-02291-COA-R3-PT, 2018 WL 3954327, at *7 (Tenn. Ct. App. Aug. 17, 2018)). This Court has recently determined that an amended petition was separate and distinct from the original when “[p]etitioners included grounds for termination only in the amended petition.” *In re Piper N.*, No. W2021-01185-COA-R3-PT, 2023 WL 334656, at *8, *11 (Tenn. Ct. App. Jan. 20, 2023) (ultimately reversing or vacating the trial court’s findings on all grounds and vacating the trial court’s best interest analysis upon remand for sufficient findings of fact and conclusions of law). This Court has also determined that “the statutes in effect at the time the second amended petition was filed” must be applied when no statutory grounds for termination were included in the original petition and the first amended petition, although including statutory grounds, contained critical errors in the naming of the parents and child, ultimately corrected only in the second amended petition. *In Re Disnie P.*, 2023 WL 2396557, at *4.

More recently, this Court has determined that when additional statutory grounds in support of termination were raised in an amended petition, the amended petition had to be considered separate and distinct from the original petition for the purpose of establishing its filing date, such that the amended statutory best interest factors that had taken effect by the time of the amended petition’s filing would be applicable. *See In re Liberty T.*, No. E2022-00307-COA-R3-PT, 2023 WL 2681897, at *10 (Tenn. Ct. App. Mar. 29, 2023). The *Liberty* Court also determined that because the trial court had failed to properly consider the twenty best-interest factors listed in the amended statute, which was deemed applicable due to the timing of the amended petition’s filing, the trial court’s finding as to the best interest analysis would have to be reversed and remanded for reconsideration utilizing the new best interest factors. *See id.*; *see also In re Disnie P.*, 2023 WL 2396557, at *14 (citing *In re Alessa H.*, 2022 WL 3332653, at *14). Upon review, we conclude that we must do the same here.

Petitioners’ amended termination petition was a separate and distinct petition insofar as it added statutory grounds for termination that were not included in the original petition. Because the amended petition became effective as of the trial court’s May 11, 2021 order granting the amendment, the trial court should have applied the twenty best interest factors included in the amended statute, which took effect in April 2021. *See* Tenn. Code Ann. § 36-1-113(i) (Supp. 2022). Accordingly, we reverse the trial court’s finding that termination of Mother’s parental rights was in the Child’s best interest and remand for reconsideration of the Child’s best interest employing the following best interest factors, as provided in Tennessee Code Annotated § 36-1-113(i) (Supp. 2022):

- (A) The effect a termination of parental rights will have on the child's critical need for stability and continuity of placement throughout the child's minority;
- (B) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological, and medical condition;
- (C) Whether the parent has demonstrated continuity and stability in meeting the child's basic material, educational, housing, and safety needs;
- (D) Whether the parent and child have a secure and healthy parental attachment, and if not, whether there is a reasonable expectation that the parent can create such attachment;
- (E) Whether the parent has maintained regular visitation or other contact with the child and used the visitation or other contact to cultivate a positive relationship with the child;
- (F) Whether the child is fearful of living in the parent's home;
- (G) Whether the parent, parent's home, or others in the parent's household trigger or exacerbate the child's experience of trauma or post-traumatic symptoms;
- (H) Whether the child has created a healthy parental attachment with another person or persons in the absence of the parent;
- (I) Whether the child has emotionally significant relationships with persons other than parents and caregivers, including biological or foster siblings, and the likely impact of various available outcomes on these relationships and the child's access to information about the child's heritage;
- (J) Whether the parent has demonstrated such a lasting adjustment of circumstances, conduct, or conditions to make it safe and beneficial for the child to be in the home of the parent, including consideration of whether there is criminal activity in the home or by the parent, or the use of alcohol, controlled substances, or controlled substance analogues which may render the parent unable to consistently care for the child in a safe and stable manner;

- (K) Whether the parent has taken advantage of available programs, services, or community resources to assist in making a lasting adjustment of circumstances, conduct, or conditions;
- (L) Whether the department has made reasonable efforts to assist the parent in making a lasting adjustment in cases where the child is in the custody of the department;
- (M) Whether the parent has demonstrated a sense of urgency in establishing paternity of the child, seeking custody of the child, or addressing the circumstance, conduct, or conditions that made an award of custody unsafe and not in the child's best interest;
- (N) Whether the parent, or other person residing with or frequenting the home of the parent, has shown brutality or physical, sexual, emotional, or psychological abuse or neglect toward the child or any other child or adult;
- (O) Whether the parent has ever provided safe and stable care for the child or any other child;
- (P) Whether the parent has demonstrated an understanding of the basic and specific needs required for the child to thrive;
- (Q) Whether the parent has demonstrated the ability and commitment to creating and maintaining a home that meets the child's basic and specific needs and in which the child can thrive;
- (R) Whether the physical environment of the parent's home is healthy and safe for the child;
- (S) Whether the parent has consistently provided more than token financial support for the child; and
- (T) Whether the mental or emotional fitness of the parent would be detrimental to the child or prevent the parent from consistently and effectively providing safe and stable care and supervision of the child.

The statute further provides: "When considering the factors set forth in subdivision (i)(1), the prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest." Tenn. Code Ann. § 36-1-113(g)(i)(2).

In remanding for reconsideration of the best interest analysis, we recognize that “time has marched on during this litigation.” See *In re Disnie P.*, 2023 WL 2396557, at *14 (quoting *In re Alessa H.*, 2022 WL 3332653, at *14). In its discretion, the trial court may therefore consider additional evidence on remand. See *In re Disnie P.*, 2023 WL 2396557, at *14.

VI. Conclusion

For the foregoing reasons, we affirm the trial court’s findings as to the statutory grounds of abandonment through failure to support, abandonment through failure to visit, and severe child abuse of a sibling. However, we reverse the trial court’s finding that termination of Mother’s parental rights was in the best interest of the Child and remand for reconsideration applying the amended best interest factors contained in Tennessee Code Annotated § 36-1-113(i) (Supp. 2022). This case is remanded to the trial court, pursuant to applicable law, for further proceedings consistent with this Opinion and collection of costs below. Costs on appeal are assessed one-half to the appellant, Ziquorra R., and one-half to the appellees, Robert D. and Gwendolyn D.

s/Thomas R. Frierson, II

THOMAS R. FRIERSON, II, JUDGE