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

**IN RE SERENITY S. ET AL.**

**Appeal from the Chancery Court for Giles County**
**No. 314 Stella L. Hargrove, Judge**

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**No. M2022-01091-COA-R3-PT**

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Heather B.[1] ("Mother") and John S., III ("Father") are the biological parents of Serenity S. Mother and Raymond R. are the biological parents of Harmony R., Mellody O., and Angel O. Tina S. ("Grandmother") and John S., Jr. ("Grandfather" or, together with Grandmother, "Petitioners") petitioned the Chancery Court for Giles County (the "trial court") for termination of Mother's and Raymond R.'s parental rights in April of 2021 and for adoption of the children. Father voluntarily surrendered his parental rights as to Serenity S. As for the grounds for termination, Petitioners alleged: substantial noncompliance with the permanency plan, persistence of conditions, and failure to manifest an ability and willingness to personally assume legal and physical custody of the children. Following a bench trial, the trial court concluded that Petitioners proved all three statutory grounds for termination and that termination was in the Children's best interests. Mother appeals to this Court. Having reviewed the record, we conclude that the trial court's order must be vacated and remanded. Because Petitioners proved no statutory grounds for termination by clear and convincing evidence, we need not consider whether termination of Mother's parental rights is in the Children's best interests.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated; Case Remanded**

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

Robert W. Curtis, Pulaski, Tennessee, for the appellant, Heather B.

James R. Potter, Clarksville, Tennessee, for the appellees, John S. and Tina S.

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[1] In actions involving juveniles, it is this Court's policy to protect the privacy of children by using only the first name and last initial, or only the initials, of the parties involved.

## OPINION

This is an appeal from a termination of parental rights and adoption case involving four children. The oldest, Serenity S., was born in 2011 to Mother and Father, who were unmarried. It is undisputed that Father was absent for Serenity S.'s earliest years and did not establish any meaningful relationship with her until she was approximately six years old. The other three children, Harmony R., Mellody O., and Angel O. (together with Serenity S., "the Children"), were born in 2012, 2014, and 2017, respectively. Harmony R., Mellody O., and Angel O. have a different father, Raymond R.[2] The Children lived with Mother, and intermittently Raymond R., until the Children's removal by Department of Children's Services ("DCS").

DCS received sixteen referrals regarding the family between 2012 and 2017, and at some point, had provided Mother with homemaker services. DCS visited Mother's home again on January 24, 2017, following a new referral for environmental neglect and lack of supervision. Mother initially denied the DCS workers entry into the home but eventually capitulated. The caseworkers found the home full of trash and infested with cockroaches. The Children's beds had holes and no sheets. The water pipes were broken, and the home lacked running water. DCS filed a petition on January 25, 2017, seeking to place the Children in protective custody. DCS's petition was granted the same day. During this time period, Mother was pregnant with Angel O., who was also placed in DCS custody after his birth.

Raymond R. has a history of domestic violence against Mother. He was first arrested for domestic assault in 2013 and received a judicial diversion. He pled guilty to another domestic assault charge in 2016. In August of 2017, Raymond R. pointed a weapon at Mother and was charged with aggravated assault. He pled guilty on February 12, 2018, and received supervised probation.

In the interim, on October 19, 2017, the first permanency plan and a ninety-day trial home stay with Mother were approved.[3] However, the Children were again removed from Mother a few weeks into the trial visit. According to Mother, this was because her roommate made untruthful statements to DCS about Mother not feeding the Children. It is unclear from the record if Raymond R. was living with Mother during the trial visit, but the record suggests that Mother was living only with an unnamed roommate.

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[2] Raymond R.'s parental rights to Harmony R., Mellody O., and Angel O. were terminated by the trial court, and Raymond R. did not appeal. As Father voluntarily surrendered his parental rights to Serenity S., both fathers are discussed only for context and their rights are not at issue in this appeal.

[3] The first permanency plan is not in the record; however, the parties do not dispute that it was created.

On June 12, 2018, a second family permanency plan was created. Mother's overall requirements included: completing homemaker services, having a minimum four hours of visitation per month, being on time for visitation, participating in domestic violence classes, maintaining contact with DCS, on-time payment of rent and utilities, maintaining minimal housekeeping standards, making child support payments, and completing a mental health assessment with a parenting component.

On October 24, 2018, the trial court granted temporary custody of the Children to Father's parents, Petitioners John S. and Tina S. At that time, Father lived with Petitioners, as did Petitioners' adult daughter and two other minor grandchildren. Father had no consistent or meaningful contact with Serenity S. prior to this placement. Father claims he was homeless in Florida for a brief period prior to moving in with Petitioners. Petitioners also had no relationship with any of the Children prior to the DCS placement in their home. The court order granting custody of the Children to Petitioners gave Mother the ability to petition for custody upon completion of the steps in the permanency plan.

Aside from Raymond R.'s criminal charges, the record is sparse regarding Mother's circumstances between losing custody of the Children in 2017 and the filing of the petition for termination on April 9, 2021. Petitioners alleged several statutory grounds for termination as to Mother: substantial noncompliance with the permanency plan; persistence of conditions; and failure to manifest an ability and willingness to assume custody. Petitioners also alleged that termination was in the Children's best interests and requested to adopt all four of the Children.

Trial was held on July 11, 2022. Witnesses included Mother, Father, and Petitioners. Mother testified that she was homeless for a period of time following the Children's removal but was living in Kentucky at the time of trial and had been for the past two years. In September of 2020, Mother gave birth to another child with Raymond R. Mother testified that Kentucky Child Protective Services ("CPS") opened a case after the delivery nurse became suspicious of Mother giving birth in Kentucky while having other children in Tennessee. Mother claimed that Kentucky CPS made her re-complete many of the classes required by DCS. Mother also provided documentation at trial showing that she completed domestic violence classes in March of 2021. Mother maintained that she is no longer homeless and that she and her infant son were accepted into Kentucky public housing in December of 2021. Mother claimed to be employed as a pizza delivery driver and testified that the Kentucky CPS case is now closed.

At the time of trial, the Children were still living with Petitioners, Father, two other of Petitioners' minor grandchildren, and those children's adult mother. The proof showed that since the Children have lived with Petitioners and Father, most of Mother's visits have been virtual. A large portion of the scheduled visits did not occur, but there was conflicting testimony regarding whether the inconsistency was due to Mother's absence or Petitioners'

internet issues. Grandmother admitted that she cancelled some of Mother's visits. Grandmother also testified that once the petition for termination was filed, she disallowed any contact between Mother and the Children.

Raymond R. was still incarcerated at the time of trial. He was again arrested for domestic assault against Mother in April of 2021 while free on supervised probation following the 2017 incident. This arrest violated the conditions of his supervised release and a warrant for his arrest was issued. Raymond R. pled guilty to assault and violating his probation on June 28, 2021. While the length of Raymond R.'s current sentence is unclear from the record, it was undisputed that he was still incarcerated at the time of trial. In their respective testimonies, Mother and Grandmother disagreed as to whether the Children witnessed domestic violence in Mother's home. Mother was not questioned at trial about any potential reconciliation with Raymond R.

Father also testified at trial, explaining that he lives in the same home as Petitioners and the Children. Father testified that he surrendered his parental rights to Serenity S. so the adoption could occur. Generally, Petitioners maintained that the Children were doing well in their custody and that Petitioners wished to adopt all four of them.

The trial court entered its final order on July 18, 2022, finding that Petitioners proved three statutory grounds for termination as to Mother. The trial court also concluded that terminating Mother's parental rights was in the Children's best interests. Mother timely appealed to this Court.

## ISSUES

Mother raises the following issues on appeal, which we have restated slightly:

1. Whether the trial court erred in finding, by clear and convincing evidence, that Petitioners established statutory grounds for terminating Mother's parental rights.

2. Whether the trial court inappropriately shifted the burden of proof to Mother to disprove the statutory grounds of termination and best interests of the Children.

3. Whether the trial court erred in finding that termination of Mother's parental rights was in the best interests of the Children.

## STANDARD OF REVIEW

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.

## DISCUSSION

*Grounds for Termination*

### Ground I: Substantial Noncompliance

The first statutory ground found by the trial court was substantial noncompliance with the permanency plan. This ground is proven when "[t]here has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan." Tenn. Code Ann. § 36-1-113(g)(2). A trial court "must find that the requirements of a permanency plan are 'reasonable and related to remedying the conditions which necessitate foster care placement.'" *In re Valentine*, 79 S.W.3d 539, 547 (Tenn. 2002) (quoting Tenn. Code Ann. § 37-2-403(a)(2)(C)). Termination of parental rights under this ground "requires more proof than that a parent has not complied with every jot and tittle of the permanency plan." *In re M.J.B.*, 140 S.W.3d 643, 656 (Tenn. Ct. App. 2004). Further, "noncompliance is not enough to justify termination of parental rights; the noncompliance must be substantial" and "noncompliance should be measured by both the degree of noncompliance and the weight assigned to that requirement." *In re Valentine*, 79 S.W.3d at 548.

Considering a parent's *failure to substantially comply* with a permanency plan, as opposed to substantial noncompliance with the plan, is "an incorrect standard with regard to this ground." *In re Jaylah W.*, 486 S.W.3d 537, 555 (Tenn. Ct. App. 2015). The statute calls for petitioners to show "substantial noncompliance" by parents, not a failure to substantially comply. Tenn. Code Ann. § 36-1-113(g)(2). Here, the trial court's ruling provides that "[t]he Court finds that Petitioners have carried their burden of proof, by clear and convincing evidence, that [Mother] has not substantially complied with the requirements of the permanency plan."

This Court has previously held that when a trial court applies section 36-1-113(g)(2) through the lens of substantial compliance as opposed to substantial noncompliance, the

finding should be vacated. *See, e.g.*, *In re Daylan D.*, No. M2020-01647-COA-R3-PT, 2021 WL 5183087, at *8 (Tenn. Ct. App. Nov. 9, 2021) (collecting cases and noting that the "[f]ather's failure to substantially comply with the permanency plans is not . . . a ground for termination"); *In re Jaylah W.*, 486 S.W.3d at 555 (ruling as to section 36-1-113(g)(2) vacated due to absence of appropriate findings of fact and "the application of an incorrect standard").

Because the trial court applied an incorrect standard in its final order, we deem it prudent to vacate the trial court's ruling as to section 36-1-113(g)(2).

**Ground II: Persistence of Conditions**

The trial court next found that Petitioners proved the statutory ground of persistence of conditions by clear and convincing evidence. This statutory ground applies when:

> (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.

Tenn. Code Ann. § 36-1-113(g)(3).

As we have previously explained,

> "[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 A.R.*, No. W2008-00558-COA-R3-PT, 2008 WL 4613576, at *20 (Tenn. Ct. App. Oct. 13, 2008) (citing *In re T.S. & M.S.*,

> No. M1999-01286-COA-R3-CV, 2000 WL 964775, at *7 (Tenn. Ct. App. July 13, 2000)). The failure to remedy the conditions which led to the removal need not be willful. *In re T.S. & M.S.*, 2000 WL 964775, at *6 (citing *State Dep't of Human Servs. v. Smith*, 785 S.W.2d 336, 338 (Tenn. 1990)). "Where . . . efforts to provide help to improve the parenting ability, offered over a long period of time, have proved ineffective, the conclusion [ ] that there is little likelihood of such improvement as would allow the safe return of the child to the parent in the near future is justified." *Id.* The purpose behind the "persistence of conditions" ground for terminating parental rights is "to prevent the child's lingering in the uncertain status of foster child if a parent cannot within a reasonable time demonstrate an ability to provide a safe and caring environment for the child." *In re A.R.*, [2008 WL 4613576, at *20] (quoting *In re D.C.C.*, No. M2007-01094-COA-R3-PT, 2008 WL 588535, at *9 (Tenn. Ct. App. Mar. 3, 2008)).

*In re Navada N.*, 498 S.W.3d 579, 605–06 (Tenn. Ct. App. 2016). Additionally,

> this ground for termination may be met when either the conditions that led to the removal persist 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[.]" 36-1-113(g)(3)(A)(i). Thus, even if the initial reasons that the children were placed in DCS custody have been remedied, if other conditions continue to persist that make the home unsafe, this ground may still be shown.

*In re Daylan D.*, 2021 WL 5183087, at *9.

Here, DCS's initial petition for removal cited, almost exclusively, environmental concerns in Mother's home. Specifically, DCS averred that the home was "full of trash, ha[d] a roach infestation[,] and confirmed that there [was] no running water." The removal petition also claimed that "[M]other was unable to maintain the home in a clean and safe environment." The permanency plan listed "environmental concerns" as the event leading to removal.

While the trial court's order addresses the safety and condition of Mother's home, the problem with this ground, as with the first ground, is the lens through which the trial court considered it. Regarding persistence of conditions, the trial court's order provides in part:

> On the day of trial, [Mother] cannot show the Court she had a safe and appropriate home for the [C]hildren.
>
> * * *

> [Raymond R.] is now in prison, serving time for two felony convictions of aggravated assault, involving the use or display of a weapon. [Mother] testified that she currently lives with her son, [A.R.] [Raymond R.] is also the father of this child. They live in a two-bedroom apartment in public housing, and she receives food stamps for [A.R.] [Mother] had no proof of housing, no pictures of her home, and no proof of income from the recent pizza delivery job she described. There were no questions asked of [Mother] relative to living with [Raymond R.] once he is released from prison; however, historically they have resumed living together off and on during many years of domestic violence. At least one of the [C]hildren recalled witnessing the violence and the gun to her mother's head.

As Mother argues in her brief, it is clear that with regard to this statutory ground, the trial court inappropriately shifted the burden of proof to Mother. As previously noted, "the persons seeking to terminate [parental] rights must prove all the elements of their case by clear and convincing evidence." *In re Bernard T.*, 319 S.W.3d at 596 (citing Tenn. Code Ann. § 36-1-113(c)); *see also In re Gabriella D.*, 531 S.W.3d 662, 682 (Tenn. 2017) ("Mother did not bear the burden of proof in this termination proceeding . . . .") Consequently, Petitioners bore the burden of demonstrating by clear and convincing evidence that the conditions necessitating removal persist, or that other conditions have arisen that, in all reasonable probability, would cause the Children to be subject to further abuse or neglect. Tenn. Code Ann. § 36-1-113(c), (g)(3)(A)(i). Nonetheless, the trial court's order does not mention any proof provided by Petitioners that any of the relevant environmental conditions in Mother's home still persist. Rather, the trial court opens its discussion of this issue by noting that "[*Mother*] cannot show the Court she had a safe and appropriate home for the [C]hildren." (Emphasis added). However, Mother was not required to make such a showing. The trial court goes on to state that Mother provided no pictures of her home. As Petitioners bore the burden of proof regarding the allegations of environmental neglect, Petitioners could have, and indeed should have, sought and moved into evidence pictures or other proof regarding Mother's current living situation. There is simply no evidence in the record about any environmental issues in Mother's current home, other than Mother's own testimony that the home exists.

"Mother did not bear the burden of proof in this termination proceeding . . . ." *In re Gabriella D.*, 531 S.W.3d at 682. Accordingly, lack of proof offered by Mother does not mean that Petitioners proved by clear and convincing evidence that the conditions necessitating removal still persist. Tenn. Code Ann. § 36-1-113(c).

In its discussion of this ground, however, the trial court noted another potential condition—the domestic violence by Raymond R. against Mother. It is undisputed that Raymond R. has been arrested several times for domestic assault, some instances involving firearms. It is also undisputed, however, that Raymond R. was incarcerated for an

unknown amount of time by the time trial occurred. In nonetheless concluding that Raymond R. presents an ongoing threat to the Children, the trial court reasoned:

> Petitioner's [sic] counsel berates [Mother] for returning to live with a violent man, who has pointed guns to her head twice. [Mother] saw herself as a victim, with no choice but to live with [Raymond R.] The record reflects that the violence occurred throughout the lives of these [C]hildren — beginning in 2013, and escalating in 2020 and 2021, until [Raymond R.] went to prison in June of 2021. [Mother] testified that the [C]hildren were never there during the domestic violence; however, [Grandmother] testified that Harmony had nightmares, disclosing that "dad put a gun to mom's head."
>
> According to [Mother]'s testimony, she and [Raymond R.] were living together during the relevant six-month period. There were charges of domestic violence during this period. The more serious domestic violence charges involving firearms began in August of 2017, and [Raymond R.] is now in prison, serving time for two felony convictions of aggravated assault, involving the use or display of a weapon. [Mother] testified that she currently lives with her son, [A.R.] [Raymond R.] is also the father of this child . . . . [t]here were no questions asked of [Mother] relative to living with [Raymond R.] once he is released from prison; however, historically they have resumed living together off and on during many years of domestic violence.

The above reasoning has several issues. First, the trial court states that domestic violence occurred during "the relevant six-month period." Unlike other statutory grounds for termination, however, section 36-1-113(g)(3) contains no dispositive six-month period during which we analyze the parent's behavior. *See, e.g.*, Tenn. Code Ann. § 36-1-113(g)(1); Tenn. Code Ann. § 36-1-102(1)(A) (explaining the circumstances under which parental rights may be terminated for abandonment and providing a specific, relevant four-month period in which we analyze the parent's behavior). Rather, section 36-1-113(g)(3) merely provides that the child or children must have 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" before this statutory ground applies.

Rather than looking at a particular six-month window, we must ask whether Petitioners offered clear and convincing evidence of Mother's "*continued* inability to provide fundamental care to" the Children. *In re Navada N.*, 498 S.W.3d at 605 (emphasis added). Under the particular circumstances of this case, the answer to this question is no. Indeed, the record lacks clear and convincing evidence offered by the Petitioners that the threat of domestic violence by Raymond R. persists. Even the trial court pointed out that Petitioners asked Mother "no questions" about plans to reconcile with Raymond R. Nor have Petitioners made clear in the record if and when Raymond R. will be released. Notwithstanding the admitted lack of evidence about this issue, the trial court found clear

and convincing evidence that Raymond R. will return, at some unknown date, and continue causing problems in Mother's home. While the circumstances about Raymond R.'s potential return to Mother's life are unclear from the record, what is clear in the record is that Raymond R. is currently incarcerated and not living with Mother, and that Mother completed domestic violence classes prior to trial. Stated simply, Petitioners offered no evidence establishing that the threat of domestic violence in Mother's home persists.

Bearing in mind the heavy evidentiary burden borne by Petitioners, we take issue with the trial court's ruling that Mother's parental rights should be terminated pursuant to section 36-1-113(g)(3); indeed, this ruling is primarily premised on Mother's failure to offer proof. Inasmuch as the trial court's order suggests that it inappropriately shifted the burden of proof at trial to Mother, we deem it prudent to vacate the trial court's ruling on this ground for termination and remand for consideration within the appropriate legal framework.

**Ground III: Failure to manifest an ability and willingness to assume custody**

The third and final statutory ground found by the trial court was Mother's failure to manifest an ability and willingness to assume custody of the Children. This ground is provided by Tennessee Code Annotated section 36-1-113(g)(14):

> A parent or guardian 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.
>
> We have previously held that
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> [t]his 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.*

*In re Lily C.*, No. M2021-00885-COA-R3-PT, 2022 WL 2301598, at *10 (Tenn. Ct. App. June 27, 2022). As to the second element,

> [t]he 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)).

The evidence in the record supports the trial court's finding that Mother failed to manifest an ability and willingness to personally assume legal and physical custody of the Children. Almost three years passed from the time Petitioners were granted custody of the Children in October of 2018 to the filing of the petition in April of 2021. As noted by the trial court, "[Mother] admitted that she understood she could return to court when conditions improved for her, and that she could seek to be reunited with her [C]hildren." Mother had three years to take concrete steps towards reunification with the Children, but she never pursued any legal action to accomplish this. Mother testified she had not petitioned for custody yet because she was waiting until she had adequate housing, and she was planning on petitioning right before being served with the petition for termination.

Accordingly, we agree with the trial court's finding that Mother failed to manifest "an ability and willingness to personally assume legal and physical custody or financial responsibility" of the Children. Tenn. Code Ann. § 36-1-113(g)(14).

Termination pursuant to section 36-1-113(g)(14) requires clear and convincing proof of two elements, however. The second element requires a showing that "placing the child in the person's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child." *Id.*

Here, the trial court's reasoning as to the second element is lacking, as the entirety of the analysis provides that "placing the [C]children in [Mother's] legal and physical control would pose a risk of substantial harm to the [C]hildren's physical or psychological

welfare." As addressed at length already, a lack of evidence offered by Mother is not the same as "clear and convincing evidence" that placing the Children in her custody "would pose a risk of substantial harm." Tenn. Code Ann. § 36-1-113(c), (g)(14). Nonetheless, that is how the trial court treated this case. While Mother's history suggests that at certain points in her past she was unable to safely care for the Children, the record before us is almost nonexistent as to Mother's current circumstances. But under section 36-1-113(g)(14), the risk of harm to the Children "must be more than a theoretical possibility." *In re Ahleigha C.*, No. E2020-01683-COA-R3-PT, 2021 WL 3401021, at *6 (Tenn. Ct. App. Aug. 4, 2021) (quoting *In re Greyson D.*, No. E2020-00988-COA-R3-PT, 2021 WL 1292412, at *8 (Tenn. Ct. App. Apr. 7, 2021)). "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." *Id.* Because the trial court did not expound on what substantial harm the Children might be at risk of in Mother's custody, and because the record contains essentially no evidence regarding Mother's current living situation or circumstances, there is no way we can evaluate whether the record supports the trial court's conclusion.

Considering all of the foregoing, there are substantial issues with the trial court's final order. First and foremost, the overall tenor of the order suggests that the trial court inappropriately shifted the burden of proof at trial to Mother, instead of holding Petitioners to the relevant clear and convincing evidentiary standard. At several points in the final order, the trial court states that Mother offered no proof at trial, without sufficient, if any, discussion about what proof Petitioners offered at trial.

Further, with regard to the first ground, substantial noncompliance with the permanency plan, the trial court applied an incorrect legal standard. And with the third ground for termination, failure to manifest, the findings as to the second essential element are simply not supported by any evidence in the record. Under all of these circumstances, we are constrained to vacate the trial court's order in its entirety and remand this case for review within the appropriate legal framework and with the burden of proof placed on Petitioners. In light of this holding, we need not consider whether termination of Mother's parental rights is in the Children's best interests, as no statutory grounds were proven by clear and convincing evidence.

## CONCLUSION

The order of the Chancery Court for Giles County is hereby vacated and remanded to the trial court for proceedings consistent with this opinion. Costs on appeal are assessed to the appellees, John S. and Tina S.

KRISTI M. DAVIS, JUDGE