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

IN RE SKYLITH F., ET AL.

Appeal from the Circuit Court for Montgomery County
No. CC-2020-CV-1735 Kathryn Wall Olita, Judge

No. M2022-01231-COA-R3-PT

This appeal concerns the termination of a mother's parental rights. Step-grandparents Joe K. and Lois K. ("Petitioners") filed a petition in the Circuit Court for Montgomery County ("the Trial Court") seeking to terminate the parental rights of Vernetta G. ("Mother") to her minor children, Skylith F., Zelda F., and Celeste G. ("the Children"). After a hearing, the Trial Court entered an order terminating Mother's parental rights on the grounds of abandonment by failure to support, abandonment by failure to visit, and persistent conditions. Mother appeals. Mother argues, among other things, that she was thwarted by Petitioners from visiting the Children more often than she did. We find by clear and convincing evidence, as did the Trial Court, that Petitioners proved three grounds for termination of Mother's parental rights. We find further by clear and convincing evidence, as did the Trial Court, that termination of Mother's parental rights is in the Children's best interest. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

D. MICHAEL SWINEY, C.J., delivered the opinion of the court, in which CARMA DENNIS MCGEE, J., joined. JEFFREY USMAN, J., filed a separate concurring opinion.

Taylor R. Dahl, Clarksville, Tennessee, for the appellant, Vernetta G.

Stacy A. Turner, Clarksville, Tennessee, for the appellees, Joe K. and Lois K.

OPINION

Background

All three of the Children were born to Mother. Devin F., deceased, was the father of Skylith and Zelda, born February 2015 and January 2016 respectively. Raymond G. is the father of Celeste, born December 2018.[1] Petitioners are step-grandparents of Skylith and Zelda. In August 2018, Skylith and Zelda were removed from Mother and Raymond G.'s home on the basis of Raymond G.'s domestic violence against Mother. Skylith and Zelda were placed in Petitioners' home through an agreed Immediate Protection Agreement. Celeste, born in the midst of these events, later was placed with Petitioners. Petitions for dependency and neglect were filed in Montgomery County Juvenile Court. The Children were found dependent and neglected. In September 2019, the Juvenile Court entered orders awarding custody of the Children to Petitioners. The Juvenile Court found that Mother had exposed her children to an abusive relationship and stated: "It is concerning to the Court that over a year after the original dependency and neglect petition was filed, that the Mother has not taken any action to dissolve her marriage from the Father."

On September 18, 2020, Petitioners filed a petition for adoption and to terminate Mother's parental rights to the Children. Petitioners alleged against Mother as grounds for termination abandonment by failure to visit and persistent conditions. They also alleged that termination of Mother's parental rights is in the Children's best interest. Mother filed an answer in opposition. On September 24, 2021, Petitioners filed a motion to amend with an amended petition attached. Petitioners sought to pursue the additional ground against Mother of abandonment by failure to support.[2] Mother filed a response in opposition. By order entered November 18, 2021, the Trial Court granted Petitioners' motion to amend. In July 2022, this matter was heard.

Deshon S. testified to Mother having rented a room from him for five or six months from approximately September 2021 through February 2022. During that time, Raymond G. sometimes stayed with Mother. On cross-examination, Deshon S. acknowledged that he had not personally witnessed any disputes between Mother and Raymond G.

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[1] Raymond G.'s parental rights were terminated by the Trial Court. Raymond G. has not participated in this appeal.

[2] Petitioners also alleged against Mother the ground of failure to manifest an ability and willingness to assume custody. However, the Trial Court did not address that ground, and Petitioners do not argue on appeal that the ground should have been found. We consider the ground of failure to manifest as having been abandoned by Petitioners.

Lois K., step-grandmother and one of the Petitioners, testified next. Skylith and Zelda were placed with Petitioners in August 2018. An order concerning Celeste was entered in 2019. When Skylith and Zelda arrived, they were quiet, reserved, and fearful. Petitioners took them to a pediatrician "many times." Mother's visitation with the Children, per an agreement, "would be Wednesday afternoons and Saturday mornings for two hours each time, unsupervised at our discretion." When Mother needed to come to Petitioners' house, she relied on friends or Lyft. Lois K. testified in detail as to Mother's record of visitation during the four months before the initial petition was filed. Mother was inconsistent over this period. Lois K. said that she tried to accommodate Mother. Regarding child support, Mother originally agreed to pay $600 per month. Mother made two such payments, but none were made after September 2018. Lois K. acknowledged that Mother sometimes provided toys, school supplies, and food or snacks for the Children. When Mother visits, the Children are happy to see her, but usually that is because she has brought them something. Lois K. said that Mother does not pay much attention to Celeste. Lois K. did not believe Mother had a bond with the Children. Asked why she believed it is in the Children's best interest for Mother's parental rights to be terminated, Lois K. testified:

> Because the girls are totally bonded with us. This is what they know. They're taken well care of. They have extracurriculars. They have friends. We have a huge support system. The church is amazing. They have grandmas all over the place, besides me, that take care of them and help. We have friends. They're doing very well. They're doing well emotionally. They're doing well physically, and they're thriving in every sense of the word in every area.

On cross-examination, Lois K. was asked a number of questions pertaining to whether she impeded Mother's efforts to visit the Children. Lois K. said that she left it up to Mother whether she wanted to cancel visits or not on account of being sick. Lois K. acknowledged that Mother had been exercising more visitation as of late. After Lois K. concluded her testimony, step-grandfather Joe K. testified as well. His testimony was largely in accord with Lois K's. Paul E., pastor of Petitioners' church, testified to a close bond between Petitioners and the Children. Jessica H., an individual who attends church with Petitioners, testified favorably about Petitioners' caregiving for the Children.

Raymond G., Celeste's father and Mother's husband, testified also. Raymond G. is not participating in this appeal. Nevertheless, as pertinent to the issues before us, Raymond G. has been involved in multiple domestic violence incidents. He said that he was last arrested for a domestic incident involving Mother in December 2020. Raymond G. spent time in jail for his criminal matters. Mother filed for divorce against him, but the divorce was never finalized. On cross-examination, Raymond G. was asked in detail about his

history of domestic violence against Mother. He acknowledged that he had violated a court order prohibiting him from having in-person contact with Mother. Asked what sort of relationship he still has with Mother, Raymond G. said: "(Respite.) Just, kind of, taking -- solve problems that we had in the past." He added: "I don't see her no more." According to Raymond G., the last time he saw Mother was in January of that year, "[j]ust to check in on her." At that time, he was arrested for violation of probation.

Mother testified next. Asked how Covid had impacted her ability to visit the Children in 2020, Mother stated: "Well, no work. No drivers. No money to get to and for, like, back and forth to the visits. And then with Covid, like, actually being sick, not knowing what it was, so. . . I mean, that's that." Mother also said that she sometimes felt under the weather. She said: "I mean, yes, depression gets you there. Like, having epilepsy, it comes along with depression. Anxiety, not knowing, so, yes." Mother said that she had asked for additional time for visitation, unsupervised time, and overnight time, but none of those were allowed. Mother said that she had not brought the Children around Raymond G. since they left her custody. Regarding her relationship with Petitioners, Mother is "civil" with them. Mother lives with her Aunt Robin, Robin's boyfriend, and the boyfriend's brother. When asked why she had not divorced Raymond G. yet, Mother stated: "Honestly, because I forget to bring the paperwork with me when I come to court or. . . ." Concerning ongoing communication with Raymond G., Mother said that she updates him on how the Children are doing. On the matter of child support, Mother said that Petitioners told her that they did not need any help from her. Mother testified that she has a stable job. She does not pay rent at her current residence.

On cross-examination, Mother was asked about Raymond G.'s history of domestic violence against her. She stated:

> Q. The first aggravated assault against Mr. [G.] involved him hitting you with a vehicle, didn't it?
> A. I have no idea. I don't recall any of it.
> Q. You don't recall any of the assault --
> A. No.
> Q. -- with Mr. [G.]?
> A. No, put it behind me. Don't even think about it.
> Q. Put it behind you?
> A. Yes.
> Q. Okay. What about the second assault with Mr. [G.]?
> A. I just said I don't remember any of it.
> Q. Okay. So you -- when you heard me read out the allegations on the warrant which was supposedly what you told the officer, do you agree or disagree with me that that's what happened?

A. I can't agree or disagree.
Q. So it's your testimony as we sit here today that you don't remember any domestic assault between you and Mr. [G.]?
A. I know what happened, but I don't remember specific dates or specific things that did happen.

Mother's aunt, Robin D., testified. Robin D. is Mother's aunt by marriage. Robin D. testified that Mother has an affectionate relationship with the Children. Mother lives with Robin D. at least part of the time. Robin D.'s fiancé Benny and his brother Tico also live in the home. Robin D. said that she has no reason to believe Mother and Raymond G. have continued a romantic relationship. On cross-examination, Robin D. acknowledged that Mother does not always stay at her home. Crystal M., a friend of Mother's, testified next. Crystal M. testified to having observed a positive interaction between Mother and the Children on a visit.

In August 2022, the Trial Court entered its final order terminating Mother's parental rights to the Children. The Trial Court found that Petitioners had proven, by clear and convincing evidence, three grounds for termination against Mother: abandonment by failure to support; abandonment by failure to visit; and persistent conditions. The Trial Court also found by clear and convincing evidence that termination of Mother's parental rights is in the Children's best interest. In its detailed final order, the Trial Court stated, in relevant part:

[abandonment by failure to support]

The relevant four-month period preceding the filing of the supplemental petition alleging this ground is July 17, 2021 to November 17, 2021. Mother argues that her gifts, treats and school supplies constitute support. As set forth above, the items that fell during the relevant period were backpacks and school supplies; supply fees of $25 and $6 and individual food items brought at visits. The Court finds the items provided to the children, while well-intentioned, were token and do not constitute support. Token support during the relevant period will not prevent a finding of abandonment. For the purposes of making this determination, T.C.A. § 36-1-102(1)(B), "token support" means that the support provided, under the circumstances of this particular case, is insignificant given the parent's means. Because "token" is determined in light of the parent's ability to pay, whether support payments are token requires considerable proof of the parent's financial circumstances. In the context of token support, the word "means" connotes both income and available resources for the payment of debt. In re Z.J.S., No. M2002-02235-

COA-R3-JV, 2003 WL 21266854, at *11 n. 24 (Tenn. Ct. App. June 3, 2003); *see also Black's Law Dictionary* 1070 (9th ed. 2009).

It is not in dispute that Mother was gainfully employed during the relevant period. She has maintained full time employment . . . for more than a year. More impactful at this trial, however, was the evidence that Mother receives nearly $1,600.00 per month in benefits from the United States Military. Her gross monthly income, then, is $3,176.24 per month. Mother testified she essentially has no living expenses. She has been residing with her Aunt Robin and pays no rent or utilities. Her monthly income is essentially all for her own personal discretionary spending. Prior to moving in with her Aunt, she rented a single room in Mr. [S.'s] home and paid just $40 per month for utility use. Prior to that, she resided in the marital home, which the parties allowed to be foreclosed upon. Mother did not put on any proof of extraordinary living expenses during that time. Given her income/benefits, the Court finds Mother has failed to make reasonable payments toward the support of the children. The items she supplied during the relevant period were token in light of her ability to pay.

It is not disputed that there is no support order in place. However, "[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." T.C.A. § 36-1-102(H). Further, the contribution of one parent does not alleviate the responsibility of the other parent to support his child. Children have a right to support from *both* parents who are equally charged with their care, nurture, welfare, education and support. Kirkpatrick v. O'Neal, 197 S.W.[3d] 674, 679 (Tenn. 2006). Moreover, there is no requirement that a child's custodian ask for support, nor that there be a court order setting support. Bryant v. Bryant, 1999 WL 43282, *4 (Tn. Ct. App. 1999); State Dep't of Hum. Servs. v. Manier, 1997 WL 675209, *5 (Tn. Ct. App. 1997).

The Court finds proof by clear and convincing evidence that Mother has abandoned her children based upon a willful failure to support.

[abandonment by failure to visit]

Petitioners have also alleged abandonment on the basis of Respondent's failure to visit the children. The same definitions apply as set forth above for failure to support. The Court looks at the relevant period of May 17, 2020 through September 17, 2020 for the relevant period related to failure to visit. It is undisputed that Mother has not [had] custody of her minor children since 2018. Mother had the following visits during the relevant period:

a. In May 2020, Mother exercised three visits.
b. In June 2020, Mother exercised two visits.
c. In July 2020, Mother exercised one visit.
d. In August 2020, Mother exercised one visit.
e. In September 2020, Mother had no visits with the children.

The Court finds that seven visits during the relevant period constitute token visitation. By agreed order of the parties, Mother was entitled to two-hour visits twice a week, for a total of 32 potential visits over four months. Mother complains that her transportation issues prevented her from visiting, but a review of Exhibits 11 — 14 show that Mother cancelled visits on Saturdays as well as Wednesdays. In addition, Mother knew when she entered into the agreed order that transportation would be her responsibility for the Wednesday visits each week. For Saturday visits, she did not require transportation. Mother's reasons for cancelling very often included being tired, babysitting for other people's children and work. Correspondences with Joe [K.] show that [Petitioners] tried to work with Mother as best they could to work around her schedule.

Based upon the evidence presented at trial, the Court finds that the seven visits Mother had with the children during the relevant period were token and as such, Mother failed to visit with her children during the relevant period. Further, the Court finds that her failure to do so is willful. Mother was aware of her duty to visit with her children; she had the freedom to do so; she only intermittently attempted to do so; and she had no justifiable excuse for repeatedly not doing so.

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In her answer to the Petition, Mother asserts that her failure to visit is not willful. There has been no credible proof that [Petitioners] attempted to thwart Mother's ability to visit or support her children. To the contrary, [Petitioners] were in contact with Mother regularly and tried to accommodate her when she would cancel visits. Mother's failure to visit was based upon her own actions and the consequences of those actions. To the extent Mother has attempted to establish as an affirmative defense that her failure to visit was not willful, she has failed to do so. The Court finds proof by clear and convincing evidence that Mother has abandoned her children based upon failure to visit.

[persistent conditions]

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Skylith and Zelda [F.] were removed from the physical custody of their Mother in August of 2018. Celeste [G.] was removed from the physical custody of her parents through an Immediate Protection Agreement signed by all parties and the Department of Children's Services on December 13, 2018. Petitioners obtained legal custody of Celeste by order of the Juvenile Court of Montgomery County entered September 17, 2019. The children have been removed from their parents for a period of greater than six (6) months. Respondents waived preliminary and adjudicatory hearings and the children were found to be dependent and neglected.

It is the Petitioners' contention that the conditions that led to the children's removal still persist, preventing the children's safe return to the care of the parent or guardian — that is, Raymond [G.] is still in Mother's life. Indeed, the evidence in this case supports this assertion. Even long after the filing and service of the original Petition upon Mother, she has continued to engage with Father. Following the filing of the Petition on September 18, 2020, Father assaulted Mother again on December 23, 2020 and was arrested and charged. Father spent two periods of time incarcerated following that event, but by September of 2021, Mother was in contact with Father when he helped her move into Mr. [S.'s] home. Mr. [S.] saw Father there on at least one other occasion. It was undisputed that the parties had seen each other as recently as January of 2022. This contact was all despite knowing this litigation was ongoing and that the basis for the children's removal from their care was the existence of the relationship. Mother said it most candidly during her testimony: she and Father are in consistent contact when he is not incarcerated — "I update him on the children," she testified.

Perhaps most disturbing was Mother's refusal to answer questions at trial about the abuse she suffered at the hands of Father. She claimed she couldn't remember the abusive events, even when her recollection was refreshed with criminal records and police reports. She simply said she "decided [she] wouldn't remember." She also testified that she just kept "forgetting" to finalize her divorce from Father. Mother was very candid at trial that she has allowed Father around her and has never called the cops on him for violating any of the many orders in place prohibiting their contact. At all times relevant to this matter, the Juvenile Court, the Department of Children's Services and the Petitioners suspected that Mother has continued to maintain a relationship with Father and those suspicions are confirmed by the evidence. Mother appears to maintain a steadfast refusal to address these shortcomings and as such, they remain a barrier to remedying the conditions.

The Court finds there is little likelihood that these conditions will be remedied at an early date so that the children can be safely returned to the parents in the near future. There is little parent-child relationship to speak of between Mother and the children at this point — she has not had custody of them since 2018. While the girls do enjoy seeing her and enjoy the treats she brings them at the visits, the relationship they have is not that of a parent and child. Therefore, any continuation of the parent-child relationship greatly diminishes the children's chances of early integration into a safe, stable, and permanent home.

The Court finds that the conditions that led to the removal still persist such that, in all probability, would lead to further neglect of the children and that there is little chance that those conditions will be remedied soon so that the children can be returned safely to Mother's care. The Court finds proof by clear and convincing evidence that grounds exist to terminate Mother's rights for persistence of the conditions that led to removal.

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[best interest]

(A) The effect a termination of parental rights will have on the child's critical need for stability and continuity of placement throughout the child's minority;

The children at issue in this action have been living in a loving, stable and satisfactory home with [Petitioners] since 2018. In the case of Celeste, she has lived with [Petitioners] nearly her entire life. The girls have had the love and support of [Petitioners] throughout the entirety of that time. Stability and continuity are critical for these children's continued success and development. A termination of the parental rights will have a positive impact on their stability and continuity of placement.

(B) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological, and medical condition;

The children are doing exceptionally well in their current home. The family is very active with all three children being involved in extracurricular activities, as well as the family being very involved in their church. The girls are bonded to [Petitioners], have now lived with them for four years for Skylith and Zelda and for nearly Celeste's whole life. While the girls are happy to see Mother at visits, Mrs. [K.] testified that the visits are very

superficial and that Mother often ignores Celeste altogether. The girls look forward to the small gifts and food treats Mother brings, but their interactions are not of a bonded parent-child nature. To effectuate a change of caretakers and physical environment would have a negative impact on them emotionally and psychologically. Given the length of time they have been removed from their parents' care, a change at this point would no doubt be harmful to the children and not in their best interests.

(C) Whether the parent has demonstrated continuity and stability in meeting the child's basic material, educational, housing, and safety needs;

Neither parent has shown continuity or stability in meeting the children's basic material, educational, housing and safety needs. The older girls were removed from their Mother's care in August of 2018 and [Petitioners] have provided for their every need since that date. Celeste has never been in the Respondents' care. Neither Mother nor Father has provided for her basic needs. Neither parent is in a position to currently provide for the girls' housing and safety needs.

[Petitioners] have been consistently providing for the girls needs for nearly all their lives. In addition, [Petitioners] have invested the various monetary benefits the children are entitled to in college savings and regular savings accounts for their benefit. By contrast, even after the girls were removed from Mother's care, she continued to receive the girls' benefits for a period of time and kept those for herself.

This factor favors termination of Respondents' parental rights.

(D) Whether the parent and child have a secure and healthy parental attachment, and if not, whether there is a reasonable expectation that the parent can create such attachment;

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There is also no healthy parental attachment existing between Mother and the children. They have not been in her care since 2018. While their visits with Mother are pleasant, the relationship they have is not that of a parent-child. The children are happy to see her and to see what treats she has brought them. They are happy to play on her phone. They do not otherwise engage with her in the way that a child would with a meaningfully bonded parent.

Courts are called to be mindful that "[t[he child's best interests [are] viewed from the child's, rather than the parent's, perspective." In re Audrey S.,182 S.W.3d at 878. In fact, "[a] focus on the perspective of the child is the common theme" throughout a review of a factors. Id. "[W]hen the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child. . . ." Tenn. Code Ann. § 36-1-101(d); In Re Gracie H. Y. et al., No. M201900639COAR3PT, 2020 WL 1249453, at *21 (Tenn. Ct. App. Mar. 16, 2020). Considering all the testimony given in this matter, the Court finds that no meaningful relationship exists between Respondents and the children. The Court does not believe there is a reasonable expectation that Mother or Father can create such attachment with the children.

This factor favors termination of Respondents' parental rights.

(E) Whether the parent has maintained regular visitation or other contact with the child and used the visitation or other contact to cultivate a positive relationship with the child;

The Court's findings on this issue are discussed at length above under Grounds and those findings are incorporated herein.

(F) Whether the child is fearful of living in the parent's home;

The Court does not consider this factor to be applicable in this matter.

(G) Whether the parent, parent's home, or others in the parent's household trigger or exacerbate the child's experience of trauma or post-traumatic symptoms;

The Court does not consider this factor to be applicable in this matter.

(H) Whether the child has created a healthy parental attachment with another person or persons in the absence of the parent;

The Court finds that the children are bonded to [Petitioners]. The children have developed this healthy parental attachment given the absence of both Mother and Father.

(I) Whether the child has emotionally significant relationships with persons other than parents and caregivers, including biological or foster siblings, and

the likely impact of various available outcomes on these relationships and the child's access to information about the child's heritage;

The Court does not consider this factor to be applicable in this matter.

(J) Whether the parent has demonstrated such a lasting adjustment of circumstances, conduct, or conditions to make it safe and beneficial for the child to be in the home of the parent, including consideration of whether there is criminal activity in the home or by the parent, or the use of alcohol, controlled substances, or controlled substance analogues which may render the parent unable to consistently care for the child in a safe and stable manner;

As it relates to Mother, the Court finds that she has not made a lasting adjustment of her circumstances, conduct, or conditions to make it safe and beneficial for the children to be in her home. First, Mother has "her own space" in her aunt's home where Benny and Tico also reside. These persons are unknown to the children (and the Court). Mother is not prepared to take the children into her care and custody and is not prepared to provide safe and stable housing for them. Second, the Court is not convinced that the continuing cycle of domestic violence which has consumed the entirety of Respondents' relationship has been resolved. While legally separated, the Respondents have not yet divorced and neither could give a good explanation as to why. Mother's testimony (or lack thereof) regarding the abuse she suffered suggests that she is either unbothered by that past or has not adequately processed it for her own benefit. These issues render her unable to consistently care for the children in a safe stable manner.

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This factor favors termination of Respondents' parental rights.

(K) Whether the parent has taken advantage of available programs, services, or community resources to assist in making a lasting adjustment of circumstances, conduct, or conditions;

Both parents have taken advantage of some development opportunities available to them. Father has taken a 28-week domestic violence course, a 10-week healthy parenting course and three 10-week anger management sessions. When asked if he felt these opportunities had been effective, he candidly answered, "yes and no." He admitted that some of it he only did

because it was court-mandated and "I wasn't paying attention most of the time." Mother testified that she continues counseling to address her loss and grief, but also refused to testify against Father at trial regarding the abuse she suffered at by his hand. Whether these efforts will assist in making a lasting adjustment of circumstances, conduct or conditions cannot yet be determined.

This factor favors termination of Respondents' parental rights.

(L) Whether the department has made reasonable efforts to assist the parent in making a lasting adjustment in cases where the child is in the custody of the department;

The Court does not consider this factor to be applicable in this matter.

(M) Whether the parent has demonstrated a sense of urgency in establishing paternity of the child, seeking custody of the child, or addressing the circumstance, conduct, or conditions that made an award of custody unsafe and not in the child's best interest;

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Mother filed a motion with this court seeking additional, unsupervised visitation just prior to the trial of this matter. Mother testified that she asked for additional visitation from [Petitioners] but that her requests were denied. Respectfully, the evidence simply does not support Mother's assertion. In the four months preceding the filing of this Petition, Mother exercised very few of her permitted visits and those she missed were nearly all at her request. While Mother has more consistently exercised visitation since the filing of the Petition, abandonment may not be repented after the petition for termination is filed. *See* T.C.A. § 36-1-102(1)(A)(v)(F), stating, "[a]bandonment may not be repented of by resuming visitation or support subsequent to the filing of any petition seeking to terminate parental or guardianship rights or seeking the adoption of a child." Otherwise, she has not demonstrated a sense of urgency in addressing the circumstance, conduct, or conditions that made an award of custody unsafe and not in the children's best interest.

This factor favors termination of Respondents' parental rights.

(N) Whether the parent, or other person residing with or frequenting the home of the parent, has shown brutality or physical, sexual, emotional, or psychological abuse or neglect toward the child or any other child or adult;

The Court has discussed at length the history of domestic abuse between Mother and Father. Father has shown physical brutality toward Mother throughout the entirety of their relationship to include when Mother was pregnant with Celeste. At least two of the domestic abuse occasions took place in the [presence] of Skylith and Zelda. This Court is not convinced that Respondents are finished with their relationship with each other, as set forth above. This factor favors termination of Respondents' parental rights.

(O) Whether the parent has ever provided safe and stable care for the child or any other child;

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Mother has not had care of Skylith and Zelda since 2018. They were ages three and two at the time they were removed from her care. Their removal was precipitated by Mother's turbulent relationship with Father and the girls' witness to a specific incident was [sic] Mother (pregnant with Celeste) was drug to the ground by Father's car. This factor favors termination of Respondents' parental rights.

(P) Whether the parent has demonstrated an understanding of the basic and specific needs required for the child to thrive;

The Court does not consider this factor to be applicable in this matter.

(Q) Whether the parent has demonstrated the ability and commitment to creating and maintaining a home that meets the child's basic and specific needs and in which the child can thrive;

Neither parent demonstrated the ability and commitment to creating and maintaining a home that meets the children's basic and specific needs and in which the children can thrive. Four years after the children having been removed from her care, Mother still does not have stable housing where the children's basic needs could be met. . . .This factor favors termination of Respondents' parental rights.

(R) Whether the physical environment of the parent's home is healthy and safe for the child;

The Court cannot say that Mother's home is healthy and safe for the children. At trial, Mother's testimony was unclear on what her plan would be for the children's sleeping arrangements in her aunt's home. Further, two other adults — Benny and Tico — reside in the home and this Court has no information about them or their situations.

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This factor favors termination of Respondents' parental rights.

(S) Whether the parent has consistently provided more than token financial support for the child; and

Neither parent has consistently provided more than token financial support.

(T) Whether the mental or emotional fitness of the parent would be detrimental to the child or prevent the parent from consistently and effectively providing safe and stable care and supervision of the child.

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Mother maintained absolute silence as to her domestic abuse situation at the trial of this matter. She refused to answer specific questions about that aspect of her relationship with Father. Yet, she had to agree that she has continued to allow him to be a part of her life even as recently as just a few months before this trial. She keeps "forgetting" to finalize her divorce from Father. Mother's inability to mentally or emotionally accept, process and appropriately respond to these issues prevents her from providing a safe and stable home for the children. This factor weighs in favor of terminating Respondents' parental rights.

(Record citations omitted, bold type removed). The Trial Court also found that placing the Children with Petitioners on a prompt and permanent basis is in the Children's best interest. Mother timely appealed to this Court.

Discussion

Although not stated exactly as such, Mother raises the following issues on appeal: 1) whether the Trial Court erred in finding the ground of abandonment by failure to support; 2) whether the Trial Court erred in finding the ground of abandonment by failure to visit; 3) whether the Trial Court erred in finding the ground of persistent conditions; and 4) whether the Trial Court erred in finding that termination of Mother's parental rights is in the Children's best interest.

As our Supreme Court has instructed regarding the standard of review in parental rights termination cases:

> A parent's right to the care and custody of her child is among the oldest of the judicially recognized fundamental liberty interests protected by the Due Process Clauses of the federal and state constitutions.[3] *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *In re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010); *In re Adoption of Female Child*, 896 S.W.2d 546, 547-48 (Tenn. 1995); *Hawk v. Hawk*, 855 S.W.2d 573, 578-79 (Tenn. 1993). But parental rights, although fundamental and constitutionally protected, are not absolute. *In re Angela E.*, 303 S.W.3d at 250. "'[T]he [S]tate as *parens patriae* has a special duty to protect minors . . . .' Tennessee law, thus, upholds the [S]tate's authority as *parens patriae* when interference with parenting is necessary to prevent serious harm to a child." *Hawk*, 855 S.W.2d at 580 (quoting *In re Hamilton*, 657 S.W.2d 425, 429 (Tenn. Ct. App. 1983)); *see also Santosky v. Kramer*, 455 U.S. 745, 747, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *In re Angela E.*, 303 S.W.3d at 250. "When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it." *Santosky*, 455 U.S. at 759, 102 S.Ct. 1388. "Few consequences of judicial action are so grave as the severance of natural family ties." *Id*. at 787, 102 S.Ct. 1388; *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 119, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996). The parental rights at stake are "far more precious than any property right." *Santosky*, 455 U.S. at 758-59, 102 S.Ct. 1388. Termination of parental rights has the legal effect of reducing the parent to the role of a complete stranger and of "severing forever all legal rights and

[3] U.S. Const. amend. XIV § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."). Similarly, article 1, section 8 of the Tennessee Constitution states "[t]hat no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land."

obligations of the parent or guardian of the child." Tenn. Code Ann. § 36-1-113(*l*)(1); *see also Santosky*, 455 U.S. at 759, 102 S.Ct. 1388 (recognizing that a decision terminating parental rights is "*final* and irrevocable"). In light of the interests and consequences at stake, parents are constitutionally entitled to "fundamentally fair procedures" in termination proceedings. *Santosky*, 455 U.S. at 754, 102 S.Ct. 1388; *see also Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 27, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981) (discussing the due process right of parents to fundamentally fair procedures).

Among the constitutionally mandated "fundamentally fair procedures" is a heightened standard of proof – clear and convincing evidence. *Santosky*, 455 U.S. at 769, 102 S.Ct. 1388. This standard minimizes the risk of unnecessary or erroneous governmental interference with fundamental parental rights. *Id.*; *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010). "Clear and convincing evidence enables the fact-finder to form a firm belief or conviction regarding the truth of the facts, and eliminates any serious or substantial doubt about the correctness of these factual findings." *In re Bernard T.*, 319 S.W.3d at 596 (citations omitted). The clear-and-convincing-evidence standard ensures that the facts are established as highly probable, rather than as simply more probable than not. *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005); *In re M.A.R.*, 183 S.W.3d 652, 660 (Tenn. Ct. App. 2005).

Tennessee statutes governing parental termination proceedings incorporate this constitutionally mandated standard of proof. Tennessee Code Annotated section 36-1-113(c) provides:

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

This statute requires the State to establish by clear and convincing proof that at least one of the enumerated statutory grounds[4] for termination exists and

[4] Tenn. Code Ann. § 36-1-113(g)(1)-(13).

that termination is in the child's best interests. *In re Angela E.*, 303 S.W.3d at 250; *In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). "The best interests analysis is separate from and subsequent to the determination that there is clear and convincing evidence of grounds for termination." *In re Angela E.*, 303 S.W.3d at 254. Although several factors relevant to the best interests analysis are statutorily enumerated,[5] the list is illustrative, not exclusive. The parties are free to offer proof of other relevant factors. *In re Audrey S.*, 182 S.W.3d at 878. The trial court must then determine whether the combined weight of the facts "amount[s] to clear and convincing evidence that termination is in the child's best interest." *In re Kaliyah S.*, 455 S.W.3d 533, 555 (Tenn. 2015). These requirements ensure that each parent receives the constitutionally required "individualized determination that a parent is either unfit or will cause substantial harm to his or her child before the fundamental right to the care and custody of the child can be taken away." *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999).

Furthermore, other statutes impose certain requirements upon trial courts hearing termination petitions. A trial court must "ensure that the hearing on the petition takes place within six (6) months of the date that the petition is filed, unless the court determines an extension is in the best interests of the child." Tenn. Code Ann. § 36-1-113(k). A trial court must "enter an order that makes specific findings of fact and conclusions of law within thirty (30) days of the conclusion of the hearing." *Id*. This portion of the statute requires a trial court to make "findings of fact and conclusions of law as to whether clear and convincing evidence establishes the existence of each of the grounds asserted for terminating [parental] rights." *In re Angela E.*, 303 S.W.3d at 255. "Should the trial court conclude that clear and convincing evidence of ground(s) for termination does exist, then the trial court must also make a written finding whether clear and convincing evidence establishes that termination of [parental] rights is in the [child's] best interests." *Id*. If the trial court's best interests analysis "is based on additional factual findings besides the ones made in conjunction with the grounds for termination, the trial court must also include these findings in the written order." *Id*. Appellate courts "may not conduct de novo review of the termination decision in the absence of such findings." *Id*. (citing *Adoption Place, Inc. v. Doe*, 273 S.W.3d 142, 151 & n. 15 (Tenn. Ct. App. 2007)).

[5] Tenn. Code Ann. § 36-1-113(i).

B. Standards of Appellate Review

> An appellate court reviews a trial court's findings of fact in termination proceedings using the standard of review in Tenn. R. App. P. 13(d). *In re Bernard T.*, 319 S.W.3d at 596; *In re Angela E.*, 303 S.W.3d at 246. Under Rule 13(d), appellate courts review factual findings de novo on the record and accord these findings a presumption of correctness unless the evidence preponderates otherwise. *In re Bernard T.*, 319 S.W.3d at 596; *In re M.L.P.*, 281 S.W.3d 387, 393 (Tenn. 2009); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007). In light of the heightened burden of proof in termination proceedings, however, the reviewing court must make its own determination as to whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, amount to clear and convincing evidence of the elements necessary to terminate parental rights. *In re Bernard T.*, 319 S.W.3d at 596-97. The trial court's ruling that the evidence sufficiently supports termination of parental rights is a conclusion of law, which appellate courts review de novo with no presumption of correctness. *In re M.L.P.*, 281 S.W.3d at 393 (quoting *In re Adoption of A.M.H.*, 215 S.W.3d at 810). Additionally, all other questions of law in parental termination appeals, as in other appeals, are reviewed de novo with no presumption of correctness. *In re Angela E.*, 303 S.W.3d at 246.

In re Carrington H., 483 S.W.3d 507, 521-24 (Tenn. 2016) (footnotes in original but renumbered). In conjunction with a best interest determination, clear and convincing evidence supporting any single ground will justify a termination order. *E.g., In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). Regarding witness credibility, our Supreme Court has stated:

> When it comes to live, in-court witnesses, appellate courts should afford trial courts considerable deference when reviewing issues that hinge on the witnesses' credibility because trial courts are "uniquely positioned to observe the demeanor and conduct of witnesses." *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000). "[A]ppellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary." *Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999); *see also Hughes v. Metro. Gov't of Nashville & Davidson Cnty.*, 340 S.W.3d 352, 360 (Tenn. 2011). In order for evidence to be clear and convincing, it must eliminate any "serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *State v. Sexton*, 368 S.W.3d 371, 404 (Tenn. 2012) (quoting *Grindstaff v. State*, 297 S.W.3d 208, 221 (Tenn. 2009)). Whether the evidence is clear and convincing is a

> question of law that appellate courts review de novo without a presumption of correctness. *Reid ex rel. Martiniano v. State*, 396 S.W.3d 478, 515 (Tenn. 2013), (citing *In re Bernard T.*, 319 S.W.3d 586, 596-97 (Tenn. 2010)), *cert. denied*, —— U.S. ——, 134 S.Ct. 224, 187 L.Ed.2d 167 (2013).

Kelly v. Kelly, 445 S.W.3d 685, 692-93 (Tenn. 2014).

There are three grounds for termination at issue—abandonment by failure to support, abandonment by failure to visit, and persistent conditions. On September 18, 2020, Petitioners filed their initial termination petition. On September 24, 2021, Petitioners sought leave to file an amended petition. On November 18, 2021, Petitioners' motion to amend was granted. The relevant statutory grounds and definitions remained unchanged throughout. The grounds were set out as follows:

> (g) Initiation of termination of parental or guardianship rights may be based upon any of the grounds listed in this subsection (g). The following grounds are cumulative and nonexclusive, so that listing conditions, acts or omissions in one ground does not prevent them from coming within another ground:
>
> (1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred;
>
> ***
>
> (3)(A) The child has been removed from the home or the physical or legal custody of a parent or guardian for a period of six (6) months by a court order entered at any stage of proceedings in which a petition has been filed in the juvenile court alleging that a child is a dependent and neglected child, and:
> (i) The conditions that led to the child's removal still persist, preventing the child's safe return to the care of the parent or guardian, or other conditions exist that, in all reasonable probability, would cause the child to be subjected to further abuse or neglect, preventing the child's safe return to the care of the parent or guardian;
> (ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent or guardian in the near future; and
> (iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable, and permanent home;
> (B) The six (6) months must accrue on or before the first date the termination of parental rights petition is set to be heard[.]

Tenn. Code Ann. § 36-1-113(g) (West July 1, 2021 to June 30, 2022).

The grounds of abandonment at issue, failure to support and failure to visit, were defined as follows:

> (1)(A) For purposes of terminating the parental or guardian rights of a parent or parents or a guardian or guardians of a child to that child in order to make that child available for adoption, "abandonment" means that:
> (i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding, pleading, petition, or any amended petition to terminate the parental rights of the parent or parents or the guardian or guardians of the child who is the subject of the petition for termination of parental rights or adoption, that the parent or parents or the guardian or guardians either have failed to visit or have failed to support or have failed to make reasonable payments toward the support of the child;
>
> ***
>
> (B) For purposes of this subdivision (1), "token support" means that the support, under the circumstances of the individual case, is insignificant given the parent's means;
> (C) For purposes of this subdivision (1), "token visitation" means that the visitation, under the circumstances of the individual case, constitutes 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;
> (D) For purposes of this subdivision (1), "failed to support" or "failed to make reasonable payments toward such child's support" means the failure, for a period of four (4) consecutive months, to provide monetary support or the failure to provide more than token payments toward the support of the child. That the parent had only the means or ability to make small payments is not a defense to failure to support if no payments were made during the relevant four-month period;
> (E) For purposes of this subdivision (1), "failed to visit" means the failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation. That the parent had only the means or ability to make very occasional visits is not a defense to failure to visit if no visits were made during the relevant four-month period;

> (F) Abandonment may not be repented of by resuming visitation or support subsequent to the filing of any petition seeking to terminate parental or guardianship rights or seeking the adoption of a child;
>
> ***
>
> (H) Every 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; [and]
> (I) For purposes of this subdivision (1), it shall be a defense to abandonment for failure to visit or failure to support that a parent or guardian's failure to visit or support was not willful. The parent or guardian shall bear the burden of proof that the failure to visit or support was not willful. Such defense must be established by a preponderance of evidence. The absence of willfulness is an affirmative defense pursuant to Rule 8.03 of the Tennessee Rules of Civil Procedure[.]

Tenn. Code Ann. § 36-1-102 (West July 1, 2021 to May 8, 2022).

We first address whether the Trial Court erred in finding the ground of abandonment by failure to support. The Trial Court examined a four-month period—July 17, 2021 through November 17, 2021—preceding the November 18, 2021 entry of its order granting Petitioners' motion to amend. However, using that date, the correct four-month window to apply is July 18, 2021 through November 17, 2021. *See In re Jacob C.H.*, No. E2013-00587-COA-R3-PT, 2014 WL 689085, at *6 (Tenn. Ct. App. Feb. 20, 2014), *no appl. perm. appeal filed* ("[T]he applicable four month window . . . includes the four months preceding the day the petition . . . is filed but excludes the day the petition is filed."). Nevertheless, the error was harmless in this instance.

In her brief, Mother does not dispute the four-month window used by the Trial Court. She instead says that she was not under an order to pay child support. She says that, notwithstanding that, she provided gifts, treats, and schools supplies for the Children. The Trial Court found that the items Mother provided were well-intentioned but token in light of her means. The evidence does not preponderate against this or any of the Trial Court's findings relative to this issue. The Trial Court noted Mother's gross income of $3,176.24 per month, and the fact that she essentially has no living expenses. The various gifts and knick-knacks provided by Mother were no substitute for genuine child support. The trial testimony reflects that Mother made two payments of $600 in 2018, but that was well before the determinative period. In the relevant time period, Mother provided no more than token support for the Children as found by the Trial Court. In addition, that Mother was not under a child support order is not dispositive as "[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). Mother was over the age of 18 at all material times herein. She is therefore presumed to have known of her duty to support the Children. We find, as did the Trial Court, that the ground of abandonment by failure to support was proven against Mother by clear and convincing evidence.

We next address whether the Trial Court erred in finding the ground of abandonment by failure to visit. On this ground, the Trial Court examined the period from May 17, 2020 through September 17, 2020, four months before the filing of the initial petition. As the initial petition was filed on September 18, 2020, the period for review was actually May 18, 2020 through September 17, 2020. Once again, the error was harmless under the circumstances. The Trial Court found that Mother exercised seven out of 32 possible visits over the four-month period. On appeal, Mother argues that she had justifiable excuses for missing visits, including bouts of sickness or transportation issues. Mother also says that Petitioners were not accommodating to her in making up for missed visits. We defer heavily to a trial court's credibility determinations, and the Trial Court plainly did not credit Mother's excuses for why she did not visit the Children more often than she did. The Trial Court found that "[t]here has been no credible proof that [Petitioners] attempted to thwart Mother's ability to visit or support her children." We find no clear and convincing evidence to overturn the Trial Court's assessment of Mother's credibility.

The Trial Court found further that Mother's seven visits with the Children in the four-month period were token when 32 visits were possible. The record reflects that Mother's visits, while pleasant, were not highly meaningful.[6] Even still, they were not utterly de minimis, either. Thus, a question remains as to whether seven decent if unremarkable visits out of a possible 32 visits in the determinative period—or around a 22% attendance rate—constitutes token visitation. The question is not amenable to a formulaic answer. *See In re Enrique F.*, No. M2019-01765-COA-R3-PT, 2021 WL 1885925, at *6 (Tenn. Ct. App. May 11, 2021), *no appl. perm. appeal filed* ("Although much emphasis has been made by the GAL and the Grandparents that Father exercised less than half of the available visitation time afforded him, it is clear from caselaw that mere mathematical percentages do not control the question of whether a parent's visitation is token."). In *In re Addalyne S.*, 556 S.W.3d 774 (Tenn. Ct. App. 2018), this Court discussed as follows:

[6] In the findings of fact section of its termination order, the Trial Court found regarding the substance of Mother's visits: "More often than not, Mother brings food and treats with her to visits such that the girls typically ask 'what do you have for us.' They almost always go for Mother's phone and she lets them play on it."

The trial court found, and there is no dispute on appeal, that Mother exercised eight of twenty-two, or approximately 36% of, potential visits with Addy during the relevant time period. Further, Mother testified that Addy calls her "Mommy." Additionally, there is evidence that Mother and Addy like to do many activities together during Mother's visitation such as playing outside together or doing makeup and hair, and that they are affectionate towards one another during visits.

Mother's amount of visitation certainly borders on being token. Indeed, at least one Tennessee court has held that a mother who completed 37.5% of her potential visits during the relevant time period only engaged in token visitation. *See In re L.J.*, No. E2014-02042-COA-R3-PT, 2015 WL 5121111, at *4-*6 (Tenn. Ct. App. June 29, 2015).

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At first blush, the facts of *In re L.J.* appear to be analogous to the case-at-bar. Indeed, Mother attended a similar, but even lesser amount, of visitation over the relevant time period, had problems with reliable transportation, and Mother and Addy's relationship was also built during her scheduled, supervised visits. Token visitation, however, is analyzed in regard to the "circumstances of the individual case." Tenn. Code Ann. § 36-1-102(1)(c). As such, this Court has never imposed a bright-line rule as to what percentage of visitation must be attended in order [to] avoid categorization as token. *Compare In Re Jayden B.T.*, No. E2014-00715-COA-R3-PT, 2015 WL 3876573, at *8 (Tenn. Ct. App. June 23, 2015) (holding that petitioners failed to prove that visitation was token where the parent made only two visits in four months); *In re E.M.P.*, No. E2006-00446-COA-R3PT, 2006 WL 2191250, at *5 (Tenn. Ct. App. Aug. 3, 2006) (holding that given the "sparse record," petitioners failed to provide clear and convincing evidence that mother's single visit to the child in the four month period was token under the circumstances), *with In re Audrey S.*, 182 S.W.3d 838, 867 (Tenn. Ct. App. 2005) (holding that one or two visits in four months was "nothing more than token visitation"). *In re L.J.*, 2015 WL 5121111, at *4-*6 (holding that three visits in four months was no more than token visitation). Indeed, we have recognized that each termination of parental rights case requires "individualized decision making[,]" rather than the application of bright-line rules. *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005) ("Because of the gravity of their consequences, proceedings to terminate parental rights require individualized decision making.").

Although the percentage of visitation in this case is similar to *In re L.J.*, other facts lead us to reach a different conclusion in this case. Here, unlike the mother in *In re L.J.*, the trial court found that Mother was able to maintain a meaningful relationship with Addy through the somewhat meager visitation that she attended. This Court has previously considered whether a parent's visitation was sufficient to "establish a meaningful relationship or bond between [the parent] and the children" in determining whether visitation was token. *In re Kaylee F.*, No. M2012-00850-COA-R3PT, 2013 WL 1097791, at *3 (Tenn. Ct. App. Mar. 15, 2013). In this case, the trial court explicitly found that the visitation was sufficient to continue the bond with the child, and the evidence in the record does not preponderate against this finding. In reaching this result, it appears that the trial court generally credited Mother's testimony rather than the testimony of Grandparents regarding the quality of the visitation between Mother and the child. Findings based on credibility are afforded great weight by this Court. *See Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997).

Moreover, Mother consistently maintained at trial that she had problems obtaining reliable transportation. The same excuse was provided by the mother in *In re L.J.*; however, in that case, the court appeared to discredit her testimony by noting the countervailing proof in the record that DCS had provided the mother with transportation assistance. *See In re L.J.*, 2015 WL 5121111, at *5. In contrast, the trial court in this case appeared to credit Mother's testimony regarding her transportation woes, finding that Mother's failure to work during the period at issue was due to the lack of reliable transportation. Because of the great weight afforded to a credibility determination of a particular witness by the trial court, *see Estate of Walton*, 950 S.W.2d at 959, we accept the trial court's implicit finding that Mother's testimony regarding her lack of reliable transportation was credible and therefore provided a justifiable excuse for some of her missed visits. Lastly, we are unable to determine Mother's relationship with Addy prior to the relevant four-month period because the record contains only vague statements regarding Mother's visitation before August 2015. Accordingly, under these particular circumstances, Mother's visits were more than perfunctory and were frequent enough to establish more than minimum or insubstantial contact with Addy; thus, Mother's visitation does not meet the definition of token visitation under our termination statutes. *See* Tenn. Code Ann. § 36-1-102(C). We therefore affirm the trial court's determination that Grandparents failed to provide clear and convincing evidence that Mother willfully failed to visit her child.

In re Addalyne S., 556 S.W.3d at 785-86.

Here, Mother exercised only seven out of 32 possible visits, a rate of approximately 22%. In *In re Addalyne S.*, we characterized the mother's visits as bordering on token when she exercised 36% of her possible visits. While this inquiry is not a rote mathematical one, if exercising 36% of possible visits borders on token, we think 22% tends to cross over into being token. In addition, in *In re Addalyne S.*, the trial court credited the mother's excuses for missing visits. Here, the Trial Court did not credit Mother's excuses, a key distinction given the deference we extend to trial courts' credibility assessments. As found by the Trial Court, Mother was not thwarted by Petitioners from visiting the Children more often than she did. Thus, Mother attended fewer than one-quarter of the visits available to her in the relevant timeframe without valid reason, and the seven visits she made were unexceptional toward building a meaningful relationship with the Children. Both the quantity and quality of Mother's visits factor into this analysis. While a close call, in view of the Trial Court's factual findings and implicit assessment of Mother's credibility, we conclude that the Trial Court did not err in determining that Mother engaged in only token visitation in the determinative period. With regard to her defense of a lack of willfulness, Mother has failed to carry her burden of proof to establish by a preponderance of the evidence that her failure to exercise more than token visitation in the relevant timeframe was not willful. The evidence does not preponderate against the Trial Court's findings relative to this ground. We find, as did the Trial Court, that the ground of abandonment by failure to visit was proven against Mother by clear and convincing evidence.

We next address whether the Trial Court erred in finding the ground of persistent conditions. There is no dispute that the Children were removed from Mother's custody for the six months necessary for this ground to apply. In addition, the Children were alleged and found to be dependent and neglected. As to this ground, Mother states that the basis for the Children's removal was domestic violence between her and Raymond G. According to Mother, she has moved on from Raymond G. Nevertheless, Mother had seen Raymond G. as recently as January 2022, around six months before trial. Mother testified that she keeps Raymond G. updated on the Children. Mother was less than forthcoming when asked about domestic violence she had endured from Raymond G. The Trial Court found: "At all times relevant to this matter, the Juvenile Court, the Department of Children's Services and the Petitioners suspected that Mother has continued to maintain a relationship with [Raymond G.] and those suspicions are confirmed by the evidence. Mother appears to maintain a steadfast refusal to address these shortcomings and as such, they remain a barrier to remedying the conditions." The evidence does not preponderate against the Trial Court's findings. Therefore, conditions persist—chiefly, the risk of the Children being exposed to domestic violence—that in all reasonable probability would cause the Children to be subjected to further abuse or neglect, thus preventing the Children's safe return to Mother's care. Given the length of time since the Children's

removal and the persistence of these conditions, and Mother's dubious testimony on the subject, there is little likelihood that these conditions will be remedied at an early date so that the Children can be safely returned to Mother in the near future. Finally, the continuation of the parent and child relationship greatly diminishes the Children's chances of early integration into a safe, stable, and permanent home, particularly when the evidence reflects that the Children enjoy a stable home with Petitioners. We find, as did the Trial Court, that the ground of persistent conditions was proven against Mother by clear and convincing evidence.

The final issue we address is whether the Trial Court erred in finding that termination of Mother's parental rights is in the Children's best interest. Between the filing of the initial petition and the amended petition, the statutory best interest factors underwent revision. The newer factors are inclusive of the older factors. *See In re Da'Moni J.*, No. E2021-00477-COA-R3-PT, 2022 WL 214712, at *23 (Tenn. Ct. App. Jan. 25, 2022), *perm. app. denied Apr. 1, 2022* ("We agree with the Juvenile Court that the best interest factors relevant to this case are included in the new version of factors that went into effect in April 2021."). The Trial Court applied the newer factors, which were set out as follows:

> (i)(1) In determining whether termination of parental or guardianship rights is in the best interest of the child, the court shall consider all relevant and child-centered factors applicable to the particular case before the court. Those factors may include, but are not limited to, the following:
> (A) The effect a termination of parental rights will have on the child's critical need for stability and continuity of placement throughout the child's minority;
> (B) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological, and medical condition;
> (C) Whether the parent has demonstrated continuity and stability in meeting the child's basic material, educational, housing, and safety needs;
> (D) Whether the parent and child have a secure and healthy parental attachment, and if not, whether there is a reasonable expectation that the parent can create such attachment;
> (E) Whether the parent has maintained regular visitation or other contact with the child and used the visitation or other contact to cultivate a positive relationship with the child;
> (F) Whether the child is fearful of living in the parent's home;
> (G) Whether the parent, parent's home, or others in the parent's household trigger or exacerbate the child's experience of trauma or post-traumatic symptoms;
> (H) Whether the child has created a healthy parental attachment with another person or persons in the absence of the parent;

(I) Whether the child has emotionally significant relationships with persons other than parents and caregivers, including biological or foster siblings, and the likely impact of various available outcomes on these relationships and the child's access to information about the child's heritage;
(J) Whether the parent has demonstrated such a lasting adjustment of circumstances, conduct, or conditions to make it safe and beneficial for the child to be in the home of the parent, including consideration of whether there is criminal activity in the home or by the parent, or the use of alcohol, controlled substances, or controlled substance analogues which may render the parent unable to consistently care for the child in a safe and stable manner;
(K) Whether the parent has taken advantage of available programs, services, or community resources to assist in making a lasting adjustment of circumstances, conduct, or conditions;
(L) Whether the department has made reasonable efforts to assist the parent in making a lasting adjustment in cases where the child is in the custody of the department;
(M) Whether the parent has demonstrated a sense of urgency in establishing paternity of the child, seeking custody of the child, or addressing the circumstance, conduct, or conditions that made an award of custody unsafe and not in the child's best interest;
(N) Whether the parent, or other person residing with or frequenting the home of the parent, has shown brutality or physical, sexual, emotional, or psychological abuse or neglect toward the child or any other child or adult;
(O) Whether the parent has ever provided safe and stable care for the child or any other child;
(P) Whether the parent has demonstrated an understanding of the basic and specific needs required for the child to thrive;
(Q) Whether the parent has demonstrated the ability and commitment to creating and maintaining a home that meets the child's basic and specific needs and in which the child can thrive;
(R) Whether the physical environment of the parent's home is healthy and safe for the child;
(S) Whether the parent has consistently provided more than token financial support for the child; and
(T) Whether the mental or emotional fitness of the parent would be detrimental to the child or prevent the parent from consistently and effectively providing safe and stable care and supervision of the child.
(2) When considering the factors set forth in subdivision (i)(1), the prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest.

(3) All factors considered by the court to be applicable to a particular case must be identified and supported by specific findings of fact in the court's written order.
(4) Expert testimony is not required to prove or disprove any factor by any party.
(5) As used in this subsection (i), "parent" includes guardian.

Tenn. Code Ann. § 36-1-113(i) (West July 1, 2021 to June 30, 2022).

With regard to making a determination concerning a child's best interest, the Tennessee Supreme Court has instructed:

> When conducting the best interests analysis, courts must consider nine statutory factors listed in Tennessee Code Annotated section 36-1-113(i). 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. *In re Carrington H.*, 483 S.W.3d at 523 (citing *In re Audrey S.*, 182 S.W.3d 838, 878 (Tenn. Ct. App. 2005)). Facts considered in the best interests analysis must be proven by "a preponderance of the evidence, not by clear and convincing evidence." *In re Kaliyah S.*, 455 S.W.3d at 555 (citing *In re Audrey S.*, 182 S.W.3d at 861). "After making the underlying factual findings, the trial court should then consider the combined weight of those facts to determine whether they amount to clear and convincing evidence that termination is in the child's best interest[s]." *Id*. When considering these statutory factors, courts must remember that "[t]he child's best interests [are] viewed from the child's, rather than the parent's, perspective." *In re Audrey S.*, 182 S.W.3d at 878. Indeed, "[a] focus on the perspective of the child is the common theme" evident in all of the statutory factors. *Id*. "[W]hen the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child. . . ." Tenn. Code Ann. § 36-1-101(d) (2017).
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> Ascertaining a child's best interests involves more than a "rote examination" of the statutory factors. *In re Audrey S.*, 182 S.W.3d at 878. And the best interests analysis consists of more than tallying the number of statutory factors weighing in favor of or against termination. *White v. Moody*, 171 S.W.3d 187, 193-94 (Tenn. Ct. App. 2004). Rather, the facts and circumstances of each unique case dictate how weighty and relevant each statutory factor is in the context of the case. *See In re Audrey S.*, 182 S.W.3d at 878. Simply put, the best interests analysis is and must remain a factually

> intensive undertaking, so as to ensure that every parent receives individualized consideration before fundamental parental rights are terminated. *In re Carrington H.*, 483 S.W.3d at 523. "[D]epending upon the circumstances of a particular child and a particular parent, the consideration of one factor may very well dictate the outcome of the analysis." *In re Audrey S.*, 182 S.W.3d at 878 (citing *White v. Moody*, 171 S.W.3d at 194). But this does not mean that a court is relieved of the obligation of considering all the factors and all the proof. Even if the circumstances of a particular case ultimately result in the court ascribing more weight—even outcome determinative weight—to a particular statutory factor, the court must consider all of the statutory factors, as well as any other relevant proof any party offers.

In re Gabriella D., 531 S.W.3d 662, 681-82 (Tenn. 2017).[7]

Mother contends that the Trial Court erred in its best interest determination. She argues, to wit: that she has established a meaningful relationship with the Children; that she visited the Children as much as she could; that she has adjusted her circumstances as evidenced by, among other things, her being consistently employed and her participation in counseling; that she has been a victim of domestic violence; and that she has not taken the Children around Raymond G. since the case began.

First, while Mother is correct in that the evidence reflects that her visits with the Children generally went well, that alone does not make her relationship with them "meaningful." The Trial Court found that "[w]hile their visits with Mother are pleasant, the relationship they have is not that of a parent-child. The children are happy to see her and to see what treats she has brought them." The evidence supports that finding. To her credit, Mother's visitation improved later in the case. Even still, it has not resulted in a close, meaningful bond with the Children. It is also to Mother's credit that she is employed, although this makes her failure to pay regular child support all the more concerning. We note further that Mother has undergone counseling. Nevertheless, these positive actions by Mother are heavily outweighed by the troubling aspects of her behavior.

Domestic violence is the foremost concern in this case. The Trial Court found that "the Court is not convinced that the continuing cycle of domestic violence which has consumed the entirety of Respondents' relationship has been resolved." Indeed, Mother's testimony was unimpressive and highly evasive on this score. Mother did not show a sufficient appreciation of the risk posed to the Children of exposing them to domestic

[7] In *In re Gabriella D.*, a prior version of the best interest factors was in effect. However, we believe the Tennessee Supreme Court's analysis applies to the amended version of Tenn. Code Ann. § 36-1-113(i), as well.

violence. Mother also did not convince the Trial Court that Raymond G. was out of her life. Given Mother's testimony, this was unsurprising. In addition, apart from the central issue of domestic violence, Mother does not have a place of her own. She lives with her aunt and two men who the Trial Court knew nothing about. Despite having few if any expenses, Mother has not provided more than token support for the Children. These facts do not demonstrate that Mother will be ready to parent the Children any time soon. Meanwhile, the Children are well-bonded in Petitioners' home. Petitioners attend to the Children's needs in a stable environment. Mother has not demonstrated that she can provide that. The Trial Court made findings corresponding to each of the statutory best interest factors. The evidence does not preponderate against the Trial Court's findings relative to the Children's best interest. We find by clear and convincing evidence, as did the Trial Court, that termination of Mother's parental rights is in the Children's best interest.

Conclusion

The judgment of the Trial Court terminating Mother's parental rights is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, Vernetta G., and her surety, if any.

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D. MICHAEL SWINEY, CHIEF JUDGE