IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 7, 2022 Session

IN RE ISABELLA G.

Appeal from the Chancery Court for Giles County
No. 7513 Stella L. Hargrove, Judge

No. M2022-00246-COA-R3-PT

Taylor M. ("Mother") and Caleb G. ("Father") are the biological parents of Isabella G. (the "Child"). Mother and her current husband, David M. ("Stepfather") petitioned the Chancery Court for Giles County (the "trial court") for termination of Father's parental rights in April of 2021, and for Stepfather to adopt the Child. As grounds for termination, Mother and Stepfather alleged abandonment by failure to visit, abandonment by failure to support, and failure to manifest an ability and willingness to personally assume legal and physical custody of the Child. Following a bench trial, the trial court concluded that Mother and Stepfather failed to prove any statutory grounds for termination of Father's parental rights. The trial court then concluded, however, that termination would have been in the Child's best interests. Mother and Stepfather appealed to this Court. Because clear and convincing evidence establishes multiple grounds for termination of Father's parental rights, and because clear and convincing evidence establishes that termination is in the Child's best interests, we reverse.

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

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and JEFFREY USMAN, J., joined.

Robert D. Massey, Pulaski, Tennessee, for the appellants, Taylor M. and David M.

Jason C. Davis, Lewisburg, Tennessee, for the appellee, Caleb G.

OPINION

BACKGROUND

This is an appeal from a termination of parental rights case. The Child was born in 2017 to Mother and Father, who were unmarried. When Mother discovered she was pregnant, she had just begun college at the University of Tennessee Knoxville and Father was still in high school. Mother left college and moved back to the parties' hometown. Mother and Father lived with Mother's parents until the Child was born. When the Child was four months old, Mother and Father broke up and Father moved out of Mother's parents' home. This was in approximately August of 2017. Around the same time, Father's parents began paying Mother $300.00 per month in child support. Father's stepfather wrote a $150.00 check for Mother every two weeks. At first, Mother would drive to Father's mother's office to pick up the checks. When the Child was approximately six months old, Mother met and began dating Stepfather, who has been heavily involved in the Child's life ever since.

It is undisputed that Mother has always been the Child's primary caregiver. Father testified at trial that he has never cooked for the Child or taken her to a doctor's appointment. Father testified that he helped dress the Child and put her to bed during the first four months of the Child's life when the parties lived with Mother's parents. There is little evidence in the record establishing Father's day-to-day involvement with the Child during the first year of her life, other than a text message exchange from December 25, 2017, in which Mother offered to bring the Child by Father's parents' home to open Christmas presents. That exchange went as follows:

> Mother: What time are y'all eating tonight?
>
> Father: I think around 5, why?
>
> Mother: I was going to get [the Child] there around that time. So eating then presents?
>
> Father: Yeah. You're staying right?
>
> Mother: Is that the plan? Me to stay?
>
> Father: I thought so. Since she wasn't feeling good and she's been so attached.

In that vein, Mother testified that often when Father or his parents visited with the Child, Mother had to stay because the Child would cry if left alone. According to Mother, this was because the Child was unfamiliar with Father and his family.

After Father graduated from high school in 2019, he chose to attend a school in Indiana in order to play football. Father testified that he considered schools closer to the Child but that the college in Indiana was the best option. Mother remained in the parties'

hometown with the Child. Although the record is not clear on the exact dates, Mother and Stepfather bought a home and had their first child in 2019.

While they never entered into a parenting plan or formal child support arrangement, the parties dealt with one another with relative ease for the first few years of the Child's life. Because Father lived out of state, Mother and Stepfather cared for the Child on a daily basis. The Child occasionally saw Father when he came home for weekends and holidays. Mother testified that she has always maintained an "open door policy" to Father and his family, meaning Mother made the Child available to them when they asked. Text messages from 2019 establish that Father occasionally texted Mother to ask how the Child was doing. Mother maintained at trial that although she has always encouraged Father to foster a closer relationship with the Child, Father's efforts were lukewarm. Mother testified that she generally had to initiate interactions between Father and the Child. For example, one text exchange between the parties on June 12, 2019, went as follows:

> Mother: Hey I was calling about Father's [D]ay.
>
> Father: The 16th right?
>
> Mother: Yeah it's this Sunday and I hadn't heard from you so I didn't know what your plan was or what you wanted to do[.]
>
> Father: If you want we can go eat dinner somewhere like last year?
>
> Mother: It's up to you it's Father's Day so I didn't know what your plan was or what you wanted to do[.] I was thinking breakfast.
>
> Father: I'll be coming home from [Bonnaroo] Sunday. I can leave that morning and we can do brunch[.]

Another example is from October 30, 2019:

> Mother: Hey so you're coming down this weekend for sure right I want to make sure I have everything set for you to have breakfast with [the Child] Sunday[.]
>
> Father: Yes. What time again? 10?

Mother's sister also testified about taking the Child to a visit with Father and Father's mother in December of 2019, at which the Child appeared not to recognize Father.

The parties proceeded in such a manner until approximately August of 2020. Father was still living in Indiana and had a serious girlfriend, Kaitlin M. Mother testified that by

August of 2020, she was ready for Father to take a more serious role in the Child's life because the Child largely did not know who Father was. In Mother's opinion, Father's involvement with the Child was becoming "less and less" even when he was in town. At a family party in August of 2020, Mother, Stepfather, Father, and Kaitlin M. discussed co-parenting of the Child. According to Mother, this conversation was not productive. As Mother recalls it, the gist of the conversation was that Father needed to take a more active role in the Child's life and that Father's response was "let's get drunk and rally." Mother also testified that she wanted Father to start calling the Child regularly and doing FaceTime visits. Father and Kaitlin M. also recalled the August 2020 conversation, but Kaitlin M.'s testimony was that the conversation was geared towards persuading Mother to be more cooperative. According to Kaitlin M.,

> we all went outside and we started talking about everything. And I brought up the conversation about like getting together and trying to figure out a co-parenting plan somehow while we're down here so [Mother] didn't always have to come with us to each family event because it was starting to get awkward, in my sense. And I basically just told them they were still in a high school relationship and they really needed to get out of that.

The parties dispute the level of communication that occurred following the August 2020 conversation. Mother testified that Father called the Child on FaceTime two or three times and the calls then stopped. Kaitlin M. testified, however, that they tried to call the Child two or three times per week. Father testified that he was working a CNA job around this time and that the long hours made communication difficult.[1]

Mother filed a petition to change the Child's last name in the trial court on September 17, 2020. On November 9, 2020, Mother reached out to Father about the petition and to ask that he agree to the change. Regarding this decision, Mother testified:

> Q: So approximately, let's just say, 20 days, give or take, after this serious conversation with him about being more involved in which he made two FaceTime calls. So you were pretty quick on the trigger to go just forget it, I'm going to take your name off her name. Right?
>
> A: I'd been thinking about that for a little bit more time before that because the relationship had changed. I had tried -- when he moved, it was less and less and less. He was already not as frequent or continuous when he was here, but he was less and less and less as he moved. So I had already been thinking about that as far as just getting [Father's last name] taken off and leaving [Mother's maiden name].

[1] While the record is not entirely clear on the timeline, at some point Father left the college he had been attending. He remained in Indiana with his girlfriend, however.

> Q. Okay. But what was the purpose? What benefit would that have served [the Child] to have [Father's name] taken off? That seems, at her young age, that was more just a slight towards [Father] than it was for [the Child's] benefit. Right?
>
> A. No, sir. I was thinking more of when she started school just her learning right off the bat to say [Mother's maiden name]. Because if he was going to continue dropping out and not having as much contact, I didn't want her being confused if it did happen later on.

At the same time that Mother asked Father to agree to the name change, she also requested that Father begin to mail child support, as opposed to Mother going to pick it up from Father's parents. At trial, Mother's mother testified that the arrangement of Mother driving to Father's mother's office became less feasible after Mother had her second child. On November 9, 2020, Mother texted the following to Father: "As far as child support I ask you to mail to [Mother's parents' home]. . .beginning September 6, 2020. Please mail the previous and future to the address stated."

Father would not agree to the name change and instead filed a petition to legitimate and to establish a permanent parenting plan and child support order on December 8, 2020. Father did not file a proposed temporary parenting plan requesting any particular days with the Child. It is undisputed that once Father's petition was filed, he did not initiate phone calls with the Child or send further child support. Both Father and his mother testified at trial that they acted on advice of counsel in discontinuing child support and contact. The record establishes only one visit after the August 2020 party, which was a family dinner at a local restaurant. On or about December 27, 2020, Father texted Mother and said that he was going back to Indiana in two days and wanted to see the Child. Mother arranged a dinner for the next night. Mother, her parents, Father, Father's parents, and Father's girlfriend all attended the dinner at which the Child opened Christmas presents from Father's family. Mother testified that her parents paid for the Child's meal. It is undisputed that at this dinner, the Child referred to Father as "Uncle Matt." Mother's mother testified that "Uncle Matt" is the Child's great-uncle. Father's mother maintained that the Child recognized Father because she was playing with him.

Mother did not answer Father's petition until April 15, 2021. Along with her answer to the petition, Mother and Stepfather filed a petition to terminate Father's parental rights and for Stepfather to adopt the Child.[2] Mother asserted that Father had abandoned the Child through failure to visit and failure to support. She also asserted that Father failed to manifest an ability and willingness to assume legal and physical custody of the Child.

[2] Mother and Stepfather married in March of 2021. Mother was pregnant with their second child by the time of trial.

A bench trial was held in the trial court on December 28 and 29, 2021. By the time of trial, Father had enlisted in the military and was living in Oklahoma. Mother, Father, Stepfather, Kaitlin M., and various family members of both parties testified. On January 24, 2022, the trial court entered an order determining that Mother and Stepfather failed to carry their burden of proof as to all alleged statutory grounds for termination. As pertinent, the order provides:

> It is undisputed that the last time [Father] was in the presence of [the Child] was Christmas of 2020, at a local restaurant, Legends. [Mother's] mother testified that various family members of [Father] were there, along with his girlfriend; that [Father] talked with [the Child] a little; he turned his attention toward his girlfriend, and upon the insistence of the girlfriend, eventually sat beside [the Child]. [Mother's mother] testified that the dinner lasted one and a half to two hours, and that [the Child] thought [Father] was actually someone else, "Uncle Matt or Mack."
>
> Also, [Mother] testified that [the Child] did not recognize [Father], and that he did nothing to get [the Child] to do so. Her testimony is bolstered by [Mother's] half-sister. Members of [Father's] family deny this. This dinner gathering at Legends is undisputedly the only time [Father] visited with [the Child] during the four-month statutory period, December 15, 2020, to April 15, 2021.
>
> The Court is mindful that [Mother] filed her pro se Petition for Change of Name some three months prior to the Christmas dinner. She explains in a text to [Father], dated November 9, 2020, (Exhibit 1), she is simply seeking a name change and her filing has nothing to do with parental rights or child support. She requests that [Father] sign the paperwork and send it back to her. [Father] filed his response seeking denial of the Petition on December 8, 2020, along with the pleadings to establish paternity, a parenting plan and child support. [Mother] testified that [Father] has made no real effort to be involved as a parent in [the Child's] life. She stated her last attempt to get him involved was late August, 2020, suggesting that he and his family need to sit down with her and work out a plan. [Mother] testified his response was: "Let's get drunk and rally."
>
> * * *
>
> [Father] did not deny he made the following statement to [Mother]:
>
> "I understand we have a child, but I need to find my happiness." However, he wanted the Court to know he made the statement at a time "when they had broken up." [Father] agreed that in August of 2020, they talked about him

stepping up and having a meaningful relationship with [the Child]. Additionally, he agreed that [Mother] offered him more time with [the Child] in 2018. He acknowledges that through various texts from January, 2019, to August, 2020, they were able to communicate and agree on his time with [the Child]. See Exhibits 10 through 13.

[Father] testified he did the best he could to visit [the Child]. At some point in time, [Father] was pursuing a degree at a college in Indiana. The Court is not certain of the time frame he was in Indiana; however, his pleadings in response to the name change, filed December 8, 2020, reveal his address to be Anderson, Indiana. His responses to interrogatories, dated July 27, 2021, (Exhibit 9), and specifically No. 13, states: "I left Anderson University to join the military. I expect to report to basic training on August 2, 2021." [Father] describes his relationship with [the Child] as "fairly distant." He testified that he is willing to co-parent [the Child]. The Court finds he has done very little to co-parent up to now, and that his family is pushing him to do so. [Father's] family has been more involved in [the Child's] life than [Father] ever has. The Court questions his credibility and sincerity. Asked if he had any regrets about not having a close relationship with [the Child], [Father] responded: "Yes, sometimes I feel like I could have been there more."

The Court finds that [Mother] tried to encourage [Father] to have a closer relationship with [the Child] until August of 2020. She filed for the name change for [the Child] on September 17, 2020. The Court understands she was probably fed up, waiting on [Father] to be involved in [the Child's] life. The text from [Mother] to [Father] on November 9, 2020, is important to the Court. (Exhibit 1). [Father] must have questioned the reason for the name change, and [Mother] told him that litigation over parental rights was not at issue. [Father] did not sign for the name change and filed for a parenting plan on December 8, 2020. [Mother] was served the same day, December 8, 2020.

Several events are important to the Court:

Seven (7) days after [Mother] was served with [Father's] pleadings, the date of December 15, 2020, will put the four-month statutory time of abandonment in place; Counsel for [Mother], Mr. Massey, filed a notice of representation as early as December 29, 2020; however, no response was filed on her behalf until the Petition to terminate the parental rights of [Father] was filed, April 15, 2021, slightly more than four months beyond service on December 8, 2020.

> While [Father] did nothing to pursue a timely hearing, [Mother] used this time to become the four-month statutory period to claim abandonment.
>
> The Court agrees with counsel for [Father] that [Mother] orchestrated the four-month statutory period for purposes of alleging abandonment by failure to visit and to support. The Court finds that [Father] has shown that the failure to visit is not willful. Indeed, he had litigation pending asking the court to establish residential sharing.
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> Ruling: The Court finds that [Mother and Stepfather] have failed to carry their burden of proof by clear and convincing evidence that [Father] has failed to visit his child during the statutory period clearly orchestrated by her.

The trial court's ruling regarding abandonment by failure to support was largely the same, noting that "it is blatantly unfair to use this four-month period to establish abandonment by failure to support and to visit to forever sever this father's rights."

Regarding the final ground for termination, the trial court found as relevant:

> The Court believes that [Father's] immediate family members are the moving force in protecting their rights to have [the Child] involved in their lives and in the [Father's] family. [Father] is not asking to assume physical and legal control of [the Child], or even visitation for the next year during his commitment to the military. The Court finds that none of the financial support paid over the years on behalf of [the Child] has been paid by [Father], or reimbursed by him to others. However, the Court finds that due to the way this case evolved, with [Mother] orchestrating the four-month statutory period while [Father's] pleadings are pending, [Mother and Stepfather] have not carried their burden of proof by clear and convincing evidence that [Father] has failed to manifest an ability and willingness personally to assume legal and physical custody and financial responsibility of the child, and placing the child in his legal and physical control would pose a risk of substantial harm to her physical or psychological welfare.
>
> Therefore, the Court finds that [Mother and Stepfather] have not carried their burden of proof by clear and convincing evidence that one or more statutory grounds exist for the termination of the parental rights of [Father]. To be on the safe side, assuming an appeal, and the Court of Appeals disagreeing with its ruling, the Court will address best interest of [the Child].

Consequently, the trial court found no statutory basis to terminate Father's parental rights to the Child. Although it was unnecessary, the trial court then conducted a best interests analysis. After applying the factors found at Tennessee Code Annotated section 36-1-113(i), the trial court determined that terminating Father's parental rights would be in the Child's best interests.[3] Ultimately, Mother's and Stepfather's petition for termination and adoption was denied. They timely appealed to this Court.

ISSUES

On appeal, Mother and Stepfather (together, "Appellants") assert that the trial court erred in concluding that no statutory grounds for termination were proven. Father defends the trial court's ruling on appeal but does not properly raise[4] any additional issues in his posture as appellee.

STANDARD OF REVIEW

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,

[3] The trial court did two best interest analyses in its opinion. Noting that it was "[u]nsure of which test applies," it first applied the best interest factors in the version of Tennessee Code Annotated section 36-1-113(i) in effect at the time Appellants' petition for termination was filed. It then applied the amended version of the factors now found at section 36-1-113(i). The trial court was correct in its first analysis, insofar as we apply the version of the statute in effect at the time the petition was filed. *See In re Braxton M.*, 531 S.W.3d 708, 732 (Tenn. Ct. App. 2017).

[4] Father argues in the body of his brief that the trial court erred in its best interests analysis. Father did not include in his brief, however, a statement of the issues. Any argument in this regard is therefore waived. *See* Tenn. R. App. P. 27(b); *Hodge v. Craig*, 382 S.W.3d 325, 335 (Tenn. 2012) (internal quotations and bracketing omitted) ("Parties who have not filed their own application for permission to appeal may present issues other than those presented by the appellant or party seeking [relief]. To do so, however, Tenn. R. App. P. 27(b) requires a party to include in its brief the issues and arguments involved in its request for relief as well as the answer to the brief of the appellant or party seeking [relief].").

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. *See* 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." *In re Jacobe M.J.*, 434 S.W.3d 565, 568 (Tenn. Ct. App. 2013) (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.

Finally, this Court affords considerable deference to a trial court's findings where

issues of credibility and weight of oral testimony are involved, 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). Where an issue "hinges on the credibility of witnesses, the trial court will not be reversed unless there is found in the record clear, concrete, and convincing evidence other than the oral testimony of witnesses which contradict the trial court's findings." *Id.* (citing *Galbreath v. Harris*, 811 S.W.2d 88, 91 (Tenn. Ct. App. 1990)); *see also Franklin Cnty. Bd. of Educ. v. Crabtree*, 337 S.W.3d 808, 811 (Tenn. Ct. App. 2010) ("If the trial court's factual determinations are based on its assessment of witness credibility, this Court will not reevaluate that assessment absent clear and convincing evidence to the contrary." (citing *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002))).

DISCUSSION

Statutory grounds for termination

Because a party petitioning for termination of parental rights must prove at least one statutory ground warranting termination, *see* Tenn. Code Ann. § 36-1-113(c), we first address the grounds alleged by Appellants.

A. Abandonment – Failure to visit

Abandonment, as defined in section 36-1-102, is a ground for termination of parental rights. Tenn. Code Ann. § 36-1-113(g)(1). Section 36-1-102 provides that abandonment occurs, among other instances, when

> [f]or a period of four (4) consecutive months immediately preceding the filing of a proceeding, pleading, petition, or any amended petition to terminate the parental rights of the parent or parents . . . of the child who is the subject of the petition for termination of parental rights or adoption, that the parent or parents . . . have failed to visit or have failed to support or have failed to make reasonable payments toward the support of the child.

Id. § 36-1-102(1)(A)(i). Abandonment by failure to visit occurs when a parent, "for a period of four (4) consecutive months, [fails] to visit or engage in more than token visitation." Tenn. Code Ann. § 36-1-102(1)(E). "Token visitation" is "visitation, under the circumstances of the individual case, [that] 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." *Id.* § 36-1-102(1)(C). A parent may assert the absence of willfulness, which must be proven by a preponderance of the evidence, as an affirmative defense to abandonment by failure to visit. *Id.* § 36-1-102(1)(I).

Here, the relevant four-month period for purposes of abandonment was December

15, 2020 through April 14, 2021.[5] Father did not seek contact with the Child during that time aside from the Christmas dinner in late December 2020. According to Father, he was advised by his counsel to stop contacting Mother and the Child after Father's petition for legitimation and a parenting plan was filed on December 8, 2020:

> [Q.] Between this four-month period that we've been talking about, December of 2020 to April of 2021, aside from the visit at Legends, is there any other time that you saw [the Child] during that period of time?
>
> A. No, sir.
>
> Q. Okay. I think you just answered this, but did you reach out to [Mother], aside from on [the Child's] birthday, to try to set up a time to see [the Child] during that time?
>
> A. No, sir.
>
> Q. Okay. Is there a reason that you can give the Court as to why you weren't communicating with [Mother]?
>
> A. Well, we had figured out that [Mother] lawyered up, so we also got an attorney and then you, Mr. Davis, told us not to contact [Mother] during that time or offer support.
>
> Q. Was it your intention to let the Court system handle it from that point forward?
>
> A. Yes, sir.

Consequently, regardless of the reason, Father admits that he did not call or otherwise reach out to Mother regarding visitation after December 8, 2020, other than the Christmas dinner. The dinner, however, was scheduled at the last minute before Father's return to Indiana and lasted for two hours at most. And the Child did not recognize Father. Mother testified that Father's mother had to correct the Child on Father's name after the

[5] The "Determinative Period" for purposes of abandonment ends on the day preceding the day on which the petition for termination is filed. *In re Jude M.*, 619 S.W.3d 224, 236 (Tenn. Ct. App. 2020) (citing *In re Joseph F.*, 492 S.W.3d 690, 702 (Tenn. Ct. App. 2016)); *see also In re Jacob C.H.*, No. E2013-00587-COA-R3-PT, 2014 WL 689085, at *6 (Tenn. Ct. App. Feb. 20, 2014) (explaining that "the last day of the four month period is the day before the petition is filed"). The trial court noted in its order that the four-month statutory period was December 15, 2020 through April 15, 2021, meaning the trial court included the day the petition was filed in its calculation. Nonetheless, when the inclusion of the day of filing does not impact our analysis of abandonment, the error is harmless. *In re Jude M.*, 619 S.W.3d at 236 n.2.

Child referred to Father as "Uncle Matt." Mother's mother also testified that while she and Mother left a chair open next to the Child for Father, he had to be encouraged by his family to sit next to the Child. Considering all of these circumstances, the dinner amounts to token visitation. It was "perfunctory" and of "such short duration as to merely establish minimal or insubstantial contact with the child." *Id.* § 36-1-102(1)(C); *see also In re Keri C.*, 384 S.W.3d 731, 750-53 (Tenn. Ct. App. 2010) (explaining that "perfunctory" visits can include those in which a parent is physically present but "uninterested" in the child, and finding that three to four short visits in large group settings was token visitation).

The trial court found, however, that Mother was to blame for Father's lack of contact during the relevant period. Father defends this finding on appeal, maintaining that his failure to visit was not willful because Mother "clearly and knowingly orchestrated the creation of the four-month statutory period[.]" Having reviewed the record, we respectfully disagree with both Father and the trial court.

It is true that "[f]ailure to visit is not willful if another person's conduct prevents the parent from visiting or 'amounts to a significant restraint of or interference with the parent's efforts to develop a relationship with the child.'" *In re Mattie L.*, 618 S.W.3d 335, 350–51 (Tenn. 2021) (quoting *In re Audrey S.*, 182 S.W.3d at 863). Thwarting a parent's access to a child may include "'(1) telling a man he is not the child's biological father, (2) blocking access to the child, (3) keeping the child's whereabouts unknown, (4) vigorously resisting the parent's efforts to support the child, or (5) vigorously resisting a parent's efforts to visit the child.'" *In re Braelyn S.*, No. E2020-00043-COA-R3-PT, 2020 WL 4200088, at *5 (Tenn. Ct. App. July 22, 2020) (quoting *In re S.M.*, 149 S.W.3d 632, 642 n.18 (Tenn. Ct. App. 2004)).

In *In re Mattie L.*, our Supreme Court concluded that abandonment by failure to visit could not be proven against the father[6] because the record contained ample evidence that he sought visitation and contact with his child but was repeatedly denied by the child's mother. *Id.* at 349–50. The child's mother repeatedly told the father "no money-no kid," referring to the father's child support arrearages. *Id.* at 350. The court described this "policy" as "unacceptable" and reversed the lower court's decision to terminate the father's parental rights for failure to visit. *Id.*

The present case is distinguishable from *Mattie L.* and other cases in which one parent has purposefully impeded the other parent's access to a child. *See, e.g.*, *In re Braelyn S.*, 2020 WL 4200088, at *8 (reversing termination of father's parental rights for failure to visit because the child's mother "consistently rebuffed [f]ather's efforts to be any

[6] *In re Mattie L.* was decided under a prior version of Tennessee Code Annotated section 36-1-113 in which willfulness was not an affirmative defense to abandonment as it is now, but rather part of the statutory ground that the petitioner had the burden to prove. 618 S.W.3d at 346; Tenn. Code Ann. § 36-1-113(c)(1) (2017 & Supp. 2020). Nonetheless, insofar as Father argues that his lack of visitation was not willful because Mother orchestrated the four-month period, we consider *Mattie L.* instructive.

part of the child's life"). First, Father never raised lack of willfulness as an affirmative defense in any pleading in the trial court. This Court has often held that this omission results in waiver of lack of willfulness as an affirmative defense. *See, e.g.*, *In re Jaidon S.*, No. M2021-00802-COA-R3-PT, 2022 WL 1017230, at *5 (Tenn. Ct. App. Apr. 5, 2022); *In re Analesia Q.*, No. E2021-00765-COA-R3-PT, 2022 WL 1468786, at *5 (Tenn. Ct. App. May 10, 2022); *In re Christopher L.*, No. M2020-01449-COA-R3-PT, 2021 WL 4145150, at *5 (Tenn. Ct. App. Sept. 13, 2021). Second, nothing in the record supports Father's claim that Mother somehow impeded Father's access to the Child, inasmuch as Father concedes he did not pursue contact with the Child. On the single occasion that Father sought visitation, Mother took the Child to the Christmas dinner with Father's family the very next day and was cordial.

It was not Mother's role to pursue Father and initiate visitation after receiving no contact from him. Nor are we persuaded that the timing of Mother's pleadings is dispositive here. Father asserts in his brief that

> [Mother] could have filed a timely response to [Father's] petition and moved forward with a hearing on her request for name change. Instead, [Mother] hired counsel who filed a Notice of Appearance on December 29, 2020 but filed no response or pleading otherwise until April 15, 2021. As referenced earlier, [Mother] also chose to get married during this time, the same being a mere 19 days before filing her Petition for Termination and for Adoption.

(Record citations omitted). Nonetheless, Mother's decision to marry and her delay in responding to Father's petition are independent from the issue of Father's efforts to visit the Child during the relevant four-month period. There is no legal authority providing that Father could not have contact with the Child while his petition for legitimation and a parenting plan was pending. Nor has Father cited in his brief any authority providing that Mother's delay in responding to the petition is related to Father's separate responsibility to visit the Child. Stated simply, Mother's decision to respond to Father's lack of contact with a petition for termination does not mean that Mother somehow orchestrated the lack of contact to begin with. Father failed to show, by a preponderance of the evidence, that his failure to visit the Child during the relevant four-month period was not willful.

Appellants established at trial that Father engaged only in token visitation in the four-months preceding the filing of the termination petition. Father has not established that the failure was not willful because there is no evidence Mother thwarted Father's efforts to access the Child. 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[,]" and here there is no evidence Mother kept the Child from Father. *In re Braelyn S.*, 2020 WL 4200088, at *5 (quoting *In*

re M.L.P., 281 S.W.3d 387, 392–93 (Tenn. 2009)).[7] Accordingly, the trial court erred in concluding that Appellants failed to carry their burden of proof as to abandonment by failure to visit. We conclude that Appellants did carry their burden as to this ground, and the trial court's ruling is reversed.

B. Abandonment – Failure to support

Appellants also sought termination of Father's parental rights for abandonment by failure to support. *See* Tenn. Code Ann. § 36-1-113(g)(1). Abandonment through failure to support occurs when a parent fails, "for a period of four (4) consecutive months, to provide monetary support or . . . more than token payments toward the support of the child." Tenn. Code Ann. § 36-1-102(1)(D). Token support is support that, "under the circumstances of the individual case, is insignificant given the parent's means[.]" *Id.* § 36-1-102(1)(B). As an affirmative defense, parents facing termination may argue that their failure to support a child was not willful. *Id.* § 36-1-102(1)(I). All parents over the age of eighteen are presumed to know of their legal obligation to support their children. *Id.* § 36-1-102(1)(H).

It is undisputed that Father paid no child support during the relevant four-month period. It is also undisputed that he and his parents ceased making payments to Mother upon advice of counsel. Again, the trial court concluded that the absence of support in the four-month period was orchestrated by Mother through her failure to respond to Father's petition in a timely manner.

Our analysis of abandonment by failure to support is largely the same as the above analysis pertaining to abandonment by failure to visit. Appellants established that no support was paid, and Father does not dispute this. Father did not argue at trial nor does he argue on appeal that he could not afford to pay child support. Again, nothing in the record buttresses Father's argument that the failure to support was somehow "orchestrated" by Mother. Rather, the record shows that Father's stepfather stopped making the payments in response to Mother asking that the checks be mailed instead of picked up, and because Father's attorney advised not to have contact with Mother. As for Father, he was not even aware of the amount of child support being provided by his stepfather to Mother.[8]

[7] Father has not argued on appeal that the advice of his counsel amounts to "acts of another" that created a significant restraint or interference with Father's attempts to visit or support the Child. Nor did our research reveal any cases explaining how this scenario affects Father's willfulness.

[8] This Court has previously explained, in the context of termination for failure to support, that "[t]he voluntary nature of a child support payment, rather than the source of the payment, is the most important consideration. We are unaware of any legal authority that prohibits a parent from paying child support with money obtained from a relative." *In re C.L.*, No. E2018-02032-COA-R3-PT, 2020 WL 359743, at *7 (Tenn. Ct. App. Jan. 21, 2020). The issue in this case is not that Father's stepfather provided child support, but rather that Father had essentially no interest or involvement in supporting the Child and took no initiative to continue paying when stepfather withdrew his support.

Insofar as Father is presumed to have knowledge of his responsibility to support the Child, neither of these reasons establish that Father's failure to support was not willful. Tenn. Code Ann. § 36-1-102(1)(H).

The trial court erred in concluding that the Appellants failed to prove this ground by clear and convincing evidence.

C. Failure to manifest ability and willingness

The final ground for termination alleged by Appellants was failure to manifest an ability and willingness to assume legal and physical custody of the Child. This ground applies 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.

Tenn. Code Ann. § 36-1-113(g)(14). This ground requires clear and convincing proof of two elements. *In re Neveah M.*, 614 S.W.3d 659, 674 (Tenn. 2020). 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.* 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.* 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. *Id.* at 677. 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.*; *see also In re Amynn K.*, No. E2017-01866-COA-R3-PT, 2018 WL 3058280, at *13 (Tenn. Ct. App. June 20, 2018).

Regarding the second prong of section 36-1-113(g)(14),

> [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 Virgil W., No. E2018-00091-COA-R3-PT, 2018 WL 4931470, at *8 (Tenn. Ct. App. Oct. 11, 2018) (quoting *Ray v. Ray*, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001)).

Here, the trial court found that Appellants did not prove this ground "due to the way this case evolved, with [Mother] orchestrating the four-month statutory period while [Father's] pleadings are pending[.]" As we did with the abandonment grounds, we respectfully disagree with the trial court's findings and conclude that Appellants proved, by clear and convincing evidence, that Father has failed to manifest a willingness to assume legal and physical custody of the Child.

As a threshold point, the four-month period discussed *supra* is inapposite for purposes of termination under section 36-1-113(g)(14). Although the trial court relied on the perceived "orchestration" of the four-month period in ruling on this ground, section (g)(14) does not mention any particular four-month period. The analysis of a parent's failure to manifest an ability and willingness to assume custody or financial responsibility focuses on the parent's actions throughout the life of the Child. *In re Neveah M.*, 614 S.W.3d at 677 (internal quotations omitted) (explaining that the legislative intent of section 36-1-113(g)(14) is to allow termination of parental rights "upon proof of a parent's or guardian's *long term* either inability or unwillingness to provide for a child that is biologically or legally yours, and such conduct leads to harm to a child") (emphasis added).

The proof in this case establishes that throughout the Child's life thus far, Father has shown little interest in parenting. Mother and Stepfather have done the lion's share of day-to-day caregiving for the Child. Father has never fixed the Child a meal or taken her to a doctor's appointment. The last time Father helped put the Child to bed was when the Child was only a few months old, and there is no evidence that Father has ever requested overnight visitation with the Child. Aside from a few text messages, there is little proof that Father inquires about the Child on any regular basis. As best we can discern from the record, prior to August of 2020, Father saw the Child only a few times per year when he came to town. Even after Father ceased attending college in Indiana, he stayed in Indiana with Kaitlin M. Father conceded at trial that his relationship with the Child is "distant" and that he could have done more to foster it. As the trial court aptly noted, "[Father's] immediate family members are the moving force in protecting their rights to have [the Child] involved in their lives and in the [Father's] family." The trial court also questioned Father's credibility regarding his desire to parent the Child, describing his demeanor as "nonchalant," "self-centered and selfish." The record bears out such findings. Considering the totality of Father's actions and his long-term behavior, the proof is clear and convincing that Father has failed to manifest a willingness to assume legal and physical custody of the Child. The first prong of section 36-1-113(g)(14) is therefore satisfied. *In re Neveah M.*, 614 S.W.3d at 677.

Sadly, Father's disinterest is not lost on the Child. It is undisputed that the last time the Child saw Father, in December of 2020, she referred to him as a different family

member. According to Mother's family, this was not the only occasion on which the Child appeared not to recognize Father. Mother testified that it is difficult to leave the Child alone with Father and his family because the Child screams and cries. Mother also testified that following such episodes, the Child's behavior changes and she wets the bed. The Child refers to Stepfather as her father and is bonded to him. Stepfather has been a primary caregiver for virtually all of the Child's life. The Child is also bonded to her half-sister, with whom she is close in age.

This Court has previously held that when a parent is essentially a stranger to a Child, and the Child is thriving and bonded in his or her current household, forcing the Child to begin visitation with the estranged parent is likely to cause psychological harm to the Child. *See In re Braelyn S.*, 2020 WL 4200088, at *17 (collecting cases and noting that "there can be no dispute that [f]ather is a virtual stranger to the child[;] [o]ther cases have held in similar situations that forcing the child to begin visitation with a near-stranger would make psychological harm sufficiently probable"). For all of the reasons addressed above, this case is analogous to *Braelyn S.* and the cases cited therein. Consequently, Appellants proved, by clear and convincing evidence, the second prong of Tennessee Code Annotated section 36-1-113(g)(14). The trial court erred in concluding otherwise.

Best interests

Having determined that Appellants proved several statutory grounds for termination of Father's parental rights, we turn to the best interests of the Child. 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 child's best interests. Tenn. Code Ann. § 36-1-113(c). Indeed, "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)). Rather, 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.* As such, the focus of the best interest analysis is not the parent but rather 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.").

Under the version of section 36-1-113(i) in effect at the time the petition was filed, we consider nine statutory factors when analyzing best interests:

> (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.

Tenn. Code Ann. § 36-1-113(i). These factors are 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).

In this case, the trial court made detailed findings of fact and conclusions of law regarding the Child's best interests:

> The Court finds that [Father] has failed to make any adjustment of circumstances, conduct or conditions as to make it safe and in the child's best interest to be in a home with him. [Father] agrees that he will not seek visitation of [the Child] for the next year while he is stationed in South Korea. Otherwise, the Court knows nothing definite about any home in the future, and whether he could provide a safe environment and stable care and supervision for [the Child].
>
> As we sit in Court, [the Child] does not know [Father] as anyone other than a reluctant playmate. These factors weigh in favor of termination.
>
> The Court finds that [Father] has failed to establish a close and meaningful relationship with [the Child] despite [Mother's] efforts to encourage him to do so. It is his family, and not [Father], who desire a relationship with [the Child]. His history, as well as his nonchalant demeaner in court, validate the Court's statements. In [Father's] eyes, this case is all about him. This factor weighs in favor of termination.
>
> The Court doesn't know enough about [Father] to be concerned about his mental and emotional status, and whether his emotional status would be detrimental to the child or prevent him from effectively providing safe and stable care and supervision for the child. The Court finds [Father] self-centered and selfish.
>
> Except for the brief time [Mother] and [Father] lived together when [the Child] was born, the record is void of any day-to-day interaction and responsibility on [Father's] part in caring for the child over her entire life.
>
> The Court finds a change of caretakers and physical environment will have a profound negative effect on the child, both emotionally and psychologically. This factor weighs in favor of termination.
>
> [Father] has failed to personally provide financial support for his child. He has failed to reimburse family members for their financial support. This factor weighs in favor of termination.
>
> Ruling: The Court finds [Appellants] have carried their burden of proof by clear and convincing evidence that termination of [Father's] parental rights is in the child's best interest under this test.

Largely, the record preponderates in favor of the trial court's findings. With regard to the first factor, we note that Father's decision to join the military is commendable and that his absence in this regard does not weigh against him. When the petition for

termination was filed, Father was still living and working in Indiana, and there was no evidence that his absence from the Child's life up to that point was related to military service. Our conclusion that Father failed to make a meaningful adjustment of circumstances stems from the undisputed evidence that in the first four years of the Child's life, Father made virtually no effort to foster a relationship with the Child or have contact with her on a regular basis. Further, Father testified that once he is out of the military, he and Kaitlin M. plan to live in Sevierville, Tennessee, which is several hours away from the Child. Accordingly, notwithstanding his absence due to service, Father has no future plans to reside in the same place as the Child or see her on a regular basis. We also note that there was some evidence, primarily the testimony of Father's stepfather, that Father has reimbursed him for small amounts of child support.

Aside from inconsequential discrepancies, we agree with the trial court's best interest findings and its conclusion that termination is in the Child's best interests. Father has done virtually nothing to foster a relationship with the Child and at trial seemed disinterested in doing so in the future. As discussed at length above, this has profoundly affected the Child. By all accounts, she regards Stepfather as her father figure and has a close and loving relationship with him. The Child is bonded to her half-sister and Mother's family and, in contrast, has a distant relationship with Father's family. Father concedes that the relationship is distant and that he could have done more. Based on all of the proof adduced at trial, we conclude that the Child's best interests are served by terminating Father's parental rights, such that the Child can become fully integrated into Mother and Stepfather's stable and loving home.

The trial court erred in determining that no statutory grounds for termination were proven at trial. We conclude that Appellants proved, by clear and convincing evidence, abandonment by failure to visit and by failure to support and Father's failure to manifest a willingness to assume legal and physical custody of the Child. We also conclude that Appellants proved, by clear and convincing evidence, that terminating Father's parental rights is in the Child's best interests. The trial court's ultimate ruling that Appellants' petition should be denied and dismissed is therefore reversed.

CONCLUSION

The ruling of the Chancery Court for Giles County is reversed, and this case is remanded for proceedings consistent with this opinion. Costs on appeal are assessed to the appellee, Caleb G., for which execution may issue if necessary.

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KRISTI M. DAVIS, JUDGE