

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 3, 2022

IN RE JACKSON R.¹ ET AL.

**Appeal from the Juvenile Court for Smith County
No. 2021-JV-97 Branden Bellar, Judge**

No. M2021-01545-COA-R3-PT

Mother appeals the termination of her parental rights to two children. Two years after the children were removed and found to be dependent and neglected, the Department of Children’s Services petitioned for the termination of her parental rights. The trial court found the existence of four grounds for termination: abandonment by failure to provide a suitable home, abandonment by an incarcerated parent/wanton disregard, persistence of conditions, and failure to manifest an ability and willingness to assume custody with custody posing a risk of substantial harm to the children. Finding it also to be in the best interest of the children, the court terminated the mother’s parental rights. Mother contends these findings were in error. Finding no error, we affirm.

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.

Matthew B. Ramsey, Lebanon, Tennessee, for the appellant, Rachel R.

Herbert H. Slattery, III, Attorney General and Reporter, and Amber L. Barker, Assistant Attorney General, Nashville, Tennessee, for the appellee, Tennessee Department of Children’s Services

OPINION

FACTS AND PROCEDURAL HISTORY

¹ This court has a policy of protecting the identity of children by initializing the last names of the children, parents, relatives, and pre-adoptive parents.

Jackson R. and Braxton R. (“the Children”) were born in 2016 and 2018, respectively, to Rachel R. (“Mother”).² Mother was arrested on March 17, 2019, and charged with aggravated domestic assault of John M., Braxton’s father. It was alleged that she assaulted him in the presence of the Children. Because Mother was detained in jail, a family friend picked up the Children but told law enforcement that she could not care for them for more than a few days.

Following a referral, a case manager with the Department of Children’s Services (“DCS”) met with Mother at the jail the following day.³ During this visit, the case manager learned that Mother had tested positive for benzodiazepines and THC and admitted to using both drugs. Mother also informed the case manager that she had been diagnosed with bipolar disorder and schizophrenia but was not receiving treatment.

Upon the petition of DCS and pursuant to an emergency protective custody order entered on March 21, 2019, the Children were removed from Mother’s custody and initially placed with a relative, a maternal aunt, Jenny V.

On April 23, 2019, the Children were adjudicated dependent and neglected due to several factors including Mother’s drug usage, domestic violence, and incarceration.

Pursuant to an order entered on November 18, 2019, the Children were removed from the aunt’s custody and placed in the physical custody of DCS, where they have remained ever since. The November order also stated that child support would be set at a later date, but the amount of support was never established.

The first permanency plan was approved on December 5, 2019. The permanency plan was subsequently revised on May 20, 2020, and again on November 5, 2020, the last of which gave Mother until May 5, 2021, to satisfy the goals and requirements of the plans, which Mother failed to do.

In the interim, in February of 2020, DCS Case Manager Kayla Gensemer asked Mother to complete an alcohol and drug assessment. Mother completed the assessment, which recommended intensive inpatient services. Mother reported to Ms. Gensemer that she was considering New Leaf for inpatient care, but she never enrolled.

Mother initially maintained regular visitation with the Children, but her last visitation with the Children was May 28, 2020. Prior to that time, DCS had difficulty communicating with Mother. Throughout June of 2020, DCS documented several failed

² The Children have different fathers. The parental rights of both fathers were terminated and neither father appealed.

³ This was DCS’s fourth involvement with Mother, all of which involved either drugs or domestic violence.

attempts to contact Mother for the purposes of updating her address, scheduling parenting and anger management classes, holding video visitation, and rescheduling visitation. DCS also documented Mother's erratic behavior when they were able to contact her, including Mother's statement that "the boxes were talking to her" and nonsensical and incoherent messages. When asked by Ms. Gensemer if she was under the influence, Mother "expressed that she was mad." Ms. Gensemer also advised Mother to "stick to the schedule" in contacting foster parents because, as noted by DCS, she was calling them several times, sending them messages that "did not make sense," and "messaging the foster parent at 3:00 a.m." Ms. Gensemer addressed her concerns for Mother's mental health and sobriety directly with Mother several times, but those conversations seemed to elicit little response or action toward remediation.

In July 2020, DCS contacted Ms. K., the maternal grandmother of the Children, in an attempt to locate Mother. Ms. K. stated that she heard from Mother every few days and that she thought Mother was "back on drugs and that she needs help but won't get any." In August, DCS contacted Ms. K. again in an attempt to contact Mother but to no avail.

With still no contact from Mother in September, DCS requested a "diligent search" to locate her, which returned a last-known address. However, when DCS visited that address, it "appeared to be a campground," and attendants informed DCS that Mother was no longer there. Ms. Gensemer contacted another number she had received for Mother and left a detailed message including contact information; however, Mother did not answer or respond.

In January of 2021, Ms. K. informed Ms. Gensemer that Mother was incarcerated in California on November 3, 2020, on charges of assault with a deadly weapon, second degree robbery, and misdemeanor battery. Mother remained incarcerated in California throughout the duration of these proceedings, with an expected release in July 2023.

On March 31, 2021, two years after the Children were removed from Mother's custody, DCS filed a petition for termination of parental rights alleging four grounds: "Abandonment – Failure to Provide Suitable Home," "Abandonment by Incarcerated Parent/Wanton Disregard," "Persistent Conditions," and "Failure to Manifest an Ability and Willingness to Assume Custody."⁴

The termination petition was tried on October 18, 2021, and the court took the matter under advisement at the conclusion of the trial. In the trial court's final order, entered on November 30, 2021, it found that DCS had proven by clear and convincing evidence four grounds for termination and that termination of Mother's parental rights was in the Children's best interests. Based on these findings, the court terminated Mother's parental

⁴ The petition also asserted the ground of "Substantial Noncompliance with Permanency Plan"; however, upon the motion of DCS during the trial, this ground was stricken.

rights and awarded custody, control, and guardianship to DCS with the right to place the Children for adoption.

This appeal followed.

ISSUES

Mother and DCS present the same two issues:

1. Whether the trial court erred in finding that there was clear and convincing evidence of grounds for Mother's parental rights to be terminated
2. Whether the trial court erred in finding that it was in the best interest of the minor children to terminate Mother's parental rights

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 with 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.

ANALYSIS

I. GROUNDS FOR TERMINATION

The trial court found that DCS had proven four grounds for termination: “Abandonment – Failure to Provide Suitable Home,” “Abandonment by Incarcerated Parent/Wanton Disregard,” “Persistent Conditions,” and “Failure to Manifest an Ability and Willingness to Assume Custody.” We will discuss each in turn.

A. Abandonment – Failure to Provide Suitable Home

Abandonment can arise from a number of circumstances, one of which is when the parent fails to provide a suitable home. *See* Tenn. Code Ann. § 36-1-102(1)(A)(ii). To establish this ground, the petitioner must demonstrate that:

(ii)(a) 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 . . . ;

(b) The juvenile court found . . . 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

(c) 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 or guardian in establishing a suitable home for the child shall be found to be reasonable if such efforts equal or

exceed the efforts of the parent or guardian toward the same goal, when the parent or guardian is aware that the child is in the custody of the department.

Tenn. Code Ann. § 36-1-102(1)(A)(ii).

DCS satisfied subsection (a) by introducing into evidence the protective custody order pursuant to which the Children were removed from Mother's home, as well as the final order finding the Children to be dependent and neglected. It also satisfied subsection (b) because the juvenile court found that DCS had made reasonable efforts to prevent removal and "there was no less drastic alternative to removal."

Subsection (c) requires that DCS prove, *inter alia*, that for a period of four months following the physical removal of the Children DCS made reasonable efforts to assist Mother to establish a suitable home for the Children but that she did not make reciprocal reasonable efforts to do so and that she demonstrated a lack of concern for the Children to such a degree that it appears unlikely that she will be able to provide a suitable home for the Children at an early date. In accordance with this subsection, DCS focused on the four-month period from June 2, 2020 to October 2, 2020, which period began after removal of the Children and ended prior to the filing of the petition.⁵

Kayla Gensemer, the DCS case manager, testified as to her continual efforts during the relevant time period to contact Mother, to schedule therapeutic visitation, to schedule parenting classes, to send an updated permanency plan, and to correct Mother's erratic attempts to contact the foster parents, while repeatedly expressing concern for Mother's sobriety and mental health. Ms. Gensemer also testified that, during the relevant period, Mother failed to attend therapeutic visitation and video visitation with the Children. When asked if Mother "utilize[d] any of the visitation with her children during that timeframe," Ms. Gensemer answered, "No, she did not." Ms. Gensemer eventually lost contact with Mother, which resulted in DCS conducting a diligent search for leads on Mother's whereabouts. This search proved fruitless.

In its final order, the trial court found that Mother "made no reasonable efforts to provide a suitable home" and failed "to make even minimal efforts to improve [her] home and personal condition" during the relevant period. With regard to the third element, the court found that the efforts of DCS to assist Mother "in establishing a suitable home for the children were reasonable, in that they . . . equaled, or exceeded, the efforts" of Mother.

⁵ Unlike other grounds that require proof concerning "the four (4) consecutive months *immediately preceding* the filing of the action," *see* Tenn. Code Ann. § 36-1-102(1)(A)(iv) (emphasis added), this ground is not limited to a number of months "immediately preceding" the filing of the petition. Instead, the relevant time is "a period of four (4) months following the physical removal[.]" Tenn. Code Ann. § 36-1-102(1)(A)(ii)(c).

After a careful review of the record, we affirm the trial court’s determination that DCS has proven by clear and convincing evidence that Mother abandoned the Children by failing to provide a suitable home.

B. Abandonment by Incarcerated Parent/Wanton Disregard

Grounds for abandonment can also be found if “[a] parent . . . is incarcerated at the time of the filing of a proceeding . . . or a parent . . . has been incarcerated during all or part of the four (4) consecutive months immediately preceding the filing of the action” and the parent has done either of the following:

(a) Failed to visit, has failed to support, or has failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding the parent’s or guardian’s incarceration; . . . or . . .

(c) Has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child[.]

Tenn. Code Ann. § 36-1-102(1)(A)(iv).⁶

To meet the threshold requirement, DCS proved that Mother had been continuously incarcerated since November 3, 2020. The petition to terminate was filed on March 31, 2021. Therefore, Mother was incarcerated at the time of the filing of the petition and during the four-month period immediately preceding the filing of the petition.

As for the second element, Tennessee Code Annotated § 36-1-102(1)(A)(iv) requires that DCS prove *either* part (a) or (c). To satisfy part (a), DCS proved that Mother did not visit the Children during the four months preceding her incarceration even though she was offered visitation and knew how to schedule it. DCS also proved that Mother did not pay child support even though the evidence proved that she was able-bodied, which is undisputed.⁷

Ms. Gensemer testified that Mother visited the Children regularly before May 28, 2020; however, Mother had not visited since that date. She also testified that Mother had

⁶ Tennessee Code Annotated § 36-1-102(1)(A)(iv)(c), effective July 1, 2022, contains the additional language “With knowledge of the existence of the born or unborn child.” However, the petition to terminate parental rights in this case was filed on March 31, 2021, and because the amended statute applies only to petitions for termination filed on or after its effective date, the amended language does not apply here. Accordingly, any reference to § 36-1-102 herein is to the version in effect when the petition was filed.

⁷ “[I]t shall be a defense to abandonment for failure to visit or failure to support that a parent or guardian’s failure to visit or support was not willful. The parent or guardian shall bear the burden of proof that the failure to visit or support was not willful.” Tenn. Code Ann. § 36-1-102(1)(I).

not visited during the four-month period immediately preceding Mother’s incarceration— July 2, 2020 to November 2, 2020. Mother claims that she attempted “to call the children directly multiple times.” The evidence, however, shows that Mother would contact the foster parents erratically, “messaging the foster parents with messages that did not make sense,” and “messaging the foster parent at 3:00 a.m.” Ms. Gensemer testified that she addressed this issue with Mother on June 4, 2020, almost a month before the relevant four-month period. Ms. Gensemer’s testimony also reveals that she “expressed to [Mother on June 16] that OMNI was trying to get in contact with her to sign paperwork so that she can continue to work services with her and have supervised visitation.” Further, the record reveals that on June 23 “OMNI attempted to have a scheduled video Duo call between [Mother] and her children, and she did not answer the call.” By July 2, 2020, the beginning of the relevant four-month period, all communication with Mother had ceased, despite DCS’s repeated attempts to contact and locate her. Based on these and other facts in the record, the trial court found that Mother willfully failed to visit the Children in the four-month period immediately preceding her incarceration, and the evidence clearly and convincingly supports this finding. Thus, we affirm the trial court’s finding of abandonment by an incarcerated parent through failure to visit.

With regard to the failure to pay child support ground, Mother contends she did not pay support because no amount of child support was ever set. While it is undisputed that a support order was never entered, “[e]very parent who is eighteen (18) years of age or older is presumed to have knowledge of a parent’s legal obligation to support such parent’s child or children.” Tenn. Code Ann. § 36-1-102(1)(H). Moreover, “[a] parent’s obligation to support his or her child exists regardless of a court order requiring the parent to pay support.” *In re Jacobe M.J.*, 434 S.W.3d 565, 572 (Tenn. Ct. App. 2013).

The trial court found, “[i]n the four months before she went to jail, she failed to make reasonable payments toward the children’s support. She paid nothing in that period, although she was able-bodied and capable of working and earning enough to pay support.” The evidence clearly and convincingly supports this conclusion. Thus, we affirm the trial court’s finding that Mother’s failure to support was willful.

To prove part (c) of the second element of Tennessee Code Annotated § 36-1-102(1)(A)(iv), DCS must establish that Mother engaged in conduct that exhibits a wanton disregard, and “[i]ncarceration alone is not conclusive evidence of wanton conduct prior to incarceration.” *In re C.A.H.*, No. M2009-00769-COA-R3-PT, 2009 WL 5064953, at *5 (Tenn. Ct. App. Dec. 22, 2009). Thus, a court must “determine whether the parental behavior that resulted in incarceration is part of a broader pattern of conduct that renders the parent unfit or poses a risk of substantial harm to the welfare of the child.” *Id.* (quoting *In re Audrey S.*, 182 S.W.3d 838, 866 (Tenn. Ct. App. 2005)). “[P]robation violations, repeated incarceration, criminal behavior, substance abuse, and the failure to provide adequate support or supervision for a child can, alone or in combination, constitute conduct

that exhibits a wanton disregard for the welfare of a child.” *Id.* (quoting *In re Audrey S.*, 182 S.W.3d at 867–68).

Significantly, conduct constituting a wanton disregard for the child is not limited to the four consecutive months immediately preceding incarceration or the filing of the action. *See In re Audrey S.*, 182 S.W.3d at 871. “If parental conduct which exhibits a wanton disregard for the welfare of a child can constitutionally form a ground for the termination of parental rights, it would appear to be of no moment whether that conduct occurred during the four months immediately preceding the parent’s incarceration or at some earlier point in time.” *Id.*

Here, the trial court found that:

there was abandonment by incarcerated parent[] and wanton disregard, that there’s been no suitable housing that had been provided for the minor children. Instead [Mother] is now in the custody of the State of California serving time. Her actions have demonstrated a transient style of living. Absconded from the state of Tennessee to California leaving behind children and while picking up new charges and also characterized as a dangerous felon. That [Mother’s] last visit with the minor children was on May the 28th, 2020. She’s picked up a DUI charge since that time. She’s also charged—been charged as of November the 3rd, 2020, with assault with a deadly weapon and second degree robbery. . . .

. . . .

All behaviors as a result of multiple criminal activity demonstrate a wanton disregard of the children and abandonment by the incarcerated parents. At this point there’s been no showing that the likelihood of these behaviors will be even ceased. It’s to the contrary. The probability of the continued wanton disregard of the children continues to exist.

The record clearly and convincingly supports the foregoing factual findings and conclusions by the trial court. Accordingly, we affirm the trial court’s finding of abandonment by an incarcerated parent through failure to visit, failure to support, and conduct that exhibits a wanton disregard for the Children.

C. Persistent Conditions

Grounds for abandonment may also be found when the conditions that led to the child’s removal persist for a period of more than six months. *See* Tenn. Code Ann. § 36-1-113(g)(3). Specifically, the statute requires:

(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)(3)(A)–(B) (emphasis added).

As noted in more detail earlier, the Children were removed from Mother's home on March 21, 2019, as a result of a domestic dispute when Mother stabbed one of the biological fathers. DCS then filed the dependency and neglect petition, citing the incident, Mother's drug screen that was "positive for benzodiazepines and THC," and her untreated mental health conditions.

Over the next two years, there was evidence of Mother's continuing violent behavior, as she was incarcerated for "assault with a deadly weapon, second degree robbery, and misdemeanor battery." Mother had not completed domestic violence services in an attempt to remedy those conditions. Mother had also been charged with a DUI while the Children were in DCS custody. Further, Ms. Gensemer testified, "she's also in jail. She doesn't have housing. She doesn't have an income. . . . [S]he wouldn't be able to be appropriate to parent these children at this time." At the time of trial, the earliest conceivable date at which the conditions could be remedied was upon Mother's expected release date of July 2023.

The trial court found that the conditions that led to the Children's removal still persist, which prevent their safe return to Mother, that there was "little chance that those conditions will be remedied soon so that the children can be returned safely to the home,"

and that “[c]ontinuation of the parent/child relationship greatly diminishes the children’s chances of being placed into a safe, stable[,] and permanent home.” Based on these and other findings, the trial court concluded that this ground had been proven.

Having determined that the evidence clearly and convincingly supports the trial court’s findings and conclusions, we affirm the trial court’s determination that the ground of abandonment by persistent conditions has been proven.

D. Failure to Manifest an Ability and Willingness to Assume Custody

This ground requires that the petitioner prove two elements by clear and convincing evidence. *See* Tenn. Code Ann. § 36-1-113(c)(1), (g)(14). First, the petitioner must prove that the parent failed to manifest “an ability and willingness to personally assume legal and physical custody or financial responsibility of the child[ren].” Tenn. Code Ann. § 36-1-113(g)(14). Second, the petitioner must prove that placing the children in the parent’s “legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child[ren].” Tenn. Code Ann. § 36-1-113(g)(14). Both elements must be satisfied for this ground to be established. *In re Neveah M.*, 614 S.W.3d 659, 677 (Tenn. 2020).

As for the first element, our Supreme Court has explained that the petitioner must prove by clear and convincing evidence that the parent has failed to manifest *either* ability or willingness. *In re Neveah M.*, 614 S.W.3d 659, 677 (Tenn. 2020) (emphasis added). If either is proven, then the first element is satisfied. *Id.*

With regard to the second element, the court has not identified a set list of circumstances that would constitute substantial harm because of the varied forms of conduct in which substantial harm can arise. However, this court has stated that “substantial harm” would indicate two things. “First, it connotes a real hazard or danger that is not minor, trivial, or insignificant. Second, it indicates that the harm must be more than a theoretical possibility.” *In re Amynn K.*, No. E2017-01866-COA-R3-PT, 2018 WL 3058280, at *11 (Tenn. Ct. App. June 20, 2018) (quoting *Ray v. Ray*, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001)).

Mother contends that the trial court’s holding on this ground must be reversed because “the Juvenile Court did not make specific findings as to this ground; rather, the Court relied on the previous findings of fact in concluding that Mother failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility of the children.” We find no error with the court incorporating by reference specific findings of fact made in prior sections of its decision.

In the final order, the trial court stated:

As to the grounds of failure to manifest an ability and willingness to assume custody, the Court incorporates all of the above findings of fact regarding the previous grounds and uses those findings of fact in concluding as follows:

28. [Mother has] failed to manifest by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility of the children.

29. Placing the children in [Mother's] legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the children.

Tennessee Code Annotated § 36-1-113(k) requires that “[t]he court . . . enter an order that makes specific findings of fact and conclusions of law.” This “reflects the General Assembly’s understanding that findings of fact and conclusions of law facilitate appellate review and promote the just and speedy resolution of appeals.” *In re Adoption of Muir*, No. M2002-02963-COA-R3CV, 2003 WL 22794524, at *3 (Tenn. Ct. App. Nov. 25, 2003). These written findings allow the court to review the record de novo; yet “[w]ithout such findings and conclusions, this court is left to wonder on what basis the court reached its ultimate decision.” *In re M.E.W.*, No. M2003-01739-COA-R3-PT, 2004 WL 865840, at *19 (Tenn. Ct. App. Apr. 21, 2004).

In the present case, the trial court made numerous and specific written findings of fact, which it incorporated in its analysis of this ground for termination. Thus, the trial court’s decision does not leave this court wondering on what basis the trial court made its decision on this ground. Further, it comports with the statutory notion that the grounds are “cumulative and nonexclusive, so that listing conditions, acts[,] or omissions in one ground does not prevent them from coming within another ground[.]” Tenn. Code Ann. § 36-1-113(g).

The trial court made findings of fact that pertained to the first prong, that Mother has “failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility of the child” pursuant to Tennessee Code Annotated § 36-1-113(g)(14). These findings include, among others:

11. . . . [Mother] made no reasonable efforts to provide a suitable home. Instead, [Mother] stopped communicating with the Department, moved to California without providing a forwarding address, and incurred new criminal charges in California.

12. [Mother's] failure to make even minimal efforts to improve [her] home and personal condition demonstrates a lack of concern for the children to

such a degree that it appears unlikely that [she] will be able to provide a suitable home for the children at an early date.

....

15. In the four months before she went to jail, she failed to visit the children, although she was able to visit, she knew the children were in DCS custody, and there was no court order or any other impediment to visitation.

16. In the four months before she went to jail, she failed to make reasonable payments toward the children's support. She paid nothing in that period, although she was able-bodied and capable of working and earning enough to pay support.

The trial court also made findings of fact relating to the second prong, that "placing the child in the person's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child" pursuant to Tennessee Code Annotated § 36-1-113(g)(14). These findings include:

14. [Mother] was in jail part or all of the four months just before this petition was filed, serving a four-year sentence for the following charges: (1) assault with a deadly weapon; (2) second degree robbery; and (3) misdemeanor battery.

....

17. [Mother] engaged in conduct that exhibited a wanton disregard for the children's welfare when she incurred the following charges: driving under the influence. . . .

18. [Mother] engaged in conduct that exhibited a wanton disregard for the children's welfare when she incurred the following charges: (1) assault with a deadly weapon; (2) second degree robbery; and (3) misdemeanor battery.

....

24. DCS removed the children from the home because of a domestic violence episode wherein [Mother] stabbed [biological father] in the presence of the children. Furthermore, [Mother has] a history of substance abuse. The conditions that led to the removal still persist[.]

25. The following other conditions in the home exist that, in all reasonable probability, would lead to further neglect or abuse of the children: [Mother

continues] to incur criminal charges. [Mother] is incarcerated in the state of California. . . .

26. There is little chance that those conditions will be remedied soon so that the children can be returned safely to the home.

27. Continuation of the parent/child relationship greatly diminishes the children's chances of being placed into a safe, stable[,] and permanent home.

After a careful review of the record, we find that the evidence clearly and convincingly supports the trial court's findings of fact and conclusion that Mother failed to manifest an ability and willingness to assume legal and physical custody and that legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the Children. Therefore, we affirm the trial court's ruling on this ground.

II. BEST INTEREST FACTORS

Having affirmed the trial court's findings that grounds exist for termination, we now review the best interest factors. The statute in effect at the time of the filing of the petition specifies nine best interest factors; however, the court is not limited to considering only those nine factors.⁸ *See* Tenn. Code Ann. § 36-1-113(i). "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 Jude M.*, 619 S.W.3d 224, 244 (Tenn. Ct. App. 2020). As such, we review each factor "from the child's, rather than the parent's perspective." *In re Gabriella D.*, 531 S.W.3d 662, 681 (Tenn. 2017).

As guidance for weighing the best interest factors, our Supreme Court has offered:

These statutory factors are illustrative, not exclusive, and any party to the termination proceeding is free to offer proof of any other factor relevant to the best interests analysis. 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

⁸ 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. 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 reference to § 36-1-113(i) herein is to the version in effect when the petition was filed.

whether they amount to clear and convincing evidence that termination is in the child's best interest[s].”

Id. (citations omitted).

Here, the trial court found that DCS proved by clear and convincing evidence that the termination of Mother's parental rights was in the best interest of the Children. Mother contends that the trial court erred in this finding for reasons that we will review alongside the trial court's findings for each of the best interest factors.

A. Adjustment of Circumstance & Lasting Adjustment

Mother takes issue with the court's findings on the first two factors, each of which pertain to Mother adjusting to the circumstances that affect the Children. As such, we shall discuss the first two factors together.

The first factor to be considered is “[w]hether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian.” Tenn. Code Ann. § 36-1-113(i)(1) (2020). Finding that this factor was applicable, the trial court noted, “[Mother continues] to have unresolved substance abuse issues, and [Mother] has unresolved domestic violence issues. Thus, the Court finds that this factor weighs in favor of terminating [Mother's] parental rights.”

The second factor is “[w]hether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible[.]” Tenn. Code Ann. § 36-1-113(i)(2). The trial court found that Mother has “not made lasting changes in [her] lifestyle or conduct after reasonable efforts by the state to help, so that lasting change does not appear possible. [Mother continues] to engage in criminal behavior and abuses substances. Thus, the Court finds that this factor weighs in favor of terminating [Mother's] parental rights.”

Mother takes issue with the court's findings on the first two factors, stating in her brief that she “passed every drug screen she was given throughout the entirety of this matter.” However, DCS proved that after Mother's arrest on March 17, 2019, which initiated the dependency and neglect petition, Mother “tested positive for benzos and THC,” and Mother “admitted to using both.”

DCS case manager, Ms. Gensemer, testified about Mother's drug screens:

Q. Now, you mentioned some concerns as to drug use issues. Did you ever drug screen [Mother]?

A. Yes, I did.

Q. Okay.

A. She always had a negative drug screen at that time. Now, there was a past history of drug usage that I explained whenever the children came into custody where she admitted to – I believe it was benzos and THC. . . . But she also received a DUI in January. And I asked her to take another A&D assessment. And she did not complete IOP at that time. And, then, there – a few months later she had reported to me of drinking again. She took an assessment[,] and it recommended that she have intensive inpatient services. And at that time I believe she was looking at New Leaf to try and get into their program for inpatient. And she kind of like fell – like, I hadn't heard from her after that after she was trying to get into New Leaf.

Q. But, again, back to my original question, though. She never failed a drug screen for you?

A. Not for me she hadn't. No.

Q. Okay. Are you aware that she took a hair follicle back in September of 2019 and passed that?

A. Yes. She did pass – she passed all of her drug screens whenever I had the case.

While Mother's use of illegal drugs may have been remedied, she continued to struggle with alcohol abuse, as evidenced by the DUI charges incurred. Further, the evidence is clear that Mother continues to exhibit violent behavior, as evidenced by the California charges leading to her current incarceration.

We have determined that the evidence does not preponderate against the trial court's findings as to the first two best interest factors. Thus, we affirm the trial court's determination that the first two factors weigh in favor of termination.

B. Regular Visitation or Contact

The third factor is “[w]hether the parent or guardian has maintained regular visitation or other contact with the child.” Tenn. Code Ann. § 36-1-113(i)(3). The trial court found that Mother has “not engaged in regular visitation with the children” and “that this factor weighs in favor of terminating” her parental rights. Yet Mother offers as a defense to both this and the following factor that she “in fact had regular visitation with no

issues for seemingly at least one (1) year prior to the four-month period picked by DCS to use in their Petition to Terminate.”

DCS corroborates Mother’s claim that she had, in fact, previously exercised regular visitation with the Children. However, unrefuted testimony reveals that Mother’s last visitation with the Children was May 28, 2020. Thus, Mother exercised no visitation with the Children during the seventeen months preceding trial. While evidence shows that she did attempt contact with the Children—via messages that “would not make sense,” calls “at 3 a.m.” to the foster parents, and a letter while incarcerated—the sum of those attempts does not constitute maintaining regular visitation or contact and is, at best, token. *See In re Addalyne S.*, 556 S.W.3d 774, 784 (Tenn. Ct. App. 2018) (“Token visitation” means that “under the circumstances of the individual case, [there is] nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child.” Tenn. Code Ann. § 36-1-102(C)). Having determined that the evidence does not preponderate against the trial court’s findings, this factor weighs in favor of terminating Mother’s parental rights.

C. Meaningful Relationship

Factor four examines “[w]hether a meaningful relationship has otherwise been established between the parent or guardian and the child.” Tenn. Code Ann. § 36-1-113(i)(4). The trial court found, “[w]hile [Mother has] some relationship with [her] children, the Court finds that contact has not been consistent or positive and that at this point, it is no longer meaningful to the children. [Mother] has not seen either of the children since May 28, 2020. . . . Thus, the Court finds that this factor weighs in favor of terminating [Mother’s] parental rights.”

We again note Mother’s defense to factors three and four that she, at one time, had visited the Children regularly. However, considering the young age of the Children and that Mother did not have contact with them in the seventeen months prior to trial, we agree that the evidence preponderates in accordance with the trial court’s findings. Accordingly, we affirm the finding that this factor favors termination.

D. Change of Caretakers and Physical Environment

The fifth factor evaluates “[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). Based on testimony from Ms. Gensemer and the foster parents, the trial court found that “changing caregivers at this stage of the children’s life would have a detrimental effect on them. The children are bonded with their foster family and are thriving in this pre-adoptive placement.” After reviewing the record, we find that the evidence does not preponderate against the trial court’s findings and affirm the finding that this factor favors termination.

E. Abusive Behavior

The trial court found that the sixth factor, regarding abuse, was “not applicable in this matter and does not weigh in favor of, or against, termination.”

F. Physical Environment of Parent’s Home

Factor seven examines “[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). The trial court found that the physical environment of Mother’s home was not safe “because there is crime in [Mother’s] home, as evidenced by the various criminal charges incurred.” After review of the record, we find that the evidence does not preponderate against the trial court’s findings and agree that this factor weighs in favor of terminating Mother’s parental rights.

G. Mental and Emotional State

The eighth factor measures “[w]hether the parent’s or guardian’s mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child[.]” Tenn. Code Ann. § 36-1-113(i)(8). The trial court found that this factor weighed in favor of termination because Mother’s “mental and emotional state would be detrimental to the children and would prevent [her] from effectively parenting the children.” The evidence preponderates in favor of this finding; thus, we agree that this factor weighs in favor of termination of Mother’s parental rights.

H. Child Support

The ninth factor determines “[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 has “not paid child support consistent with the child support guidelines.”

Mother argues that she did not willfully fail to pay support because a child support amount was never set for her to pay. However, as stated previously, the absence of a court order does not relieve a parent of her obligation to support her children. *See In re Jacobs M.J.*, 434 S.W.3d at 572. It is undisputed that Mother has not paid child support consistent with the guidelines; thus, we agree that this factor weighs in favor of termination.

Having considered these best-interest factors, the trial court found that DCS had proven by clear and convincing evidence that termination of Mother's parental rights was in the best interest of the Children. Considering the weight of the evidence and these factors as a whole, we agree and affirm the trial court's findings that termination of Mother's parental rights is in the best interest of the Children.

III. ADDITIONAL ARGUMENTS

Mother raises two "Additional Arguments" in the closing pages of her brief which were not listed in the Statement of the Issues as required by Rule 27(a)(4) of the Tennessee Rules of Appellate Procedure. It is well settled that an appellant's failure to designate an issue in its appellant brief as required by Tennessee Rule of Appellate Procedure 27 may result in waiver of that issue. *See In re Tamera W.*, 515 S.W.3d 860, 873 (Tenn. Ct. App. 2016) ("This Court has repeatedly held that the failure to designate an argument as an issue in the party's appellate brief results in a waiver of the argument on appeal.").

Moreover, Mother failed to cite any applicable law in her brief supporting either of her "Additional Arguments" as required by Rule 27(a)(7) of the Tennessee Rules of Appellate Procedure. "This court has repeatedly held that a party's failure to cite authority for its arguments or to argue the issues in the body of its brief constitute a waiver on appeal." *Forbess v. Forbess*, 370 S.W.3d 347, 355 (Tenn. Ct. App. 2011) (quoting *Newcomb v. Kohler Co.*, 222 S.W.3d 368, 401 (Tenn. Ct. App. 2006) (failure "to cite to any authority or to construct an argument regarding [a] position on appeal" constitutes a waiver of the issue)).

Accordingly, the issues that Mother attempts to raise as "Additional Arguments" are waived.

IN CONCLUSION

Having affirmed the juvenile court's findings that grounds exist for termination and that termination is in the best interest of the Children, we affirm the judgment of the juvenile court to terminate the parental rights of Mother. Costs of appeal are assessed against the appellant, Rachel R.

FRANK G. CLEMENT JR., P.J., M.S.