

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

**IN RE JAYLA S.<sup>1</sup>**

**Appeal from the Juvenile Court for Lincoln County**  
**No. 22-JC-18      N. Andy Myrick, Judge**

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**No. M2022-01492-COA-R3-PT**

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The parents of Jayla S. appeal the termination of their parental rights. Jayla was removed from her parents' custody because Jayla tested positive for amphetamines at birth. The Department of Children's Services ("DCS") subsequently filed a petition to terminate both parents' parental rights. Following a two-day trial, the trial court found that multiple grounds for termination had been proven, including the ground of severe child abuse. Finding it also to be in the best interest of Jayla that her parents' parental rights be terminated, the court terminated both parents' parental rights. This appeal followed. Finding no error, we affirm.

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

FRANK G. CLEMENT JR., P.J., M.S., delivered the opinion of the Court, in which ARNOLD B. GOLDIN and KRISTI M. DAVIS, JJ., joined.

Jonathan Caulley Brown, Fayetteville, Tennessee, for the appellant, Ashley R. S.

Walter Garrett Honea, Fayetteville, Tennessee, for the appellant, Ronnie D. C.

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

**OPINION**

**FACTS AND PROCEDURAL HISTORY**

Ashley R. S. ("Mother") and Ronnie D. C. ("Father") are the parents of Jayla S., who was born prematurely in a bathroom of an Economy Inn in Winchester, Tennessee in

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<sup>1</sup> This court has a policy of protecting the identity of children by initializing the last names of the children, parents, relatives, and pre-adoptive parents.

October 2020.<sup>2</sup> Immediately thereafter, she was transported to Southern Tennessee Medical Center in Winchester, Tennessee, and then transferred to Erlanger Medical Center in Chattanooga, Tennessee. On the day of her birth, Jayla tested positive for amphetamines while her mother tested positive for amphetamines and reported taking Subutex. While hospitalized, Jayla exhibited withdrawal symptoms, including intermittent jerking and twitching of the arms and legs. As a consequence, Jayla was treated for drug exposure and received extensive treatment in neonatal intensive care in the hospital.

Acting on a referral concerning Jayla's and Mother's drug screens, DCS obtained an ex parte Protective Custody Order from the Juvenile Court of Franklin County, Tennessee on October 30, 2020, based on a petition that alleged that Jayla was dependent and neglected pursuant to Tennessee Code Annotated § 37-1-102(b)(13)(F), and (G) and severely abused pursuant to Tennessee Code Annotated § 37-1-102(b)(27). Based on the findings that Jayla was dependent and neglected and the victim of severe child abuse, the juvenile court granted temporary legal custody of Jayla to DCS effective October 28, 2020, and authorized placing her in foster care. Upon her release from the hospital, DCS placed Jayla in foster care with a family relative where she remains.

On February 22, 2022, the juvenile court adjudicated Jayla dependent and neglected and a victim of severe child abuse perpetrated by her parents due to Jayla's exposure to drugs in utero and Jayla's positive drug screen at birth. Based on the finding of severe child abuse, the court also relieved DCS of any obligation to make reasonable efforts to reunite Jayla with the parents.

In the interim, on February 2, 2022, DCS filed its petition to terminate the parental rights of Mother and Father in the Lincoln County Juvenile Court. The petition alleged multiple grounds as to both parents including: (1) abandonment by failure to visit; (2) abandonment by failure to provide a suitable home; (3) substantial noncompliance with the permanency plans; (4) severe child abuse; and (5) failure to manifest an ability and willingness to care for Jayla. As to Father only, it alleged the ground of failure to remedy persistent conditions preventing reunification. It also alleged that termination of both parents' parental rights was in Jayla's best interest. The case was tried over two days, on July 19 and September 9, 2022.<sup>3</sup> The evidence presented at trial established the following.

Permanency Plans were created without the participation of either parent. The first permanency plan was created on November 16, 2020, with alternative goals of Return to

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<sup>2</sup> Jayla was born prematurely at 33 weeks' gestation.

<sup>3</sup> On April 6, 2022, DCS filed a motion for default against each parent because they failed to file a responsive pleading, which the trial court granted on April 20, 2022. The matter was set for trial on May 18, 2022. On the morning of trial, both parents appeared but without counsel. Thus, the court appointed Jonathan Brown to represent Mother and Garrett Honea to represent Father. The court also continued the trial to July 19, 2022, when and where both parties were present and represented by counsel.

Parent and Adoption. The plan addressed both parents' alcohol and drug abuse as well as their mental health and housing needs. The plan noted that the parents' drug use is interfering with their ability to safely parent. It required that both parents submit to hair follicle drug tests, complete an alcohol and drug assessment and mental health assessments, be honest with the provider, and follow the recommendations until completion. The plan required the parents sign a release to allow DCS to access their records, submit to and pass random drug screens and obtain and maintain stable housing.

The second permanency plan, which was substantially the same as the first permanency plan, was created on May 6, 2021. The significant difference in this plan was that the goal of return to parent was removed. The second plan also required Father to submit to DNA testing for proof of paternity.

In October 2021, the third permanency plan was created and ratified without the parents' participation. The parents' responsibilities remained the same as before. By this time, Father had completed DNA testing that proved his paternity but neither parent had completed anything else. At the ratification hearing, the juvenile court found that the parents were in substantial noncompliance with their responsibilities as they had not sought mental health or alcohol and drug treatment, had not visited Jayla in the past four months, and had not maintained contact with DCS. Specifically, Mother had refused any services offered by DCS, insisting that she would independently seek services because she had health insurance. Mother also insisted that she go to Kathy Smith, a "certified clinical sociologist" and "certified health coach." This was problematic because DCS did not have a contract with her for services.

DCS Family Service Worker ("FSW") Kimberly Goney arranged for Father to complete alcohol and drug and mental health assessments, which he later declined because he also wanted to see Kathy Smith. Ms. Goney had also arranged for Health Connect America (hereinafter "Health Connect") to provide therapeutic visitation and hair follicle drug screens for the parents but Health Connect worker Amanda Gibson was unable to contact the parents after multiple attempts. She called and texted Mother's phone number, and she tried calling Father's phone number but was unsuccessful. Although she spoke to Mother on multiple occasions, Mother was often not responsive.

As for visitation with Jayla, there were two occasions when visits were scheduled but Mother cancelled one when someone in her home had Covid and another time when the parents had to take the paternal uncle to the hospital. Although the parents stated that transportation was an issue, Ms. Gibson spoke to them about TennCare as an option to assist with transportation, advising Mother that TennCare provided transportation to doctor's appointments and to a Suboxone clinic in Columbia. She also provided them with a phone number and offered to assist them, but the parents were unresponsive.

From January through August 2021, the parents visited Jayla only once, on June 19, 2021. During the two-hour visit, Mother was jittery and shaky, which caused Ms. Gibson to question whether Mother was using drugs. During the visit, Ms. Gibson twice asked Mother to sit down while holding Jayla out of concern that Mother would drop her. Father was more comfortable and was able to instruct Mother on what to do.

After this visit, Ms. Gibson attempted to contact the parents to arrange further visits. While Ms. Gibson was attempting to arrange therapeutic visits, Sarah Ahmed, a Health Connect worker, also attempted to contact the parents to schedule hair follicle drug screens. Both Ms. Gibson and Ms. Ahmed tried to coordinate schedules to complete the hair follicles at the same time they came for a visit, but the parents remained unresponsive.

In addition to the efforts of Health Connect personnel, Ms. Goney tried to work with the parents. At a court hearing, she notified them of who to contact for therapeutic visitation, and she sent them an email with the contact information they needed to arrange visits. At a December 2020 court date, Father notified Ms. Goney that he no longer had a phone and instructed her to use Mother's phone number to contact him. Ms. Goney tried calling and texting that number but received no responses. She then obtained an email address for Mother but was unsuccessful in communicating with Mother via any form of communication.

Significantly, Mother admitted at trial that she did not maintain contact with DCS, acknowledged that Ms. Goney contacted her about completing random drug screens, but Mother testified, "it wouldn't work right then." Father testified that he did not personally contact DCS or anyone else for services; rather, he was "next to" Mother when she would contact them.

The evidence revealed that the parents never attended any child and family team meetings, despite being invited to each. Father acknowledged that although DCS set up an alcohol and drug assessment for him and that Health Connect tried multiple times to set up a hair follicle screen, he did not comply. He recalled being ordered by the juvenile court to complete the alcohol and drug assessment and parenting classes, but he did not. Father acknowledged that he did very little of what was required of him under the permanency plan except for DNA testing while admitting that services were made available to him by DCS but that he chose to ignore them since he did not have a vehicle and he "just didn't answer" DCS's communications.

Jayla's grandmother, with whom the parents occasionally resided, provided Father and Mother with transportation to the Suboxone clinic, and sometimes Father would borrow her vehicle for his own use. However, when asked why he did not borrow her vehicle for visits with Jayla, Father answered, "That's a good question" and "I just didn't—I just didn't ask her."

Following the completion of the trial, the court entered a final order on September 30, 2022, terminating Mother's and Father's parental rights on the following grounds: (1) abandonment by failure to visit; (2) abandonment by failure to provide a suitable home; (3) substantial noncompliance with the permanency plans; (4) severe child abuse; and (5) failure to manifest an ability and willingness to care for Jayla.<sup>4</sup> As for Father only, the court also found that DCS had proven the ground of failure to remedy persistent conditions preventing reunification. The court also concluded that termination of Mother's and Father's rights was in Jayla's best interest. Accordingly, the court terminated both parents' parental rights.

This appeal by both parents followed.

### ISSUES

The two issues presented by both parents are substantially similar:

1. Whether the trial court erred in finding that there was clear and convincing evidence to establish any ground for termination.
2. Whether the trial court erred in finding that it was in the best interest of Jayla to terminate the parents' parental rights

### STANDARD OF REVIEW

"Parents have a fundamental constitutional interest in the care and custody of their children under both the United States and Tennessee constitutions." *Keisling v. Keisling*, 92 S.W.3d 374, 378 (Tenn. 2002). "[T]his right is not absolute and parental rights may be terminated if there is clear and convincing evidence justifying such termination under the applicable statute." *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)).

"To terminate parental rights, a court must determine that clear and convincing evidence proves not only that statutory grounds exist but also that termination is in the child's best interest." *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002) (citing Tenn. Code Ann. § 36-1-113(c)). "Clear and convincing evidence enables the fact-finder to form a firm belief or conviction regarding the truth of the facts, and eliminates any serious or substantial doubt about the correctness of these factual findings." *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010) (citation omitted). "The clear-and-convincing-evidence standard ensures that the facts are established as highly probable, rather than as simply

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<sup>4</sup> DCS also petitioned to terminate both parents' rights on the ground of abandonment for failure to support. The trial court found that ground had not been proven by clear and convincing evidence and DCS does not appeal that decision.

more probable than not.” *In re Carrington H.*, 483 S.W.3d 507, 522 (Tenn. 2016) (citations omitted).

In an appeal, “this [c]ourt is required ‘to review thoroughly the trial court’s findings as to each ground for termination and as to whether termination is in the child’s best interests.’” *In re Connor B.*, 603 S.W.3d 773, 779 (Tenn. Ct. App. 2020) (quoting *In re Carrington H.*, 483 S.W.3d at 525). In doing so, we must “determine whether the trial court’s findings, made under a clear and convincing standard, are supported by a preponderance of the evidence.” *In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006). Stated another way, we must make our “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 Carrington H.*, 483 S.W.3d at 524.

The trial court’s findings of fact are reviewed de novo upon the record with a presumption of correctness unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d). Questions of law, however, are reviewed de novo with no presumption of correctness. *In re Carrington H.*, 483 S.W.3d at 524.

## ANALYSIS

### I. GROUNDS FOR TERMINATION

The trial court found that DCS had proven five grounds for termination of Mother’s parental rights and six grounds for termination of Father’s parental rights. We will discuss each in turn.

#### A. Severe Child Abuse

A court may terminate a parent’s rights if the parent “has been found to have committed severe child abuse as defined in Tennessee Code Annotated § 37-1-102, under any prior order of a court or is found by the court hearing the petition to termination parental rights . . . to have committed severe child abuse against any child.” Tenn. Code Ann. § 36-1-113(g)(4). As is relevant to this case, “severe child abuse” is defined as:

(A)(i) The knowing exposure of a child to or the knowing failure to protect a child from abuse or neglect that is likely to cause serious bodily injury or death . . . ;

(E) Knowingly or with gross negligence allowing a child under eight (8) years of age to ingest an illegal substance or a controlled substance that

results in the child testing positive on a drug screen, except as legally prescribed to the child.

Tenn. Code Ann. § 37-1-102(b)(27)(A), (E).

On February 22, 2022, the Juvenile Court of Lincoln County entered an order in the dependent and neglect action finding that Jayla was a victim of severe child abuse due to her exposure to drugs in utero. This order was not appealed and neither parent challenges the finality or validity of the adjudicatory order.

“A finding of severe abuse is *res judicata* ‘in a later termination of parental rights proceeding when such a finding ha[s] been made in a previous dependency and neglect action.’” *In re Collwynn J.*, No. E2020-00726-COA-R3-PT, 2020 WL 7319549, at \*5 Tenn. Ct. App. Dec. 11, 2020) (citing *In re Heaven L.F.*, 311 S.W.3d 435, 439 (Tenn. Ct. App. 2010)), *no perm. app. filed*. Accordingly, the issue of Mother’s and Father’s severe child abuse of Jayla is *res judicata* in this termination action. *See In re Dakota C.R.*, 404 S.W.3d 484, 497 (Tenn. Ct. App. 2012); *In re Heaven L.F.*, 311 S.W.3d at 439-40. As we discussed in *In re Heaven L.F.*:

The doctrine of *res judicata* applies when “an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.” *Galbreath v. Harris*, 811 S.W.2d 88, 90 (Tenn. Ct. App. 1990). This court previously applied the doctrine of *res judicata* to prevent a parent from re-litigating whether she committed severe child abuse in a later termination of parental rights proceeding, when such a finding had been made in a previous dependency and neglect action. *See State v. Tate*, No. 01-A-01-9409-CV-00444, 1995 WL 138858, at \*5 (Tenn. Ct. App. Mar. 31, 1995). Mother and the Department were parties in the dependency and neglect action and the issue of whether Mother committed severe child abuse was fully litigated in that action. Therefore, the issue of whether Mother committed severe child abuse is *res judicata* and the trial court properly found by clear and convincing evidence that Mother’s parental rights should be terminated pursuant to Tenn. Code Ann. § 36-1-113(g)(4).

*In re Heaven L.F.*, 311 S.W.3d at 439-40.

For these reasons, the trial court properly held that the ground of severe child abuse had been established. *See In re Collwynn J.*, 2020 WL 7319549, at \*5-6 (affirming ground as *res judicata* where “[n]othing in the record suggests that [the prior severe abuse] finding

was appealed, and neither parent asserted at trial that the . . . order is somehow nonfinal”); *see also In re Trinity H.*, No. M2020-00440-COA-R3-PT, at \*10 (Tenn. Ct. App. 2020).

Although only one ground for termination need be established, we shall also discuss the other grounds found by the trial court. *See In re Heaven L.F.*, 311 S.W.3d at 440 (“If one statutory ground for termination is proven by clear and convincing evidence, a parent’s rights may be terminated if it is also determined that termination of the parent’s rights is in the best interests of the children.”); *see also In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003).

## B. Failure to Visit

Abandonment can arise from a number of circumstances, one of which is when the parent fails to visit. *See* Tenn. Code Ann. §§ 36-1-102(1)(A)(i); 36-1-113(g)(1). This form of abandonment occurs when a parent fails to visit the child for four consecutive months preceding the filing of the petition for termination. *See* Tenn. Code Ann. § 36-1-102(1)(A)(i).

DCS filed its termination petition on February 2, 2022; thus, the relevant four-month period ran from October 1, 2021, through February 1, 2022. *See* Tenn. Code Ann. § 36-1-102(1)(A)(i). The parents participated in only one visit, which occurred on June 19, 2021. Thus, the parents’ only visit was outside the four-month period.

Furthermore, one visit is token. *See In re Audrey S.*, 182 S.W.3d 838, 867 (Tenn. Ct. App. 2005) (determining that one or two visits during a four-month period is “nothing more than token visitation”); *In re Boston G.*, No. M2019-00393-COA-R3-PT, 2020 WL 2070399, at \*4 (Tenn. Ct. App. Apr. 29, 2020) (affirming finding that one visit was token visitation). “Token visitation” — visitation that, “under the circumstances of the individual case, constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child” — does not count. *See* Tenn. Code Ann. § 36-1-102(1)(C), (E).

We acknowledge that Mother and Father blame DCS for their lack of visits, arguing that DCS should have arranged visits and provided transportation.<sup>5</sup> However, whether DCS

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<sup>5</sup> Specifically, Mother contends: “The record indicates that transportation was never offered by DCS, no referrals were made for [Mother] by DCS, nor were any rehabilitation programs contacted on her behalf. The DCS worker only put in a case service to [H]ealth [C]onnect for visitations and hair follicle tests.” She also contends that “the law requires the Department of Children’s Services to make reasonable efforts to communicate with and assist parents with the requirements of their permanency plan.” Father made similar arguments and both parents focused on the fact that they had transportation problems and claimed that DCS never offered to drive the parents to a visit other than referring such responsibilities to Health Connect.



made reasonable efforts is not an essential element of this ground.<sup>6</sup> As we explained in *In re Kaliyah S.*, 455 S.W.3d 533 (Tenn. 2015):

nothing in the plain language of Section 36-1-113 indicates that a petitioner in a proceeding to terminate parental rights is in fact required to put on proof of DCS’s reasonable efforts to assist the respondent parent. Rather, the language of the statute indicates only that the trial court is to consider DCS’s reasonable efforts, or the lack thereof, in determining whether termination of the parent’s rights is in the child’s best interest. *See id.* § 36-1-113(i)(2).

*Id.*, 455 S.W.3d at 554 (footnote omitted); *see also In re Jordan P.*, No. E2022-00499-COA-R3-PT, 2023 WL 27706780, at \*6 (Tenn. Ct. App. Apr. 4, 2023), *no perm. app. filed*, (refusing to consider whether DCS made reasonable efforts to arrange visits as it “is not relevant to our review of the abandonment by failure to visit ground for termination”).

Willfulness is an essential element of this ground; however, the lack of willfulness must be raised as an affirmative defense in the answer to the petition pursuant to Tenn. R. Civ. P. 8.03. *See* Tenn. Code Ann. § 36-1-102(1)(I). Father did not raise lack of willfulness to visit as an affirmative defense in his answer to the petition. Therefore, Father waived this defense. *See In re Brylan S.*, No. W2021-01446-COAR3-PT, 2022 WL 16646596, at \*6 (Tenn. Ct. App. Nov. 3, 2022), *no perm. app. filed*; *In re Imerald W.*, No. W2019-00490-COA-R3-PT, at \*4 n.5 (Tenn. Ct. App. Jan. 31, 2020).

Although Mother did not raise willfulness as an affirmative defense, the trial court found that she raised the defense at trial. Nevertheless, the trial court found that Mother failed to prove lack of willfulness by a preponderance of the evidence and the evidence does not preponderate against this finding.

Amanda Gibson of Health Connect testified that she attempted to contact the parents multiple times to arrange visits, by calling and texting multiple phone numbers and, while Mother occasionally responded, most of the time she was unresponsive. Moreover, on the few occasions the parents told Ms. Gibson that transportation to visits was an issue, Ms. Gibson proposed TennCare as a transportation option and provided contact information. She even offered to assist them and to have a three-way call with TennCare and the parents to arrange transportation. However, Mother declined her assistance and stated she would directly contact TennCare.

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<sup>6</sup> “Section 36-1-113 does not include DCS’s reasonable efforts to reunify as a required element to be established along with grounds and best interest. Rather, reasonable efforts is referenced in one of the factors to be weighed in determining whether termination of parental rights is in the child’s best interest. Section 36-1-113 directs a court to consider whether the parent ‘has failed to effect a lasting adjustment *after reasonable efforts*’ have been made.” *In re Kaliyah S.*, 455 S.W.3d 533, 553 (Tenn. 2015) (quoting Tenn. Code Ann. § 36-1-113(i)(2) (emphasis added)).

In any event, Father testified that he last saw Jayla in June of 2020, and it is undisputed that he had no visits during the relevant four-month period. As for Mother, it is undisputed that she had no visits during the four months prior to the filing of the petition and her last visit was on June 19, 2021. Moreover, both parents failed to establish that their failure to visit was not willful. Therefore, we affirm the trial court's finding that DCS proved this ground by clear and convincing evidence.

### C. Failure to Provide Suitable Home

A ground of abandonment can be established when the parent fails to provide a suitable home. *See* Tenn. Code Ann. § 36-1-102(1)(A)(ii). To establish this ground, the petitioner must demonstrate that:

(ii)(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 . . . ;

(b) The juvenile court found . . . that the department . . . 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 . . . 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 . . . 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.

Tenn. Code Ann. § 36-1-102(1)(A)(ii).

A suitable home must be more than adequate "physical space." *In re A.D.A.*, 84 S.W.3d 592, 599 (Tenn. Ct. App. 2002). It requires that the child receive appropriate care and attention. *Id.* A suitable home should be free from drugs and domestic violence. *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), ("[T]hese parents have not provided a suitable home for

these children due to the drug and domestic violence issues that have plagued them for years, and continue to do so . . .”).

Jayla was removed from the physical or legal custody of both parents by a court order entered in a dependency-and-neglect proceeding on October 30, 2020, which granted DCS temporary legal custody of Jayla retroactive to October 28, 2020. *See* Tenn. Code Ann. § 36-1-102(1)(A)(ii)(a). Thus, the relevant four-month period for this ground commenced on October 29, 2020, and ended on February 28, 2021.

During the four months following Jayla’s removal, DCS made reasonable efforts to assist the Parents establish a suitable home. *See* Tenn. Code Ann. § 36-1-102(1)(A)(ii)(c). During this time DCS developed a permanency plan, reviewed it with the Parents, reviewed the termination criteria with the Parents, arranged for therapeutic visitation and hair follicle drug screens through Health Connect, attempted to maintain contact with the parents by leaving voicemails and text messages, attempted to visit their home, which was Grandmother’s home, and arranged for Father’s alcohol and drug assessment through Health Connect. Moreover, as the trial court stated in its final order:

- a. D.C.S. developed a permanency plan[] for the parents with a goal of returning custody to the parent. On December 16, 2021, the D.C.S. Family Service Worker, Kim Goney, met with the parents, gave them a copy of the permanency plan, and they indicated they understood.
- b. D.C.S. arranged for drug screening of the parents.
- c. D.C.S. arranged for services through Health Connect and arranged for visitation.
- d. D.C.S. made diligent searches for the parents and attempted to make contact with the parents when the parents basically disappeared. However, the Parents did not [] reciprocate.

Correspondingly, the trial court also found that during the relevant four-month period, the parents made no reasonable effort to provide a suitable home. Instead, they:

- a. Failed to maintain contact with the D.C.S. workers.
- b. Failed to be drug tested.
- c. Failed to have mental health assessments. [a]nd
- d. Refused to accept services (In her December 16, 2021, meeting with Kim Goney the mother refused services and stated she “had her own insurance.”)

The trial court also found that both parents’ failure to make “even minimal efforts” to improve their condition demonstrates a lack of concern for Jayla to such a degree that it appears unlikely that they will be able to provide a suitable home for Jayla at an early date. The court also found that DCS exerted reasonable efforts to assist both parents in establishing a suitable home because its efforts were equal to or exceeded the efforts of the

parents toward the establishing a suitable home. See *In re Brian W.*, No. M2020-00172-COA-R3-PT, 2020 WL 6390132, at \*5 (Tenn. Ct. App. Oct. 30, 2020) (“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[.]”).

Based on these and other findings, the trial court found that DCS had proven, by clear and convincing evidence, the ground of abandonment by failure to provide a suitable home against each parent. We affirm this holding.

#### D. Substantial Noncompliance

A parent’s rights may be terminated for substantial noncompliance with the responsibilities contained in a permanency plan, Tenn. Code Ann. § 36–1–113(g)(2), provided the plan requirements are “reasonable and related to remedying the conditions which necessitate[d] foster care placement.” *In re Valentine*, 79 S.W.3d 539, 547 (Tenn. 2002). Thus, the court must initially find “that the requirements of the permanency plan are ‘reasonable and related to remedying the conditions which necessitate foster care placement.’” *In re Valentine*, 79 S.W.3d at 547 (citing Tenn. Code Ann. § 37-2-403(a)(2)(C)). The court must also determine that “the parent’s noncompliance is substantial in light of the degree of noncompliance and the importance of the particular requirement that has not been met.” *In re M.J.B.*, 140 S.W.3d 643, 656 (Tenn. Ct. App. 2004).

Determining whether a parent has substantially complied with a permanency plan involves more than merely counting up the tasks in the plan to determine whether a certain number have been completed and “going through the motions” does not constitute substantial compliance. *In re Carrington H.*, 483 S.W.3d at 537 (citing *In re Valentine*, 79 S.W.3d at 547).

In the instant case, the permanency plans required the parents to, inter alia, have an alcohol and drug abuse assessment, submit to random drug screens, have a mental health assessment, obtain stable housing, and report on time for visitation. DCS and Health Connect workers attempted to aid the parents in meeting these requirements. However, their efforts were largely unsuccessful.

As previously stated, Father declined Ms. Goney’s attempts to arrange complete alcohol and drug and mental health assessments for him. Ms. Goney had also arranged for Health Connect America to provide therapeutic visitation and hair follicle drug screens for the parents. However, Health Connect worker Amanda Gibson was unable to contact the parents after multiple attempts. Ms. Gibson was also unsuccessful in reaching the parents.

While Ms. Gibson spoke to Mother on multiple occasions, Mother was often not responsive.

Moreover, the parents visited Jayla only once from January through August 2021. Although the parents had scheduled two other visits, Mother cancelled both. After the parents' visit, Ms. Gibson attempted to contact the parents to arrange further visits and spoke to the parents about TennCare as a transportation option. She also provided them with a phone number and offered to assist them. However, the parents were unresponsive. The parents were also unresponsive to Health Connect worker Sarah Ahmed's attempts to coordinate schedules to complete the hair follicles at the same time they came for a visit.

The parents never attended any child and family team meetings. The parents also never completed a hair follicle drug screen. As we noted earlier, Father acknowledged that he had not complied with DCS's attempts to set up an alcohol and drug assessment, nor had he complied with Health Connect's multiple attempts to set up a hair follicle screen. He recalled being ordered by the juvenile court to complete the alcohol and drug assessment and parenting classes, but he did not. Although services were made available to him by DCS, Father admitted that he had chosen to ignore them since he did not have a vehicle. Father acknowledged that he did very little of what was required of him under the permanency plan except for DNA testing. Mother admitted that she also did not maintain contact with DCS. Although Mother acknowledged that Ms. Goney contacted her about completing random drug screens, she testified, "it wouldn't work right then." Moreover, Mother never completed a mental health assessment.

In its final order, the trial court found that the permanency plan requirements were "reasonable and related to remedying the conditions that caused the child to be removed from the parents' custody." The evidence in the record preponderates in favor of these findings.

The trial court also made independent findings concerning whether either parent was in substantial noncompliance with the permanency plan. As to Father, the court noted that "he testified he has done nothing on the plan other than the DNA paternity test, for which an attachment for his arrest was issued before he did that." As to Mother, the court made the following findings:

[S]he did have an alcohol and drug abuse assessment in May of 2022. However, she testified she does not have housing at this time, that she never did a drug test as required, and never had a mental health assessment. The mother's failures are more than "trivial, minor, or technical deviations. . . ."

Based on these and other findings, the trial court concluded that both parents were in substantial noncompliance with the statement of responsibilities in the permanency plan

and concluded that DCS had proven, by clear and convincing evidence, the ground of abandonment by failure to provide a suitable home against each parent and we affirm this holding.

The foregoing reveals that the trial court found that the requirements of the permanency plans were reasonable and related to remedying the conditions which necessitated Jayla's foster care placement, *see In re Valentine*, 79 S.W.3d at 547, that both parents were in noncompliance with the permanency plan, and that the parents' noncompliance was substantial in light of the degree of noncompliance and the importance of the particular requirement that has not been met. *See In re M.J.B.*, 140 S.W.3d at 656.

Accordingly, we affirm the trial court's finding that DCS proved the ground of substantial non-compliance by clear and convincing evidence.

#### E. Failure to Manifest an Ability and Willingness to Assume Custody

This ground requires that the petitioner prove two elements by clear and convincing evidence. *See* Tenn. Code Ann. § 36-1-113(c)(1), (g)(14). First, the petitioner must prove that the parent failed to manifest "an ability and willingness to personally assume legal and physical custody or financial responsibility of the child[ren]." Tenn. Code Ann. § 36-1-113(g)(14). Second, the petitioner must prove that placing the children in the parent's "legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child[ren]." Tenn. Code Ann. § 36-1-113(g)(14). Both elements must be satisfied for this ground to be established. *In re Neveah M.*, 614 S.W.3d 659, 677 (Tenn. 2020).

As for the first element, our Supreme Court has explained that the petitioner must prove by clear and convincing evidence that the parent has failed to manifest *either* ability or willingness. *Id.* If either is proven, then the first element is satisfied. *Id.*

With regard to the second element, the court has not identified a set list of circumstances that would constitute substantial harm because of the varied forms of conduct in which substantial harm can arise. However, this court has stated that "substantial harm" would indicate two things. "First, it connotes a real hazard or danger that is not minor, trivial, or insignificant. *In re Amynn K.*, No. E2017-01866-COA-R3-PT, 2018 WL 3058280, at \*11 (Tenn. Ct. App. June 20, 2018) (quoting *Ray v. Ray*, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001)). Second, it indicates that the harm must be more than a theoretical possibility." *Id.*

The trial court found that both parents "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.” The findings the court made in this regard read as follows:

33. As to the mother, she has made much progress by obtaining employment and generally improving her situation. Further, she does seem to have a willingness to assume custody. However, she does not have the ability at this time. There are many requirements of the permanency plan she has not completed. Further, she does not have a home.

34. As to the father, as stated previously, he is incarcerated basically because he understands he does not have the responsibility required to even remain on probation. Further, he has completed only one of the requirements of the permanency plan, which was simply being tested to prove that he is the father of the child.

Tennessee Code Annotated § 36-1-113(k) requires that “[t]he court . . . enter an order that makes specific findings of fact and conclusions of law.” This “reflects the General Assembly’s understanding that findings of fact and conclusions of law facilitate appellate review and promote the just and speedy resolution of appeals.” *In re Adoption of Muir*, No. M2002-02963-COA-R3CV, 2003 WL 22794524, at \*3 (Tenn. Ct. App. Nov. 25, 2003). These written findings allow the court to review the record de novo; yet “[w]ithout such findings and conclusions, this court is left to wonder on what basis the court reached its ultimate decision.” *In re M.E.W.*, No. M2003-01739-COA-R3-PT, 2004 WL 865840, at \*19 (Tenn. Ct. App. Apr. 21, 2004).

In the present case, the trial court made numerous and specific written findings of fact, which it incorporated in its analysis of this ground for termination. Thus, the trial court’s decision does not leave this court wondering on what basis the trial court decided this ground. Further, it comports with the statutory notion that the grounds are “cumulative and nonexclusive, so that listing conditions, acts[,] or omissions in one ground does not prevent them from coming within another ground[.]” Tenn. Code Ann. § 36-1-113(g).

After a careful review of the record, we agree with the trial court’s findings of fact and conclusion and find that both parents failed to manifest an ability and willingness to assume legal and physical custody of Jayla and that legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of Jayla. Therefore, we affirm the trial court’s ruling on this ground.

#### F. Persistent Conditions

The trial court found that this ground had been proven as to Father but that it had not been proven as to Mother. Father appeals the adverse finding against him; DCS does

not appeal the ruling concerning Mother. Thus, we shall only consider Father's appeal concerning this issue.

Grounds for abandonment may also be found when the conditions that led to the child's removal persist for a period of more than six months. *See* Tenn. Code Ann. § 36-1-113(g)(3). Specifically, the statute requires:

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

(i) The conditions that led to the child's removal still persist, preventing the child's safe return to the care of the parent or guardian, or other conditions exist that, in all reasonable probability, would cause the child to be subjected to further abuse or neglect, preventing the child's safe return to the care of the parent or guardian;

(ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent or guardian in the near future; *and*

(iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable, and permanent home;

(B) The six (6) months must accrue on or before the first date the termination of parental rights petition is set to be heard[.]

Tenn. Code Ann. § 36-1-113(g)(3)(A)–(B) (emphasis added).

As it pertains to Father, the trial court made the following findings:

27. As of the filing of the petition in this case, the child had been removed from the custody of the parents for fifteen months. The child was removed from the parent's custody because the child was born premature and drug addicted as a result of the mother's drug use.

28. Persistence of conditions occurs when "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."



We have already discussed in detail facts that relate to this ground, which need not be restated, and find that the evidence clearly and convincingly supports the trial court's findings and conclusions as they pertain to Father. Thus, we affirm the trial court's determination that the ground of abandonment by persistent conditions has been proven as it relates to Father only.

## II. BEST INTEREST FACTORS

“When a parent has been found to be unfit by establishment of at least one statutory ground for termination of parental rights, as here, the interests of parent and child diverge, and the focus shifts to what is in the child's best interest.” *In re Jude M.*, 619 S.W.3d 224, 244 (Tenn. Ct. App. 2020) (citations omitted). As such, we review each factor “from the child's, rather than the parent's perspective.” *In re Gabriella D.*, 531 S.W.3d 662, 681 (Tenn. 2017).

As guidance for weighing the best interest factors, our Supreme Court has offered:

These statutory factors are illustrative, not exclusive, and any party to the termination proceeding is free to offer proof of any other factor relevant to the best interests analysis. Facts considered in the best interests analysis must be proven by “a preponderance of the evidence, not by clear and convincing evidence.” “After making the underlying factual findings, the trial court should then consider the combined weight of those facts to determine whether they amount to clear and convincing evidence that termination is in the child's best interest[s].”

*Id.* (citations omitted).

The statute, as amended in 2021, that was in effect at the time of the filing of the petition specifies twenty best interest factors; however, the court is not limited to considering only these factors.<sup>7</sup> *See* Tenn. Code Ann. § 36-1-113(i). Instead, the court is to consider the relevant factors. In this case the trial court found eleven of the statutory factors relevant. Thus, we will focus on the trial court's findings concerning the eleven factors the court deemed most relevant.

(A) The effect a termination of parental rights will have on the child's critical need for stability and continuity of placement throughout the child's minority. Tenn. Code Ann. § 36-1-113(i)(A).

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<sup>7</sup> The petition at issue was filed on April 6, 2022, at which time the 2021 amendment to Tennessee Code Annotated § 36-1-113(i) was in effect. *See* Act of April 22, 2021, 2021 Tenn. Pub. Acts, ch. 190, § 1 (effective April 22, 2021).

With regard to this factor, the trial court found that Jayla “is currently placed with [A.W.], a relative of the father, who seems to have a safe and stable home. The child has been with her since she was released from the hospital, and Mrs. [W.] is basically the only mother the child has ever known.” The evidence does not preponderate against this finding.

(C) Whether the parent has demonstrated continuity and stability in meeting the child’s basic material, educational, housing, and safety needs. Tenn. Code Ann. § 36-1-113(i)(C).

The trial court found that “the parents have never met [Jayla’s] basic needs. Granted, the child has never been in their custody. However, their failure to comply with the permanency plans or cooperate with D.C.S. demonstrates an inability or unwillingness to do provide basic needs for [Jayla].” The evidence does not preponderate against this finding.

(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. Tenn. Code Ann. § 36-1-113(i)(D).

With regard to this factor, the trial court found that “the parents have no or little attachment to the child. They have simply not been involved in [Jayla’s] life. [Jayla] was removed from their care at birth, placed in the hospital, and then placed with Mrs. [W.]. The parents failed to exercise enough visitation with the child to establish attachment.” The evidence does not preponderate against this finding.

(E) Whether the parent and child has maintained regular visitation or other contact with the child and used the visitation or other contact to cultivate a positive relationship with the child. Tenn. Code Ann. § 36-1-113(i)(E).

The trial court found that both parents failed to maintain regular visitation or other contact with Jayla. As it explained, “After removal in October of 2020, the mother did not visit with the child until June of 2021 and did not visit with the child at all thereafter. As to the father, he testified his last visitation occurred in June of 2020.” The evidence does not preponderate against these findings.

(H) Whether the child has created a healthy parental attachment with another person or persons in the absence of the parent. Tenn. Code Ann. § 36-1-113(i)(H).

With regard to this factor, the trial court found that Jayla has a healthy attachment to Mrs. W. and her family. The court also found that “it would be detrimental to [Jayla] to sever this attachment.” The evidence does not preponderate against this finding.

(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, including consideration of whether there is criminal activity in the home or by the parent, or the use of alcohol, controlled substances, or controlled substance analogues which may render the parent unable to consistently care for the child in a safe and stable manner. Tenn. Code Ann. § 36-1-113(i)(J).

The trial court found that both parents failed to demonstrate a lasting adjustment of circumstances, conduct, or conditions to make it safe and beneficial for Jayla to be in their home. “Granted, the mother has made some progress and appears to have a good attitude, but it is simply too little too late, and as indicated before, the father is in jail, and has made little or no effort to improve his situation.” The evidence does not preponderate against these findings.

(K) Whether the parent has taken advantage of available programs, services, or community resources to assist in making a lasting adjustment of circumstances, conduct, or conditions. Tenn. Code Ann. § 36-1-113(i)(K).

The trial court found that “[e]xtensive services were offered by D.C.S. and the parents simply failed to cooperate or take advantages of those services.” The evidence does not preponderate against these findings.

(L) Whether the department has made reasonable efforts to assist the parent in making a lasting adjustment in cases where the child is in the custody of the department. Tenn. Code Ann. § 36-1-113(i)(L).

The trial court found that DCS made reasonable efforts to assist both parents in making a lasting adjustment while Jayla was in DCS custody. As it explained, “D.C.S. established a permanency plan, offered services, and attempted to contact the parents, but the parents repeatedly failed to cooperate in that regard.” The evidence does not preponderate against these findings.

(M) Whether the parent has demonstrated a sense of urgency in establishing paternity of the child, seeking custody of the child, or addressing the circumstance, conduct, or conditions that made an award of custody unsafe and not in the child’s best interest. Tenn. Code Ann. § 36-1-113(i)(M).

With regard to this factor, the trial court found “there has been no ‘urgency’ displayed by the parents in addressing their problems, and in fact, other than the recent positive steps by the mother, they have made little effort in addressing their problems at all.” The evidence does not preponderate against these findings.

(Q) Whether the parent had 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. Tenn. Code Ann. § 36-1-113(i)(Q).

The trial court found that “the mother testified that she has not obtained her own home, but that should could ‘if given a few more months.’ The mother currently lives with her mother, and she did testify the child would have her own room in a four bedroom, two bathroom, home. The father is in jail.” The evidence does not preponderate against these findings.

After considering all of these factors and its respective findings, the trial court found that DCS had proven “by clear and convincing evidence that termination of the parental rights of each parent would be in the best interest of [Jayla].”

As we have already noted, when one statutory ground for termination is established, “the interests of parent and child diverge, and the focus shifts to what is in the child's best interest.” *In re Jude M.*, 619 S.W.3d at 244. As such, we review each factor “from the child's, rather than the parent's perspective.” *In re Gabriella D.*, 531 S.W.3d at 681.

Significantly, “[f]acts considered in the best interests analysis must be proven by ‘a preponderance of the evidence, not by clear and convincing evidence.’” *Id.* “After making the underlying factual findings, the trial court should then consider the combined weight of those facts to determine whether they amount to clear and convincing evidence that termination is in the child's best interest[s].” *Id.*, see also *In re Kaliyah S.*, 455 S.W.3d at 555-56 (“the trial court should then consider the combined weight of those facts to determine whether they amount to clear and convincing evidence that termination is in the child's best interest.”).

We have already stated that the evidence preponderates in favor of each of the trial court's best interest findings, which are itemized above. Having made these factual findings, we are to consider the combined weight of these facts to determine whether they amount to clear and convincing evidence that termination is in the child's best interests. *Id.* Having done so, we find that combined weight of these facts prove by clear and convincing evidence that termination of both parents' parental rights is in Jayla's best interest.

Accordingly, we affirm the trial court's determination that termination of both parents' parental rights is in Jayla's best interest.

#### IN CONCLUSION

Having affirmed the trial court's finding that grounds for termination have been proven and that termination of both parents' parental rights is in Jayla's best interest, we affirm

the termination of the parental rights of Mother and Father. Costs of appeal are assessed jointly and severally against Ashley R. S. and Ronnie D. C.

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FRANK G. CLEMENT JR., P.J., M.S.