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Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs January 3, 2023

IN RE DIXEE D. ET AL.

Appeal from the Chancery Court for Lawrence County
No. 21-19978 Stella L. Hargrove, Judge

No. M2022-00785-COA-R3-PT

A father appeals the termination of his parental rights to two children. The trial court concluded that the maternal aunt and uncle proved two statutory grounds for termination by clear and convincing evidence. The court also concluded that there was clear and convincing evidence that termination was in the children's best interest. After a thorough review, we agree and affirm.

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

W. NEAL MCBRAYER, J., delivered the opinion of the court, in which THOMAS R. FRIERSON II, and KENNY W. ARMSTRONG, JJ., joined.

Teresa P. Martin, Lawrenceburg, Tennessee, for the appellant, Cory D.

M. Wallace Coleman, Jr., Lawrenceburg, Tennessee, for the appellee, Felicia L., and Derek L.

Teresa Brewer Campbell, Lawrenceburg, Tennessee, Guardian ad Litem.

OPINION

I.

A.

On February 20, 2020, Felicity L. petitioned for emergency custody of Dixee D. and Daisee D. Her petition alleged that the children were in danger of immediate harm due to lack of supervision and possible drug exposure. The juvenile court granted the maternal aunt temporary custody and ordered DCS to investigate the allegations.

DCS discovered that the children's mother, Angella D. ("Mother"), was in jail. And the children's father, Cory D. ("Father"), was not a suitable custodian because the pill count for his Oxycodone prescription was over 40 pills short.

At the preliminary hearing, the court found probable cause to believe that the children were dependent and neglected because of Mother's incarceration and Father's pill count. It limited Father to supervised visitation.

DCS created a permanency plan and began providing services to the family. Father completed his requirements. And on August 10, 2020, the children began a trial home visit with Father.

The trial home visit had a promising start. But in December, the children told the DCS case manager that Father had taken them to visit Mother in Alabama. The case manager reminded Father that Mother was restricted to therapeutic supervised visitation. And she told him that it was inappropriate to allow Mother to visit with the children outside of a therapeutic setting.

Then, on January 20, 2021, the case manager received a disturbing video from the guardian ad litem. The video showed Father and Mother smoking an unknown substance in a glass pipe. The case manager made an unannounced visit to Father's home the next day. She found the children awake but Father in bed. When Father emerged, he was aggressive and argumentative. The case manager administered a drug screen. Father tested positive for methamphetamines and amphetamines, but he denied using any illegal drugs. He claimed that Mother's family was plotting against him. He believed that he could hear them in the walls. The case manager noted that the house was a mess, with dirty dishes and laundry piled everywhere. With Father's permission, the case manager immediately removed the children and placed them with the maternal aunt and uncle.

DCS petitioned the court to declare the children dependent and neglected based on Father's drug use and his repeated violations of the court's visitation order. According to the children, Father had taken them to visit Mother twice in December and once in January. Father stipulated that the children were dependent and neglected when they were removed based on lack of supervision, violation of the court's order, and his failed drug screen. The court adjudicated the children dependent and neglected and awarded custody to the maternal aunt and uncle.

After they were removed, the children revealed that conditions in Father's home had deteriorated after a few months. They often lacked food. Sometimes the children asked the neighbors for food. Father was always in bed. Ten-year-old Dixee was responsible for the cooking and cleaning. She also took care of Daisee. The children attended school

virtually because of Covid concerns. At age eight, Daisee was unable to read more than a few words. Father made Dixee do her sister's schoolwork.

DCS asked Father to complete substance abuse and mental health assessments and follow any recommendations. His substance abuse assessment initially had no recommendations for further treatment. But the case manager discovered that Father had not been candid about his recent use of methamphetamines. Once aware of Father's history, the provider referred him to an intensive outpatient treatment program. Father completed the program in July. Subsequent drug screens showed no further signs of illegal drug use.¹

Father's mental health screen also had no recommendations. But the case manager persuaded him to go to counseling. The therapist determined that Father showed signs of depression and anxiety. He was prescribed medication. And he attended a few counseling and medication management sessions.

Father also participated in therapeutic supervised visitation, which had a parenting component. Father never missed a visit. And his interactions with the children were appropriate. So the court awarded Father unsupervised visitation in September 2021.

Unsupervised visitation did not go well. The children complained that Father constantly talked about the case. He made negative comments about their aunt and uncle. And he pressured the children to say that they wanted to live with him. When one girl told Father that she was happy living with her aunt and uncle, he yelled at her. Father's behavior made the children anxious and uncomfortable. They began to exhibit negative behaviors. And they asked the case manager if visitation could be supervised again. The case manager repeatedly discussed the problem with Father, but nothing changed.

On December 10, 2021, the maternal aunt and uncle petitioned to terminate both parents' parental rights to the children and to adopt. The petition alleged four grounds for termination of parental rights: abandonment by failure to visit and support, persistence of conditions, and failure to manifest an ability and willingness to assume custody of the children. The guardian ad litem joined in the petition.

B.

The court heard from multiple witnesses at trial including the case manager, the aunt and uncle, and Mother and Father. The court also heard from the children. Mother did not contest the termination of her parental rights.

¹ Father tested positive for alcohol at a court hearing in February 2021.

According to the maternal aunt, the children regressed during their time with Father. They were diagnosed with severe depression. They were also struggling academically. The aunt found a number of inappropriate drawings in Dixee's sketchpad. When questioned, Dixee explained that she drew the images to get them out of her head. Both girls claimed to have seen movies containing violence and nudity while at Father's house.

The case manager conceded that Father completed his plan requirements. He never tested positive for methamphetamines again. He never missed visitation. And his parenting skills appeared to improve with therapeutic visitation. But in her view, Father merely "checked the boxes" without making any lasting changes so that the girls could thrive in his care. After Father was granted unsupervised visits, Daisee started wetting the bed. And she had trouble concentrating at school. Dixee had emotional outbursts. Despite repeated requests, Father never corrected his behavior. So the court ordered a return to supervised visitation.

Mother told the court that Father had a history of drug use. She claimed that she smoked methamphetamine with Father during the January visit. She used her mother's cell phone to record the incident. The court watched a video that showed Mother and a man, who was only partially visible, talking and smoking something in a glass pipe. Mother identified the video as the one she recorded on the last day of Father's visit in mid-January 2021.

Father denied ever using illegal drugs. And he specifically denied smoking methamphetamines with Mother during the January visit. When asked to explain his drug test result on January 21, 2021, he speculated that someone put methamphetamine in his chewing tobacco.

He conceded that he took the children to see Mother once in January. And he knew he was violating the court's visitation order. As he recalled, Mother called on January 16, 2021, complaining that she had no food. Distraught at Mother's predicament, the children wanted to help her. Father explained that he had "a big heart." He could not deny his children anything. Although he had planned to just drop off the groceries and leave, they were caught in a blizzard. He claimed that the roads were closed for two days. So he was forced to stay with Mother.

Father categorically denied the children's account of living conditions at his home. He claimed that all the children's needs were met. He also denied pressuring the children or talking to them about the case during visitation. When pressed, he faulted himself for using "bad language" around the girls and spending time with Mother. Otherwise, he viewed himself as a model parent. In his eyes, the children were unhappy in their current living environment. They were planning on coming home.

The trial court terminated both parents' parental rights. The court concluded that there was clear and convincing evidence of two grounds for termination of Father's parental rights: persistent conditions and failure to manifest an ability and willingness to assume custody. It found that the petitioners had not proven abandonment by failure to support or visit. The court also concluded that there was clear and convincing evidence that termination of Father's parental rights was in the children's best interest.

II.

A parent has a fundamental right, based in both the federal and state constitutions, to the care and custody of his or her own child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174 (Tenn. 1996); *In re Adoption of Female Child*, 896 S.W.2d 546, 547 (Tenn. 1995). But parental rights are not absolute. *In re Angela E.*, 303 S.W.3d at 250. The government's interest in the welfare of a child justifies interference with a parent's constitutional rights in certain circumstances. See Tenn. Code Ann. § 36-1-113(g) (2021).

Tennessee Code Annotated § 36-1-113 sets forth both the grounds and procedures for terminating parental rights. *In re Kaliyah S.*, 455 S.W.3d 533, 546 (Tenn. 2015). Parties seeking termination of parental rights must first prove the existence of at least one of the statutory grounds for termination listed in Tennessee Code Annotated § 36-1-113(g). Tenn. Code Ann. § 36-1-113(c)(1). If one or more statutory grounds for termination are shown, they then must prove that terminating parental rights is in the child's best interest. *Id.* § 36-1-113(c)(2).

Because of the constitutional dimension of the rights at stake in a termination proceeding, parties seeking to terminate parental rights must prove both the grounds and the child's best interest by clear and convincing evidence. *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010) (citing Tenn. Code Ann. § 36-1-113(c); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 808-09 (Tenn. 2007); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002)). This heightened burden of proof serves "to minimize the possibility of erroneous decisions that result in an unwarranted termination of or interference with these rights." *Id.* "Clear and convincing evidence" leaves "no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992). It produces a firm belief or conviction in the fact-finder's mind regarding the truth of the facts sought to be established. *In re Bernard T.*, 319 S.W.3d at 596.

We review the trial court's findings of fact "de novo on the record, with a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise." *In re Taylor B.W.*, 397 S.W.3d 105, 112 (Tenn. 2013); TENN. R. APP. P. 13(d). We then "make [our] own determination regarding whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, provide clear and

convincing evidence that supports all the elements of the termination claim.” *In re Bernard T.*, 319 S.W.3d at 596-97. We review the trial court’s conclusions of law de novo with no presumption of correctness. *In re J.C.D.*, 254 S.W.3d 432, 439 (Tenn. Ct. App. 2007).

A.

Father argues that the court erred in admitting Mother’s video as an exhibit at trial. He claims that the video was not properly authenticated, and it was unfairly prejudicial.² We review evidentiary decisions for an abuse of discretion. *White v. Beeks*, 469 S.W.3d 517, 527 (Tenn. 2015).

Before evidence may be admitted, the proponent must establish its authenticity or identity. TENN. R. EVID. 901(a). The authenticity requirement may be satisfied by “[t]he testimony of a witness with knowledge ‘that a matter is what it is claimed to be.’” *Delta Dev. Corp. v. F. Fani Gulf Int’l*, 393 S.W.3d 185, 194 (Tenn. Ct. App. 2012) (quoting *State v. Braxton*, No. M2010-01998-CCA-R3-CD, 2011 WL 5573357, at *5 (Tenn. Crim. App. Nov. 15, 2011)); TENN. R. EVID. 901(b)(1). Here, Mother testified that she made the video recording on her mother’s cell phone on the last night of the January visit. And she attested to the video’s accuracy. Her testimony was sufficient to satisfy the authenticity requirement.³ Father contends Mother was not credible. But the trial court found otherwise. And we will not disturb the court’s credibility determination on this record. *See Coleman Mgmt., Inc. v. Meyer*, 304 S.W.3d 340, 348 (Tenn. Ct. App. 2009).

Father complains that the aunt and uncle failed to establish a chain of custody for the video. But this additional step was unnecessary here because a knowledgeable witness specifically identified the video. *See State v. Scott*, 33 S.W.3d 746, 760 (Tenn. 2000) (explaining that “a witness must be able to identify the evidence or establish an unbroken chain of custody”) (citation omitted).

Nor do we find the video unfairly prejudicial. Relevant evidence may “be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” TENN. R. EVID. 403. The video reflected poorly on both parents. But “most evidence introduced during . . . trial . . . has a prejudicial impact on the position of one party.” *State v. Vann*, 976 S.W.2d 93, 103 (Tenn. 1998). The issue is whether the prejudice is unfair. *Id.* Prejudice is only “unfair” if it has an “[u]ndue tendency to suggest decision on an improper

² On appeal, Father asserts that the video should have been excluded as hearsay. But he did not raise a hearsay objection at trial. So we deem this issue waived. *See Fayne v. Vincent*, 301 S.W.3d 162, 171 (Tenn. 2009) (“[P]arties will not be permitted to raise issues on appeal that they did not first raise in the trial court.”).

³ The case manager also identified Father’s voice in the video. *See* TENN. R. EVID. 901(b)(5) (recognizing that a witness may testify to his or her opinion on the identity of a speaker, whether the witness heard the voice “firsthand or through mechanical or electronic . . . recording”).

basis.” *State v. DuBose*, 953 S.W.2d 649, 654 (Tenn. 1997) (citation omitted). The video helped the court understand the circumstances that led to the children’s removal. It was also probative of Father’s credibility. Nothing about the video was inflammatory.

B.

1. Abandonment by Failure to Support

One of the statutory grounds for termination of parental rights is “[a]bandonment by the parent.” Tenn. Code Ann. § 36-1-113(g)(1). The word “abandonment” is statutorily defined in multiple ways. *See id.* § 36-1-102(1)(A) (2021). Here, the aunt and uncle claimed that Father abandoned the children when, “[f]or a period of four (4) consecutive months immediately preceding the filing of . . . [their petition to terminate parental rights],” Father “failed to support or . . . failed to make reasonable payments toward the support of the child[ren].” *See id.* § 36-1-102(1)(A)(i). The trial court found that the petitioners did not prove this ground for termination of Father’s parental rights. The guardian ad litem challenges that determination.

Because the petition to terminate parental rights was filed on December 10, 2021, the relevant four-month period is August 10, 2021 to December 9, 2021, the day before the petition was filed. *See In re Jacob C.H.*, No. E2013-00587-COA-R3-PT, 2014 WL 689085, at *6 (Tenn. Ct. App. Feb. 20, 2014) (concluding that the day before the petition is filed is the last day in the relevant four-month period). Father’s child support obligation was \$317 a month. Father was disabled. The aunt and uncle began receiving the children’s social security disability benefit payments—\$338 per month—on September 9, 2021. “Social Security disability benefit payments paid to the [child’s custodian] may be credited against the disabled parent’s support obligation.” *Orr v. Orr*, 871 S.W.2d 695, 696 (Tenn. Ct. App. 1993).

The GAL contends that Father could have done more. He admitted that he received the children’s benefit payments through August, 2021. And he did not share those funds with the aunt and uncle. Still, our focus is on the payments made during the relevant period. The total amount that the aunt and uncle received during the relevant period exceeded Father’s support obligation for that same period. We cannot say that the amount paid was insignificant given Father’s limited means.⁴ *See* Tenn. Code Ann. § 36-1-102(1)(B), (D). So we conclude that the evidence is less than clear and convincing that Father abandoned his children by failure to support.

⁴ Father testified that he received \$1,096 each month in disability income. After paying rent and utilities, he had \$250 to cover the rest of his expenses.

2. Persistence of Conditions

The trial court found termination of parental rights appropriate under Tennessee Code Annotated § 36-1-113(g)(3), a ground commonly referred to as “persistence of conditions.” *In re Audrey S.*, 182 S.W.3d 838, 871 (Tenn. Ct. App. 2005). The ground of persistence of conditions focuses “on the results of the parent’s efforts at improvement rather than the mere fact that he or she had made them.” *Id.* at 874. So the question before the court is “the likelihood that the child can be safely returned to the custody of the [parent].” *In re K.A.H.*, No. M1999-02079-COA-R3-CV, 2000 WL 1006959, at *5 (Tenn. Ct. App. July 21, 2000).

Persistence of conditions may be a basis to terminate parental rights when:

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

- (i) The conditions that led to the child’s removal still persist, preventing the child’s safe return to the care of the parent . . . , or other conditions exist that, in all reasonable probability, would cause the child to be subjected to further abuse or neglect, preventing the child’s safe return to the care of the parent . . . ;
- (ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent . . . in the near future; and
- (iii) The continuation of the parent . . . and child relationship greatly diminishes the child’s chances of early integration into a safe, stable, and permanent home[.]

Tenn. Code Ann. § 36-1-113(g)(3)(A). Each of the statutory elements must be established by clear and convincing evidence. *In re Valentine*, 79 S.W.3d at 550.

It is undisputed that the first statutory element was satisfied. At the time of trial, the children had been removed from Father’s custody for well more than six months. *See* Tenn. Code Ann. § 36-1-113(g)(3)(B) (“The six (6) months must accrue on or before the first date the termination of parental rights petition is set to be heard.”).

Father argues that he remedied the conditions that precipitated the children’s removal. We agree. The children were removed from Father’s care based on his drug use and violations of the visitation order. There is no evidence here of any ongoing substance abuse concerns. Nor is there any evidence that Father continued to allow the children to visit Mother without supervision.

Even so, this ground may be established if other conditions persist that make the parent's home unsafe for the children. *Id.* § 36-1-113(g)(3)(A)(i). "A parent's continued inability to provide fundamental care to a child, even if not willful, . . . constitutes a condition which prevents the safe return of the child to the parent's care." *In re Navada N.*, 498 S.W.3d 579, 605 (Tenn. Ct. App. 2016) (citation omitted). Here, the court found that Father failed to demonstrate that his parenting skills had improved. Although he completed his plan requirements, he remained "unable to even recognize, much less, remedy" the deficiencies in his parenting. Even at trial, Father still "ha[d] no idea how his children [we]re affected by his actions and inappropriate conduct." The evidence does not preponderate against these findings.

We conclude that there is clear and convincing evidence that conditions still exist that in all reasonable probability will subject the children to further abuse or neglect. From the children's account, it appears that Father did very little parenting when he had custody. He stayed in bed all day, leaving Dixee in charge. She did her best to cook, clean, and raise her sister. But the children were often hungry. The house was not clean. Both children fell behind in school. They also watched inappropriate movies on what Father called "family movie night." On the surface, Father's parenting skills improved with therapeutic visitation. But once he was alone with the children, he showed how little he had learned. He pressured the girls to say that they wanted to live with him. And he yelled at them if they voiced a different viewpoint. His inappropriate behavior continued until the court ordered a return to supervised visitation. Father denied these claims. But the court credited the children's version of events. And we find no basis in this record to disturb the court's credibility finding. *See Coleman Mgmt., Inc.*, 304 S.W.3d at 348.

The evidence is equally clear and convincing that there is little likelihood that these conditions will be remedied in the near future. Father steadfastly refused to acknowledge any fault. He either insisted that the other witnesses were lying or cast the blame elsewhere. A parent's "refusal to acknowledge any deficiencies in [his] parenting inspires little confidence that this condition will be remedied in the near future, or that safe reintegration of the [children] into [the parent's] home is possible." *In re Katrina S.*, No. E2019-02015-COA-R3-PT, 2020 WL 5269236, at *8 (Tenn. Ct. App. Sept. 3, 2020); *see also In re Roderick R.*, No. E2017-01504-COA-R3-PT, 2018 WL 1748000, at *10 (Tenn. Ct. App. Apr. 11, 2018) (noting a mother's "lack of progress in improving her parenting abilities [wa]s exacerbated by her steadfast refusal to recognize her own shortcomings and tendency to place blame on others").

Continuation of the parent-child relationship would also diminish the children's opportunity for an early integration into a safe, stable, and permanent environment. The children are thriving in their current environment. The aunt and uncle want to adopt them.

3. Failure to Manifest an Ability and Willingness to Assume Custody or Financial Responsibility for the Children

The court also found termination of Father's parental rights appropriate under Tennessee Code Annotated § 36-1-113(g)(14). Under this ground, a parent's rights may be terminated if he or she

[1] has failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility of the child, and [2] placing the child in the person's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child.

Id. § 36-1-113(g)(14). Both prongs must be established by clear and convincing evidence. *In re Neveah M.*, 614 S.W.3d 659, 674 (Tenn. 2020).

As to the first prong, the petitioner may prove that a parent is either unable or unwilling to "assume legal and physical custody or financial responsibility for the child." *Id.* at 677. The court found that Father was unable to assume legal and physical custody of these children. We agree. Father's conduct during unsupervised visitation showed that he has yet to learn appropriate parenting. Nor does he appear to be aware of any shortcomings in his parenting.

The evidence is equally clear and convincing that placing the children in Father's custody would pose a risk of substantial harm to their emotional and psychological welfare. *See Ray v. Ray*, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001). The children were diagnosed with post-traumatic stress disorder as well as anxiety and depression. They do not trust Father to provide for their physical needs. And he has shown no sensitivity to their emotional and psychological needs. The children had such a negative reaction to the idea of reunification with Father that the therapist was forced to stop family therapy after just one session. *See In re Stephen H.*, No. M2022-00674-COA-R3-PT, 2022 WL 17843018, at *18 (Tenn. Ct. App. Dec. 22, 2022) (noting the relevance of the children's negative reaction to family therapy).

C.

Because "[n]ot all parental misconduct is irredeemable," our parental termination "statutes recognize the possibility that terminating an unfit parent's parental rights is not always in the child's best interests." *In re Marr*, 194 S.W.3d 490, 498 (Tenn. Ct. App. 2005). Tennessee Code Annotated § 36-1-113(i) lists twenty factors for courts to consider in a best interest analysis. The "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 Gabriella D.*, 531 S.W.3d 662, 681 (Tenn. 2017). In reaching a decision,

“the court must consider all of the statutory factors, as well as any other relevant proof any party offers.” *Id.* at 682.

The focus of this analysis is on what is best for the child, not what is best for the parent. *In re Marr*, 194 S.W.3d at 499. The analysis should consider “the impact on the child of a decision that has the legal effect of reducing the parent to the role of a complete stranger.” *In re C.B.W.*, No. M2005-01817-COA-R3-PT, 2006 WL 1749534, at *6 (Tenn. Ct. App. June 26, 2006). Although “[f]acts relevant to a child’s best interests need only be established by a preponderance of the evidence, . . . the combined weight of the proven facts [must] amount[] to clear and convincing evidence that termination is in the child’s best interests.” *In re Carrington H.*, 483 S.W.3d 507, 535 (Tenn. 2016).

The trial court found that best interest factors overwhelmingly favored termination of Father’s parental rights. Father contends that at least some factors should weigh in his favor in light of his strong bond with the children.

Father testified about his loving relationship with the children. Two of Father’s friends echoed that sentiment. Still, the court found that the children’s relationship with Father had changed over time. By the time of trial, Father did not have a “secure and healthy parental attachment” with the children and was unlikely to develop one. Tenn. Code Ann. § 36-1-113(i)(1)(D). Father also failed to use his visitation time to “cultivate a positive relationship” with his children. *Id.* § 36-1-113(i)(1)(E). The evidence does not preponderate against these findings. We have no doubt that Father loves these children and they may love him. But they do not trust him to provide for them. They had a negative reaction to family therapy when reunification with Father was discussed. And he made them anxious and uncomfortable during unsupervised visitation. They no longer want to be alone with him.

The evidence also does not preponderate against the court’s findings with respect to Father’s ability to provide for these children. The court found that Father had never demonstrated continuity and stability in meeting the children’s basic needs. *Id.* § 36-1-113(i)(1)(C). He only acted appropriately when he was in a therapeutic setting. *Id.* § 36-1-113(i)(1)(O). And he appeared to have no understanding of what the children needed to thrive. *Id.* § 36-1-113(i)(1)(P). The children were hungry and largely unsupervised while in his care. Daisee was behind in school. Rather than help his younger daughter improve, Father instructed Dixee to do Daisee’s schoolwork. He also exposed the children to sexually explicit movies, which the court deemed to be emotional and psychological abuse. *Id.* § 36-1-113(i)(1)(N). Father’s behavior during unsupervised visitation in conjunction with his failure to acknowledge any deficiencies in his parenting showed that he had no real understanding of appropriate parenting.

The court recognized that Father completed the requirements of the permanency plan. *Id.* § 36-1-113(i)(1)(K). But he did not make a lasting adjustment. *Id.* § 36-1-

113(i)(1)(J). When no one was watching, “he resort[ed] to totally unacceptable and inappropriate behavior with the children.” The court also found that Father failed to show sufficient urgency in addressing his parenting shortcomings. *Id.* § 36-1-113(i)(1)(M). Father continues to deny that he has any deficiencies in his parenting.

By contrast, the court found that the children had formed a healthy parental attachment with the aunt and uncle. *Id.* § 36-1-113(i)(1)(H). And termination of parental rights would allow the children to be adopted into a stable home. *Id.* § 36-1-113(i)(1)(A). The aunt and uncle have provided the children with a “normal, secure, loving and stable home.” The children no longer worry about having enough food. They are thriving academically and socially. Daisee can read above her grade level. The aunt and uncle want to adopt them.

The court also found that a change in caregivers would be “devastating” to these children and a return to Father’s care would “exacerbate the[ir] experience of . . . post-traumatic symptoms.” *Id.* § 36-1-113(i)(1)(B), (G). The children were diagnosed with post-traumatic stress disorder, anxiety, and depression. Their therapist reported that they have an intense fear of being removed from their aunt and uncle. They do not trust Father to provide for them. They reacted negatively to family therapy. Father’s behavior during unsupervised visitation caused renewed depressive episodes in the children.

We conclude that the evidence preponderates against the court’s findings on one factor.⁵ The court found that Father’s mental or emotional fitness was detrimental to the children and precluded consistent and effective parenting. *Id.* § 36-1-113(i)(1)(T). There was no evidence at trial that Father had any significant mental or emotional issues. His mental health assessment had no recommendations. And he attended counseling and medication management sessions for his depression. This factor favors Father.

Still, we reach the same conclusion as the trial court. The combined weight of the proven facts amounts to clear and convincing evidence that termination of Father’s parental rights is in the children’s best interest.

D.

Finally, the GAL seeks damages for a frivolous appeal. *See* Tenn. Code Ann. § 27-1-122 (2017). The statute authorizing an award of damages for a frivolous appeal “must be interpreted and applied strictly so as to not discourage legitimate appeals.” *Davis v.*

⁵ The court also erroneously determined that factor (L) favored termination of Father’s parental rights. *Id.* § 36-1-113(i)(1)(L). Factor (L) considers whether DCS made reasonable efforts to assist the parent in making a lasting change. *Id.* But that factor only applies “in cases where the child is in the custody of [DCS].” *Id.*

Gulf Ins. Grp., 546 S.W.2d 583, 586 (Tenn. 1977). A frivolous appeal is one “utterly devoid of merit.” *Combustion Eng’g, Inc. v. Kennedy*, 562 S.W.2d 202, 205 (Tenn. 1978). This appeal was not devoid of merit. Father “made legitimate arguments and cited to relevant law and facts.” *See Coolidge v. Keene*, 614 S.W.3d 106, 120 (Tenn. Ct. App. 2020). His appeal was unsuccessful, not frivolous. *See id.*

III.

We conclude that the evidence was less than clear and convincing that Father abandoned his children by failure to support. But we affirm the termination of Father’s parental rights. The record contains clear and convincing evidence to support two statutory grounds for termination. We also conclude that terminating Father’s parental rights was in the children’s best interest.

s/ W. Neal McBrayer
W. NEAL McBRAYER, JUDGE