

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
May 3, 2016 Session

IN RE JACQUELINE G. ET AL.

**Appeal from the Chancery Court for Maury County  
No. 14-301 Stella L. Hargrove, Judge**

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**No. M2015-02156-COA-R3-PT – Filed July 26, 2016**

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The mother and stepfather of two children filed a petition to terminate the parental rights of the children’s father. Father was incarcerated when the petition was filed and had not visited or supported the children during the four months preceding his incarceration. Father was released in February 2015 after serving more than three years in prison on a theft of property charge and admitted at trial that the oldest child “might remember” him but that the youngest child would not. Nevertheless, Father testified that he had been sober for more than four years, had started his own business, had paid child support since his release, and wanted to restore his relationship with his children. While the petition was pending, Mother, who also had a history of drug and alcohol abuse, was arrested for driving under the influence. After a two-day trial, the court found that two grounds for termination had been proved; however, the court found that Mother and Stepfather had failed to prove by clear and convincing evidence that termination of Father’s parental rights was in the best interest of the children. The trial court’s best-interest findings were based in part on findings that Father had “turned his life around” and was addressing his addiction while Mother, who admitted to having a “very serious, addiction to alcohol,” was not realistically dealing with her addiction. Mother and Stepfather appeal contending the trial court erred by considering Mother’s DUI and addiction when it was Father who was the subject of the petition. They also contend the evidence demonstrated that it was in the best interest of the children to terminate Father’s parental rights. We find no error with the trial court’s consideration of Mother’s addiction in its best-interest analysis because Tenn. Code Ann. § 36-1-113(i) expressly authorizes consideration of factors other than the enumerated factors when determining the best interest of a child. Furthermore, the evidence does not preponderate against the trial court’s finding that Mother and Stepfather failed to prove by clear and convincing evidence that it is in the children’s best interest to terminate Father’s parental rights. Therefore, we affirm.

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

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which RICHARD H. DINKINS and THOMAS R. FRIERSON, II, JJ., joined.

S. Jason Whatley, Columbia, Tennessee, for the appellants, Nicole and Brian C.<sup>1</sup>

Thomas M. Hutto, Columbia, Tennessee, for the appellee, Randall G.

Cara E. Lynn, Columbia, Tennessee, Guardian *ad litem*.

## OPINION

Nicole C. (“Mother”) and Randall G. (“Father”) are the parents of two minor children who are the subject of this appeal. The parents met at a crack house in 2007 and regularly used drugs together. Their first child was born in June 2008. Two weeks later, Father was arrested for the assault of his adult daughter from a prior relationship. He was released in May 2009 after 10 months of incarceration. After Father’s release, Mother and Father quickly resumed their relationship and use of drugs, but their relationship was short-lived. Father was arrested for a parole violation and again incarcerated. Their second child was born in June 2010 while Father was imprisoned.<sup>2</sup>

In November 2010 while Father was still incarcerated, the Tennessee Department of Children’s Services (“DCS”) filed a petition to transfer temporary legal custody of the children. The petition alleged that Mother was unable to care for the children because of her drug and alcohol use. This petition was granted, and the children were placed in the custody of Father’s mother (“Grandmother”) for several weeks in December 2010. Father had been released from prison by this time, and Father and Mother lived together with the children at Grandmother’s house. During this time, Father was charged with the domestic assault of Mother and, in a separate incident, of Grandmother. Grandmother did not pursue charges against Father, but Father pled guilty to the assault of Mother.

In January 2011, the Juvenile Court of Maury County issued an order calculating Father’s child support arrearage and requiring him to pay \$200 per month in order to satisfy it. Later that month, DCS filed a petition requesting that it be awarded temporary legal custody of the children. The petition alleged Grandmother had “not been able to effectively protect the children from the violent surroundings between the children’s parents.” The petition was granted, and custody of the children was given to Mother’s friend and her husband.

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<sup>1</sup> This court has a policy of protecting the identity of children in parental termination cases by initializing the last names of the parties.

<sup>2</sup> There is no dispute that Father is a biological parent of these children. Paternity was established by a court order based on genetic testing. *See* Tenn. Code Ann. § 36-1-102(28)(B).

DCS developed a permanency plan for Mother and Father, both of whom visited the children during the first half of 2011. The children were returned to Mother in July 2011 for a 90-day trial home visit period. *See* Tenn. Code Ann. § 37-1-130(e) (2011).<sup>3</sup> In August 2011, Mother began dating Brian C. (“Stepfather”). Mother completed the trial home visit period in October 2011, and DCS relinquished custody of the children to her. The order divesting custody to Mother does not provide for any visitation by Father. Father was arrested again on December 13, 2011. He pled guilty to a theft of property charge and received a nine-year sentence.

Mother married Stepfather in April 2013. On June 16, 2014, Mother and Stepfather filed a petition seeking to terminate Father’s parental rights as to both children and to allow Stepfather to adopt them. Father was still incarcerated at the time the petition was filed, but he was released on parole in February 2015, several months before trial.

Trial of the termination petition occurred on September 2-3, 2015. Several witnesses testified, most notably Stepfather, Mother, and Father. Stepfather testified that he and Mother had a stable relationship and that the children were happy and doing well. Stepfather agreed that Mother “had some problems with alcohol . . .” and that she had been charged with driving under the influence in 2014. He stated that the DUI made Mother “open her eyes and realize that, you know, she doesn’t need to be drinking and needs to stop drinking . . . .”

Stepfather stated that he had known the younger child since he was one year old and the older child since she was three years old. According to Stepfather, his relationship with the children was “natural,” and they thought of him as “Dad.” Stepfather testified that he wanted to adopt the children and that he understood the ramifications of that decision. Stepfather also stated that Father had not been involved with the children or provided any financial support. He testified that the younger child had not mentioned anything about Father and that the older child remembered a visit with Father and a social worker.

Stepfather also testified that he would remain in the children’s lives and continue to support them if the trial court denied the petition to terminate Father’s parental rights. Further, he stated that he would allow Father to establish a relationship with the children if the court determined that such a relationship was in the best interest of the children.

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<sup>3</sup> Currently, the provisions related to 90-day trial home visit periods are located in Tenn. Code Ann. § 37-1-130(d).

Mother testified that losing custody of the children in 2011 was a turning point in her life and “a huge wake-up call . . . .” Mother stated that she went to a rehab facility for two months beginning in January 2011. Mother testified that she had not used crack or cocaine since January 2011. However, Mother admitted that she had been arrested for driving under the influence in November 2014. She discussed the last day she drank alcohol as follows:

A. Okay. As far as alcohol, I was arrested on November 2nd for a DUI, and the next day, once [Stepfather and the children] had come to pick me up for -- out of jail for DUI, I have not had a drink since.

Q. Is that November 2nd of last year [i.e., 2014]?

A. Yes, it was.

Mother stated that she was not participating in Alcoholics Anonymous (“AA”). Instead, she was active in her church, at the gym, and on a website called “Alcohol Online.”

Mother testified that Father had participated in supervised visitation during the first half of 2011 but stated that he had not participated in visitation after July 1, 2011. However, Mother also stated that she made no effort to give Father her address when the children were returned to her in July 2011. Around that time, she also changed her phone number. According to Mother, DCS wanted her to change her number because Father was using a friend’s phone to harass her. Mother stated that she received cards and letters after July 1, 2011, that were sent to the children from Grandmother. Mother returned these cards unopened.

Mother testified that she had a good relationship with Stepfather and described him as “the best thing that ever happened to me in my life . . . .” She stated that the children had an excellent relationship with Stepfather and that they considered him to be their “real dad.” Mother opined that it was in the best interest of the children to terminate Father’s parental rights because “I have moved forward, we have moved forward, and [the children] know [Stepfather] as their father.” She further stated:

[T]hese children have an excellent life now and . . . they’ve got the chance and they live under a roof with two parents who love and adore them. We work very hard to provide for them. We have an amazing relationship. Our relationship is extremely healthy between myself and my husband. So we are very good role models for the children. We are very, very involved in their lives as far as schooling, whatever it is, activities they are in, both of us share all that responsibility together.

In contrast, she described her relationship with Father as “unhealthy” and “horrible.” Mother stated that the children were exposed to drugs and alcohol while she and Father were together, and it was in the children’s best interest not to be exposed to those substances.

Father testified that he had participated in supervised visitation in the first half of 2011 and that he did not remember the last month in which he exercised visitation that year. However, he testified that the last time he visited the children “it was getting cooler out.” Father stated that he did not exercise visitation in late 2011 because he did not know where Mother and the children were living. According to him, DCS never communicated with him, and he did not know that Mother had begun her 90-day trial home visit in July 2011. However, he admitted that Mother’s address was contained in a copy of a permanency plan he received in April 2011. Father acknowledged that the younger child does not know him but stated that the older child “might remember” him.

Father also stated that he had tried to maintain contact with the children while he was in prison from December 2011 to February 2015. His efforts included giving Grandmother power of attorney and directing her to attempt to maintain contact with the children. Grandmother also sent cards to the children on Father’s behalf. All of these cards were returned unopened. While Father was still incarcerated, he filed a “Petition to Set Residential Sharing Time” through an attorney in October 2013. Based on the record before us, it is not clear whether any action was ever taken on it.

Father conceded that he only made one child support payment in 2011. He stated that he had relapsed in 2011 and was “hardly employable” but admitted that he was “probably” in a financial position to make child support payments during that time.

Father testified that he had been sober for four years. The last day he used drugs or alcohol was December 12, 2011, the day before he was most recently arrested. Father stated that he began attending AA meetings in prison, that he remained involved in AA, that he had a sponsor, that he attended meetings every day, and that he sponsored other people in the program. While he was in prison, Father worked as a trustee and did not violate any prison rules.

Father testified that he was currently on parole and had been living at a halfway house since his release from prison in February 2015. Father stated that he had not stolen anything or otherwise violated his probation. Father testified that he volunteered to live at a halfway house because the structure and recovery program that it provided helped him stay sober. Father was looking for a house to purchase and provided the trial court with the name and contact information of his mortgage broker.

Father testified that he had started his own business as an HVAC technician and employed four or five people, depending how much work he had. Father stated that he

was current on all bills and that he had been making child support payments since his release from prison. An account statement from DCS confirmed that Father made 10 child support payments since April 2015.

Diana Rooker, a DCS employee, also testified. Ms. Rooker was a caseworker for the children until she was promoted to supervisor. Ms. Rooker testified that, based on her review of DCS records, Father attended supervised visitation with his children in April, May, June, and July of 2011. According to the records, Father's last day of visitation was July 22, 2011. Ms. Rooker stated that DCS stopped making records of visitation after Mother completed her 90-day trial home visitation period in October 2011.

On September 29, 2015, the trial court issued an order denying the petition to terminate Father's parental rights. Although it found that two grounds for termination had been established by clear and convincing evidence, the court determined that terminating Father's parental rights was not in the best interest of the children.

The court found that Mother and Stepfather had established abandonment by willful failure to visit and abandonment by willful failure to support. *See* Tenn. Code Ann. §§ 36-1-102(1)(A)(iv), -113(g)(1). Because Father was incarcerated when the petition for termination was filed, the court found the relevant time period for abandonment was the four months before Father's incarceration, August 2011 to November 2011. *See* Tenn. Code Ann. § 36-1-102(1)(A)(iv). The trial court found that Father made only one child support payment during that time and that the last day he visited his children was in July 2011. The court concluded that the failure to visit and support was willful because Father was "aware of his duty to visit and to support his children; he had the capacity to do so; he made no attempt to do so, and he has no justifiable excuse for not doing so for more than four months preceding December, 2011."

Regarding the best interest of the children, the final order indicates that the court considered seven of the enumerated best-interest factors. *See* Tenn. Code Ann. § 36-1-113(i)(1), (3)-(5), (7)-(9). The court found Father "to be a genuine, credible witness" and stated that Father "possesses great humility." The court accepted Father's testimony that he operated an HVAC business, employed four or five workers, and was "current on all debts . . . ." The court found that Father was living at a halfway house but was "in the process of purchasing a house . . . ." The court found that Father was active in AA, had a sponsor, and sponsored others. The court also found that "[u]nlike [Mother], [Father] knows his date of sobriety . . . ."

The trial court's order also states that Father:

testified that during his last time in prison, he gave his mother power of attorney and used her as a liaison to stay in contact with the children. It is

undisputed that every card and letter they sent to the children was sent back to his mother unopened. He testified that he did everything he could do to stay in touch with the children under a three-way phone situation while in the penitentiary.

Ultimately, the court believed Father's testimony that he loved his children, wanted to be involved in their lives, and was "handling things now . . . ."

After discussing Father, the court made several findings about Mother:

[Mother] filed her petition to terminate [Father's] rights on June 16, 2014. She was unable to stay sober even five months and was charged with driving under the influence on November 2, 2014. Counsel for the parties agree that the Court may take judicial notice of [Mother's] plea of guilty to DUI on March 12, 2015. It is troubling to the Court that although [Mother] had some two months of drug and alcohol treatment in 2011, [Mother] now addresses her self-described, very serious, addiction to alcohol, "on line."

[Mother] testified: "I was an addict." She does not see herself as a recovering addict and expresses no need for AA. Her demeanor is one of "know it all" and arrogance. She has absolutely no humility. [Mother's] demeanor during the testimony of [Father], the father of her children, is noteworthy. Her actions went from laughter to expressions of utter sarcasm.

The best thing [Mother] has going for her is meeting [Stepfather], a man who is genuinely involved with, and loves these children. . . . [Mother] knows she can rely on [Stepfather] to care for and raise the children, whether or not she is sober.

The trial court concluded that terminating Father's parental rights was not in the best interest of the children. As stated by the court:

The Court is being asked to terminate the rights of a father, a natural parent, who has addressed his addiction, continues to address his addiction, has turned his life around 360 degrees, is paying regular child support and who loves these children; while the mother, in this Court's eyes, refuses to adequately address her addiction and take full responsibility for these children. It is clear to the Court that if [Mother] does not address her addiction to her number one choice of drugs – alcohol, and the father's rights are terminated, [Stepfather] will be the parent raising these children.

RULING: The Court finds the father of these children, the only natural parent who continues to address his addiction, should have a chance to be a father to the children. The Court finds it to be in the best interest of the children that their father's rights not be terminated . . . . The Court finds that [Father] should be granted visitation with the children once he is settled into a house of his own.

Mother and Stepfather appealed.

### 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) (citing *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972)). This interest 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, 769-70 (1982)); see 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) (internal citations omitted).

When reviewing a case involving the termination of parental rights, appellate courts review the trial court's findings of fact using the standard of review in Tenn. R. App. P. 13(d). *In re Carrington H.*, 483 S.W.3d 507, 523-24 (Tenn. 2016). Under this standard, we review the factual finding de novo on the record accompanied by a presumption of correctness, unless the evidence preponderates otherwise. See *id.*; *In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006). “In light of the heightened burden of proof in termination proceedings, however, the reviewing court must make its own determination as to whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, amount to clear and convincing evidence of the elements necessary to terminate parental rights.” *In re Carrington H.*, 483 S.W.3d at 524; see *In re Bernard T.*, 319 S.W.3d at 596-97. The trial court's ruling regarding whether the evidence sufficiently supported termination is a conclusion of law, which we review de novo with no presumption of correctness. See *In re Carrington H.*, 483 S.W.3d at 524.

In addition, “[w]hen credibility and weight to be given to testimony are involved, considerable deference must be afforded to the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony.” *Hughes v. Metro. Gov't of Nashville and Davidson Cnty.*, 340 S.W.3d 352, 360 (Tenn. 2011). When trial courts have the opportunity to observe and evaluate witnesses, their assessments of



credibility will not be overturned on appeal absent clear and convincing evidence to the contrary. *Id.*

## ANALYSIS

Mother and Stepfather contend the trial court erred when it determined that terminating Father's parental rights was not in the best interest of the children. For his part, Father has not challenged the trial court's determination that grounds for terminating his parental rights existed. Instead, he contends that the trial court correctly concluded that terminating his parental rights was not in the best interest of the children. Father also argues that this appeal is frivolous and seeks damages under Tenn. Code Ann. § 27-1-122.

### I. PETITION TO TERMINATE FATHER'S PARENTAL RIGHTS

"[I]n order to obtain termination of the parental rights of a biological parent, a petitioner must prove two elements by clear and convincing evidence: (1) at least one of the listed grounds for termination, and (2) that termination of parental rights is in the child's best interest." *In re Kaliyah S.*, 455 S.W.3d 533, 552 (Tenn. 2015) (citing Tenn. Code Ann. § 36-1-113(c)).

On appeal, no one challenges the trial court's determination that Mother and Stepfather demonstrated the existence of two grounds for termination by clear and convincing evidence. Nevertheless, we must review the trial court's findings regarding the grounds for termination of Father's parental rights. *In re Carrington H.*, 483 S.W.3d at 525-26 ("[T]he Court of Appeals must review the trial court's findings as to each ground for termination and as to whether termination is in the child's best interests, regardless of whether the parent challenges these findings on appeal.") (citing *In re Angela E.*, 303 S.W.3d 240, 251 n.14 (Tenn. 2010)). Accordingly, we will begin by reviewing the trial court's findings as to each ground for termination and, if the facts establish those grounds by clear and convincing evidence, review the trial court's best-interest determination. *See id.*

#### A. Grounds for Termination

The court found that Mother and Stepfather had established two grounds for termination: abandonment by willful failure to visit and abandonment by willful failure to support. *See* Tenn. Code Ann. §§ 36-1-102(1)(A)(iv), -113(g)(1).

When a parent is incarcerated at the time of the filing of a petition to terminate his or her parental rights, abandonment occurs if that parent "either has willfully failed to visit or has willfully failed to support or has willfully failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding

such parent's . . . incarceration . . . ." Tenn. Code Ann. § 36-1-102(1)(A)(iv); *see In re Audrey S.*, 182 S.W.3d 838, 865 (Tenn. Ct. App. 2005). "Failure 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." *In re Audrey S.*, 182 S.W.3d at 864. Willful failure to visit includes situations in which a parent engages in only "token visitation." *See* Tenn. Code Ann. § 36-1-102(1)(E). "Token visitation" is 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." Tenn. Code Ann. § 36-1-102(1)(C).

Here, Father was incarcerated on December 13, 2011, and remained incarcerated when the petition to terminate his parental rights was filed. Thus, the four-month period from August 11, 2011, to December 12, 2011, is relevant when assessing his visitation and support of the children. *See* Tenn. Code Ann. § 36-1-102(1)(A)(iv).

The trial court found that Father last visited his children in July 2011, and the evidence does not preponderate against this finding. DCS records indicate that Father last visited the children in July 2011.<sup>4</sup> The only evidence that Father visited the children after July 2011 was Father's testimony that "it was getting cooler out" the last time he met with his children. This testimony, without more, only indicates that Father may have had token visitation during the relevant four-month period. *See* Tenn. Code Ann. § 36-1-102(1)(C). Accordingly, the evidence does not preponderate against the trial court's finding that Father's last visit with his children was in July 2011.

The trial court also found that Father only made one child support payment in 2011. This finding is supported by DCS records, which establish that the only child support payment Father made was for \$200 in June 2011, and by Father's admission that he only made one support payment in 2011. In addition, Father testified that he was "probably" in a financial position to make child support payments during 2011. Therefore, the evidence does not preponderate against the trial court's finding that Father willfully failed to support the children.

Based on the foregoing, we affirm the trial court's determination that Mother and Stepfather proved the grounds of abandonment by willful failure to visit and abandonment by willful failure to support.

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<sup>4</sup> DCS stopped recording visits in October 2011 when custody was returned to Mother.

## B. Best Interest of the Children

Once one or more of the grounds for terminating parental rights have been established, the focus of our analysis turns to the best interest of the children. *See In re Marr*, 194 S.W.3d 490, 498 (Tenn. Ct. App. 2005). “Tennessee’s termination of parental rights statutes recognize the possibility that terminating an unfit parent’s parental rights is not always in the child’s best interests.” *In re Audrey S.*, 182 S.W.3d at 877. Consequently, the best-interest inquiry is separate and distinct from the inquiry related to establishing that grounds for terminating parental rights exist. *See In re Angela E.*, 303 S.W.3d at 254. “One important distinction is that grounds are generally established on the basis of the parent’s past actions. Best interest, by its nature, must focus on the current situation and, to some extent, is based on a prediction of future events.” *In re C.B.W.*, No. M2005-01817-COA-R3-PT, 2006 WL 1749534, at \*6 (Tenn. Ct. App. June 26, 2006).

The child’s best interests must be viewed from the child’s perspective. *In re Audrey S.*, 182 S.W.3d at 878. When the best interest of a child conflict with the best interest of the adults, the conflict must be resolved in favor of the rights and best interests of the child. Tenn. Code Ann. § 36-1-101(d). The best-interest analysis is necessarily fact-intensive and is guided by the factors listed in the Tennessee Code. *See In re Audrey S.*, 182 S.W.3d at 878; Tenn. Code Ann. § 36-1-113(i). Courts are not required to find the existence of each factor before they conclude that terminating a parent’s rights is in a child’s best interest. *See In re Dominique L.H.*, 393 S.W.3d 710, 719 (Tenn. Ct. App. 2012) (quoting *In re M.A.R.*, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005)). Instead, “[t]he relevancy and weight to be given each factor depends on the unique facts of each case.” *In re Audrey S.*, 182 S.W.3d at 878. Depending upon the circumstances of a particular case, “the consideration of one factor may very well dictate the outcome of the analysis.” *Id.*

Mother and Stepfather contend that the trial court erred by making findings about Mother even though Father was the subject of the petition to terminate parental rights. They also contend that they carried their burden of demonstrating that terminating Father’s parental rights was in the best interest of the children.

### 1. Findings Regarding Mother

According to Mother and Stepfather, findings about Mother are irrelevant or inapplicable to the best-interest analysis because Father was the subject of the petition to terminate parental rights. Additionally, they argue that some of the trial court’s findings about Mother are not supported by the evidence.

Courts are not limited to the statutorily enumerated factors when assessing a child’s best interest. *See In re Dominique L.H.*, 393 S.W.3d at 719 (“Depending on the circumstances of an individual case, the consideration of a single factor *or other facts*

*outside the enumerated, statutory factors* may dictate the outcome of the best interest analysis.” (Emphasis added)). As Tenn. Code Ann. § 36-1-113(i) itself states, “[i]n determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court *shall consider, but is not limited to,* the following . . . .” (Emphasis added). According to the Tennessee Supreme Court, this sentence means exactly what it says: “The statute enumerates factors for the best interests analysis that the court ‘shall consider,’ but, as opposed to the inquiry into grounds for termination, the best interests analysis ‘is not limited to’ the factors enumerated in the statute.” *In re Angela E.*, 303 S.W.3d at 251. Indeed, this court has stated that “courts should not disregard any evidence about the child’s situation at the time the best interest determination is made.” *In re C.B.W.*, 2006 WL 1749534, at \*7. As part of this analysis, we have considered the future suitability of the person who currently has custody of the child. *See id.* at \*11 (“Finally, we note that adoption by [the child’s grandmother] and cutting off all legal obligations of [the mother] does not address the question of what would happen to the child if [the grandmother] dies or becomes unable to care for the child.”).

Here, the trial court considered factors that were not enumerated in Tenn. Code Ann. § 36-1-113(i) when it considered how Mother described her addiction and her efforts to maintain sobriety. Trial courts are not precluded from considering this information. *See* Tenn. Code Ann. § 36-1-113(i); *In re Angela E.*, 303 S.W.3d at 251; *In re Dominique*, 393 S.W.3d at 719. The best-interests determination necessarily looks to the future of the children, and the focus of this inquiry should ultimately be on the impact that terminating parental rights will have on them. *See In re C.B.W.*, 2006 WL 1749534, at \*6. One way to assess that impact is to examine the relationships that remain available to a child after a petition for termination of parental rights is granted. *See id.* at \*11. Based on the plain language of Tenn. Code Ann. § 36-1-113(i), the trial court did not err by considering other factors, including Mother’s addiction.

## 2. Best Interest Based on All Relevant Factors

Mother and Stepfather also contend that it was in the best interest of the children to terminate Father’s parental rights. As the petitioners, Mother and Stepfather have the burden of establishing this contention by clear and convincing evidence. They contend that they carried this burden based on the factors in Tenn. Code Ann. § 36-1-113(i).

Mother and Stepfather argue that Father does not have a safe home for the children because he currently lives at a halfway house, which Father admitted was not appropriate for the children to visit. *See* Tenn. Code Ann. § 36-1-113(i)(1), (7). At trial, the evidence showed that Father was attempting to move out of the halfway house. Father testified about his efforts to purchase a home and provided the court with the name and contact information of his mortgage broker. The trial court found all of Father’s testimony credible.

Moreover, although Father's current living situation is a valid concern, the safety of his current residence is less relevant than it otherwise might be based on the facts of this case. An order denying a petition to terminate Father's parental rights will not, in and of itself, change the custody of the children or require them to live with Father. *See In re C.B.W.*, 2006 WL 1749534, at \*6 (“[D]enial of a petition to terminate parental rights does not in and of itself affect the custody of a child . . .”) (citing *In re Valentine*, 79 S.W.3d 539, 550 (Tenn. 2002)). Mother has custody of the children, and maintaining Father's parental rights will not immediately change that fact. Consequently, Father's current living situation is less relevant than it otherwise might be. *See id.*; *In re Adoption of J.A.K.*, No. M2005-02206-COA-R3-PT, 2006 WL 211807, at \*4 (Tenn. Ct. App. Jan. 26, 2006) (“The question of whether the children could safely reside with [their mother] is of little relevance since [their father] has had custody under court orders since shortly after the divorce and any change of custody could only occur if those orders were modified under applicable legal standards.”).

Mother and Stepfather also note that the children have lived with them for “virtually all of their lives” and contend that changing the children's caretaker and physical environment would not be in their best interest. *See* Tenn. Code Ann. § 36-1-113(i)(5). As previously stated, maintaining Father's parental rights will not automatically make him their primary caretaker. *See In re C.B.W.*, 2006 WL 1749534, at \*6; *In re Valentine*, 79 S.W.3d at 550. Moreover, Stepfather testified that he would remain involved in the children's lives and continue to support them if the court determined that Father should maintain his parental rights. Consequently, maintaining Father's parental rights will not deprive the children of Mother and Stepfather's support.

Mother and Stepfather did not provide any evidence to support a finding that Father's current mental or emotional health would be detrimental to the children. *See* Tenn. Code Ann. § 36-1-113(i)(8). However, they did present evidence about his past behavior and have argued on appeal that it would be detrimental to the children if Father repeated such behavior, including his use of drugs and alcohol. *See id.* We certainly agree, but the evidence at trial was that Father was no longer involved with drugs or alcohol. Indeed, the evidence supports the findings that Father has made a substantial adjustment in his circumstances, that he is sober, and that he is “handling things now.” *See* Tenn. Code Ann. § 36-1-113(i)(1), (8). Father has started his own business, is paying his expenses, has remained involved in AA, and is seriously pursuing the purchase of his own residence. Although Father has not paid child support in the past, he has made numerous payments since his release from prison in February 2015. *See* Tenn. Code Ann. § 36-1-113(i)(9). The trial court and multiple attorneys questioned Father about his sobriety, and the trial court found that Father was credible and “possess[ed] great humility.” There is no evidence in the record to overturn that assessment. *See Hughes*, 340 S.W.3d at 360.

As for the trial court's findings that concern Mother's addiction, the evidence only preponderates against one of those findings. As Mother and Stepfather note, contrary to the trial court's finding, Mother testified specifically about her date of sobriety from alcohol.<sup>5</sup> Mother testified that the last date she consumed alcohol was the date of her DUI, November 24, 2014. Thus, the evidence preponderates against the trial court's finding that Mother did not remember her date of sobriety from alcohol. However, the evidence does not preponderate against the trial court's other findings about Mother. It is undisputed that Mother has struggled with her addiction to drugs and alcohol. She pled guilty to a DUI incident that occurred in November 2014, only months after filing the petition to terminate Father's parental rights. In addition, Mother testified that she "was an addict," that she was not involved in AA, and instead, she was addressing her addiction via an online support group as well as by being involved with her church and gym. The trial court understandably found this troubling when considering the children's present and future best interests.

The most concerning best-interest factor is the lack of a relationship between Father and the children. *See* Tenn. Code Ann. § 36-1-113(i)(3), (4). Father himself testified that the older child "might remember" him but that the younger child does not. The lack of a relationship between a parent and child is a significant factor in cases involving the termination of parental rights. *See White v. Moody*, 171 S.W.3d 187, 194-95 (Tenn. Ct. App. 2004) (discussing the best interest of the child almost exclusively in terms of the lack of a relationship between the child and her biological father). However, it was not Father's burden to prove that allowing him to visit his children was in their best interest. *See In re Adoption of J.A.K.*, 2006 WL 211807, at \*6. Instead, Mother and Stepfather were required to clearly and convincingly demonstrate that terminating Father's parental rights was in the best interest of the children. *See In re Kaliyah S.*, 455 S.W.3d at 552.

At the time of trial, Father had not had contact with his children for four years. After such a long time, it is not difficult to imagine that establishing relationships between Father and the children may be disruptive. *See In re Adoption of J.A.K.*, 2006 WL 211807, at \*6. However, under the facts of this case, the inference that establishing relationships between Father and the children will be disruptive does not equate to clear and convincing evidence that forever severing Father's parental rights is in the children's

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<sup>5</sup> In Mother and Stepfather's principal brief, their attorney, who did not represent them at trial, also argued that the parties never agreed that the trial court could take judicial notice of Mother's guilty plea for DUI and that such an agreement was not in the record. At oral argument, counsel for Father, who represented Father at trial, clarified that he and Mother's previous counsel had reached that agreement in a conference call with the trial judge. We are satisfied that both attorneys have accurately represented the record to this court. That is, the agreement about Mother's guilty plea is not contained in the record because it occurred in a conference call between the trial judge, the lawyer for Mother and Stepfather, and the lawyer for Father.

best interest. The children were only five and seven at the time of the trial, and there was no evidence presented that they were too old to establish a meaningful relationship with Father.

In summary, Mother testified that terminating Father's parental rights was in the children's best interest because the children have "an excellent life . . ." and "live under a roof with two parents who love and adore them." Based on the evidence produced at trial, maintaining Father's parental rights will not deprive them of that living situation or expose them to drugs or alcohol. Instead, Mother will continue to have custody of the children, and Stepfather will continue to be involved in their lives. Additionally, the evidence supports the trial court's finding that Mother has struggled with an addiction to alcohol and may continue to do so in the future.

Moreover, as we mentioned earlier, depending upon the circumstances of a particular case, "the consideration of one factor may very well dictate the outcome of the analysis." *In re Audrey S.*, 182 S.W.3d at 878. That one factor in this case is Mother's addiction and the trial court's concern that Mother has failed to properly address her addiction. This is evident from the trial court's notations that Mother has not sought the assistance of AA. Instead, she is engaged in self-help and online therapy. Based upon Mother's history of drug and alcohol abuse, we cannot say that the trial court's concerns are unfounded.

Under the unique circumstances of this case, Mother and Stepfather have not carried their burden of demonstrating by clear and convincing evidence that terminating Father's parental rights is in the best interest of the children. As a result, we affirm the trial court's order denying the petition to terminate Father's parental rights.

## II. FRIVOLOUS APPEAL

Father contends that this appeal is frivolous because trial courts are expressly allowed to consider factors that are not enumerated Tenn. Code Ann. § 36-1-113(i).

This court is statutorily authorized to award just damages against the appellant if we determine that the appeal is frivolous or that it was taken solely for delay. Tenn. Code Ann. § 27-1-122. The statute, however, is to be "interpreted and applied strictly so as not to discourage legitimate appeals." *Wakefield v. Longmire*, 54 S.W.3d 300, 304 (Tenn. Ct. App. 2004) (quoting *Davis v. Gulf Ins. Group*, 546 S.W.2d 583, 586 (Tenn. 1977) (discussing the predecessor of Tenn. Code Ann. § 27-1-122)). A frivolous appeal is one that is devoid of merit or has no reasonable chance of success. *Wakefield*, 54 S.W.3d at 304. Determining whether to award damages for a frivolous appeal is a discretionary decision. *Young v. Barrow*, 130 S.W.3d 59, 66-67 (Tenn. Ct. App. 2003).

Although Father has prevailed on appeal, the issues that Mother and Stepfather raised were not devoid of merit or without a reasonable chance of success, and this appeal was not taken solely for the purpose of delay. Accordingly, this appeal was not frivolous, and Father is not entitled to damages under Tenn. Code Ann. § 27-1-122.

**IN CONCLUSION**

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Nicole and Brian C.

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FRANK G. CLEMENT, JR., JUDGE