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Clerk of the  
Appellate Courts

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

**IN RE AUBREE D.<sup>1</sup>**

**Appeal from the Juvenile Court for Overton County**  
**No. 20-JV-141                      Tiffany G. Gipson, Judge**

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**No. M2022-00267-COA-R3-PT**

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The mother of Aubree D. appeals the termination of her parental rights. The trial court found that the Tennessee Department of Children’s Services (“DCS”) established several grounds for terminating the mother’s parental rights—including severe child abuse—and that termination of her rights was in Aubree’s best interest. On appeal, the mother contends that the evidence is insufficient to prove any ground for termination or that termination of her parental rights is in Aubree’s best interest. In a dependency and neglect proceeding, the Circuit Court for Overton County found that the mother subjected Aubree to severe child abuse, and this court affirmed that finding in *In re Aubree D.*, No. M2021-01229-COA-R3-JV, 2022 WL 4488507 (Tenn. Ct. App. Sept. 28, 2022). Thus, the finding of severe child abuse is *res judicata*. We have also determined that DCS proved other grounds for termination and that termination of the mother’s parental rights was in Aubree’s best interest. Accordingly, we affirm the termination of the mother’s parental rights.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed**

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the court, in which CARMA DENNIS MCGEE and KRISTI M. DAVIS, JJ., joined.

Kelly R. Williams, Livingston, Tennessee, for the appellant, Taylor F. R.

Herbert H. Slattery, III, Attorney General and Reporter, and Erica M. Haber, Assistant Attorney General, Nashville, Tennessee, for the appellee, the Tennessee Department of Children’s Services.

**OPINION**

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<sup>1</sup> This Court has a policy of protecting the identity of children by initializing the last names of the parties, relatives, and foster parents.

## FACTUAL AND PROCEDURAL BACKGROUND

Taylor F. R. (“Mother”) and Austin L. D. (“Father”) are the parents of Aubree D. (“Aubree”), born to them in March 2019. Mother was the primary caretaker during the first month of Aubree’s life. After a month of maternity leave, Mother returned to work as a certified nursing assistant, while Father was at home caring for Aubree.<sup>2</sup> When neither Mother nor Father could care for her, Aubree stayed with her maternal grandmother, Melinda R. (“Grandmother”), who “lives down the road,” or with a sitter, Ms. Betty.

The two primary events leading up to the involvement of DCS occurred on May 18 and 22, 2019, when Aubree was ten weeks old. On May 18, while Mother was at work, Father called Mother to inform her that Aubree’s arm “popped” while he was changing her diaper.<sup>3</sup> Mother immediately rushed home, and she and Father promptly took Aubree to the local hospital, Livingston Regional Hospital, where it was determined that Aubree had a broken arm, more specifically a proximal left ulna fracture. Because the treating physician also concluded that the break “would have occurred from great force, such as an adult,” he informed the parents that DCS had been notified of Aubree’s injuries.

DCS received the referral regarding Aubree on May 18, 2019, at which time Investigator Harli Langford (“Investigator Langford”), who was trained in severe abuse cases, was immediately dispatched to the hospital to investigate. Upon arriving at the hospital, Investigator Langford first met with the medical personnel before interviewing the parents, the details of which are discussed below.

Because the medical personnel at Livingston Regional Hospital were unable to determine the cause of Aubree’s injuries, Investigator Langford instructed Mother and Father to take Aubree to Vanderbilt Children’s Hospital for examination by a CARE Team.<sup>4</sup> An appointment was scheduled for on May 20; however, the parents did not take Aubree to Vanderbilt on May 20 because Mother was not feeling well.

Two days later, on May 22, 2019, the parents took Aubree to Vanderbilt Children’s Hospital for an examination by the CARE team. Following a thorough examination, it was determined that Aubree had approximately 15 broken bones at various stages of healing.

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<sup>2</sup> When Mother returned to work from maternity leave, she worked 12-hour day shifts on a rotating schedule. Father, who also worked, typically worked 16-hour night shifts.

<sup>3</sup> Father also called the maternal grandmother to let her know that something was wrong with Aubree, and she came over immediately.

<sup>4</sup> The record tells us that a “CARE Team” is comprised of physicians and social workers who evaluate complex cases. When a CARE Team does a consultation concerning a child, they perform, inter alia, a full skeletal scan, complete a full panel of blood work, meet with the caregivers, gather historical information about the events leading up to the injury, and review, discuss, and report their findings.

More specifically, the x-rays and skeletal survey showed that Aubree had fractures of numerous ribs, including the anterior left 3rd, 5th, 6th, and 7th ribs, and posterior fractures of the left 3rd, 10th, and 11th ribs. There was an irregularity of the left distal femoral metaphysis, which suggested an evolving fracture and a bucket-handle fracture of the distal right tibia as well as evidence of a left proximal tibia fracture. The impression, as stated in the medical records, was: “Multiple rib fractures in various stages of healing, as well as bucket-handle fractures metaphyseal fracture of the left proximal tibia and possibly the left distal femur.” It was also noted that “these fractures in a 10-week-old are highly consistent with nonaccidental injury.”

Based on the foregoing, DCS filed a petition to declare the child dependent and neglected on May 22, 2019 in the Circuit Court for Overton County, Tennessee. On the same day, the juvenile court issued a protective custody order which immediately removed Aubree from the custody of Mother and Father and placed her in the protective custody of DCS where she has remained ever since.<sup>5</sup>

The adjudicatory hearing was held on October 9, 2019, after which the matter was taken under advisement. The juvenile court’s memorandum opinion and order was entered on November 26, 2019, in which it found that Aubree was a victim of severe abuse perpetrated by Father and that Mother failed to protect Aubree from his abuse.

The dispositional hearing was held on July 22, 2019, and February 7, 2020, following which the juvenile court found that Aubree should remain in DCS custody.

Both parents appealed that decision to the Circuit Court of Overton County for a de novo hearing. Following a three-day de novo hearing in May and June of 2021, the circuit court found that Aubree was dependent and neglected, that both parents committed severe child abuse, and that Aubree should remain in the custody of DCS. Mother appealed that decision; Father did not.

On September 28, 2022, this court affirmed the judgment of the circuit court, including the finding that Mother subjected Aubree to severe child abuse, for which mandate issued on December 9, 2022. *See In re Aubree D.*, No. M2021-01229-COA-R3-JV, 2022 WL 4488507 (Tenn. Ct. App. Sep. 28, 2022).

On November 23, 2020, DCS commenced this action with the filing of its petition to terminate the parental rights of Mother and Father in the Juvenile Court for Overton County, Tennessee.<sup>6</sup> The termination petition was heard over two days, May 18 and

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<sup>5</sup> Since Aubree came into DCS custody she has lived with her foster parents and their three children.

<sup>6</sup> To minimize confusion, we note that the dependency and neglect action was tried in the circuit court while this appeal arises from the juvenile court, the latter of which we refer to as the “trial court” or the “juvenile court.”

October 12, 2021.<sup>7</sup> The witnesses presented by DCS who testified in person included Mother; Father; Jeffery Scott Herman, a psychological examiner and expert on the diagnosis and treatment of mental health and disorders; Randall Slayton, criminal investigator with the 13th Judicial District of the District Attorney General's Office; Harli Langford, child protection services investigator with DCS; Jennifer Leftwich, a DCS case manager; and Natasha M., Aubree's foster mother. In addition to live testimony, the court received the deposition testimony of James Nelson, M.D., Heather N. Williams, M.D., Meghan Reeder, R.N., and Mother's counselor, Jerri Cross, who has a bachelor's degree in sociology and a master's degree in counseling and supervision.

The witnesses presented by Mother included Grandmother; Jacie Boyd, a case worker who was previously employed with Omni Community Health; Ralph Maverick, an investigator with the Overton County Sheriff's Department; and Danny Sells, Mother's neighbor. Mother also introduced into evidence the deposition testimony of Randall Slayton.

The juvenile court took the matter under advisement at the conclusion of the trial. Shortly thereafter, the judge's administrative assistant sent an email to DCS counsel requesting counsel to prepare a skeleton, rough draft of the final order in the appropriate format that included, inter alia, party information and the procedural history of the case. After receiving the draft order, the judge inserted her own findings of facts and conclusions of law and, on February 9, 2022, the Order for Termination of Parental Rights and Final Decree of Guardianship was filed. The court found that DCS had proven the grounds of severe child abuse, abandonment by failure to establish a suitable home, substantial noncompliance with permanency plan, persistence of conditions, and failure to manifest an ability and willingness to assume custody. The court also determined that termination of both parents' parental rights was in Aubree's best interest. Mother appealed; Father did not.<sup>8</sup>

## ISSUES

The issues raised by Mother, as restated by the court, are:

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<sup>7</sup> When the parents made their first court appearance in this action before the Judge Daryl Colson of the Juvenile Court of Overton County, Tennessee, Mother made an oral motion to recuse Judge Colson. Judge Colson granted the motion and recused himself from this case. Judge Tiffany Gipson, the General Sessions Judge of Jackson County, sitting by interchange, presided over the case from that point to its conclusion.

<sup>8</sup> Because Father did not appeal the termination of his parental rights, we will only reference his involvement in the underlying events to the extent necessary to present a complete picture of the facts and procedural history relevant to the issues Mother raised.

1. Whether the trial court erred in requesting DCS's attorney prepare a rough draft of the final order.
2. Whether the trial court erred in finding that DCS proved, by clear and convincing evidence, the grounds of: 1) abandonment by failing to establish a suitable home; 2) substantial non-compliance with the permanency plans; 3) persistence of conditions; 4) failure to manifest an ability to assume custody of Aubree; and 5) severe child abuse.
3. Whether the trial court erred in finding that it is in Aubree's best interests that Mother's parental rights be terminated.
4. Whether the trial court erred in not announcing the court's ruling or issuing its final order within 30 days of the final hearing.

#### STANDARD OF REVIEW

"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). "[T]his 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)).

"To terminate parental rights, a court must determine that clear and convincing evidence proves not only that statutory grounds exist but also that termination is in the child's best interest." *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002) (citing Tenn. Code Ann. § 36-1-113(c)). "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 586, 596 (Tenn. 2010) (citation 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 Carrington H.*, 483 S.W.3d 507, 522 (Tenn. 2016).

In an appeal, "this [c]ourt is required 'to review thoroughly the trial court's findings as to each ground for termination and as to whether termination is in the child's best interests.'" *In re Connor B.*, 603 S.W.3d 773, 779 (Tenn. Ct. App. 2020) (quoting *In re Carrington H.*, 483 S.W.3d at 525). In doing so, we must "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). Stated another way, we must make our "own determination as to whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, amount to

clear and convincing evidence of the elements necessary to terminate parental rights.” *In re Carrington H.*, 483 S.W.3d at 524.

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. Tenn. R. App. P. 13(d). Questions of law, however, are reviewed de novo with no presumption of correctness. *In re Carrington H.*, 483 S.W.3d at 524. A trial court’s ruling regarding whether the evidence sufficiently supports termination is a conclusion of law, which we review de novo with no presumption of correctness. *See id.* Furthermore, a trial court’s determinations regarding witness credibility are entitled to great weight on appeal and will not be disturbed “absent clear and convincing evidence to the contrary.” *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007).

## ANALYSIS

### I. THE DRAFT, SKELETAL ORDER

Mother contends the trial court erred by requesting and allowing DCS’s attorney “to prepare a rough draft of the final order setting out style of the case; party information; and procedural history prior to the court announcing its ruling in the case.”

In her appellate brief, Mother relies on this court’s decision from *In re Nathan C.*, No. E2019-01197-COA-R3-PT, 2020 WL 730623, at \*1 (Tenn. Ct. App. Feb. 12, 2020), in which we vacated the judgment of the trial court because it was evident that the trial court did not exercise its independent judgment in reaching its decision. Having reviewed this record, we find Mother’s reliance on *Nathan C.* misplaced because it is evident that the trial court exercised its independent judgment by entering, among other things, numerous and specific findings of fact to support its decision, findings of fact which were not contained in the draft, skeletal order submitted by DCS.

The record does not inform this court as to how Mother’s objection was raised in the trial court; nevertheless, it is evident that it was raised because the trial court entered an order responding to Mother’s objection to DCS being asked to draft and submit a skeletal final order for the trial court’s consideration. The trial court’s order, which explains what occurred and why the request was made, reads as follows:

This cause came to be heard on December 15, 2021, upon the Objection of the Respondent, [Mother], to the Department of Children’s Services being requested to submit to the Court a modifiable Order following the hearing on the Petition for Termination of Parental Rights, and the Proposed Order that followed pursuant to that request, as it contained procedural history, proposed findings of fact and proposed conclusions of law.

It has been this Court's practice in matters involving the termination of parental rights, to ask the Department of Children's Services to prepare an order in such a format that can be edited by the Court, being as the Petitioners bear the burden of proof of those averments contained in their Petition. This Court then spends many, many hours considering each and every paragraph, preparing its own independent findings of facts and conclusions of law, based upon the proof submitted at hearing. This Court then types out and modifies the Order personally, not the Department of Children's Services, not Court staff, but the Court. The implication in the Objection that the Court would sign an order of this importance containing findings that were not "independence" is not well taken. This practice has been utilized by this Court in both granting and denying a Petition to Terminate Parental Rights.

Therefore, to address the objection of Respondent Mother, the Court ordered that all parties that wished to do so, submit a modifiable proposed order with the inclusion of the procedural history of the case and any proposed findings to me in a format that can be edited and submitted to the Court by 4:00 pm January 10, 2022.

Further, as this Order is being prepared, nunc pro tunc, Respondent Mother has submitted a Proposed Order to the Court, which is quite apparent to be nothing more than an edited copy of the Proposed Order submitted by the Department. The Respondent Mother's reliance upon the framework prepared by the Department and edited as deemed appropriate is just the action the Court intended to utilize per the initial request.

IT IS SO ORDERED.

Contrary to Mother's assertions, the draft, skeletal order submitted by DCS does not contain proposed findings of fact. This is evident from the findings of fact section of the draft, skeletal order, which reads in pertinent part:

#### FINDINGS OF FACT

15. Insert Findings based upon proof
16. Insert Findings based upon proof
17. Insert Findings based upon proof
18. Insert Findings based upon proof
19. Insert Findings based upon proof
20. Insert Findings based upon proof
21. Insert Findings based upon proof
22. Insert Findings based upon proof
23. Insert Findings based upon proof

24. Insert Findings based upon proof
25. Insert Findings based upon proof

Furthermore, while the draft order contains some conclusions of law, it contains instructions for the trial court to “Insert Findings” applicable to each ground and best interest factor. For example, the section concerning one of the grounds for termination reads:

*Failure to Manifest an Ability and Willingness to Assume Custody*

57. [Mother] and [Father] have failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility for the child. Insert Findings.
58. Placing the child in [Mother] and [Father]’s legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child. Insert Findings.
59. Therefore, [Mother] and [Father]’s parental rights should be terminated pursuant to Tenn. Code Ann. § 36-1-113(g)(14).

Furthermore, the same instruction for the trial court to make its own findings of fact were included in the best interest analysis. The draft, skeletal order reads in pertinent part:

BEST INTERESTS

The Court finds that the State of Tennessee, Department of Children’s Services has proven by clear and convincing evidence that termination of parental rights is in the best interest of the child. At the time this petition was filed in November of 2020, the best interest factors were set out in Tenn. Code Ann. §§. 36-1-113(i) 1-9. The Court makes the following findings based upon these factors:

60. Whether the parents have made an adjustment of circumstances, conduct or conditions as to make it safe and in the child’s best interest to be in the home of the parents: Insert Findings
61. Whether or not the parents have effected a lasting adjustment after reasonable efforts by available social agencies for such duration of time that lasting adjustment appears possible: Insert Findings
62. Whether or not the parents have maintained regular visitation or other contact with the child: Insert Findings



63. Whether or not a meaningful relationship has otherwise been established between the child and the parents: Insert Findings

Thus, and contrary to Mother's contentions, the final order entered in this action clearly reveals that the trial court exercised its independent judgment by entering numerous and specific findings of fact to support its decision, findings of fact which were not contained in the draft, skeletal order submitted by DCS. For these reasons, we find that the trial court fulfilled its statutory duty under Tennessee Code Annotated § 36-1-1223(k) "to enter an order that makes specific findings of fact and conclusions of law" that are the product of the court's "independent judgment." See *In re Nathan C.*, 2020 WL 730623, at \*3 (quoting *Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 316 (Tenn. 2014)). Thus, we find no error with the trial court requesting DCS submit an outline of a proposed final order which the court then used to edit and complete by making and inserting its own findings of fact.

## II. GROUNDS FOR TERMINATION

The trial court found that DCS proved five grounds for which Mother's parental rights could be terminated: (a) severe abuse, (b) abandonment by failing to establish a suitable home, (c) substantial noncompliance with the permanency plan, (d) persistence of conditions, and (e) failure to manifest an ability and willingness to assume custody. We will discuss each in turn.

### A. Severe Child Abuse

The ground of severe child abuse is established if the parent:

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**.

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

Severe abuse, as is relevant to this case, is defined as:

(C) The commission of any act towards the child prohibited by . . . § 39-13-531 [aggravated rape of a child] . . . or the knowing failure to protect the child from the commission of any such act to the child. . . .

Tenn. Code Ann. § 37-1-102(b)(27)(C).

Pursuant to an order entered in the dependency and neglect proceeding on September 21, 2021, the Circuit Court for Overton County found that Mother subjected Aubree to severe abuse. Mother appealed that order; however, this court affirmed that judgment on September 28, 2022, and mandate issued on December 9, 2022. *See In re Aubree D.*, 2022 WL 4488507, at \*19. Accordingly, the judgment of the circuit court in the dependency and neglect action in which Mother was found to have subjected Aubree to severe abuse is now a non-appealable final judgment. As a consequence, the finding of severe child abuse in the dependency and neglect action is res judicata and cannot be relitigated. *See In re Heaven L.F.*, 311 S.W.3d 435, 439 (Tenn. Ct. App. 2010) (quoting *Galbreath v. Harris*, 811 S.W.2d 88, 90 (Tenn. Ct. App. 1990)) (The doctrine of res judicata applies when “an existing final judgment rendered upon the merits . . . is conclusive of rights, questions and facts in issue as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.”).

The finding in the dependency and neglect action that Mother subjected Aubree to severe abuse also satisfies the “under any prior order of a court” language in Tennessee Code Annotated § 36-1-113(g)(4). Accordingly, the ground of severe child abuse under Tennessee Code Annotated § 37-1-102(b)(27)(C) has been established. As such, we affirm the trial court’s determination that DCS proved the ground of severe child abuse by clear and convincing evidence.<sup>9</sup>

#### B. Abandonment by Failing to Provide a Suitable Home

Mother contends the trial court erred in finding that DCS proved that she failed to provide a suitable home because she always had a home for Aubree. However, as DCS notes in its brief, this argument fails because having adequate physical housing or “physical space” is not the only relevant consideration. *See In re A.D.A.*, 84 S.W.3d 592, 599 (Tenn. Ct. App. 2002). A suitable home “requires more than a proper physical living location.” *In re Nevada N.*, 498 S.W.3d 579, 595 (Tenn. Ct. App. 2016) (citations omitted). And, as is most relevant here, this ground requires a home that is free of domestic violence. *Id.*

Abandonment for failure to provide a suitable home occurs when:

The child has been removed from the home or the physical or legal custody of a parent . . . by a court order at any stage of proceedings in which a petition has been filed in the juvenile court alleging that a child is a dependent and neglected child, and the child was placed in the custody of the department . . . ;

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<sup>9</sup> Although only one ground for termination need be established, *see* Tenn. Code Ann. § 36-1-113(c), we shall review the additional grounds found by the trial court to satisfy the mandate under *In re Carrington H.*, 483 S.W.3d at 525.

The . . . court where the termination of parental rights petition is filed finds, that the department . . . made reasonable efforts to prevent removal of the child or that the circumstances of the child’s situation prevented reasonable efforts from being made prior to the child’s removal; and

For a period of four (4) months following the physical removal, the department . . . made reasonable efforts to assist the parent . . . to establish a suitable home for the child, but that the parent . . . ha[s] not made reciprocal reasonable efforts to provide a suitable home and ha[s] demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date. The efforts of the department . . . to assist a parent . . . in establishing a suitable home for the child shall be found to be reasonable if such efforts equal or exceed the efforts of the parent . . . toward the same goal, when the parent . . . is aware that the child is in the custody of the department.

Tenn. Code Ann. § 36-1-102(1)(A)(ii)(a)–(c).

Generally, this ground requires that DCS make reasonable efforts to assist the parent; however, Mother was found to have subjected Aubree to severe abuse. For this reason, DCS was relieved from making reasonable efforts to assist Mother in the dependency and neglect proceeding. *See* Tenn. Code Ann. § 37-1-166 (“Reasonable efforts . . . shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that: (A) The parent has subjected the child that is the subject of the petition . . . to aggravated circumstances as defined in § 36–1–102. Severe child abuse is among the types of aggravated circumstances defined in Tennessee Code Annotated 36-1-102.”); *see also In re Dakota C.R.*, 404 S.W.3d 484, 497 (Tenn. Ct. App. 2012) (“Accordingly, if there is a finding of severe abuse as to a parent, DCS is not required to make reasonable efforts toward reunification with that parent.”). Thus, DCS was excused of the responsibilities set forth in subsection (1)(A)(ii)(c) above.

Nevertheless, and as the trial court correctly found, DCS made reasonable efforts to assist Mother toward reunification by developing permanency plans that included psychological evaluations, which DCS arranged. Although Mother attended therapy sessions, the psychological assessments she completed were invalidated because of her unreliable responses. Additionally, Mother never completed her psychiatric assessment and she failed to assume any responsibility for Aubree’s injuries. As Ms. Cross testified, “from the very onset of the case,” Mother “indicated that she had no culpability in the case,” and “seemed very unaware” that she had been found to be an enabler of Aubree’s severe abuse. Moreover, Mother repeatedly told Ms. Cross that Father was solely responsible for Aubree’s injuries, and she was not responsible because she was at work when Aubree was injured. However, the record shows that Aubree’s injuries were not

sustained on one occasion but over a period of days or weeks.

In pertinent part, the trial court found:

19. Based upon the findings of fact noted above, neither parent had a suitable home in the first four months following the removal of Aubree. Nothing was completed by either parent in regards to addressing the issues that led to removal. There was no change of circumstances in any capacity that would provide for a safe environment in either the home of [Mother] or [Father]. . . . [Mother's] multiple assessments were invalid due to faking good and other reasons previously testified to by Scott Herman. As a result, [Mother] did not even begin counseling to address her issues until several months later, on June 12, 2020, certainly not within the first four months.

20. Therefore, no subsequent action was taken addressing the safety of the minor child to the point that Aubree could have been safely returned to her parents. In fact, the Court does not believe that it would be safe to return the child even at this point in time, some two years later.

Having reviewed the record carefully, we have determined that the evidence supports the trial court's findings and its determination that DCS proved this ground by clear and convincing evidence. For these and other reasons, we affirm the trial court's finding that DCS proved by clear and convincing evidence that Mother failed to provide a safe or suitable home for Aubree.

### C. Substantial Noncompliance with Permanency Plans

“Substantial noncompliance . . . with the statement of responsibilities in a permanency plan” is another ground on which a parent's rights may be terminated. Tenn. Code Ann. § 36-1-113(g)(2). However, as a condition precedent, the court must first find “that the requirements of the permanency plan are ‘reasonable and related to remedying the conditions which necessitate foster care placement.’” *In re Valentine*, 79 S.W.3d 539, 547 (Tenn. 2002) (citing Tenn. Code Ann. § 37-2-403(a)(2)(C)).

The treatment goals of the permanency plan included stress management, understanding and addressing depression, addressing and understanding domestic violence and toxic relationships, recognizing signs and symptoms of child abuse, understanding the seriousness of the allegations, safety planning for Mother and Aubree, “red flags” in relationships, establishing healthy boundaries and healthy relationships, and positive coping skills. The trial court found that Mother's responsibilities under the permanency plan were “reasonably related to remedying the conditions that necessitate[d] foster care” and the record fully supports this finding. Based on our review of the record, we agree with the trial court that the requirements of the permanency plan were reasonably related to

remedying the conditions that necessitated Aubree's removal. Thus, we shall now consider whether the evidence preponderates against the trial court's finding that Mother was substantially noncompliant with the permanency plan, *see id.* at 547, and whether Mother's "noncompliance is substantial in light of the degree of noncompliance and the importance of the particular requirement that has not been met." *In re M.J.B.*, 140 S.W.3d 643, 656 (Tenn. Ct. App. 2004).

While Mother completed some of her responsibilities, she remained substantially noncompliant with most of the requirements. Specifically, Mother participated in four psychological evaluations, however, the evaluations were invalidated due to Mother "faking good." Further, although one of her evaluations was completed and initially deemed valid, it was later determined that Mother had the characteristics of a "child abuser." In this regard, the trial court made the following finding:

34. As for Ms. Riley, after two years, she had completed four assessments with Scott Herman that had been determined to be invalid, one with another provider, and a sixth was taken with Ms. Grello in Knoxville that was determined to be valid, but indicated that she had the characteristics of a physical child abuser. The report specifically indicated that the "results do provide evidence of an increased risk for potential child abuse, indicating that she shares characteristics similar with known child abusers, and there is need for additional evaluation data for determination of child abuse risk."

Mother also failed to complete a required psychiatric assessment. Although Mother contended that she did not know she was required to complete a psychiatric evaluation, Ms. Leftwich testified that she reminded Mother of this requirement on numerous occasions.

With regard to the treatment goals, Ms. Cross testified that she focused on the following treatment goals with Mother: stress management, understanding and addressing depression, addressing and understanding domestic violence and toxic relationships, recognizing signs and symptoms of child abuse, understanding the seriousness of the allegations, safety planning for herself and Aubree, red flags in relationships, establishing healthy boundaries and healthy relationships, and positive coping skills. However, Mother repeatedly insisted to Ms. Cross that she had not been found to be a perpetrator of severe abuse. Moreover, Mother failed to disclose several relationships upon inquiry by Ms. Cross even when directly asked about them during therapy sessions.

Moreover, Mother's lack of honesty with Ms. Cross and Mr. Herman demonstrated that Mother did not understand the purpose of her therapy. These discussions also revealed that Mother had not taken responsibility for her failures to protect Aubree.

For these and other reasons, the trial court found that DCS proved that Mother had

not substantially complied with the permanency plan. Based on our careful review of the record, we have determined that the evidence supports the trial court's findings and its determination that DCS proved this ground by clear and convincing evidence. Thus, we affirm the trial court's determination that DCS proved the ground of substantial noncompliance with the permanency plans.

#### D. Persistence of Conditions.

The ground commonly referred to as "persistence of conditions," applies where:

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

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

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

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

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

Tenn. Code Ann. § 36-1-113(g).

The purpose behind the "persistence of conditions" ground for terminating parental rights is "to prevent the child's lingering in the uncertain status of foster child if a parent cannot within a reasonable time demonstrate an ability to provide a safe and caring environment for the child." *In re Nevada N.*, 498 S.W.3d at 606 (quoting *In re D.C.C.*, No. M2007-01094-COA-R3-PT, 2008 WL 588535, at \*9 (Tenn. Ct. App. Mar. 3, 2008)) (other citations omitted).

Aubree was removed from Mother's physical custody in May 2019, and the petition

for termination came on for hearing almost two years later, with the trial beginning in May 2021. Therefore, the six-month provision in Tennessee Code Annotated § 36-1-113(g)(3)(B) was satisfied.

Aubree was removed when it was determined that Aubree had been subjected to severe abuse that caused numerous broken bones and other serious injuries. Although Mother has been found to have subjected Aubree to severe abuse, Mother has consistently insisted that she was not responsible for Aubree's injuries. Further, she continues to insist that she did not fail to protect Aubree from severe abuse even though the record clearly indicates that she did. Moreover, Jennifer Leftwich, a DCS case manager testified, "I don't see any significant changes, and I don't see anything that would show any reason to believe this child is safer today than she was on the day of removal."

Significantly, and as noted above, Ms. Grello found that Mother has "characteristics similar to those of known physical child abusers." While Mother refused to acknowledge the severity of her acts and omissions, she continued to insist that she had not been found responsible for Aubree's severe abuse, even though she had. For these and other reasons, the trial court refused to grant Mother unsupervised visitation. Thus, the conditions that led to Aubree's removal persisted. As the trial court found:

[Mother] continues to minimize her role in failing to protect Aubree from abuse, and continues to cast blame upon everyone except herself. Without this open and honest progression in therapy, there remains a risk for the child to be safely returned to her parents, as the risks associated with possessing the characteristics of a physical child abuser cannot be eliminated. A parent that is in denial about abuse occurring is at a very high risk and less likely to participate fully in counseling that could result in reunification.

Based on our independent review of the record, we agree with the trial court's determination that DCS clearly and convincingly proved that the conditions that led to Aubree's removal still persist, that there is little likelihood that these conditions will be remedied at an early date, and that continuing Mother's relationship with Aubree would diminish Aubree's chances of early integration into a safe, stable, and permanent home. *See* Tenn. Code Ann. § 36-1-113(g)(3)(A)(iii). Accordingly, we affirm the trial court's finding that DCS proved the ground of persistence of conditions.

#### E. Failure to Manifest an Ability and Willingness to Assume Custody.

A court may terminate a parent's rights if the parent (1) "failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility of the child" and (2) "placing the child in the [parent]'s legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child." Tenn. Code Ann. § 36-1-113(g)(14).

“[T]he first prong requires clear and convincing proof that the parent ‘has failed to manifest either ability or willingness’ to assume custody of or responsibility for the child.” *In re Manning H.*, No. M2020-00663-COA-R3-PT, 2021 WL 2935047, at \*6 (Tenn. Ct. App. July 13, 2021) (quoting *In re Neveah M.*, 614 S.W.3d 659, 677 (Tenn. 2020)). To satisfy the second prong, DCS must show “clear and convincing proof that placing the child in the parent’s physical custody would likely cause substantial harm.” *Id.* at \*6. Though the statute does not specifically define “substantial harm,” we have construed it to require evidence of “a real hazard or danger that is not minor, trivial, or insignificant.” *Ray v. Ray*, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001).

In pertinent part, the trial court found that Mother “failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility for [Aubree]” for several reasons, including the following:

67. [Mother] has failed to manifest an ability and willingness to assume custody of her minor child in that after two years, she had completed four assessments with Scott Herman that had been determined to be invalid, one with another provider, and a sixth was taken with Ms. Grello in Knoxville that was determined to be valid, but indicated that she had the characteristics of a physical child abuser. The report specifically indicated that the “results do provide evidence of an increased risk for potential child abuse, indicating that she shares characteristics similar with known child abusers, and there is need for additional evaluation data for determination of child abuse risk.” Thereafter, [Mother] has failed to complete a psychiatric evaluation, pursuant to Ms. [Grello’s] recommendation. [Mother] continues to minimize her role in failing to protect Aubree from abuse, and continues to cast blame upon everyone except herself. Without this open and honest progression in therapy, there remains a risk for the child to be safely returned to her parents, as the risks associated with possessing the characteristics of a physical child abuser cannot be eliminated. A parent that is in denial about abuse occurring is at a very high risk and less likely to participate fully in counseling that could result in reunification.

68. [Mother] has failed to discuss her relationships in a therapeutic setting, that could have evidenced her willingness to address issues that could be barriers to reunification Based on [Mother’s] social media posts and conversations with Ms. Leftwich, personally, [Mother] has been in four potential relationships over the past two years. Not all of these relationships were disclosed to Ms. Cross during [Mother’s] therapy sessions, which were intended to help her maintain healthy relationships for both herself and her daughter. This non-disclosure is concerning, in light of the history of



domestic violence from her first husband and the physical abuse that occurred to Aubree, and would seem to be contrary to the requirement in her plan to participate in intense counseling with a PhD level or skilled Master Level therapist. Without open and honest progression in therapy, there remains a risk for the child to be safely returned to [Mother].

69. There have been no changes by [Mother] that would indicate that Aubree would be any safer with them at this time than she was on the date of removal, nor has there been an adjustment in the parents' circumstances. The Court further notes that after her daughter being removed from her care and custody, no counselor has recommended any unsupervised visitation between [Mother] and her daughter. It would seem unlikely that these conditions will be remedied in the near future.

Having reviewed the record carefully, we have determined that the evidence supports the trial court's findings. We also agree with the trial court's determination that DCS proved Mother failed to manifest the ability to assume custody or responsibility for Aubree and that placing Aubree in Mother's physical custody would likely cause substantial harm to Aubree. Accordingly, we affirm the trial court's determination that this ground was proven by clear and convincing evidence.

Having found that grounds exist for terminating Mother's parental rights, we shall next consider whether terminating Mother's parental rights is in Aubree's best interest pursuant to the relevant factors in Tennessee Code Annotated § 36-1-113(i) that were in effect when the petition to terminate Mother's parental rights was filed.

### III. AUBREE'S BEST INTEREST

Mother contends the trial court erred by finding that it was in Aubree's best interest to terminate her parental rights. More specifically, she contends that she frequently acted as a responsible parent by seeking medical attention on several occasions leading up to the trip to the emergency room, she only missed one of her supervised visits over a two-year period, she paid all her child support obligations, she has a home for Aubree to live in, and Father is no longer in her life.

Tennessee Code Annotated § 36-1-113(i) identifies several factors to be considered when analyzing whether termination of parental rights is in a child's best interest; however, these "factors are illustrative, not exclusive," and the parties are free to offer proof of any other relevant factor to the analysis.<sup>10</sup> *In re Travionna W.*, No. W2021-01349-COA-R3-

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<sup>10</sup> The petition at issue was filed prior to April 22, 2021, at which time Tennessee Code Annotated § 36-1-113(i) identified nine factors for consideration. The statute was subsequently amended, and it now includes additional factors that should be considered, if relevant. *See* Act of April 22, 2021, 2021 Tenn.

PT, 2022 WL 8080022, at \*10 (Tenn. Ct. App. Oct. 14, 2022) (quoting *In re Gabriella D.*, 531 S.W.3d 662, 681 (Tenn. 2017)). In *In re Gabriella D.*, our Supreme Court summarized the law pertaining to this analysis:

Facts considered in the best interests analysis must be proven by “a preponderance of the evidence, not by clear and convincing evidence.” “After making the underlying factual findings, the trial court should then consider the combined weight of those facts to determine whether they amount to clear and convincing evidence that termination is in the child’s best interests.” When considering these statutory factors, courts must remember that “[t]he child’s best interests [are] viewed from the child’s, rather than the parent’s, perspective.” Indeed, “[a] focus on the perspective of the child is the common theme” evident in all of the statutory factors. “[W]hen the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child. . . .”

Ascertaining a child’s best interests involves more than a “rote examination” of the statutory factors. And the best interests analysis consists of more than tallying the number of statutory factors weighing in favor of or against termination. Rather, the facts and circumstances of each unique case dictate how weighty and relevant each statutory factor is in the context of the case. Simply put, the best interests analysis is and must remain a factually intensive undertaking, so as to ensure that every parent receives individualized consideration before fundamental parental rights are terminated.

531 S.W.3d at 681–82 (citations omitted).

The trial court set forth findings of fact regarding the factors it deemed applicable, and we review those findings below.

#### A. Adjustment of Circumstance

The first factor considered by the trial court was “[w]hether the parent . . . has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child’s best interest to be in the home of the parent.” Tenn. Code Ann. § 36-1-113(i)(1).

The trial court found that there have been no changes by Mother that would indicate that Aubree would be any safer with her than she was on the date of removal, nor has there

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Pub. Acts, ch. 190, § 1 (effective April 22, 2021). Because the amended statute applies only to petitions for termination filed on or after April 22, 2021, the new factors do not apply to the present case. Accordingly, any citation to § 36-1-113(i) herein is to the version of the statute in effect when the petition was filed.

been an adjustment in the parents' circumstances. The court also noted that after removal, Mother was only allowed supervised visitation and "no counselor has recommended any unsupervised visitation between [Mother] and her daughter." The court also noted that Mother "failed to complete the requirements in her plan to participate in intense counseling with a PhD level or skilled Master Level therapist. Without open and honest progression in therapy, there remains a risk for the child to be safely returned to [Mother]. It would seem unlikely that these conditions will be remedied in the near future."

The evidence in this record fully supports these findings.

#### B. Regular Visitation or Contact

The second factor considered by the trial court was "[w]hether the parent . . . has maintained regular visitation or other contact with the child." Tenn. Code Ann. § 36-1-113(i)(3).

The trial court found that Mother had maintained supervised visitation, up to three hours per week; however, unsupervised contact has never been recommended or ordered by the Court.

The evidence in the record fully supports these findings.

#### C. Meaningful Relationship

The third factor considered by the trial court was "[w]hether a meaningful relationship has otherwise been established between the parent . . . and the child." Tenn. Code Ann. § 36-1-113(i)(4).

The trial court made the following findings of fact concerning this factor:

Aubree was ten weeks old at the time of her removal. . . . [Mother] has maintained supervised visitation, up to three hours per week, however, unsupervised contact has never been recommended by a counselor nor ordered by the Court. Her visits have seemed to be appropriate and without incident. [Mother] appears at her visits timely and does not miss visits. She brings Aubree snacks, clothing, and other items. [Mother] engages with Aubree in an open and affectionate manner, however, this Court did not hear sufficient proof that a meaningful relationship has otherwise been established between [Mother] and Aubree.

The evidence in the record fully supports these findings.

#### D. Change of Caretakers and Physical Environment

The fourth factor considered by the trial court was “[t]he effect a change of caretakers and physical environment is likely to have on the child’s emotional, psychological and medical condition.” Tenn. Code Ann. § 36-1-113(i)(5).

The trial court made the following findings of fact concerning this factor:

Aubree’s current placement is the only foster placement she has had and all the child has ever known. There is a blood relation between Aubree and the foster mother’s biological children. Aubree is bonded to her foster mother and father, and their children. The Court heard credible testimony that Aubree would be “lost” if removed from her foster family. In her current foster placement, Aubree is a happy, well-adjusted, and healthy child. [The foster mother] and her family are bonded with Aubree and in the event Aubree was available for adoption, she would be willing to adopt her. Aubree refers to her and her husband as “Mommy and Dad.”

The evidence in this record fully supports these findings.

#### E. Abusive Behavior

The fifth factor considered by the trial court was “[w]hether the parent . . . or other person residing with the parent . . . has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household.” Tenn. Code Ann. § 36-1-113(i)(6).

The trial court found that Mother had committed severe child abuse toward Aubree. Moreover, the circuit court’s finding in the dependency and neglect action that Mother severely abused Aubree is *res judicata*. *See In re Aubree D.*, 2022 WL 4488507, at \*19. Thus, the fact that Aubree was subjected to severe abuse by Mother cannot be disputed.

#### F. Physical Environment of Parent’s Home

The sixth factor considered by the trial court was “[w]hether the physical environment of the parent’s . . . home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol, controlled substances or controlled substance analogues as may render the parent . . . consistently unable to care for the child in a safe and stable manner.” Tenn. Code Ann. § 36-1-113(i)(7).

Regarding this factor, the trial court noted that there was no evidence of “criminal activity in the parents’ home, other than the criminal acts of child abuse and/or neglect that occurred against Aubree.” The court also stated that it “cannot find by clear and convincing evidence that alcohol or controlled substances renders the parents unable to care for

Aubree.” However, the trial court went on to find that Mother continues to minimize her role in failing to protect Aubree from abuse, and continues to cast blame upon everyone except herself.

Without this open and honest progression in therapy, there remains a risk for the child to be safely returned to her parents, as the risks associated with possessing the characteristics of a physical child abuser can not be eliminated. A parent that is in denial about abuse occurring is at a very high risk and less likely to participate fully in counseling that could result in reunification.

Although there is no evidence of use of alcohol or controlled substances that would render Mother consistently unable to care for Aubree in a safe and stable manner, *see* Tenn. Code Ann. § 36-1-113(i)(7), it is undisputed that Mother subjected Aubree to severe child abuse. Therefore, it was proven that Mother was unable to care for Aubree in a safe and stable manner.

#### G. Child Support

The seventh factor considered by the trial court was “[w]hether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.” Tenn. Code Ann. § 36-1-113(i)(9).

The trial court found that Mother paid support consistent with the guidelines, and the evidence supports this finding.

#### H. Other Relevant Factors

The trial court noted that it was not limited to considering other factors, including those added with the amendment to the statute in 2021; however, in reviewing the modified factors, the trial court stated that “any elaboration on those which have already been addressed above would be redundant and unnecessary.”

Based on the foregoing and other findings of fact made by the trial court, it concluded that DCS had proven by clear and convincing evidence that it is in the best interest of Aubree that Mother’s parental rights be forever terminated. Having carefully considered the combined weight of the trial court’s findings of fact as well as other evidence in the record, we agree with the trial court that the proof amounts to clear and convincing evidence that termination of Mother’s rights is in Aubree’s best interest. *See In re Gabriella D.*, 531 S.W.3d at 681. Accordingly, we affirm the trial court’s determination that termination of Mother’s parental rights is in Aubree’s best interest.

#### IN CONCLUSION

Having affirmed the trial court's findings that grounds exist for terminating the parental rights of Mother and that termination of her parental rights is in the best interest of Aubree, we affirm the termination of the parental rights of Mother. Costs of appeal are assessed against Mother, for which execution may issue if necessary.

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FRANK G. CLEMENT, JR., JUDGE