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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs February 1, 2023

IN RE ABRAHAM S.

Appeal from the Juvenile Court for Davidson County
No. PT263633 Sheila Calloway, Judge

No. M2022-00690-COA-R3-PT

Keith S. (“Father”) appeals the termination of his parental rights to his son, Abraham S. (“the Child”). The Juvenile Court for Davidson County (“the juvenile court”) terminated Father’s parental rights based on several statutory grounds: abandonment by failure to visit and failure to support; abandonment by failure to establish a suitable home; persistent conditions; and failure to manifest an ability to assume legal and physical custody. The juvenile court concluded that one alleged ground for termination, substantial noncompliance with permanency plan, was not proven by clear and convincing evidence. Following our review of the record, we affirm the trial court’s ruling as to all but one ground for termination. Because the record contains scant evidence of help offered to Father regarding housing, we conclude that abandonment by failure to establish a suitable home was not proven by clear and convincing evidence. We affirm the juvenile court’s ruling as to the other statutory grounds, and we affirm the ruling that termination of Father’s parental rights is in the Child’s best interests.

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

Kelli Barr Summers, Brentwood, Tennessee, for the appellant, Keith S.¹

Jonathan Skrmetti, Attorney General and Reporter; Amber L. Barker, Assistant Attorney General, for the appellee, Tennessee Department of Children’s Services.

Thomas H. Miller, Franklin, Tennessee, Guardian ad Litem.

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

OPINION

BACKGROUND

The Child was born at Metropolitan Nashville Hospital in January of 2020. He had cocaine in his system. At the time, Father lived at the Nashville Rescue Mission (“the Mission”) where he met the Child’s mother.² Mother and Father never committed to a relationship, and contact between the two remained infrequent. Indeed, Father never knew Mother used cocaine, and Father only learned about the Child three months into Mother’s pregnancy. Upon learning of the Child, however, Father seemed to commit to Mother. The pair moved together to Mayfield, Kentucky and later returned together to Nashville. At some point prior to the Child’s birth, Mother left Father and discontinued contact. Consequently, Father missed the Child’s birth and only learned of it on January 22, 2020, after someone left a message for him at the Mission. That day, Father went to Metropolitan Nashville Hospital and signed the Child’s birth certificate, asserting paternity.

However, Father did not meet the Child that day. Because the Child was born with drugs in his system and the Mother admitted same, DCS filed an Immediate Protection Agreement requiring Mother to enter a substance abuse treatment program with the Child. After just two weeks in the program, the Mother willingly surrendered custody of the Child. Father also lacked the basics required to provide for the Child: he could not provide housing, and he remained unemployed. Because neither parent could care for the Child, the juvenile court granted DCS’s petition for emergency custody on February 14, 2020.

DCS worked with Father to develop a Family Permanency Plan (“the Plan”). The Plan required Father to (1) procure stable and suitable housing sufficient for the Child’s basic needs; (2) obtain lawful, regular income evidenced by check stub or documentation; (3) maintain a bonded relationship with the Child through visitation at least four hours a month; (4) participate in a parenting assessment and follow all subsequent recommendations; (5) complete a mental health assessment and follow all subsequent recommendations; and (6) maintain regular contact with DCS and provide the agency with all reasonable updates, such as changed contact information or address. DCS agreed to provide transportation and other resources to help Father. DCS advised Father that failure to substantially complete the Plan would result in DCS petitioning to terminate his parental rights. Father testified that he participated in the creation of the initial plan.

Initially, Father took meaningful steps to follow the Plan. He completed the parenting assessment and the recommended parenting classes. He also completed the mental health screening, though he never followed through with the recommended

² Mother’s parental rights are not at issue in this appeal.

counseling or psychiatric visits.³ At least once, immediately following the Child's removal, Father met the Child at the Hermitage Library for a supervised visit. Father remained unable to find regular employment; rather, he bounced between three employers who sporadically offered as-needed, daily work, hoping one of these employers would place him in a longer-term job. This never occurred, and Father continued residing at the Mission.

By May of 2020, Father's efforts to follow the Plan declined. That month, DCS placed the Child with his current foster family with instructions to arrange visits between the Child and Father using video-call software provided by DCS. Every Saturday and Sunday evening at 6:00 p.m., the Child's foster mother ("Foster Mother") used the software to create an internet link that she would then email to Father, Father's attorney, and the Child's then-DCS caseworker. This internet link allowed the recipients to join a video call where Father could meet with the Child. Father's testimony suggests that he understood how he would receive these internet links, how to follow them to join the video call, and how to participate in the video call. The record shows Father participated in at least four video calls from April 13, 2020 through May 23, 2020. After May 23, 2020, Father stopped appearing for the visits.

Through June of 2020, Foster Mother continued to create and send the internet links to Father, his attorney, and DCS. She and the Child joined the video call before the scheduled time, waited for at least fifteen minutes after the scheduled time, and then left the video call. Father did not join. At the same time, DCS continued its attempts to contact Father. They reached out through his provided contact information, visited the Mission, contacted his attorney, and yet still could not contact him. Likewise, Father never contacted Foster Mother, DCS, or his attorney to communicate that he would not attend the visits or explain his failure to attend. Consequently, in July of 2020, after a full month of missed visits and efforts to contact Father, DCS advised Foster Mother that DCS had lost contact with Father and that, until further notice, she no longer needed to send the internet links. On July 29, 2020, an adjudicatory hearing was held at which the juvenile court determined that the Child was dependent and neglected in Father's care.⁴

The record proves murky regarding Father's activities from May of 2020 through October of 2020. According to Father's trial testimony, he completely quit working in June of 2020, and the record contains some indication that he returned to Kentucky. Around the same time, Father's contact information changed multiple times because he lost or broke multiple cell phones and simultaneously forgot the passwords to his email addresses. Despite the Plan's requirements, Father failed to consistently update DCS on any of these changes during this period. Consequently, most of DCS's attempts to contact

³ At trial, Father stated he attempted to obtain counseling and to visit a psychiatrist, but TennCare denied his request. DCS maintained at trial, however, that it would have paid for these visits if Father had provided proof of TennCare's denial.

⁴ The Juvenile Court's order was entered on October 7, 2020.

Father failed until DCS Case Manager Reba Terry (“CM Terry”) took over the case in October of 2020 and finally located Father.⁵

Around that time, Nashville’s Metropolitan Development and Housing Authority advised her that the agency had several housing openings it needed filled, and asked CM Terry to provide an application specifically to Father. While Father proved difficult to locate, CM Terry mailed and emailed the application to Father before attempting to personally hand deliver the application to Father at the two local shelters where she knew Father previously stayed. Eventually, CM Terry located Father at the Mission and provided him the application.

During this meeting, Father accepted the application but informed CM Terry he had already applied for housing in Kentucky and expected to receive his placement within two months. Father confirmed he remained unemployed but wanted to resume his video-call visits with the Child. CM Terry agreed to facilitate these meetings and worked with Foster Mother to schedule the visits starting on October 6, 2020. However, Father cancelled his visit with the Child before it took place and then cancelled two more scheduled visits later that month. After the last cancellation, DCS again experienced difficulty in maintaining contact with Father; indeed, CM Terry lost all contact with Father until April of 2021. In the interim, on January 5, 2021, DCS furnished a revised permanency plan with largely the same requirements as the original.

On April 22, 2021, CM Terry emailed Father a document titled “Criteria and Procedures for Termination of Parental Rights.” Shortly thereafter, Father called CM Terry to confirm he had received and reviewed the document, but he stated he wanted to regain custody over the Child. During this phone call, Father acknowledged he had not visited the Child in eleven months, but he indicated he hoped to resume visits. On May 11, 2021, the Child’s guardian ad litem (“GAL”) filed the petition to terminate Father’s parental rights,⁶ alleging (1) abandonment by failure to visit and failure to support; (2) abandonment by failure to provide a suitable home; (3) substantial noncompliance with the permanency plan; (4) persistent conditions; and (5) failure to manifest an ability and willingness to assume legal and physical custody of the Child. The petition also asserted termination was in the Child’s best interests. Initially, Father informed the court through his counsel that he would not contest the petition; however, Father later withdrew this decision in a timely manner.

On April 29, 2022, the Juvenile Court conducted a bench trial at which Father, Foster Mother, and CM Terry testified. Following the testimony, the juvenile court ruled

⁵ DCS successfully contacted Father only twice during this period. On June 22, 2020, Father provided DCS with an updated phone number—the only time he did so—and on July 7, 2020, Father answered DCS’s phone call only to tell DCS he would call back. He never did. DCS had no further contact with Father until early October 2020.

⁶ DCS joined as co-petitioner.

orally and found that DCS proved, by clear and convincing evidence, all but one ground for termination.⁷ Additionally, the juvenile court agreed with the GAL that it was in the Child's best interests to terminate Father's parental rights. On July 18, 2022, the juvenile court entered its final order. Father appealed to this Court.

ISSUES

On appeal, Father challenges the juvenile court's ruling as to each statutory ground found by the juvenile court. He also asserts that the juvenile court erred in determining that termination of his parental rights is in the Child's best interests. We review each of these issues in turn.

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(g) provides the various statutory grounds for termination of parental rights. “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)).

Considering 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

⁷ The juvenile court concluded that Father did not complete the permanency plan but ultimately held that DCS failed to meet the burden necessary to prove substantial noncompliance.

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 juvenile 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 juvenile 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 juvenile 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.

ANALYSIS

Grounds for termination

A. Abandonment by failure to visit or support

Tennessee Code Annotated section 36-1-113(g)(1) lists abandonment, as defined in section 36-1-102, as a ground for terminating parental rights. At the time the petition was filed,⁸ the applicable version of section 36-1-102 provided as follows:

⁸ We apply the version of the statute in effect at the time the petition for termination was filed. See *In re Braxton M.*, 531 S.W.3d 708, 732 (Tenn. Ct. App. 2017).

(1)(A) For purposes of terminating the parental or guardian rights of a parent . . . of a child to that child in order to make that child available for adoption, “abandonment” means that:

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

This ground for termination is established when a parent, “for a period of four (4) consecutive months, [fails] to visit or engage in more than token visitation.” Tenn. Code Ann. § 36-1-102(1)(E). As an affirmative defense, a parent may establish, by a preponderance of the evidence, that the failure to visit was not willful. Tenn. Code Ann. § 36-1-102(1)(I). As this Court has explained,

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

In re Audrey S., 182 S.W.3d at 864 (footnote and citations omitted); *see also In re Mattie L.*, 618 S.W.3d 335, 350 (Tenn. 2021) (“Failure to visit is not willful if it is the result of coercion.”); *In re Adoption of Angela E.*, 402 S.W.3d 636, 640 (Tenn. 2013) (“A parent cannot be said to have abandoned a child when his failure to visit or support is due to circumstances outside his control.”).

Failure to visit

Here, Father admits he failed to visit the Child from May 23, 2020, until after the petition was filed on May 11, 2021. This period well-exceeds the four-month window referenced in section 36-1-102(1)(E).⁹ Accordingly, Father’s failure to visit is undisputed. Nevertheless, Father argues on appeal that his abandonment was not willful because Foster Mother refused to send the video-call links to Father.

The only evidence supporting Father’s argument is his own trial testimony. In response to a question about the large gap in Father’s visitation, Father replied:

⁹ Here, the relevant statutory four-month period is January 10, 2021, through May 10, 2021.

A. Yes, but I didn't have a [video-call] visit for about a year because of COVID-19. And I had a [video-call visit], and it was just abruptly cut off. And I emailed the foster parent, and she never told me why she cut my [visits]. I didn't have any kind of meeting until about a year later. This was in May of 2021 when I had a [video-call] meeting. And I couldn't visit him in person because of COVID-19, so what was I to do? I mean, nobody would let me visit my son basically.

Q. So it's your testimony that you were denied visitation?

A. Yeah.

Q. So if Ms. Terry –

A. I mean, because the only way I could visit him was by the [video call], and she had control of the [video call]. I mean, how am I going to visit him if she doesn't get on the phone and put him on the camera?

Father also testified that he attempted to email Foster Mother but received no answer. Father asserted that he forwarded these emails to his attorney and alerted CM Terry that Foster Mother refused to send him the links but that neither party resolved the issue. Father did not offer these emails at trial.

Conversely, Foster Mother testified that she continuously tried to facilitate visits between Father and the Child but that these efforts went unreciprocated. Foster Mother testified that she continued to email Father the video-call links for over a month after Father stopped appearing for visits with the Child in May of 2020. Moreover, she only ceased sending the video-call links once DCS instructed her they were no longer necessary because DCS lost contact with Father. Foster Mother's testimony was corroborated by that of CM Terry. Moreover, once DCS requested that Foster Mother resume scheduling the visits, Foster Mother complied promptly. For example, on October 6, 12, and 21, 2020, Foster Mother made herself and the Child available for Father to visit, but he cancelled all three opportunities.¹⁰

¹⁰ It is undisputed that shortly after the termination petition was filed, Father began attending his scheduled visits with the Child. But “[a]bandonment may not be repented of by resuming visitation or support subsequent to the filing of any petition seeking to terminate parental or guardianship rights or seeking the adoption of a child.” Tenn. Code Ann. § 36-1-102(1)(F); *see also In re Jacobe M.J.*, 434 S.W.3d at 571 (“Father’s visitation after the filing of the petition cannot cure his failure to visit in the four month period prior to the filing date.”). Nonetheless, we note this fact here because the parties agree that Foster Mother facilitated visits by making the Child available. Except when Foster Mother’s family fell ill from the coronavirus, Foster Mother ensured the Child arrived for every scheduled visit. Often, Foster Mother took time off work to facilitate these appointments, and on at least one occasion, even provided Father transportation back to the bus stop. Thus, the record preponderates against Father’s testimony that Foster Mother impeded Father’s access to the Child.

Finally, CM Terry testified that Father was the party who typically cancelled visitation:

A. [The agency supervising the visits] would schedule the visits, and [Father] would either cancel or not show. It got to the point where I would put in the visits, and [the agency] pretty much would refuse to take it until we had a meeting because visits were canceled so often. At that point, I just said, “I’m going to supervise [the visits] myself so that I know that a visit is scheduled; I’ll know whether or not he’s coming.”

Inasmuch as the juvenile court found that “there’s not really a good reason why the father couldn’t consistently visit during the time period[,]” the juvenile court seems to have credited the testimony of Foster Mother and CM Terry over that of Father. *See Manning v. Manning*, 474 S.W.3d 252, 262 (Tenn. Ct. App. 2015) (noting that “in some cases, we may assume that the juvenile court found one party more credible than another due to the juvenile court’s decision”); *Kerst v. Upper Cumberland Rental and Sales, LLC*, No. M2014-00894-COA-R3-CV, 2015 WL 1416171, at *3 (Tenn. Ct. App. Mar. 25, 2015) (deferring to the juvenile court’s “implicit” credibility findings, and noting that same would not be overturned absent clear and convincing evidence to the contrary). On the record before us, we are disinclined to disturb that ruling. *See C.W.H. v. L.A.S.*, No. E2021-00504-COA-R3-JV, 2022 WL 17480100, at *12 (Tenn. Ct. App. Dec. 7, 2022) (“The record does not contain clear and convincing evidence establishing that the juvenile court’s implicit credibility findings should be re-evaluated.”).

Father failed to prove by a preponderance of the evidence that his failure to visit was not willful, and it is undisputed that Father failed to visit the Child during the relevant four-month period. Thus, the juvenile court properly concluded that Father abandoned the Child by failure to visit. *See* Tenn. Code Ann. § 36-1-102(1)(A).

Failure to support

The juvenile court also concluded that Father abandoned the Child by failing to provide financial support. *See* Tenn. Code Ann. § 36-1-102(1)(D). Like failure to visit, failure to support occurs when a parent, “for a period of four (4) consecutive months, [fails] to provide monetary support or . . . more than token payments toward the support of the child.” *Id.* Thus, the relevant statutory four-month period is the same as in the analysis of failure to visit—January 10, 2021, through May 10, 2021. Parents facing termination may argue, as an affirmative defense provable by a preponderance of the evidence, that their failure to support the child was not willful. Tenn. Code Ann. § 36-1-102(1)(I).

Here, Father concedes that he failed to provide any financial support towards the Child in the four months preceding the filing of the termination petition. Nevertheless, Father contends that DCS failed to prove by clear and convincing evidence that Father’s

failure to support the Child was willful or that he did not have a justifiable excuse for failing to provide support. As Father argues in his brief, “DCS has the burden to prove by clear and convincing evidence that, during the relevant four-month period, [Father]: (1) had the ability to pay support; (2) did not pay more than token support; and (3) did not have a justifiable excuse for non-payment.” However, Father misstates the law.

To prove that Father abandoned the Child by failure to support, section 36-1-102(1)(D) only requires DCS to prove by clear and convincing evidence that Father failed “to provide monetary support” during the relevant four-month period. DCS met this burden insofar as Father admitted he failed to provide monetary support at any point, including between January 10, 2021, and May 10, 2021. At that point, the burden fell to Father to assert, as an affirmative defense, that his failure to support was not willful, and to prove same by a preponderance of the evidence. Tenn. Code Ann. § 36-1-102(1)(I). Instead, Father admitted to the juvenile court that he failed to provide support for the Child, explaining that he chose to pay other bills instead of child support:

Q. All right. So the next ground that the guardian ad litem alleged in his petition is that you haven’t supported [the Child] since he’s been in foster care. Would you agree with that?

A. Well, yeah, I guess I would.

Q. You’ve not made any –

A. Because I was trying to get a house and everything for [the Child]. I was just spending up money. No, I really didn’t. I would agree with you.

Q. You would agree that you’ve not –

A. Yes, I would agree with that.

Q. -- paid any support towards [the Child’s] care since he’s been in foster care?

A. I would, yes.

Q. Were you made aware that you needed to provide some form of support for him?

A. I was asked for some diapers. I couldn’t do it. I mean, I was going back and forth from Kentucky to here, and I was actually living there and staying in a hotel room and, like I was saying, trying to find housing. I ran out of money doing that.

Q. You were –

A. Yeah, I didn't give any money. I guess I did it on purpose, because it was during COVID-19. I didn't know what to do.

Q. Okay. You say at one point you were asked to provide diapers, and you couldn't even come up with the money to do that?

A. Yes.

Q. Do you smoke cigarettes?

A. Yeah.

Q. Do you have to pay for those cigarettes that you smoke?

A. Yeah, but I don't smoke cigarettes like you might think -- might be thinking of. I might get a pack of cigarettes, and it'll last me a month.

Inasmuch as Father testified that he chose to pay other expenses instead of offering any support towards the Child's care, the juvenile court did not err in concluding that Father did not prove a lack of willfulness by a preponderance of the evidence. Accordingly, we conclude that the record contains clear and convincing evidence that Father failed to support the Child, and the juvenile court properly terminated Father's parental rights pursuant to this ground.

B. Abandonment by failure to provide a suitable home

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

(a) The child has been removed from the home or the physical or legal custody of a parent . . . by a court order at any stage of proceedings in which a petition has been filed in the juvenile court alleging that a child is a dependent and neglected child, and the child was placed in the custody of the department or a licensed child-placing agency;

(b) The juvenile court found, or the court where the termination of parental rights petition is filed finds, that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child's situation prevented reasonable efforts from being made prior to the child's removal; and

(c) For a period of four (4) months following the physical removal, the department or agency made reasonable efforts to assist the parent . . . to establish a suitable home for the child, but that the parent . . . ha[s] not made reciprocal reasonable efforts to provide a suitable home and ha[s] demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date. The efforts of the department or agency to assist a parent or guardian in establishing a suitable home for the child shall be found to be reasonable if such efforts equal or exceed the efforts of the parent or guardian toward the same goal, when the parent or guardian is aware that the child is in the custody of the department[.]

Id. § 36-1-102(1)(A)(ii)(a)–(c).

In applying this ground, we “consider[] whether a child has a suitable home to return to after the child’s court-ordered removal from the parent.” *In re Adaleigh M.*, No. E2019-01955-COA-R3-PT, 2021 WL 1219818, at *3 (Tenn. Ct. App. Mar. 31, 2021). To terminate parental rights under this ground, the juvenile court must find “that a parent failed to provide a suitable home for his or her child even after DCS assisted that parent in his or her attempt to establish a suitable home.” *In re Jamel H.*, No. E2014-02539-COA-R3-PT, 2015 WL 4197220, at *6 (Tenn. Ct. App. July 13, 2015). A suitable home requires “‘more than a proper physical living location.’” *In re Daniel B. Jr.*, No. E2019-01063-COA-R3-PT, 2020 WL 3955703, at *4 (Tenn. Ct. App. July 10, 2020) (quoting *Tenn. Dep’t of Children’s Servs. v. C.W.*, No. E2007-00561-COA-R3-PT, 2007 WL 4207941, at *3 (Tenn. Ct. App. Nov. 29, 2007)). A suitable home also requires that “[a]ppropriate care and attention be given to the child,” *In re Matthew T.*, No. M2015-00486-COA-R3-PT, 2016 WL 1621076, at *7 (Tenn. Ct. App. Apr. 20, 2016), and that the home “be free of drugs and domestic violence.” *In re Hannah H.*, No. E2013-01211-COA-R3-PT, 2014 WL 2587397, at *9 (Tenn. Ct. App. June 10, 2014).

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

parent is required to make “reasonable efforts” to establish a suitable home, “successful results” are not required, and the “statute requires that the parent also have demonstrated a lack of concern for the [child].” *In re D.P.M.*, No. M2005-02183-COA-R3-PT, 2006 WL 2589938, at *10 (Tenn. Ct. App. Sept. 8, 2006).

Here, DCS filed a petition for dependency and neglect on February 10, 2020, followed by a petition for emergency removal and custody of the Child on February 13, 2020, alleging, *inter alia*, that Father was unable to provide for the Child’s basic needs. The petition for emergency removal and custody was granted the next day, the juvenile court finding that the lack of reasonable efforts to prevent the Child’s removal was justified. *See* Tenn. Code Ann. § 36-1-102(1)(A)(ii)(a)-(b). Later, on October 7, 2020, the juvenile court entered an order adjudicating the Child dependent and neglected per Father’s agreement. Father agreed he was unsuccessful in finding housing suitable for the Child. Since the Child’s removal, Father has only managed to find housing at the Mission, a condemned house in Kentucky, and, for a short period, in a Kentucky hotel room. By the time the juvenile court held the termination hearing, Father testified that he had returned to the Mission and was waiting for the Kentucky-based housing program to accept his application. Thus, the record contains clear and convincing evidence to establish the first two elements of this ground for termination.

On appeal, however, Father argues that DCS failed to meet its burden of demonstrating that following the Child’s removal, DCS made reasonable efforts to assist Father in obtaining housing. Importantly, the statute “does not limit the window during which DCS may satisfy its obligation to make reasonable efforts to the four-month period directly following statutory removal.” *In re Jakob O.*, No. M2016-00391-COA-R3-PT, 2016 WL 7243674, at *13 (Tenn. Ct. App. Dec. 15, 2016). Rather, to satisfy this element, DCS need only exert reasonable efforts during *any* four-month period following the child’s removal and before filing the petition. Tenn. Code Ann. § 36-1-102(1)(A)(ii)(c); *In re Rahjada W.*, No. E2019-01798-COA-R3-PT, 2020 WL 2893434, at *5 (Tenn. Ct. App. June 3, 2020). Nevertheless, we agree that DCS failed to sufficiently prove that it exerted reasonable efforts to help Father obtain suitable housing.

In the fourteen-month period between the Child’s removal and the termination petition’s filing, the record establishes only one occasion when DCS sought to aid Father. In October of 2020, after considerable efforts to reach Father, CM Terry provided Father with a single housing application. However, DCS never followed up to ensure Father submitted the application, nor does the record indicate DCS provided any additional housing resources. *Compare with In re Diamond F.*, No. M2020-01637-COA-R3-PT, 2022 WL 905791, at *7 (Tenn. Ct. App. Mar. 29, 2022) (holding DCS exerted reasonable efforts where “DCS completed and mailed housing applications . . . on parent’s behalf” and “completed and mailed three applications to homeless housing help organizations, and contacted several trailer parks for the parents.”). Comparatively, Father submitted at least one self-obtained housing application, attempted to rent a house in Kentucky, and exerted

meaningful effort to find housing in Kentucky. Accordingly, on the record before us, Father's efforts exceeded those of DCS.

Although Tennessee does not require Herculean efforts by DCS, a single documented occasion of assistance does not prove by clear and convincing evidence that DCS exerted reasonable efforts to help a parent find suitable housing over a four-month period. *See In re Jacobe M.J.*, 434 S.W.3d at 569 (“Clear and convincing evidence . . . eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence.”). Consequently, we hold that DCS failed to prove that Father abandoned the Child by failing to provide a suitable home. The juvenile court's judgment is reversed as to this ground. However, because DCS successfully established alternative grounds, this ruling does not affect the juvenile court's ultimate decision to terminate Father's parental rights.

C. Persistent conditions

Next, the juvenile court also terminated Father's parental rights pursuant to Tennessee Code Annotated section 36-1-113(g)(3), which provides that termination may occur when:

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)(A).

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).

Considering this ground’s purpose, the record here clearly and convincingly supports the juvenile court’s conclusion that Father failed to remedy the persistent conditions necessitating the Child’s initial removal. DCS initiated a dependency and neglect action against Father on February 10, 2020, and the Child was removed from Father’s legal custody per an order entered on February 14, 2020. This occurred well over six months before the petition to terminate Father’s parental rights was filed in May of 2021. Tenn. Code Ann. § 36-1-113(g)(3)(A). The juvenile court later adjudicated the Child dependent and neglected after Father agreed his instability and transient lifestyle prevented him from providing suitable housing to the Child, and his chronic unemployment prevented him from providing for the Child’s basic needs. *See id.* At the termination hearing Father admitted these conditions remained unchanged.

There is little likelihood Father can remedy these conditions at an early date. Father began living at the Mission four years before the Child’s birth, and he continued to live there over two years after. While Father stated that he believed he would soon receive housing from the Kentucky-based program, the evidence shows that Father has held that belief since at least October of 2020. Additionally, Father remains unemployed, though he awaits a decision on his disability application that he filed well after the termination petition’s filing. Notwithstanding the efforts Father has taken, the bottom line is that his situation remains largely unchanged. And “[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.*, 2008 WL 4613576, at *20. Thus, it is substantially unlikely that Father will correct the conditions that led to the Child’s removal in a timely manner.

On the other hand, Foster Mother hopes to adopt the Child and has provided him “a loving, caring family for over two years,” with “a village of people who are there to help . . . make sure that the Child has the love and safety and security that he needs.” Allowing Father to retain his parental rights would prevent the Child’s adoption and, necessarily, his integration into his foster family. This outcome would “greatly diminish[] the child’s chances of early integration into a safe, stable, and permanent home.” See Tenn. Code Ann. § 36-1-113(g)(3)(A)(iii). Instead, it would force the Child to “linger[] in the uncertain status of foster child,” while Father struggles to “demonstrate an ability to provide a safe and caring environment for the child.” See *In re Navada N.*, 498 S.W.3d at 606. Thus, we find that DCS proved persistent conditions by clear and convincing evidence.

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

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

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

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

As to the first element, 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. *In re Neveah M.*, 614 S.W.3d 659, 677–78 (Tenn. 2020). 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.*

Regarding 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)) (footnotes omitted).

The juvenile court found that “in [her] heart of hearts,” she believes Father “does want to be able to provide for [the Child] and wants to assume custody and wants to have a relationship with his child[,]” a sentiment with which we agree. However, for the reasons discussed at length above, the juvenile court ultimately found that Father failed to manifest the ability to assume legal and physical custody or financial responsibility for the Child. We agree with this result as well. Father admits that he cannot provide the suitable and safe home necessary to assume legal and physical custody of the Child. Unfortunately, he remains homeless, but he agrees even the housing he temporarily obtained outside the Mission is not suitable for the Child. Moreover, Father admits he lacks the financial means to provide for the Child’s basic needs, as he depends upon the Mission to provide his own.

Regarding the second prong, we affirm the juvenile court’s conclusion that placing the Child in Father’s custody would risk significant physical and psychological harm to the Child’s welfare. First, Father’s inability to provide for his own needs highlights the likelihood that the Child would lack the physical care a young child demands. Under Father’s care, the Child would almost certainly experience housing instability. The evidence also suggests a strong likelihood that Father would neglect basic physical care the Child requires, for instance, because Father testified that he cannot buy diapers.

Moreover, removing the Child from his foster family poses a risk of severe psychological and emotional harm. As the juvenile court found, the Child views Father as “a man [he gets] to play with and see every once in a while,” but no father-son relationship exists. In contrast, the Child is attached to his foster family—the only family he has ever really known. He calls Foster Mother “Mom or Ma,” and his foster father “Dad or Papa.” When the Child feels afraid, hungry, or tired, he looks to Foster Mother to provide him care, and at night, he struggles to fall asleep unless Foster Mother remains near him. During the day, the Child continuously looks to spend time near his foster father and cries when separated from him. Similarly, the Child has developed sibling-like relationships with his two, slightly older foster sisters. Immediately after the Child wakes up each morning, he ventures to his foster sisters’ room to tell them “good morning.” The three children often play together and with their family dog. Removing the Child from this situation to place him in unsuitable, unstable housing with a man he hardly knows and who likely cannot provide the same level of care the Child currently receives would pose a significant risk of psychological and emotional harm upon the Child. Indeed, this Court

has held “that forcing the child to begin visitation with a near-stranger would make psychological harm sufficiently probable.” *In re Braelyn S.*, No. E2020-00043-COA-R3-PT, 2020 WL 4200088, at *17 (Tenn. Ct. App. July 22, 2020) (collecting cases noting same).

Accordingly, DCS established clear and convincing evidence that Father’s parental rights should be terminated pursuant to Tennessee Code Annotated section 36-1-113(g)(14).

Best Interests

In addition to proving at least one statutory ground for termination, DCS must prove by clear and convincing evidence that the Child’s best interests are served by terminating Father’s parental rights. 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 interests 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.”).

We look at twenty non-exhaustive factors when determining whether termination is in a child’s best interests. See Tenn. Code Ann. § 36-1-113(i)(1)(A)-(T). “The relevancy and weight to be given each factor depends on the unique facts of each case.” *In re Marr*, 194 S.W.3d at 499. In some circumstances, one factor may prove dispositive. *In re Audrey S.*, 182 S.W.3d at 878. Nevertheless, we must still consider “all the factors and all the proof” before concluding termination is in the child’s best interests. *In re Gabriella D.*, 531 S.W.3d 662, 682 (Tenn. 2017).

After considering all relevant factors, we agree that terminating Father’s parental rights proves in the Child’s best interests. First, proceeding with termination opens the pathway for the Child’s continued integration into his foster family. See Tenn. Code Ann. § 36-1-113(i)(1)(A) (“The effect a termination of parental rights will have on the child’s critical need for stability and continuity of placement”); *Id.* § 36-1-113(i)(1)(H) (“Whether the child has created a healthy parental attachment with another person or persons in the absence of the parent”). Already, the Child’s placement has provided him a loving, stable home in which he has developed into a happy, loving, and even bilingual child. Continued placement throughout his minority will likely provide him the tools necessary to succeed, while surrounding him with meaningful relationships and emotional support. Given the Child’s healthy and significant attachment to his foster family, to remove him from these caretakers and from his physical home would nearly certainly harm his emotional and psychological condition. See *id.* § 36-1-113(i)(1)(B) (“The effect a change of caretakers

and physical environment is likely to have on the child's emotional, psychological, and medical condition"); *Id.* § 36-1-113(i)(1)(I) ("Whether the child has emotionally significant relationships with persons other than parents and caregivers, including biological or foster siblings"); *In re Braelyn S.*, 2020 WL 4200088, at *19 ("[I]f termination were denied and even simply visitation with Father ordered, a temporary change in caretakers would occur that would place the child in the custody of someone currently seen as a stranger and would likely cause emotional and psychological harm to him.").

Moreover, as discussed at length above, Father continuously failed to demonstrate continuity and stability in meeting the Child's basic material needs. *See* Tenn. Code Ann. § 36-1-113(i)(1)(J) ("Whether the parent has demonstrated such a lasting adjustment of circumstances, conduct, or conditions to make it safe and beneficial for the child to be in the home of the parent"); *Id.* § 36-1-113(i)(1)(O) ("Whether the parent has ever provided safe and stable care for the child or any other child"); *Id.* § 36-1-113(i)(1)(P) ("Whether the parent has demonstrated an understanding of the basic and specific needs required for the child to thrive"); *Id.* § 36-1-113(i)(1)(Q) ("Whether the parent has demonstrated the ability and commitment to creating and maintaining a home that meets the child's basic and specific needs and in which the child can thrive"). His general instability and transient lifestyle left Father without a suitable home for the Child and unable to provide even occasional diapers. When Father found housing outside the Mission, his financial position forced him to live in a condemned home, which is unsafe for an adult, let alone a small child. *See id.* § 36-1-113(i)(1)(R) ("Whether the physical environment of the parent's home is healthy and safe for the child").

The pair's undeveloped relationship fails to compensate for these deficiencies. *See id.* § 36-1-113(i)(1)(D) ("Whether the parent and child have a secure and healthy parental attachment, and if not, whether there is a reasonable expectation that the parent can create such attachment"). Because Father failed to visit the Child for over a year, they never developed a father-son relationship. *Id.* Indeed, when Father finally began appearing for his visits, the Child cried until returned to his Foster Mother, and he experienced nightmares. Though the Child's responses eventually improved, the Child's relationship failed to meaningfully develop.

Since the Child's removal, Father failed to make any lasting adjustments to his circumstances, conduct, or conditions and failed to establish a safe and appropriate home for the Child. In many ways, Father's circumstances stem from his failure to take advantage of the programs DCS offered to provide to Father or would have provided Father had he remained in regular contact with the agency. Of course, as addressed above, DCS could have reasonably exerted or documented more effort on its part. But Father's long periods without contact likely impeded the potential efforts to reunite him with the Child.

To his credit, Father initially acted with urgency to gain custody over the Child. He acted quickly to establish paternity of the Child, completed his parenting assessment and recommendations, and attended a mental health assessment. However, by May 23, 2020, Father's efforts declined, and he never corrected or took meaningful steps to correct, the circumstances rendering the Child dependent and neglected. Moreover, Father failed to provide any support for the Child, though he understood the expense and effort required to raise a child. *See id.* § 36-1-113(i)(1)(S) ("Whether the parent has consistently provided more than token financial support for the child"). Instead of diapers, Father opted to purchase cigarettes. Thus, Father understands the basic needs of a child but did not do what was necessary to fulfill them.

Based on our review of the record, we feel no hesitancy in affirming the juvenile court's ruling that terminating Father's parental rights serves the Child's best interests.

CONCLUSION

The judgment of the juvenile court that DCS established the ground of abandonment by failure to provide a suitable home is reversed. The judgment of the juvenile court is in all other respects affirmed, including its ultimate ruling terminating Father's parental rights. Costs on appeal are assessed to the appellant, Keith S., for which execution may issue if necessary.

KRISTI M. DAVIS, JUDGE