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

IN RE LUCCA M. ET AL.

Appeal from the Juvenile Court for Sumner County
No. 2018-JV-710B David R. Howard, Judge

No. M2021-01534-COA-R3-PT

In this case, prospective adoptive parents Whayne D., Lauren D., James K., and Heather K.[1] ("Petitioners") filed a petition to terminate the parental rights of Miya M. ("Mother") to two of her minor children. They alleged these grounds: (1) abandonment by failure to visit; (2) abandonment by failure to financially support the children; (3) abandonment by failure to provide a suitable home; (4) persistence of the conditions that led to the children's removal; and (5) failure to manifest an ability and willingness to assume custody of the children. The trial court found that Petitioners established four of the five alleged grounds for termination by clear and convincing evidence and that termination of parental rights was in the children's best interest. We reverse the trial court's holding that Petitioners established the ground of abandonment by failure to provide a suitable home, and affirm the judgment of the trial court in all other respects, including its ultimate ruling terminating Mother's parental rights.

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

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which J. STEVEN STAFFORD, P.J., W.S., and W. NEAL MCBRAYER, J., joined.

Lee W. McDougal, Gallatin, Tennessee, for the appellant, Miya M.

Aleah Cagle, Gallatin, Tennessee, for the appellees, Whayne D., Lauren D, James K., and Heather K.

[1] This Court has a policy of abbreviating the last names of children and other parties in cases involving termination of parental rights in order to protect their privacy and identities.

OPINION

I. BACKGROUND

On December 25, 2018, Mother's children Lucca and Miyako were removed from her and placed in the custody of the Tennessee Department of Children's Services ("DCS"), due to Mother's arrest for three counts of child neglect. Mother later stipulated that the children were dependent and neglected due to her improper guardianship and control. She pled guilty to three counts of attempted child neglect and was incarcerated until her release on September 19, 2019.

At the time of Mother's arrest, Lucca was about a year and nine months old, and Miyako was about three months old. Following a brief period in DCS's custody, Lucca was placed with James and Heather K., and Miyako was placed with Whayne and Lauren D. After Mother got out of jail, she had infrequent and sporadic contact with the Petitioner foster mothers and only a few visitations with the children. Mother testified that she eventually blocked all contact from the foster mothers. She undisputedly paid no financial support for either child. The foster parents filed their petition to terminate Mother's parental rights on September 4, 2020.

The trial took place on October 22, 2021. The only witnesses were the four Petitioner foster parents and Mother. The trial court, in a thorough thirty-nine page order containing extensive findings of fact, held that Petitioners established these grounds for termination: (1) abandonment by failure to visit, *see* Tenn. Code Ann. §§ 36-1-113(g)(1), 36-1-102(1)(A)(i); (2) abandonment by failure to financially support the children; *id.;* (3) abandonment by failure to provide a suitable home; *see* Tenn. Code Ann. §§ 36-1-113(g)(1), 36-1-102((1)(A)(ii);; and (4) failure to manifest an ability and willingness to assume custody of the children. *See* Tenn. Code Ann. § 36-1-113(g)(14). The trial court held that Petitioners did not establish the alleged ground of persistence of the conditions that led to the children's removal. *See* Tenn. Code Ann. § 36-1-113(g)(3)(A). Based on these findings and the trial court's determination that termination was in the children's best interest, the trial court terminated Mother's parental rights.[2] Mother timely appealed.

II. ISSUES

The issues presented are whether the trial court erred in finding, by clear and convincing evidence, that Petitioners established the alleged grounds for terminating the

[2] The trial court also terminated the parental rights of Miyako's putative father. He did not appeal. Lucca's father voluntarily surrendered his parental rights. Thus, only the parental rights of Mother are involved in this appeal.

parental rights of Mother, and whether the trial court erred in finding termination to be in the best interests of the children.

III. STANDARD OF REVIEW

As our Supreme Court has explained,

> 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. *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.

In re Carrington H., 483 S.W.3d 507, 522-23 (Tenn. 2016). Tennessee Code Annotated section 36-1-113 provides the various grounds for termination of parental rights. *In re Jacobe M.J.*, 434 S.W.3d 565, 568 (Tenn. Ct. App. 2013); *see also* Tenn. Code Ann. § 36-1-113(g). "A party seeking to terminate parental rights must prove both the existence of one of the statutory grounds for termination and that termination is in the child's best interest." *Id.* (citing Tenn. Code Ann. § 36-1-113(c)).

In light of the substantial interests at stake in termination proceedings, the heightened standard of clear and convincing evidence applies. *In re Carrington H.*, 483 S.W.3d at 522 (citing *Santosky*, 455 U.S. at 769). This heightened burden "minimizes the risk of erroneous governmental interference with fundamental parental rights[,]" and "enables the fact-finder to form a firm belief or conviction regarding the truth of the facts[.]" *Id.* (citing *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010)). "The clear-and-convincing-evidence standard ensures that the facts are established as highly probable, rather than as simply more probable than not." *Id.* (citing *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005)). Accordingly, the standard of review in termination of parental rights cases is as follows:

> 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 at 523-24. We give considerable deference to a trial court's findings about witness credibility and the weight of oral testimony, as the trial court had the opportunity to see and hear the witnesses. *State Dep't of Children's Servs. v. T.M.B.K.*, 197 S.W.3d 282, 288 (Tenn. Ct. App. 2006).

IV. ANALYSIS

A. Abandonment by Failure to Visit

The trial court found that Mother willfully failed to visit the children for four months immediately preceding the filing of the petition. Tennessee Code Annotated section 36-1-113(g)(1) lists abandonment, as defined in section 36-1-102, as a ground for terminating parental rights. At the time the petition was filed,[3] the applicable version of Tenn. Code Ann. § 36-1-102 provided as follows:

[3] With all statutory grounds for termination, we apply the version of Tenn. Code Ann. § 36-1-113 in effect on the day the petition for termination was filed, in this case, September 4, 2020. *See In re Braxton M.*, 531 S.W.3d 708, 732 (Tenn. Ct. App. 2017).

> (1)(A) For purposes of terminating the parental or guardian rights of a parent . . . 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 . . . of the child who is the subject of the petition for termination of parental rights or adoption, that the parent . . . either ha[s] failed to visit or ha[s] failed to support or ha[s] failed to make reasonable payments toward the support of the child[.]

This ground for termination is established when a parent, "for a period of four (4) consecutive months, [fails] to visit or engage in more than token visitation."[4] Tenn. Code Ann. § 36-1-102(1)(E). A parent may assert the absence of willfulness, which must be proved by a preponderance of the evidence, as an affirmative defense to abandonment by failure to visit. *Id.* § 36-1-102(1)(I). This Court has explained:

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

In re Audrey S., 182 S.W.3d 838, 864 (Tenn. Ct. App. 2005) (footnote and citations omitted); *see also In re Adoption of Angela E.*, 402 S.W.3d 636, 640 (Tenn. 2013) ("A parent cannot be said to have abandoned a child when his failure to visit or support is due to circumstances outside his control.").

Petitioners filed the petition in this case on September 4, 2020, so the pertinent four-month period is May 3 through September 3 of 2020. The trial court found that "Mother testified that she visited with Lucca and Miyako on November 19, 2019, but then admitted that this was also her only visit. She also conceded that the last time she requested to see Lucca was March 2020." The testimony of Mother and the two foster mothers confirms these findings. It is undisputed that Mother did not visit the children during the statutory four-month period.

[4] "'[T]oken 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." Tenn. Code Ann. § 36-1-102(1)(C).

Mother thus had the statutory burden of proving by a preponderance of the evidence that her failure to visit was not willful. Tenn. Code Ann. § 36-1-102(1)(I). Mother argues on appeal that her "failure to visit was not willful because Petitioners' limitations thwarted [her] efforts to see the children at a time that would not risk Mother's early toehold at re-starting her life after incarceration." The evidence at trial does not support Mother's assertion.

"It is well established in Tennessee that a parent who attempts to visit and maintain relations with his or her child but is thwarted by the acts of others and circumstances beyond the parent's control has not willfully abandoned the child." *In re John A.*, No. E2020-00449-COA-R3-PT, 2021 WL 32001, at *7 (Tenn. Ct. App. Jan. 4, 2021) (citing *In re Adoption of A.M.H.*, 215 S.W.3d 793, 810 (Tenn. 2007)). The Supreme Court further held in *A.M.H.* that "[w]here . . . the parents' visits with their child have resulted in enmity between the parties and where the parents redirect their efforts at maintaining a parent-child relationship to the courts the evidence does not support a 'willful failure to visit' as a ground for abandonment." *Id.* A couple of years later the High Court formulated the test this way: "[a] parent's failure to visit may be excused by the acts of another only if those acts actually prevent the parent from visiting the child or constitute a significant restraint or interference with the parent's attempts to visit the child." *In re M.L.P.*, 281 S.W.3d 387, 393 (Tenn. 2009).

As we recently observed in *John A.*, "applying this test 'is not a mechanical process' and 'courts faced with determining whether a significant restraint has occurred reach different conclusions based on the circumstances of each case.'" 2021 WL 32001, at *7 (quoting *In re Braelyn S.*, No. E2020-00043-COA-R3-PT, 2020 WL 4200088, at *5 (Tenn. Ct. App. July 22, 2020) (stating "we simply cannot conclude that Father failed to meet his burden to show a lack of willfulness when, in the face of Mother's significant interference, he made sustained efforts, sometimes vigorous, sometimes more lackluster, in an attempt to maintain a relationship with his child")); *compare In re Justin P.*, No. M2017-01544-COA-R3-PT, 2018 WL 2261187, at *6 (Tenn. Ct. App. May 17, 2018) (no willfulness where "much animosity" between mother and custodian led to "unilateral decision to stop visitation"); *In re Lyric J.*, No. M2014-00806-COA-R3-PT, 2014 WL 7182075, at *6 (Tenn. Ct. App. Dec. 16, 2014) (no willfulness where "Father did not seek custody of Child or try to set up visitation rights before May 2012, but he did try to stay in contact with Child" and was told "it was not a good idea for him to visit"); *In re Alex B.T.*, No. W2011-00511-COA-R3-PT, 2011 WL 5549757, at *9 (Tenn. Ct. App. Nov. 15, 2011) (no willfulness because "the evidence shows an effort on part of the Appellants to interfere with Mother's right to see her child and that, as a result, there was animosity between Mother and the Appellants"); *In re Joseph D.N.*, No. M2009-01353-COA-R3-PT, 2010 WL 744415, at *5 (Tenn. Ct. App. Mar. 3, 2010) (no willfulness where "[t]he proof in this case showed that in order to be able to visit his child, Father would have had to either accede to Mother's onerous conditions, violate a [no-contact] condition of bail, or institute

a court proceeding that he could not afford") *with In re Jude M.*, No. E2020-00463-COA-R3-PT, 2020 WL 6233742, at *8 (Tenn. Ct. App. Oct. 22, 2020) (finding willfulness where "although Father was not particularly pleasant or welcoming in response to Mother's occasional requests to visit the Child, he did consistently refer to the visitation requirements of the . . . order and inform Mother that she could visit the Child when she met the requirements"); *In re Gavin G.*, No. M2014-01657-COA-R3-PT, 2015 WL 3882841, at *7 (Tenn. Ct. App. June 23, 2015) (although father resided in a sober living facility with restrictions during four-month period, failure to visit was willful where father "had the ability to request passes to visit others, and he was able to request visitation with Gavin through Mother or the court" and he "left the facility to personally file a motion to reduce his child support obligation" but "did not file a motion requesting visitation"); *In re Kadean T.*, No. M2013-02684-COA-R3-PT, 2014 WL 5511984, at *5 (Tenn. Ct. App. Oct. 31, 2014) (willfulness found where "Mother was never refused visitation or phone calls . . . , she did not request visitation with the child until after the petition to terminate was filed, and . . . the custody order, which required supervised visits, 'made it harder to visit but not impossible'"); *In re Erykah C.*, No. E2012-02278-COA-R3-PT, 2013 WL 1876011, at *6 (Tenn. Ct. App. May 6, 2013) (mother's conduct found willful because "she did not even attempt to visit the Child during the applicable four-month period" and "[n]o evidence was presented that anyone prevented or interfered with Mother visiting the Child").

In this case, the two Petitioner foster mothers met every other Thursday at a McDonald's so that Lucca and Miyako would have a chance to know each other. Petitioner Heather K. testified as follows:

> Lauren [D.] and I, we met every other week so that the kids could see each other, still grow up together, play together, know each other. And so I had told [Mother] that we were having those visits and had invited her to come so that she could see both of the kids.
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> * * *
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> And I had told her every time we went that she was welcome to come. And she showed up that day, on November the 19th, 2019. And that was the one and only time she came.
> Q. Were you in communication with [Mother]?
> A. I was at that time. Yes.
> Q. By phone? By text? How were you in communication?
> A. Mostly by Facebook chat message.
> Q. Did you send her updates about Lucca?
> A. Every time – just about every time we talked. I usually reached out to her and would say, he did this today, he did that today. Send pictures or videos.

Q. Who initiated you-all's conversations?
A. Most of the time it was me. . . . And then she blocked me on Facebook. And that was the last conversation we had.

* * *

Q. Since your conversation with [Mother] through Facebook, the one we just saw, have you had any contact with [Mother] at all?
A. No, ma'am. I had no way to contact her. So. And she's has not reached out to me at all.
Q. You said she blocked – your phone number?
A. Yes. She blocked me on Facebook. She has my phone number. But I did not have her new phone number. No.
Q. So
A. I never changed my number because I didn't want to block an opportunity for her to reach out to me.
Q. Has she asked you about Lucca at all?
A. No. No.
Q. Have you been able to send her updates?
A. I have no way to.

Petitioner Lauren D. similarly testified that they stayed in communication with Mother until Mother blocked them on Facebook and cut off communication, and further stated:

Q. So you and [Mother] had contact. She was able to contact you?
A. Yes. Yes. Uh-huh.
Q. In any of that contact did she ask you to assist with her visitations with Miyako?
A. She asked to visit her right after she got out of jail. And that's when we started to set up those bi-weekly visits.
Q. Did she ever tell you that she couldn't attend?
A. She did not. No. She never told me she couldn't.
Q. Did she ever ask you for a ride?
A. No.
Q. Ask you to change location so that she could get there easier?
A. No.

For her part, Mother testified:

Q. [Y]ou attended one of the visitations at McDonald's, correct?
A. Yes.

Q. And do you agree with Ms. K[’s] statement earlier that you and her had communicated about those visits?
A. Yes.

* * *

Q. So you had solid heads-up as to when visitation was going to take place?
A. Yes.
Q. Was it the same time every other week?
A. Yes. It was on a Thursday from – it was in the morning to like early – late morning/early afternoon. During my working hours when I would be at work.
Q. Okay. So did you tell them did you ask them to switch the date?
A. She said that that was the set time.
Q. That’s not what I asked you.
A. I did not ask them to switch the date. No.

* * *

Q. Do you have any evidence that you were told “no” and denied visitation?
A. No, I don’t.
Q. Okay. Did you ever ask to take off work on Thursdays?
A. No. Because I just started this job. No job is going to let you take off every other Thursday.
Q. But you don’t know that. You didn’t ask?
A. This is a small assisted living home. There’s only one person working per shift.
Q. Okay. But you don’t know that because you did not ask?
A. No.

Mother also admitted that she voluntarily made the decision to cut off communication with the foster parents. The trial court summarized its findings and holding as follows:

> There is credible testimony to find that the Mother was aware of the opportunity to visit and that she failed to do so. There was also credible testimony to find that the Mother willingly and intentionally blocked contact with the Petitioners, seemingly out of spite, but which also resulted in [Petitioners’] inability to contact the Mother. While the Court finds that the adherence to the Thursday schedule was, perhaps, a bit rigid, there is insufficient evidence to suggest that the Mother sought any alternatives to this schedule, nor did she avail herself of any court process to modify it. The

> Court finds the Mother's conduct was the product of free will, not coercion or inability. She knew what she was doing. The truth is that she simply chose not to see her children in almost two years. As such, the Court finds that the Mother has failed to present any affirmative defense that her failure to visit was not willful.

The evidence does not preponderate against these findings. We affirm the trial court's decision to terminate Mother's parental rights for abandonment by failure to visit.

B. Abandonment by Failure to Support

Failure to support occurs when a parent, "for a period of four (4) consecutive months, [fails] to provide monetary support or . . . more than token payments toward the support of the child." Tenn. Code Ann. § 36-1-102(1)(D). The relevant statutory four-month period is the same as in the analysis of failure to visit, from May 3 through September 3 of 2020. An adult parent is presumed to know that he or she has a duty to provide support. Tenn. Code Ann. § 36-1-102(1)(H); *In re Braxton M.*, 531 S.W.3d 708, 724 (Tenn. Ct. App. 2017). A parent may assert, as an affirmative defense, that the failure to provide financial support was not willful. Tenn. Code Ann. § 36-1-102(1)(I).

The trial court found that Mother was employed starting in March or April of 2020. Mother testified that she worked about forty hours per week, starting at a $10 hourly rate, which had increased by the time of trial to $13 per hour. She did not dispute that she never paid financial support in any form to Petitioners. The trial court stated that

> Mother earned . . . $2,253.33 in gross monthly income. The Mother admitted that despite her employment she never offered or paid any child support. . . . [P]ursuant to Tenn. Code Ann. § 36-1-113(g)(1), the burden would be on [Mother] to prove her failure to support the child[ren] was not willful. She did not meet this burden. She offered no explanation as to why she did not make any support payments even after she had the financial wherewithal to do so.

The proof in the record supports the trial court's conclusion, by clear and convincing evidence, that Mother abandoned the Children by failing to pay any support during the relevant time period. She did not offer any reason or excuse as to why she paid nothing to support the children. On appeal, Mother argues that "it is necessary to look deeper than merely the income of the parent, [including] living expenses and other financial obligations," and that "there was scant proof of Mother's capacity to pay support, apart from her hourly rate." But Tennessee Code Annotated section 36-1-102(1)(I) provides that "[t]he absence of willfulness is an affirmative defense," and "[t]he parent . . . shall bear the

burden of proof that the failure to visit or support was not willful, [which] defense must be established by a preponderance of the evidence." Mother failed to carry her burden of proving her defense that the failure to support was not willful. Consequently, we must affirm termination of her parental rights on this ground.

C. Failure to manifest an ability and willingness to assume custody

Tennessee Code Annotated section 36-1-113(g)(14) provides an additional ground for termination when

> [a] parent . . . 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 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.

This ground requires clear and convincing proof of two elements. *In re Maya R.*, No. E2017-01634-COA-R3-PT, 2018 WL 1629930, at *7 (Tenn. Ct. App. Apr. 4, 2018). The petitioner must first prove that the parent has failed to manifest an ability and willingness to personally assume legal and physical custody or financial responsibility of the child. *Id.* (citing Tenn. Code Ann. § 36-1-113(g)(14)). The petitioner must then prove that placing the child in the custody of the parent poses "a risk of substantial harm to the physical or psychological welfare of the child." *Id.* (quoting Tenn. Code Ann. § 36-1-113(g)(14)).

As to the first element, our Supreme Court has held that the statute requires "a parent to manifest both an ability and willingness" to personally assume legal and physical custody or financial responsibility for the child. *See In re Neveah M.*, 614 S.W.3d 659, 677-78 (Tenn. 2020) (citing *In re Amynn K.*, No. E2017-01866-COA-R3-PT, 2018 WL 3058280 at *13 (Tenn. Ct. App. June 20, 2018)). Therefore, if a party seeking termination of parental rights establishes that a parent or guardian "failed to manifest *either* ability or willingness, then the first prong of the statute is satisfied." *Id.*

As discussed in section IV(A) and (B) above, Mother showed no willingness to either visit or support the children. Regarding visitation, she voluntarily blocked all contact with Petitioners and before that, regularly declined the opportunity to visit the children. Regarding support, she never paid any, nor did she attempt to offer an excuse as to why not. The trial court found that Mother failed to manifest both the ability and willingness to assume custody of the children. In our review, we bear in mind that "manifesting an ability and willingness to assume legal and physical custody of a child must amount to more than mere words." *In re Ken'bria B.*, No. W2017-01441-COA-R3-PT, 2018 WL 287175, at

*10 (Tenn. Ct. App. Jan. 4, 2018). The trial court stated the following, as pertinent to the first element of this ground:

> The children were removed from the Mother's custody on December 25, 2018. Since that date, both children have been adjudicated dependent and neglected and placed in the physical and legal custody of third-party caretakers. At no point since either removal or final disposition have the children been returned to the Mother's legal or even physical custody. Point of fact, based upon the Mother's own testimony, in September 2020 when the Mother regained temporary custody of [another of her minor children], she did not file a petition seeking to regain custody of or visitation with Lucca or Miyako.
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> [W]hen [Mother] got out of jail that she stayed with friends. Later, she moved in with her parents and remained there through most of 2020. She admitted that she was living in her parents' home during the period of May 4, 2020, through September 4, 2020. She testified that while she was living with her grandparents that her other minor child (of whom she would regain custody in September 2020) would regularly visit. The Mother stated that Lucca and Miyako could have visited there, as well. At no time did the children visit there.
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> The Mother testified that in mid-2020 she was able to regain her drivers' license, a car, and an operable cell phone. She also testified that in February 2021 she obtained her own residence, a duplex in Franklin, Kentucky, and stated that it is appropriate for all three of her children. She testified that she paid the lease through February 2022. At no time have the children visited there.
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> . . . The children have been out of the Mother's physical and legal custody since December 2018. She never visited them. She never paid any child support for them. The Mother has been consistently aware of the children's whereabouts and chose to do nothing to alter it. Instead, she allowed them to be raised, cared for, and provided for by third parties. Essentially, she abdicated her role as a parent.

Regarding the second element of this ground, whether placing the children in the person's custody would "pose a risk of substantial harm to the physical or psychological welfare" of the children, we begin by noting that Mother has conceded that placing the children in her custody would pose a risk of substantial harm to them. She states in her brief, "[t]his Appellant is cognizant of this Court's obligation under *In re Carrington H*. to

assess all findings below but respectfully declines to challenge the second prong of Tenn. Code Ann. § 36-1-113(g)(14), the "substantial harm" element[.]" Regarding this element, we have previously explained:

> The courts 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.

In re Greyson D., No. E2020-00988-COA-R3-PT, 2021 WL 1292412, at *8 (Tenn. Ct. App. Apr. 7, 2021) (quoting *Ray v. Ray*, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001)) (footnotes omitted).

The trial court made well-supported findings of fact and well-reasoned conclusions supporting its judgment that placing the children in Mother's custody would pose a substantial risk of harm to them. The trial court's findings in this regard also serve to partially explain why termination is clearly in the children's best interest, and so we quote them at some length as follows:

> Despite the fact that she knew who had custody of the children, the Mother also went out of her way to block contact with [Petitioners]; in doing so, she never contacted them in an effort to wish the children a happy birthday or [M]erry Christmas, much less as to inquire as to the children's day-to-day welfare.
>
> Mrs. K. testified that Lucca was not quite two (2) years old when he first came into her custody. She testified that at the time he went home with her that he exhibited signs of trauma. He would not sleep well, regularly waking every few hours during the night. He would routinely follow her into the bathroom, as if afraid that she would leave him. She testified that his behavior has improved, but there are still points of regression. She indicated that [she] has done her best to provide stability and reassurance. Mrs. K. noted that she has discussed the child with his pediatrician, including the potential for trauma counseling, if necessary. Mrs. K. also noted that the child's physical health has also improved and, that despite having to have some teeth removed, the child seems to be doing well medically.

> Both Mr. and Mrs. K. testified that it would be detrimental to remove Lucca from their home. Both testified that they believed Lucca would be re-traumatized. Mrs. K. testified that Lucca has no relationship with the Mother and seemed to have no memory of her. She testified that Lucca used to ask about the Mother but stopped. After he stopped inquiring, she stopped mentioning her. Mr. K. confirmed his own positive, interactive relationship with the child, and testified that Lucca calls him "Daddy." . . . Lucca was described as being an accepted and loved part of the K. family. Mrs. K. testified that her family is all that Lucca knows; he has no relationship with the Mother or her family. Both Mr. and Mrs. K. testified that they are prepared to adopt Lucca.
>
> Mrs. D. testified that Miyako came to their home when the child was three (3) months old. Since then, they have been the child's caretakers and consider themselves the child's parents. She testified that Miyako is the "light of her life." Mr. D. testified that it would be "devastating" if the child was removed from their home; Miyako would not understand why her parents were taken away. Mr. D. also noted that he and his wife have a supportive, extended family network that loves and accepts Miyako as one of their own. Both Mr. and Mrs. D. testified that they do not believe that Miyako would recognize the Mother.
>
> When asked about her relationship with the children, the Mother admitted that she has no relationship with them. The Mother also admitted that they had been removed from her custody due to her criminal conduct against them. She was charged criminally for three (3) counts of Child Neglect and entered guilty pleas to the amended charges of three (3) counts of Attempted Child Neglect. For this she received a concurrent sentence of eleven (11) months and twenty-nine (29) days to serve in incarceration. She conceded that she has not seen them since November 2019. Further, the Mother testified that while she recognized that it would be "hard" on the children to be removed from where they are, she had worked hard to better herself. As such, she wanted a second chance.
>
> The Court finds by clear and convincing evidence that should the children be removed from their current custodians that both would be posed with the risk of substantial psychological harm.

(Petitioners' full surnames in original abbreviated; citation to record omitted). We affirm the trial court's decision that Mother failed to manifest the ability and willingness to assume custody.

D. Abandonment by Failure to Provide a Suitable Home

A trial court may also terminate a parent's rights for his or her abandonment through failure to provide a suitable home. Tenn. Code Ann. § 36-1-113(g)(1); § 36-1-102(1)(A)(ii). This form of abandonment occurs when:

> (a) The child has been removed from the home or the physical or legal custody of a parent . . . by a court order at any stage of proceedings in which a petition has been filed in the juvenile court alleging that a child is a dependent and neglected child, and the child was placed in the custody of the department or a licensed child-placing agency;
>
> (b) The juvenile court found, or the court where the termination of parental rights petition is filed finds, that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child's situation prevented reasonable efforts from being made prior to the child's removal; and
>
> (c) For a period of four (4) months following the physical removal, the department or agency made reasonable efforts to assist the parent . . . to establish a suitable home for the child, but that the parent . . . ha[s] not made reciprocal reasonable efforts to provide a suitable home and ha[s] demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date. The efforts of the department or agency to assist a parent or guardian in establishing a suitable home for the child shall be found to be reasonable if such efforts equal or exceed the efforts of the parent or guardian toward the same goal, when the parent or guardian is aware that the child is in the custody of the department[.]

Id. § 36-1-102(1)(A)(ii)(a)–(c).

A court applying this ground "considers whether a child has a suitable home to return to after the child's court-ordered removal from the parent." *In re Adaleigh M.*, No. E2019-01955-COA-R3-PT, 2021 WL 1219818, at *3 (Tenn. Ct. App. Mar. 31, 2021). To terminate parental rights under this ground, the trial court must find "that a parent failed to provide a suitable home for his or her child even after DCS assisted that parent in his or her attempt to establish a suitable home." *In re Jamel H.*, No. E2014-02539-COA-R3-PT, 2015 WL 4197220, at *6 (Tenn. Ct. App. July 13, 2015). A suitable home requires "'more than a proper physical living location.'" *In re Daniel B. Jr.*, No. E2019-01063-COA-R3-PT, 2020 WL 3955703, at *4 (Tenn. Ct. App. July 10, 2020) (quoting *Tenn. Dep't of*

Children's Servs. v. C.W., No. E2007-00561-COA-R3-PT, 2007 WL 4207941, at *3 (Tenn. Ct. App. Nov. 29, 2007)). A suitable home also requires that "[a]ppropriate care and attention be given to the child," *In re Matthew T.*, No. M2015-00486-COA-R3-PT, 2016 WL 1621076, at *7 (Tenn. Ct. App. Apr. 20, 2016), and that the home "be free of drugs and domestic violence," *In re Hannah H.*, No. E2013-01211-COA-R3-PT, 2014 WL 2587397, at *9 (Tenn. Ct. App. June 10, 2014).

DCS must make "reasonable efforts" to assist the parent by doing more than simply providing a list of service providers. *In re Matthew T.*, 2016 WL 1621076, at *7. "Reasonable efforts is a fact intensive inquiry and must be examined on a case-by-case basis." *In re Aayden C.*, No. E2020-01221-COA-R3-PT, 2021 WL 2420154, at *7 (Tenn. Ct. App. June 14, 2021) (quoting *In re C.L.M.*, No. M2005-00696-COA-R3-PT, 2005 WL 2051285, at *9 (Tenn. Ct. App. Aug. 25, 2005)). "'Reasonable efforts' as defined by the legislature is 'the exercise of reasonable care and diligence by the department to provide services related to meeting the needs of the child and the family.'" Id. (quoting Tenn. Code Ann. § 37-1-166(g)(1)). The Department should utilize its superior resources in assisting a parent to establish a suitable home, but "[its] efforts do not need to be 'Herculean.'" *In re Hannah H.*, 2014 WL 2587397, at *9 (citing *Dep't of Children's Servs. v. Estes*, 284 S.W.3d 790, 801 (Tenn. Ct. App. 2008), overruled on other grounds by *In re Kaliyah S.*, 455 S.W.3d 533 (Tenn. 2015)); see also *In re Matthew T.*, 2016 WL 1621076, at *7. Although the parent is required to make "reasonable efforts" to establish a suitable home, "successful results" are not required, and the "statute requires that the parent also have demonstrated a lack of concern for the [child]." *In re D.P.M.*, No. M2005-02183-COA-R3-PT, 2006 WL 2589938, at *10 (Tenn. Ct. App. Sept. 8, 2006).

In this case, there is practically no evidence of the efforts, if any, expended by DCS to help Mother establish a suitable home. There is also almost no evidence of the condition or suitability of the home eventually established by Mother. No one from DCS testified at trial. Its involvement appears to have been limited to removing the children, taking them into custody for a brief time, and placing them in the homes of Petitioners. When Petitioner Heather K. was asked whether there were any child and family team meetings or permanent plan meetings with DCS, she answered no.

By the time of trial, Mother had secured a lease on a home in Kentucky. She testified as follows:

> Q. You have custody of two of your children that are in your home right now?
> A. Yes, I do.
> Q. Do they live with you full time?
> A. Yes.

Q. And you live in a home that's appropriate both for them and for these two children?
A. Yes.
Q. Can you identify this document?
A. That is my lease where I'm living right now.
Q. Can you describe that home?
A. Well, it's in Franklin, Kentucky. It's a it's just a little duplex. It's in a nice neighborhood. I've lived there since February. My rent is paid up until my lease expires. Which is in February.

Mother was not asked anything further about the condition or suitability of her home. Under these circumstances, we are of the opinion that Petitioners did not meet their burden of establishing by clear and convincing evidence that Mother abandoned her children by failing to provide a suitable home. The trial court itself found that "[w]hile little is known about the actual physical environment of the Mother's home, . . . [t]here was no testimony to demonstrate that it is unsafe or inappropriate." The trial court's judgment that Petitioners established this ground is reversed. Because other statutory grounds have been established, this ruling does not affect the trial court's ultimate judgment terminating Mother's parental rights.

E. Best Interests of Children

In addition to proving at least one statutory ground for termination, a party seeking to terminate a parent's rights must prove by clear and convincing evidence that termination is in the children's best interests. *See* Tenn. Code Ann. § 36-1-113(c). "[A] finding of unfitness does not necessarily require that the parent's rights be terminated." *In re Marr*, 194 S.W.3d 490, 498 (Tenn. Ct. App. 2005) (citing *White v. Moody*, 171 S.W.3d 187 (Tenn. Ct. App. 2004)). This is because our termination statutes recognize that "not all parental conduct is irredeemable[,]" and that "terminating an unfit parent's parental rights is not always in the child's best interests." *Id.* The focus of the best interest analysis is not the parent but the child. *Id.*; *see also White*, 171 S.W.3d at 194 ("[A] child's best interest must be viewed from the child's, rather than the parent's, perspective.").

At the time Petitioners filed their petition, Tennessee Code Annotated section 36-1-113(i) provided nine factors[5] for analyzing best interests:

[5] The General Assembly subsequently amended the best interest factors at Tenn. Code Ann. § 36-1-113(i). The most recent version of the statute includes twenty enumerated factors and became effective on July 1, 2021.

> (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
>
> (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
>
> (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
>
> (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
>
> (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
>
> (6) Whether 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;
>
> (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol, controlled substances or controlled substance analogues as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
>
> (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
>
> (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

This list is non-exhaustive. *In re Marr*, 194 S.W.3d at 499. "Ascertaining a child's best interests does not call for a rote examination of each of Tenn. Code Ann. § 36-1-113(i)'s nine factors and then a determination of whether the sum of the factors tips in favor of or against the parent." *Id.* "The relevancy and weight to be given each factor depends on the unique facts of each case." *Id.* "Thus, depending 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." *Id.* (citing *In re Audrey S.*, 182 S.W.3d at 877).

As already discussed at length above, Mother willfully failed to visit or support the children after DCS secured their removal at a very young age, resulting from Mother's arrest for child neglect. Our discussion and quotation of the trial court's findings in section IV(C) above explains that Mother is a complete stranger to both children at this point, having developed no relationship with them. Removal of either child from his or her loving and caring foster family at this point would likely cause severe trauma and other detriment to them. The trial court, which had the benefit of viewing and evaluating the witnesses, found that "a change of caretakers would be catastrophic."

To Mother's credit, the trial court found that

> Mother has made some adjustments to her circumstances, conduct, or conditions. She has been released from jail; she has a home; she has acquired custody of her other minor child; she has a job; she has a driver's license; and she has a car. There is nothing in her personal conduct or circumstances—save a complete lack of relationship with the children—to demonstrate that she has not made positive changes to her life and lifestyle.

Nevertheless, the trial court ultimately

> rejected the Mother's assertion that the Petitioners had no motive to work with her, as they had already decided to adopt the children. To the contrary, the Court finds that the Mother herself seemed to lack the motivation. The Petitioners had willingly taken the children into their respective homes when the Mother was arrested for the children's neglect; financially provided for them when the Mother did not; loved and secured them while the Mother was incarcerated and after she was released; and provided avenues for the Mother to have contact with the children while the Mother was incarcerated and after her release. The Mother, however, simply chose not to do anything. Eventually, after what appears to be a petulant exchange, she cut off contact with the children's caretakers. While she may couch this decision under the guise of "working on herself," she literally abdicated her responsibilities. Even so, at trial, the Mother has requested a second chance. The Court is unwilling to subject the children to a further "second chance." She already had that but squandered it.

Based on our review of the record, we have no hesitancy in affirming the trial court's ruling that termination of Mother's parental rights is in the best interest of the children.

V. CONCLUSION

The judgment of the trial court that Petitioners established the ground of abandonment by failure to provide a suitable home is reversed. The judgment of the trial court is in all other respects affirmed, including its ultimate ruling terminating Mother's parental rights. Costs on appeal are assessed to the appellant, Miya M., for which execution may enter if necessary.

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KRISTI M. DAVIS, JUDGE