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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 1, 2022 Session

IN RE EMBERLEY W. ET AL.

**Appeal from the Juvenile Court for Wilson County
No. 21-JT-5 Charles B. Tatum, Judge**

No. M2022-00157-COA-R3-PT

Father appeals the termination of his parental rights on the grounds of persistent conditions and failure to manifest an ability and willingness to personally assume custody of the child. Father also appeals the trial court's finding that termination of his parental rights was in the best interest of the child. We affirm the trial court in all respects.

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

ANDY D. BENNETT, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and W. NEAL MCBRAYER, J., joined.

Nicole Elise Fisher, Mt. Juliet, Tennessee, for the appellant, Kristopher W.

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

OPINION

Emberley W. is the daughter of Kristopher W. ("Father") and Hilary R. ("Mother"). Mother also has a minor son, Elijah C., from her prior relationship with Jonathan C. On June 12, 2020, the Wilson County Department of Children's Services ("Wilson County DCS") received a referral¹ alleging that Emberley and Elijah lacked supervision and were

¹ The referral alleged, in pertinent part, as follows:

Emberley W[.] [] and unknown brother [] reside with [Mother] in Wilson County. The mother is probably going to Wilson County Jail in Lebanon.

The birth father is [Kristopher W.], and he resides in the home off and on. He stays in a camper next to home. [Father has] warrants on domestic assault, violation of order of protection, and trespassing.

“drug exposed.” On June 15, 2020, Wilson County DCS filed a Petition to Transfer Legal Custody and for Emergency Hearing entitled “In the Matter of: Elijah C[.]” naming Mother and Jonathan C. as respondents and stating, among other things, that a DCS investigator found Mother “severely bruised all over her body and face” and with “linear marks around her neck that appeared to be strangulation marks”; Mother reported that “she’d been attacked by [Father].” The petition also stated that Father was reported to be “avoiding arrest” and was “spotted walking down Underwood road with no clothing.” Despite referring to Emberley, Elijah, and Father throughout the body of the petition, Wilson County DCS requested for the court to “find the child, Elijah [C.], dependent and neglected” and did not name Father as a respondent. Also on June 15, 2020, the juvenile court entered a Protective Custody Order as to Emberley finding “probable cause to believe that [Emberley] is dependent and neglected.” Emberley was brought “into the protective jurisdiction of the court” and placed in foster care.

On November 13, 2020, Mother passed away “due to an apparent drug overdose.” On March 22, 2021, the Tennessee Department of Children’s Services (“DCS” or “the Department”) petitioned to terminate the parental rights of Father on the grounds of abandonment by failure to visit, abandonment by failure to provide a suitable home, substantial noncompliance with the permanency plans, persistent conditions, and failure to manifest an ability and willingness to assume custody. A hearing on the petition to terminate was held before the Wilson County Juvenile Court on August 27, 2021, with six witnesses testifying. The juvenile court held an additional hearing and announced findings of fact on December 13, 2021.

On January 12, 2022, the juvenile court entered an order terminating Father’s parental rights on the grounds of persistence of conditions and failure to manifest an ability and willingness to assume custody. The court made findings of fact related to each ground for termination, including the following:

The Court finds that the child’s exposure to domestic violence, the use of the child as a human shield, tolerating or allowing the child to be in an environment where she would learn to use derogatory and inappropriate language, demonstrates that the father is not fit to be the child’s parent. . . [F]ather has failed to establish an independence to support himself. . . [A]t the time of removal, the father exposed the child to psychological harm and

Today, 6-12-20, [] was called to [Mother’s] home to make contact [] with [Father] about his warrants. When [] arrived [Mother] was asleep. . . . It appeared that she was under the influence of a drug or prescription.

The home smells like spoiled milk and feces, and there is random stuff on the counters, empty boxes and clothes all over the floor. There is dirt on the floor. . . . Yesterday, [Father] ran into the woods and then into some else[s] house. . . .

domestic violence. Further the father testified that both he and the mother were using illegal drugs when the child was removed.

The court made specific findings that termination was in the child's best interests. The court dismissed the grounds of abandonment and substantial noncompliance, finding those grounds were not proven by clear and convincing evidence.²

Father appeals and asserts the trial court erred in finding clear and convincing evidence to support the grounds for termination and in finding clear and convincing evidence to support a finding that termination is in the child's best interest.

STANDARD OF REVIEW

Under both the federal and state constitutions, a parent has a fundamental right to the care, custody, and control of his or her own child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Angela E.*, 303 S.W.3d 240, 249-50 (Tenn. 2010) (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174-75 (Tenn. 1996) (citing *Nale v. Robertson*, 871 S.W.2d 674, 678 (Tenn. 1994)). Although this right is fundamental, it is not absolute and may be terminated in certain situations. *In re Angela E.*, 303 S.W.3d at 250. Our legislature has identified “those situations in which the state’s interest in the welfare of a child justifies interference with a parent’s constitutional rights by setting forth grounds on which termination proceedings can be brought.” *In re Jacobe M.J.*, 434 S.W.3d 565, 568 (Tenn. Ct. App. 2013) (quoting *In re W.B., IV.*, Nos. M2004-00999-COA-R3-PT, M2004-01572-COA-R3-PT, 2005 WL 1021618, at *7 (Tenn. Ct. App. Apr. 29, 2005)).

Tennessee Code Annotated section 36-1-113 provides the grounds and procedures for terminating parental rights. First, a petitioner seeking to terminate parental rights must prove that at least one ground for termination exists. Tenn. Code Ann. § 36-1-113(c)(1); *In re Angela E.*, 303 S.W.3d at 251. Second, a petitioner must prove that terminating parental rights is in the child’s best interest. Tenn. Code Ann. § 36-1-113(c)(2); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

The termination of a parent’s rights is one of the most serious decisions courts make because “[t]erminating parental rights has the legal effect of reducing the parent to the role of a complete stranger,” *In re W.B., IV.*, 2005 WL 1021618, at *6, “and of ‘severing forever all legal rights and obligations of the parent or guardian.’” *Id.* (quoting Tenn. Code Ann. § 36-1-113(l)(1)). Consequently, a parent has a constitutional right to “fundamentally fair

² The Department does not challenge the dismissal of these grounds on appeal; thus we do not review the grounds the trial court found to be inapplicable. *See In re Colton B.*, No. M2018-01053-COA-R3-PT, 2018 WL 5415921, at *5 (Tenn. Ct. App. Oct. 29, 2018) (finding that we need not “review grounds that the trial court found were not sufficiently proven when the party who sought termination does not challenge that ruling on appeal.”)

procedures” during termination proceedings. *In re Hannah C.*, No. M2016-02052-COA-R3-PT, 2018 WL 558522, at *2 (Tenn. Ct. App. Jan. 24, 2018); *see also In re Carrington H.*, 483 S.W.3d 507, 522 (Tenn. 2016).

Tennessee law ensures fundamental fairness in termination proceedings by requiring a heightened standard of proof—clear and convincing evidence. *See* Tenn. Code Ann. § 36-1-113(c)(1); *In re Carrington H.*, 483 S.W.3d at 522. Before a parent’s rights may be terminated, a petitioner must prove both the grounds and the child’s best interest by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c); *In re Valentine*, 79 S.W.3d at 546. “Clear and convincing evidence ‘establishes that the truth of the facts asserted is highly probable, and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence.’” *In re Serenity B.*, No. M2013-02685-COA-R3-PT, 2014 WL 2168553, at *2 (Tenn. Ct. App. May 21, 2014) (quoting *In re M.J.B.*, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004)).

We review the trial court’s findings of fact *de novo* with a presumption of correctness unless the evidence preponderates otherwise. TENN. R. APP. P. 13(d); *In re Serenity B.*, 2014 WL 2168553, at *2. In light of the heightened standard of proof, we must then 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 (citing *In re Bernard T.*, 319 S.W.3d 586, 596-97 (Tenn. 2010)).

ANALYSIS

I. Grounds for termination

A. Failure to manifest an ability and willingness to assume custody or financial responsibility

The trial court terminated Father’s parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(14). Under this ground, a parent’s rights may be terminated when (1) he or she “has failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility of the child” and (2) “placing the child in the person’s legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child.” Tenn. Code Ann. § 36-1-113(g)(14).

Regarding the first element, the Tennessee Supreme Court has held it “places a conjunctive obligation on a parent . . . to manifest *both* an ability and willingness to personally assume legal and physical custody or financial responsibility for the child.” *In re Neveah M.*, 614 S.W.3d 659, 677 (Tenn. 2020) (emphasis added). Because of this conjunctive obligation on a parent, a petitioner seeking to terminate a parent’s rights under this ground need only prove that a parent failed to manifest *either* an ability *or* a willingness

to assume custody. *Id.* (citing *In re Amynn K.*, No. E2017-01866-COA-R3-PT, 2018 WL 3058280, at *13-14 (Tenn. Ct. App. June 20, 2018)). “Ability focuses on the parent’s lifestyle and circumstances[,]” and willingness focuses on the parent’s attempts “to overcome the obstacles that prevent [him or her] from assuming custody or financial responsibility for the child.” *In re Serenity W.*, No. E2018-00460-COA-R3-PT, 2019 WL 511387, at *6 (Tenn. Ct. App. Feb. 8, 2019). Thus, a parent’s mere desire to reunite with his or her child is insufficient to demonstrate an ability or a willingness. *In re Nicholas C.*, No. E2019-00165-COA-R3-PT, 2019 WL 3074070, at *17 (Tenn. Ct. App. July 15, 2019). A petitioner must prove that the parent failed to demonstrate ability and/or willingness as of the date the termination petition was filed. *In re M.E.N.J.*, No. E2017-01074-COA-R3-PT, 2017 WL 6603658, at *7 (Tenn. Ct. App. Dec. 27, 2017).

Here, the trial court made the following findings regarding the ground of failure to manifest:

25. The Court finds that the Respondent 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.

26. Specifically, the Court finds that the father has verbally expressed a desire to be a parent to the child, but, thereafter, failed to demonstrate the strength to follow through with that kind of commitment. The Court finds that the father is capable of functioning in a controlled setting, such as a halfway house, but has not yet demonstrated that he can function outside of that controlled environment. The Court finds that placing the child in the Respondent’s legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child. The Court finds that this child is bonded with her foster parents and foster siblings. The Court finds that this beautiful little girl has been exposed to too much in her life already. The child’s mother and father exposed this child to too much of the dark underbelly and dark side of life. The Court believes that [Father] is incapable, even with an appropriate partner, to be able to overcome this issue. The Court finds that, when you get to this point in the child’s life and development, one cannot hit the pause button. She will continue to grow and mature. The Court finds that it is unfair to the child to expect her life to be put on hold while the father gets his life in order. This is something that should have been done the day that he found out the mother was pregnant with his child. Finally, the Court notes that throughout the course and duration of this case, [Father] has been in controlled environments, halfway houses, and incarcerated, and that he has not demonstrated that he’s capable of maintaining a household for himself, much less a minor child. The Court finds that the child is better off where she is at this time with her foster family than with her father.

27. DCS has proven, by clear and convincing evidence, the ground of failure to manifest a willingness and ability to assume custody against [Father].

As to the first prong, we agree with the trial court that Father has failed to manifest an ability and a willingness to personally assume custody of the child. We have specifically focused on his lifestyle and circumstances. See *In re Serenity W.*, 2019 WL 511387, at *6. Father acknowledged during his testimony that he has a “relatively significant criminal history” and has “been in and out of jail several times in [his] life.” He was in jail when the child came into DCS custody in June 2020, he went back to jail for a short stent during the pendency of this case, and he was in jail again at the time of trial. When he was not in jail, he resided in various halfway houses (he was dismissed from one halfway house and enrolled at another one) or with his mother (until she took out an order of protection against him). Father denied having anger management issues,³ but he admitted to “thr[owing] some stuff on the ground and br[eaking]some stuff” at his mother’s home. Another witness testified that he saw Father choking Mother, saw him throw a glass candle at Mother, and on a separate occasion, he saw Father “pull a knife” on Jonathan C. while holding Emberley as a “human shield.” And yet, Father refused to admit to or address his anger issues. In sum, Father never obtained suitable housing for himself, much less his daughter; he continued his criminal behavior and was incarcerated at the time of trial; he did not have his driver’s license at the time of trial; and he failed to complete domestic violence classes as required by his permanency plan. In addition, although Father testified of his love for the child and claims he is willing to assume legal and physical custody of the child (six months from the date of trial once he exits jail and gets housing), his actions throughout the pendency of this case indicated otherwise. See *In re Eli H.*, No. E2019-01028-COA-PT, 2020 WL 2300066, at *9 (Tenn. Ct. App. May 8, 2020) (“In assessing a parent’s willingness, ‘we look for more than mere words.’”) (quoting *In re Jaxx M.*, E2018-01041-COA-R3-PT, 2019 WL 1753054, at *9 (Tenn. Ct. App. Apr. 17, 2019)). While Father made some effort toward reunification with his daughter and testified of his desire to parent her,⁴ his actions and inactions ultimately revealed he was unwilling to do what it took to

³ On the topic of his anger problems, Father testified as follows:

Q. Would it be fair to say that you have an anger management issue?

A. No, ma’am.

Q. So you don’t think there’s a problem there?

A. No, ma’am.

Q. And although you’ve been arrested for domestic assault, you don’t acknowledge there’s an issue?

A. No, ma’am.

⁴ Father acknowledged that he had not given his “best effort” in his attempt to reunite with the child, but he wanted to have a second chance to show his best effort:

THE COURT: Have you given your best effort so far?

regain custody of the child. For these reasons, we find clear and convincing evidence that Father “has failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility of the child.” Tenn. Code Ann. § 36-1-113(g)(14).

With respect to the second prong, we must determine whether placing the child in Father’s custody would result in “a risk of substantial harm to the physical or psychological welfare of the child.” When considering what constitutes “substantial harm,” we have observed the following:

[C]ourts have not undertaken to define the circumstances that pose a risk of substantial harm to a child. These circumstances are not amenable to precise definition because of the variability of human conduct. However, the use of the modifier “substantial” indicates 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. While the harm need not be inevitable, it must be sufficiently probable to prompt a reasonable person to believe that the harm will occur more likely than not.

Ray v. Ray, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001) (footnotes omitted). More recently, this Court has provided examples of circumstances that support a finding of substantial harm:

forcing a child to begin visitation with a near-stranger would make psychological harm sufficiently probable. . . . placing a child with a parent who engaged in repeated criminal conduct that required incarceration would put a child at risk of substantial physical or psychological harm. . . . parents with a significant, recent history of substance abuse, mental illness, and/or domestic violence could lead to a conclusion of a risk of substantial harm.

In re Brianna B., No. M2019-01757-COA-R3-PT, 2021 WL 306467, at *6 (Tenn. Ct. App. Jan. 29, 2021) (citations omitted).

THE WITNESS: No, sir, I haven’t. Not so far, I have not, sir, but I would like to show you my best effort, sir. I can promise you when I get out of here I’m going to give it my best effort.

THE COURT: Why haven’t you given your best effort up to this point?

THE WITNESS: That’s a good question. That’s a good question, sir. . . .

Father’s eleventh hour request for a second chance to give his best effort is simply “too little too late.” *See In re Maya R.*, No. E2017-01634-COA-R3-PT, 2018 WL 1629930, at *6 (Tenn. Ct. App. Apr. 4, 2018).

Here again, we agree with the trial court that placing the child with Father would pose a risk of substantial harm to her physical and/or psychological welfare. In particular, evidence of Father's history of domestic violence against Mother, and Father's use of the child as a "human shield" when in physical altercations with others illustrates the risk of harm involved. Finally, there was repeated testimony of Father using inappropriate language in front of the child and screaming at her. For example, a witness testified he observed Father on three or four occasions screaming "I f---ing hate you" to the child. This use of profanity toward or in front of the child is corroborated by the foster parents' testimony that the child, who was slightly less than two when she came into their custody, "cursed like a sailor." In light of the foregoing, removing Emberley from her current home and placing her back in Father's custody would pose a substantial risk that Father would expose the child to domestic violence or engage in behavior that would be detrimental to her physical and psychological welfare. Therefore, we conclude that clear and convincing evidence exists to establish that Father failed to manifest an ability and willingness to assume custody and that placing the child in his care would pose a risk of substantial harm to her. The trial court's termination of Father's parental rights on the ground of "failure to manifest" is affirmed.

B. Persistence of conditions

The trial court also terminated Father's parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(3). This ground is often referred to as "persistence of conditions." *In re Audrey S.*, 182 S.W.3d 838, 871 (Tenn. Ct. App. 2005). Persistence of conditions may be a basis for terminating a parent's parental rights if:

The child has been removed from the home or the physical or legal custody of a parent . . . 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 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 . . . ;
- (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 . . . in the near future; and
- (iii) The continuation of the parent . . . and child relationship greatly diminishes the child's chances of early integration into a safe, stable, and permanent home[.]

Tenn. Code Ann. § 36-1-113(g)(3)(A).⁵ A petitioner seeking to terminate parental rights pursuant to this ground must prove each of the statutory elements by clear and convincing evidence. *In re Justin D.*, No. E2019-00589-COA-R3-PT, 2020 WL 4473032, at *9 (Tenn. Ct. App. Aug. 4, 2020) (citing *In re Michael B.*, No. M2019-01486-COA-R3-PT, 2020 WL 2988932, at *10 (Tenn. Ct. App. June 4, 2020)).

Our inquiry requires us to interpret the persistence of conditions statute. The Tennessee Supreme Court has given us guidance when interpreting a statute:

[W]e “must first ascertain and then give full effect to the General Assembly’s intent and purpose” in drafting those sections. *Waldschmidt v. Reassure Am. Life Ins. Co.*, 271 S.W.3d 173, 176 (Tenn. 2008). Our chief concern is to carry out the legislature’s intent without unduly broadening or restricting the statute. *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002) (quoting *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995)). We presume that every word in a statute has meaning and purpose and should be given full effect if so doing does not violate the legislature’s obvious intent. *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn. 2005) (quoting *Marsh v. Henderson*, 424 S.W.2d 193, 196 ([Tenn.] 1968)). When the statutory language is clear and unambiguous, we simply apply its plain meaning. *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004).

Shelby Cty. Health Care Corp. v. Nationwide Mut. Ins. Co., 325 S.W.3d 88, 92 (Tenn. 2010).

Father focuses on the first section of the statute and asserts that the threshold requirement for a finding of persistence of conditions has not been met in this case. Specifically, Father asserts that because the protective custody order placing Emberley in state custody “was not entered at any stage of proceedings in which a petition was filed in the juvenile court alleging that Emberley is a dependent and neglected child,” the persistence of conditions statute is not implicated. It is true that the “Petition to Transfer Temporary Legal Custody and for Emergency Hearing” was entitled “In the Matter of Elijah C[.]” and did not specifically seek to find Emberley dependent and neglected. Similarly, that petition does not name Father in the case caption, rather, it refers to Jonathan C., Elijah’s father. However, that same petition, refers almost exclusively to Emberley throughout the body of the petition, including an extensive discussion of Emberley and Father in section “III. DEPENDENCY & NEGLECT” containing allegations relevant to Emberley:

⁵ We have cited to the version of the statute that was in effect when the termination petition was filed on March 22, 2021.

On June 12, 2020 the Wilson County Department of Children's Services received a referral alleging lack of supervision and drug exposed child against Emberley W[.] perpetrated by [Mother]. The referral alleged the following concerns:

“Emb[e]rley W[.] and unknown brother[] reside with mother, . . . in Wilson County. The mother is probably going to Wilson County Jail in Lebanon. The birth father is Kristopher [W.], and he resides in the home off-and on. He stays in a camper next to home. [Father has] warrants on domestic assault, violation of order of protection, and trespassing.

Today, 6-12-20, LE was called to [Mother's] home to make contact [] with [Father] about his warrants. When LE arrived [Mother] was asleep. She was asleep 7 feet from the front door and it took LE 5 minutes to wake her up. She appeared to be under the influence and was in disarray and lethargic. It appeared that she was under the influence of a drug or prescription. The home smells like spoiled milk and feces, and there is random stuff on the counters, empty boxes and clothes all over the floor. There is dirt on the floor from normal foot traffic that has not been swept in months. The upstairs has not been observed but it believed the mother resides downstairs mostly while the brother resides upstairs. Yesterday, [Father] ran into the woods and then into someone else house, The details on the event are currently unknown. At this time, the mother is starting to sober up.”

CPSI Edge met response at the family home on June 12, 2020. CPSI Edge spoke with law enforcement to gather information about the situation. Law enforcement reported that there are clearly environmental neglect and drug use concerns. The mother appeared to be under the influence when WCSO arrived at the home early this morning. The mother has begun to sober up but still appears under the influence. CPSI Edge observed large bruises about the mother's body from a great distance. Law enforcement reported that she was assaulted by the child's father, [], last night. Emberley's father has been avoiding arrest since then. He was spotted walking down Underwood road with no clothing at the time of CPSI Edge's arrival at the home. Other deputies on scene left to attempt contact with Kristopher. Once placement was secured for Emeberley, the mother would be transported to the jail for violating an order of protection. It was reported that the mother was given the opportunity to contact people to be placement for Emberley, but she only called people asking them to make bail for her.

CPSI Edge met with the mother on the front porch of the home. The front door of the home was open and the home was very cluttered inside. The mother was observed to be severely bruised all over her body and face. She also had linear marks around her neck that appeared to be strangulation marks. The mother reported that she'd been attacked by [Father]. She also had multiple burns on her legs from [Father] putting out cigarettes on her body. Emberley was observed to be wearing only a diaper. She appeared to be dirty, had "Child's play" scratches on the fronts of her legs and bug bites on her legs and arms. The mother was observed to appear under the influence, as she had trouble maintaining her balance and leaned back while standing. CPSI Edge obtained signed consent for a urine drug screen and the mother stated that she would only be positive for her prescription Buprenorphine.

CPSI Edge entered the house with the mother. The home appeared very cluttered and unsafe for a child of Emberley's age. There were many choking hazards scattered about the home, an odor of feces, and many roaches. Every room of the home was dirty and hazardous. The home had no air conditioning or window units and was very hot. There was a pack and play in the home, however it was filled with random objects and it was clear that this was not where Emberley sleeps. CPSI Edge asked the mother where she sleeps, and it was reported that she sleeps in the pack and play or in the bed with she or [Father]. Before entering the bathroom, the mother warned CPSI Edge that there was no toilet seat, as [Father] traded it for drugs. She further reported that [Father] is addicted to methamphetamine.

In addition, on the same day that the petition naming Elijah C. was filed, June 15, 2020, a Protective Custody Order entitled "In the Matter of Emberley W." was filed stating:

Based upon the facts stated in the verified petition filed in this cause, the Court finds:

...

2. *There is probable cause to believe that the above-named child is dependent and neglected* pursuant to Tenn. Code Ann. § 37-1-102(b)(13).
3. The child is subject to an immediate threat to the child's health or safety to the extent that delay for a hearing would be likely to result in severe or irreparable harm.
4. There is no less drastic alternative to removal available that would reasonably and adequately protect the child's health and safety pending a hearing.
5. It is contrary to the child's welfare to remain in the home for the reasons set out in the petition.

(emphasis added). This Protective Custody Order included Father as a Respondent.

So, we must determine whether the Petition entitled “In re Elijah C.” which does not specifically include a prayer for relief seeking to find Emberley dependent and neglected and does not include Father as a respondent, but includes allegations that Emberley was a dependent and neglected child, satisfies the threshold requirement that an order removing Emberley from the custody of a parent was “entered at any stage of proceeding in which a petition has been filed in juvenile court alleging that a child is dependent and neglected.” The Department argues that the child subject to the termination petition need not be named in the dependency and neglect petition for persistence of conditions to apply. The Department urges this Court to focus on the articles⁶ used in the statute—distinguishing between the legislature’s use of “a” and “the”—to find that the ground applies in this case. In keeping with our duties when interpreting a statute, we must “presume that every word in a statute has meaning and purpose[,]” even words like “a” and “the.” *Shelby Cty. Health Care Corp.*, 325 S.W.3d at 92. We have broken down the statute and interposed our analysis within the text below:

The child [(Emberley)] has been removed from the home or the physical or legal custody of a parent⁷ [(Emberley was removed from her Mother’s custody on June 15, 2020)]. . . for a period of six (6) months [(Emberley was removed from June 15, 2020 until the time of trial on August 27, 2021—more than six months)] by a court order [(the trial court entered the Protective Custody Order as to Emberley on June 15, 2020)] entered at any stage of proceedings in which a petition [(a petition was filed seeking to find Elijah C. dependent and neglected)] has been filed in the juvenile court alleging that a child [(a petition seeking to find Elijah C. dependent and neglected

⁶ In this context, an “article” is defined as “any of a small set of words or affixes (such as a, an, and the) used with nouns to limit or give definiteness to the application.” *Article*, MERRIAM-WEBSTER DICTIONARY (<https://www.merriam-webster.com/dictionary/article> (last accessed Jan. 10, 2023)).

⁷ We recognize that precedent interpreting the previous version of the statute has held that the persistence of conditions ground does not apply where the record contains no order removing the child from the home of the parent whose rights are at issue. *See In re Destaney D.*, No. E2014-01651-COA-R3-PT, 2015 WL 3876761, at *6 (Tenn. Ct. App. June 23, 2015); *In re B.P.C.*, No. M2006-02084-COA-R3-PT, 2007 WL 1159199, at *7 (Tenn. Ct. App. Apr. 18, 2007). We observe that these rulings interpreting the prior version of the statute may have resulted in “exempting possibly the more reprehensible of two bad parents” from the ground of persistence of conditions. Dawn Coppock & Michael S. Jennings, *Tennessee’s New Adoption Law What You Need to Know About the 2018 First in Adoption Act*, TENN. B.J., July 2018, at 16, 18. The 2018 amendment to the persistence of conditions ground changed the phrase “removed from the home of the parent” to “removed from the home or the physical or legal custody of a parent.” *See* Tenn. Code Ann. § 36-1-113(g)(3) (emphasis added). This change illustrates the significance of the words “a” and “the” within the statute. We also note that in this case, there is evidence that Father resided in the home with the child “off and on” and stayed in a “camper next to the home” at other times. The allegations of domestic violence also show that Father was often in the home with Emberley.

included allegations relevant to both Elijah and Emberley)] is a dependent and neglected child . . .

(emphasis and parentheticals added). We note that “[t]he Legislature made ‘significant changes’” to Tennessee Code Annotated § 36-1-113(g)(3)(A) by amendment in 2018. *In re Elijah R.*, No. E2020-01520-COA-R3-CV, 2021 WL 2530644, at *9 (Tenn. Ct. App. June 21, 2021). These changes have been described as “expanding [the] reach” of the statute. *Id.* at *10 (quoting *In re Savannah M.*, No. M2018-00752-COA-R3-PT, 2019 WL 354869, at *5 n.12 (Tenn. Ct. App. Jan. 28, 2019)). We agree with the trial court and DCS that this is a case where the statute, as amended, reaches and applies to Father and the factual scenario presented here.

Now that we have determined the threshold requirements for the ground of persistence of conditions are satisfied, we proceed to analyze the other elements of the ground. In performing this analysis, we are mindful that we must focus “on the results of the parent’s efforts at improvement rather than the mere fact that he or she had made them.” *In re Audrey S.*, 182 S.W.3d at 874. The question we must answer is “the likelihood that the child can be safely returned to the custody of the [parent], not whether the child can safely remain in foster care.” *In re K.A.H.*, No. M1999-02079-COA-R3-CV, 2000 WL 1006959, at *5 (Tenn. Ct. App. July 21, 2000). Moreover, “[a] parent’s continued inability to provide fundamental care to a child, even if not willful, . . . constitutes a condition which prevents the safe return of the child to the parent’s care.” *In re Nevada N.*, 498 S.W.3d 579, 605 (Tenn. Ct. App. 2016) (quoting *In re A.R.*, No. W2008-00558-COA-R3-PT, 2008 WL 4613576, at *20 (Tenn. Ct. App. Oct. 13, 2008)).

The conditions leading to the child’s removal included Father’s domestic violence against Mother, Father’s criminal activity and incarceration, and environmental neglect. Father’s criminal behavior and incarceration certainly persisted at the time of trial. Father pleaded guilty to disorderly conduct and was in jail when the termination hearing was held. In addition, evidence was presented to show that Father’s domestic violence and anger issues persisted throughout the custodial episode. Indeed, his mother (Emberley’s grandmother) took out an order of protection against him after he had an angry outburst in her home while he was not in jail and was between halfway houses. Furthermore, he did not complete domestic violence training and refused to admit to or address his anger issues; thus, his anger issues had not been addressed through therapy or otherwise. The trial court correctly found that Father’s issues persisted and that “Father continues to minimize episodes of domestic assault and domestic violence.” *See* Tenn. Code Ann. § 36-1-113(g)(3)(A)(i).

Evidence also showed that the conditions were unlikely to be remedied at an early date. Father had over fourteen months to make adjustments that would enable the child to be returned to his care, and yet, he never obtained stable housing and continued his criminal behavior, consistently derailing any progress he made. *See* Tenn. Code Ann. § 36-1-

113(g)(3)(A)(ii). Finally, continuation of the parent-child relationship would diminish the child's chances of integration into a safe, stable and permanent home. Emberley is closely bonded to her foster family and siblings and had made great progress since being placed with the family. Meanwhile, Father was still incarcerated at the time of trial and had not resolved the issues leading to foster care placement. *See* Tenn. Code Ann. § 36-1-113(g)(3)(A)(iii). For these reasons, we affirm the trial court's determination that DCS proved the existence of the ground of persistence of conditions by clear and convincing evidence.

II. Best interest

Having determined that clear and convincing evidence of at least one statutory ground exists to terminate Father's parental rights, we must next consider whether the trial court properly determined that termination of Father's parental rights was in the best interest of the child. *See* Tenn. Code Ann. § 36-1-113(c)(2); *In re Audrey S.*, 182 S.W.3d at 860. After a court finds that clear and convincing evidence exists to support a ground for termination, the child's interests diverge from those of the parent and the court focuses on the child's best interests. *In re Audrey S.*, 182 S.W.3d at 877. A court must view the child's best interest from the perspective of the child, not that of the parent. *Id.* at 878. A finding that at least one ground for termination of parental rights exists does not necessarily require that a parent's rights be terminated. *Id.* at 877. Because some parental misconduct is redeemable, our termination of parental rights statutes recognize that "terminating an unfit parent's parental rights is not always in the child's best interests." *Id.* The facts a court considers in its best interest analysis must be proven by "a preponderance of the evidence, not by clear and convincing evidence." *In re Kaliyah S.*, 455 S.W.3d 533, 555 (Tenn. Ct. App. Tenn. 2015). Once a court makes the underlying factual findings, it should "consider the combined weight of those facts to determine whether they amount to clear and convincing evidence that termination is in the child's best interest." *Id.*

When considering whether terminating a parent's rights to a child is in the child's best interest, a trial court must consider the factors enumerated in Tenn. Code Ann. § 36-1-113(i).⁸ A trial court is not required to find that each of the enumerated factors exists before concluding that it is in the best interest of the child to terminate a parent's rights. *In re M.A.R.*, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005). Although in some circumstances "the consideration of one factor may very well dictate the outcome of the analysis," *In re Audrey S.*, 182 S.W.3d at 878, a court is still obligated to consider "all the factors and all the proof." *In re Gabriella D.*, 531 S.W.3d 662, 682 (Tenn. 2017). Here, after considering

⁸ The Tennessee General Assembly amended the statutory best-interest factors in 2021. *See* 2021 TENN. PUB. ACTS ch. 190 § 1 (S.B. 205), eff. April 22, 2021. However, the factors applicable to this appeal are the nine factors identified in Tenn. Code Ann. § 36-1-113(i) (2020), which were in effect when the termination petition was filed on March 22, 2021. *See In re Braxton M.*, 531 S.W.3d at 732.

all of the best interest factors, the trial court found that the factors favored terminating Father's parental rights. *See* Tenn. Code Ann. § 36-1-113(i).

The first best interest factor considers whether a 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). During the year and a half span that the child was removed from the home, Father never established a suitable home at which he could care for his daughter. Father was either in jail, in halfway houses, or at his mother’s home until she took out an order of protection against him. We agree with the trial court that he never “demonstrated that he is capable of maintaining a household independently that [] would be suitable for himself or a child.” Furthermore, Father continued to engage in behavior that resulted in repeated incarcerations. While Father completed some items on the permanency plan, he never completed domestic violence training and refused to acknowledge that he had anger management issues. This factor favors termination.

The trial court determined that factor two—“[w]hether the parent . . . 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” applied to this case. Tenn. Code Ann. § 36-1-113(i)(2). With respect to this factor, the trial court found:

[Father] has not made lasting changes in his lifestyle or conduct after reasonable efforts by the state to help, so that lasting change does not appear possible. The Court finds that, since Ms. Andrew was put on the case, she has attempted to work with the father. Yet, many of the conditions that led to removal continue to exist. Thus, the Court finds that this factor weighs in favor of terminating the Respondent’s parental rights.

The evidence in the record before us does not preponderate against the trial court’s findings, and we agree that this factor weighs in favor of termination.

Next, the trial court found that “no significant bond” was established between Father and the child and that “he has not demonstrated that he is capable of establishing or maintaining” a parent/child bond. Tenn. Code Ann. § 36-1-113(i)(3)-(4) (“Whether the parent . . . has maintained regular visitation” and “[w]hether a meaningful relationship has otherwise been established between the parent . . . and the child.”). The evidence shows that there have been limited visits between Father and the child. The first visit occurred ten months after the child entered state custody. Father engaged in video conference visits and three in-person visits during the custodial episode. Testimony from foster father and Father indicated those visits went well and Emberley had few, if any, regressive behaviors after the visits. Nevertheless, we agree with the trial court that there was “no proof that demonstrates or shows that there has been any sort of a significant bond established

between the child and the father.” Thus, factor three is neutral in that Father did begin to maintain some regular visitation as trial approached, but factor four weighs in favor of termination as there was not substantial evidence to show there was a meaningful relationship or “significant bond” between Father and the child.

The fifth best interest factor considers “[t]he effect of 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 evidence shows that the child is happy and is bonded with her foster family, including her foster siblings. The child refers to her foster mother as “mommy” and has made great progress while in the care of her foster family. For example, when she was first placed with the foster family she exhibited disturbing behavior during diaper changes and during bathtime. However, after therapy and through the patience of the foster family, these behaviors have resolved. The foster family also testified that the child used profanity when she initially came into their home, but the child has ceased using profanity over time. From a report written by a Court Appointed Special Advocate in December 2020, Emberley was described as having “emerged from being a withdrawn child to an outwardly engaging little girl. Her daycare likens it to Emberley just making a decision not to let her past control her.” The foster family has provided stability, safety and permanency for the child, and they wish to adopt her if adoption becomes an option. This factor favors termination. *See In re Da’Vante M.*, No. M2017-00989-COA-R3-PT, 2017 WL 6346056, at *15 (Tenn. Ct. App. Dec. 12, 2017) (“Children deserve stability and an opportunity to move on from their present limbo.”).

The sixth best interest factor considers “[w]hether the parent, or guardian, or other person residing with the parent or guardian, 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 evidence showed that Father had engaged in domestic violence against Mother. A witness also testified that Father used Emberley as a human shield while threatening Jonathan C. with a knife. This factor favors termination.

Factor seven considers whether there is criminal activity in the home and whether a parent is often unable to care for a child due to substance abuse. Tenn. Code Ann. § 36-1-113(i)(7). Following the child’s removal, Father was arrested for public intoxication, disorderly conduct, and violation of probation. He pleaded guilty to disorderly conduct and was incarcerated at the time of trial. Although Father believed he would be released from jail in the near future, he admitted he would need six months to get on his feet and out of a halfway house. He would not be able to provide a safe and healthy home during that time period. This factor favors termination.

Factor eight focuses on a parent’s mental or emotional status. Tenn. Code Ann. § 36-1-113(i)(8). The trial court found this factor was inapplicable. We, however, find it noteworthy that despite testimony regarding Father’s history of domestic violence issues,

