IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 1, 2021

IN RE ALLAINAH B.[1]

Appeal from the Juvenile Court for Franklin County
No. 19-JV-121 Thomas C. Faris, Judge

No. M2020-01381-COA-R3-PT

Cara S. and Bradley S. (together, "Petitioners") sought termination of the parental rights of Austin B. ("Father") as to Father's daughter, Allainah B. (the "Child"). Following a bench trial, the Juvenile Court for Franklin County (the "trial court") found four statutory bases for termination of Father's parental rights and further concluded that termination was in the Child's best interest. Father appealed to this Court. We conclude that the trial court's decision should be affirmed as to three statutory grounds for termination and vacated as to the fourth ground. We also conclude that termination of Father's parental rights is in the Child's best interest. The ultimate holding of the trial court is therefore affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed in Part, Vacated in Part; Case Remanded

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which J. STEVEN STAFFORD, P.J., W.S., and CARMA DENNIS MCGEE, J., joined.

Glen Isbell, Winchester, Tennessee, for the appellant, Austin B.

Russell Anne Swafford, Dunlap, Tennessee, for the appellees, Bradley S. and Cara S.

OPINION

FACTUAL BACKGROUND

Allainah B. is the minor child of Father and Dusty K. ("Mother").[2] In July 2019,

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

[2] During the proceedings below, Mother voluntarily relinquished her parental rights to the Child

the Child was residing with Father and Father's girlfriend due to Mother's struggles with methamphetamine. Father also has a history of drug abuse and criminal activity. Due to criminal charges incurred in 2018,[3] as of July 2019 Father was under the supervision of Community Corrections. As part of his requirements for release with Community Corrections, law enforcement conducted an unscheduled visit to Father's home on July 22, 2019, and discovered approximately four pounds of marijuana as well as multiple firearms. Police officers also seized the cell phone of Father's girlfriend, on which they found a video of Father dancing nude in front of the Child. As a result, Father's probation was revoked, and he incurred new criminal charges for possession of a schedule VI substance with intent to deliver, felon in possession of a firearm, child neglect of a child under the age of eight, and indecent exposure involving a child under the age of thirteen. The Child was removed from Father's home,[4] and Father was taken into custody by the Franklin County Sheriff's Department.

In need of placement, the Child was taken to the Franklin County Juvenile Court. Cara S., who is an attorney, heard about the Child through her contacts in the court system and sought emergency custody. A petition alleging dependency and neglect was filed on July 22, 2019, and heard that same day. The trial court found probable cause to conclude that the Child was dependent and neglected in Father's care based upon the illegal substances and guns seized from his home, as well as the finding that police discovered the video of Father "naked and playing with his genitals in the presence of the [C]hild." The trial court held an adjudicatory hearing on the dependency and neglect petition on August 21, 2019, thereafter concluding that dependency and neglect as to Father was proven by clear and convincing evidence. Both parents were ordered to have no contact with the Child. Father remained incarcerated, and custody of the Child remained with Petitioners.

On November 26, 2019, Petitioners filed a petition to terminate Father's parental rights, alleging multiple statutory grounds for termination: abandonment by failure to provide support, failure to manifest an ability and willingness to personally assume legal and physical custody of the Child, and persistent conditions. Soon thereafter, Father wrote to the Court and requested that he be appointed an attorney for the termination proceedings. In the meantime, Father pled guilty to the new criminal charges arising from the raid at his home on July 22, 2019. Due to the revocation of his probation, Father was also sentenced for his previously incurred criminal charges. Father's total effective sentence was fourteen years in prison.

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and agreed to the adoption. Mother also joined in the petition to terminate Father's parental rights but did not participate in the final hearing.

[3] These charges include possession of a schedule VI substance with intent to deliver, possession of a schedule IV substance with intent to deliver, theft, and child abuse involving a child under the age of eight years old.

[4] The Child was approximately eighteen months old at the time of her removal.

Petitioners filed a supplement to their original petition on April 9, 2020, alleging two additional grounds for termination: Tennessee Code Annotated section 36-1-113(g)(5) and section 36-1-113(g)(6). Specifically, this supplement alleged that Father "has been sentenced to more than two years imprisonment for conduct against a child, based on his guilty pleas to child neglect and indecent exposure[,]" and that Father "has been confined in a correctional facility by court order for more than ten years, and the child was under the age of 8 when the sentence was entered by the court."

The case proceeded to trial on August 14, 2020. Cara S. testified that the Child came into Petitioners' care on July 22, 2019 and has remained with them since. Cara S. came to know about the Child when a friend of hers with the Franklin County Justice Center called to tell Cara S. that there was a child in need of placement. Petitioners had been trying unsuccessfully to have a baby for several years and were open to the idea of adoption.

According to Cara S., on July 22, 2019, the Child appeared lethargic, unresponsive, and glassy-eyed. Cara S. had the Child's hair tested at a local lab on July 24, 2019, and it was discovered that the Child had ingested hydrocodone and been exposed to THC. Cara S. testified that the Child also had numerous wounds and bruises covering her legs, some of which appeared to Cara S. to be infected. Cara S. also explained that the Child had a strong odor, appeared to be unbathed, and had dirty fingernails. According to Cara S., the Child had to be bathed several times "to get her smelling like a baby." Both Petitioners testified that the Child had no real sleep schedule her first few weeks in their home and that they worked to settle her into a normal routine. Additionally, the Child seemed to be afraid of men, including Bradley S. and Petitioners' male relatives. Petitioners took the Child to a child therapist because they were concerned she may have suffered trauma while in Father's or Mother's care. The Child engaged in sessions with just Bradley S. and with both Petitioners. The Child also did solo therapy sessions with the provider. Cara S. testified that they did approximately twelve weeks of therapy before the provider felt comfortable with the Child's condition.

Regarding the Child's current routine, Cara S. explained that she and Bradley S. both have regular work hours and that she is done with work by 4:30 p.m. while Bradley S. gets home from work around 5:30 p.m. The Child goes to daycare while Petitioners work, but Cara S. also explained that several of her relatives live within a few miles of Petitioners and that there are multiple family members available to help with the Child if necessary. According to Cara S., the Child has become integrated into her family and enjoys playing with her cousins who live close by. Overall, Cara S.'s testimony reflected that the Child's condition has improved since coming under Petitioners' care and that the Child is happy and thriving in their home. Although Petitioners testified that they never asked the Child to call them "mommy" and "daddy" and initially referred to each other by their first names in front of the Child, they also testified that the Child soon began referring to Petitioners as "mommy" and "daddy" on her own.

Bradley S.'s testimony was largely the same as Cara S.'s. He confirmed that the Child was very attached to Cara S. at first but warmed to him eventually. Bradley S. testified that the Child has since bonded with him and that they enjoy reading bedtime stories, going fishing, and having tea parties. Like Cara S.'s family, many of Bradley S.'s relatives live near the Petitioners and see the Child often. Both Petitioners testified that they wish to adopt the Child.

Petitioners' final witness was Bonnie Eslick, who testified that she is a nurse and a medical assistant trainer. Ms. Eslick further testified that she partially owns a medical assistant school in Winchester, Tennessee, and that she also processes drug screens. Ms. Eslick came to know Petitioners when they contacted her about doing a "ChildGuard" test on the Child, which is a hair test that indicates "environmental exposure to illegal substances, drugs, and it . . . differentiates between whether it was in the air or if they touched it or touched the parent or if it was ingested." A ChildGuard test was done on the Child by Ms. Eslick on July 24, 2019, the results of which were that the Child had ingested hydrocodone. According to Ms. Eslick, she could tell that the opiate had been ingested by the Child due to the presence of metabolites. Regarding the marijuana, Ms. Eslick testified that this drug only presented as "native," meaning it was "the parent drug" and was not ingested. This result, according to Ms. Eslick, showed that marijuana was "in [the Child's] environment, around her, and landed on her." As Ms. Eslick put it, "the only way" this was possible was if the Child had been around someone smoking marijuana.

Father testified next. Father explained that the Child was living with him in July 2019 because Mother abused methamphetamine and Father did not want the Child around that. Father testified that he and the Child were living in the home of his girlfriend at the time the Child was removed. Regarding the Child's legs, Father explained that the Child loves to play outside and that the marks were simply bug bites. He testified that he tried to treat the bites with "A&D ointment" but that the Child would scratch herself and reopen the wounds. Overall, Father took the position that bug bites are inevitable and that if the Child needed to see a doctor he would have taken her to her pediatrician. When asked why the Child would have tested positive for hydrocodone, Father testified that the Child "had gotten ahold of one of the hydrocodone pills" while Father was at the store and his girlfriend was watching the Child. Father stated that he had been prescribed the pills and that he took the Child to the emergency room after discovering she had placed one in her mouth. Regarding the Child's exposure to marijuana, Father testified as follows:

> A: I mean, the only thing I could think of would be, I mean, Shelby, she did smoke. I wasn't allowed to, being on community corrections. As they said, smoking in a room, I guess that's really about it. I mean, I've never let anybody smoke with my daughter sitting next to them or even within five to ten feet.
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> * * *

Q: And you talked about how you never let anyone smoke marijuana around her, but you heard the lab tech, and she had marijuana -- she tested positive for being exposed to marijuana; correct?

A: Yes, but the lab tech also said it could have been smoked in the room and [the Child] came in, you know. But nobody had ever been, like I said, within five or ten feet of [the Child] while smoking. I wouldn't let nobody do that.

Q: Well, you lived with Shelby; correct?

A: Yes.

Q: And you testified that Shelby smoked; correct?

A: Yes.

Q: So you chose to have Shelby around [the Child]; correct?

A: I mean, what somebody does on their private time doesn't necessarily make them a bad parent.

Father also admitted that the video discovered on his girlfriend's phone, which featured Father dancing nude, was filmed in the Child's presence, although he maintained that the Child walked into the room "at the end of the video."

Nonetheless, Father contended that termination of his parental rights was not in the Child's best interest because they have a meaningful bond and Father hopes to reunite his family once he is released from prison. Father testified that he is voluntarily participating in "pro-social" classes while incarcerated, in hopes of improving his life and making better decisions once released. Ultimately, Father's position at trial was that he had made some poor decisions but wanted to rectify these and be a better parent to his daughter.

The trial court entered a final order terminating Father's parental rights on September 14, 2020. The trial court concluded that termination was appropriate pursuant to four statutory grounds: section 36-1-113(g)(1), section 36-1-113(g)(5), section 36-1-113(g)(6), and section 36-1-113(g)(14). The trial court also concluded that termination of Father's parental rights was in the Child's best interest. Father filed a timely notice of appeal to this Court.

ISSUES

On appeal, Father challenges only the trial court's finding that termination of his

parental rights is in the Child's best interest. Nonetheless, in light of our Supreme Court's holding in *In re Carrington H.*, 483 S.W.3d 507 (Tenn. 2016),[5] we must also review whether the trial court erred in concluding that Petitioners proved the statutory grounds for termination by clear and convincing evidence.

STANDARD OF REVIEW

Our Supreme Court has explained that:

> A parent's right to the care and custody of her child is among the oldest of the judicially recognized fundamental liberty interests protected by the Due Process Clauses of the federal and state constitutions. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L.Ed.2d 49 (2000); *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L.Ed.2d 551 (1972); *In re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010); *In re Adoption of Female Child*, 896 S.W.2d 546, 547–48 (Tenn. 1995); *Hawk v. Hawk*, 855 S.W.2d 573, 578–79 (Tenn. 1993). But parental rights, although fundamental and constitutionally protected, are not absolute. *In re Angela E.*, 303 S.W.3d at 250. "'[T]he [S]tate as *parens patriae* has a special duty to protect minors....' Tennessee law, thus, upholds the [S]tate's authority as *parens patriae* when interference with parenting is necessary to prevent serious harm to a child." *Hawk*, 855 S.W.2d at 580 (quoting *In re Hamilton*, 657 S.W.2d 425, 429 (Tenn. Ct. App. 1983)); *see also Santosky v. Kramer*, 455 U.S. 745, 747, 102 S. Ct. 1388, 71 L.Ed.2d 599 (1982); *In re Angela E.*, 303 S.W.3d at 250.

In re Carrington H., 483 S.W.3d at 522–23. Tennessee Code Annotated section 36-1-113 provides the various grounds for termination of parental rights. *In re Jacobe M.J.*, 434 S.W.3d 565, 568 (Tenn. Ct. App. 2013); *see also* Tenn. Code Ann. § 36-1-113(g). "A party seeking to terminate parental rights must prove both the existence of one of the statutory grounds for termination and that termination is in the child's best interest." *Id.* (citing Tenn. Code Ann. § 36-1-113(c)).

In light of the substantial interests at stake in termination proceedings, the heightened standard of clear and convincing evidence applies. *In re Carrington H.*, 483 S.W.3d at 522 (citing *Santosky*, 455 U.S. at 769). This heightened burden "minimizes the risk of erroneous governmental interference with fundamental parental rights[,]" and "enables the fact-finder to form a firm belief or conviction regarding the truth of the facts[.]" *Id.* (citing *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010)). "The clear-and-

[5] 483 S.W.3d at 524 ("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.").

convincing-evidence standard ensures that the facts are established as highly probable, rather than as simply more probable than not." *Id.* (citing *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005)). Accordingly, the standard of review in termination of parental rights cases is as follows:

> An appellate court reviews a trial court's findings of fact in termination proceedings using the standard of review in Tenn. R. App. P. 13(d). *In re Bernard T.*, 319 S.W.3d at 596; *In re Angela E.*, 303 S.W.3d at 246. Under Rule 13(d), appellate courts review factual findings de novo on the record and accord these findings a presumption of correctness unless the evidence preponderates otherwise. *In re Bernard T.*, 319 S.W.3d at 596; *In re M.L.P.*, 281 S.W.3d 387, 393 (Tenn. 2009); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007). In light of the heightened burden of proof in termination proceedings, however, the reviewing court must make its own determination as to whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, amount to clear and convincing evidence of the elements necessary to terminate parental rights. *In re Bernard T.*, 319 S.W.3d at 596–97. The trial court's ruling that the evidence sufficiently supports termination of parental rights is a conclusion of law, which appellate courts review de novo with no presumption of correctness. *In re M.L.P.*, 281 S.W.3d at 393 (quoting *In re Adoption of A.M.H.*, 215 S.W.3d at 810). Additionally, all other questions of law in parental termination appeals, as in other appeals, are reviewed de novo with no presumption of correctness. *In re Angela E.*, 303 S.W.3d at 246.

In re Carrington H., 483 S.W.3d at 523–24.

DISCUSSION

I. Grounds for Termination

In order to terminate parental rights, a trial court must find by clear and convincing evidence that: (1) at least one statutory ground for termination of parental and guardianship rights has been established, and (2) termination is in the best interest of the child. *See* Tenn. Code Ann. § 36-1-113(c). Here, the trial court found that Petitioners proved four grounds for termination, which we review in turn. As a threshold matter, we note that at the beginning of trial on August 14, 2020, the parties agreed that Father would stipulate to four grounds for termination. The trial court then found in its final order that clear and convincing evidence existed to terminate Father's parental rights "by stipulations of all parties." As we have previously explained, however,

> [a] trial court may not rely on [a parent's] stipulations that a statutory ground exists for termination of his parental rights or that termination of his

> parental rights is in the children's best interest. Our supreme court has previously held that, in order to terminate a parent's parental rights, the trial court is statutorily required to make written findings of fact and conclusions of law supported by clear and convincing evidence presented at the hearing regardless of whether the parent consents to or contests the termination. *In re Angela E.*, 303 S.W.3d [240, 256 (Tenn. Ct. App. 2010)]; *see also C.J.H. v. A.K.G.*, No. M2001-01234-COA-R3-JV, 2002 WL 1827660, at *8 (Tenn. Ct. App. Aug. 9, 2002) ("An unopposed action to terminate parental rights . . . is subject to the same statutory requirements as one that is opposed: proof by clear and convincing evidence that grounds exist and that the child's best interests are served by the termination."). Thus, the party seeking termination of parental rights is not relieved of its statutory burden of proving by clear and convincing evidence both the ground for termination and that termination is in the child's best interest simply because a parent does not oppose the termination.

In re Brianna T., No. E2017-01130-COA-R3-PT, 2017 WL 6550852, at *3 (Tenn. Ct. App. Dec. 22, 2017) (bracketing and footnote omitted). Moreover, a "trial court's ruling that the evidence sufficiently supports termination of parental rights is a conclusion of law[,]" and "questions of law are not subject to stipulation by the parties to a lawsuit." *Id.* at *4 (quotations omitted); *see also In re Dakota M.*, No. E2017-01855-COA-R3-PT, 2018 WL 3022682, at *5 (Tenn. Ct. App. June 18, 2018) (noting that even when parties purport to stipulate to grounds for termination, we are obliged to consider whether the evidence clearly and convincingly establishes those grounds).

In this case, however, the trial court also heard proof presented by the parties at the termination hearing and made some findings of fact and conclusions of law. Accordingly, "we must determine whether the proof presented together with any facts to which Father stipulated constituted clear and convincing evidence of both the ground[s] for termination and that termination was in the best interest of the [Child]." *In re Brianna T.*, 2017 WL 6550852, at *4.

a. Abandonment by failure to support

Parental rights can be terminated for abandonment, as that term is defined in Tennessee Code Annotated section 36-1-102. Tenn. Code Ann. § 36-1-113(g)(1). One form of abandonment is failure to support, which occurs when a parent, "for a period of four (4) consecutive months, [fails] to provide monetary support or . . . more than token payments toward the support of the child." *Id.* § 36-1-102(1)(D). Here, however, there are multiple problems with Petitioners' case as to this ground.

First, the petition for termination states only that "[Father] abandoned the minor child as defined under T.C.A. § 36-1-102 by failing to pay support for the child. Thus his

parental rights should be terminated pursuant to T.C.A. § 36-1-113." In turn, the trial court's order provides that Father "fail[ed] to support or make payments toward the support of this child for four months immediately preceding the filing of this action." Consequently, Petitioners and the trial court treat the relevant four-month period for purposes of failure to support as the four months immediately preceding the filing of the petition. In this case, that period runs from July 25, 2019 through November 25, 2019. Typically, this calculation is appropriate. *See* Tenn. Code Ann. § 36-1-102(1)(A)(i) (explaining that abandonment occurs when "[f]or a period of four (4) consecutive months immediately preceding the filing of a proceeding . . . to terminate the parental rights of the parent [,]" the parent failed to support the child).

"The relevant four-month period, however, differs for parents who are incarcerated at the time the petition is filed, and have been incarcerated for all or part of the preceding four months before it is filed." *In re Navada N.*, 498 S.W.3d 579, 599 (Tenn. Ct. App. 2016) (citing Tenn. Code Ann. § 36-1-102(1)(a)(iv)). Indeed, "we have repeatedly held that the definition of abandonment found in subsection (i) is inapplicable where the parent has been incarcerated during all or part of the four months preceding the filing of the termination petition." *In re London B.*, No. M2019-00714-COA-R3-PT, 2020 WL 1867364, at *7 (Tenn. Ct. App. Apr. 14, 2020) (collecting cases); *see also In re Eimile A.M.*, No. E2013-00742-COA-R3-PT, 2013 WL 6844096, at *3 (Tenn. Ct. App. Dec. 26, 2013) ("The statute is very specific for an incarcerated parent with regard to the relevant time period, limiting the analysis with regard to a failure to support to the period of four (4) consecutive months immediately preceding such parent's or guardian's incarceration.") (citation omitted).

It is undisputed in this case that Father was incarcerated on July 22, 2019 and remained incarcerated at the time of trial. The salient four-month period, then, would have been the four months immediately preceding July 22, 2019. When pleading abandonment by an incarcerated parent by failure to support, the petitioner must state the correct four-month period in the petition so as to provide the parent adequate notice. *In re Haskel S.*, No. M2019-02256-COA-R3-PT, 2020 WL 6780265, at *6 (Tenn. Ct. App. Nov. 18, 2020); *see also In re A.V.N.*, No. E2020-00161-COA-R3-PT, 2020 WL 5496678, at *8 (Tenn. Ct. App. Sept. 10, 2020) ("[W]hen abandonment is pled as a potential ground for termination, the petitioner must include the correct four-month period.") (citing *In re Justine J.*, No. E2019-00306-COA-R3-PT, 2019 WL 5079354, *8 (Tenn. Ct. App. Oct. 10, 2019)). Accordingly, even if we were to understand the petition as alleging the correct statutory basis for failure to support, which we do not, this ground was still improperly pled.

Even to the extent that Petitioners properly alleged abandonment by failure to support, this allegation is nonsensical in light of the fact that Father undisputedly had legal and physical custody of the Child in the four months preceding his incarceration on July

22, 2019.[6] It is unclear, therefore, to whom Father would have made support payments during the correct four-month period.

Insofar as Petitioners pled an inapplicable ground for termination, the trial court should not have concluded that Father's parental rights could be terminated on this basis. Accordingly, the trial court's determination that Father's parental rights should be terminated for abandonment by failure to support must be vacated. This does not end our inquiry, however, because the trial court found three additional bases for termination of Father's parental rights, and only one ground must be proven before termination may occur. *See* Tenn. Code Ann. § 36-1-113(c).

b. Sentence of two or more years for severe abuse

At the time the petition was filed, Tennessee Code Annotated section 36-1-113(g)(5) provided:

> The parent or guardian has been sentenced to more than two (2) years' imprisonment for conduct against the child who is the subject of the petition, or for conduct against any sibling or half-sibling of the child or any other child residing temporarily or permanently in the home of such parent or guardian, that has been found under any prior order of a court or that is found by the court hearing the petition to be severe child abuse, as defined in § 37-1-102. Unless otherwise stated, for purposes of this subdivision (g)(5), "sentenced" shall not be construed to mean that the parent or guardian must have actually served more than two (2) years in confinement, but shall only be construed to mean that the court had imposed a sentence of two (2) or more years upon the parent or guardian[.]

Inasmuch as this "statute states that 'sentenced' . . . shall be construed to mean that the court had imposed a sentence of two (2) or more years upon the parent[,]" it "clearly contemplates that a sentence for child abuse of exactly two years would be sufficient to trigger this ground." *In re Roderick S.*, No. E2017-01504-COA-R3-PT, 2018 WL 1748000, at *15 (Tenn. Ct. App. Apr. 11, 2018).

Here, Father was charged in 2018 with child abuse or neglect pursuant to Tennessee Code Annotated section 39-15-401(b), although the record does not clearly establish the victim of the conduct giving rise to this charge. Nonetheless, Father was again charged with child neglect[7] in July 2019, and it is undisputed that this arose from conduct against

[6] Father testified that he assumed full-time custody of the Child in March 2019. Petitioners never disputed this.

[7] Section 39-15-401(b) provides that "[a]ny person who knowingly abuses or neglects a child under eighteen (18) years of age, so as to adversely affect the child's health and welfare, commits a Class A

the Child. Indeed, Father acknowledged at trial that his 2019 charge resulted from the Child's exposure to drugs while in Father's custody and that he pled guilty to this charge. For this, Father was sentenced to two years in prison.

Pursuant to section 37-1-102, "severe child abuse" is defined as, *inter alia*, "[k]nowingly 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." Consequently, Father pled guilty to, and was sentenced to two years in prison for, conduct amounting to severe child abuse against the Child. As such, the trial court did not err in concluding that this ground for termination was proven by clear and convincing evidence.

c. Ten-year sentence

Tennessee Code Annotated section 36-1-113(g)(6) provides that grounds for termination exist when "[t]he parent has been confined in a correctional or detention facility of any type, by order of the court as a result of a criminal act, under a sentence of ten (10) or more years, and the child is under eight (8) years of age at the time the sentence is entered by the court[.]" Only two findings are necessary relative to this statutory ground: (1) that the parent has been confined to a correction or detention facility of any type, by order of the court as a result of a criminal act, under a sentence of ten or more years, and (2) that the child at issue was under eight years of age at the time the sentence was entered by the court. *In re Jamazin H.*, No. W2013-01986-COA-R3-PT, 2014 WL 2442548, at *4 (Tenn. Ct. App. May 28, 2014) (citing *In re E.M.P.*, No. E2006-00446-COA-R3-PT, 2006 WL 2191250, at *6 (Tenn. Ct. App. Aug. 3, 2006)). Establishing this ground for termination is not a "difficult task because the parent either is or is not serving a prison sentence of at least ten years, and the child either was or was not eight years old when the sentence was imposed." *Id.* (quoting *In re T.M.G.*, 283 S.W.3d 318, 325 n.4 (Tenn. Ct. App. 2008)). In this sense, "the legislature has established a 'bright line' ground for termination of parental rights" in enacting section 36-1-113(g)(6). *In re Adoption of K.B.H.*, 206 S.W.3d 80, 85 (Tenn. Ct. App. 2006).

Here, Father was incarcerated at the time of trial after having pled guilty to multiple drug-related charges, theft, felon in possession of a firearm, assault, child abuse and neglect involving a child under eight years of age, and indecent exposure involving a child under the age of thirteen. The record on appeal contains copies of the judgments entered in Father's criminal cases, and these judgments reflect that Father's total effective prison sentence is fourteen years. We need not look beyond the judgments of conviction[8] in

misdemeanor; provided, that, if the abused or neglected child is eight (8) years of age or less, the penalty is a Class E felony."

[8] At trial, Father agreed his total effective sentence is fourteen years; however, he maintained that he would not actually serve his full sentence and expected to be released next year. Nonetheless, a parent's eligibility for parole or early release does not control whether section 36-1-113(g)(6) is satisfied. *See In re*

considering this ground for termination. *In re Audrey S.*, 182 S.W.3d at 838. Further, it is undisputed that the Child is under eight years old.

Accordingly, clear and convincing evidence supports this ground for termination.

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

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

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

This ground requires clear and convincing proof of two elements. *In re Maya R.*, No. E2017-01634-COA-R3-PT, 2018 WL 1629930, at *7 (Tenn. Ct. App. Apr. 4, 2018). The petitioner must first prove that the parent has failed to manifest an ability and willingness to personally assume legal and physical custody or financial responsibility of the child. *Id.* (citing Tenn. Code Ann. § 36-1-113(g)(14)). The petitioner must then prove that placing the child in the custody of the parent poses "a risk of substantial harm to the physical or psychological welfare of the child." *Id.* (quoting Tenn. Code Ann. § 36-1-113(g)(14)). As to the first element, our Supreme Court has adopted the interpretation of section 36-1-113(g)(14) set forth in *In re Amynn K.*, No. E2017-01866-COA-R3-PT, 2018 WL 3058280 (Tenn. Ct. App. June 20, 2018). *See In re Neveah M.*, 614 S.W.3d 659, 677 (Tenn. 2020) (citing *In re Amynn K.*, 2018 WL 3058280, at *13). That is, that the statute requires "a parent to manifest both an ability and willingness" to personally assume legal and physical custody or financial responsibility for the child. *Id.* Therefore, if a party seeking termination of parental rights establishes that a parent or guardian "failed to manifest *either* ability or willingness, then the first prong of the statute is satisfied." *Id.*

The trial court made the following findings as to this ground:

> [Father] has failed to manifest, by act or omission, an ability and willingness to personally assume physical or legal custody of the minor child, and placing the [C]hild in his legal and physical custody would pose a substantial harm to the physical or psychological welfare of the [C]hild.

Jamazin H., 2014 WL 2442548, at *11 n.6 ("This ground for termination applies regardless of the possibility of early parole[.]"); *In re Adoption of K.B.H.*, 206 S.W.3d at 85 ("At the time [section 36-1-113(g)(6)] was enacted, the legislature was certainly aware of parole and other means by which a prisoner could end up released from his or her incarceration prior to expiration of the full sentence, and did not include such circumstances in the language of the statute.").

> [Father] admitted in testimony that his actions in committing the actions that led to his criminal convictions were voluntary acts on his part. The convictions contained in Collective Exhibit 1 show a continuous pattern of criminal activity by [Father] from August, 2018 through July, 2019. The results of the drug exposure screen taken on the [C]hild when she was removed from [Father], and the testimony of the drug test expert, reveal that the [C]hild both ingested drugs (hydrocodone) and was exposed to the use of illegal drugs (marijuana). Although presented with opportunities to correct his behavior with both probation and community correction, [Father] refused to change his behavior. Such behavior exposed the child to physical and psychological harm. The testimony of [Petitioners] and the photos of the [C]hild showed the [C]hild was covered in bites, scrapes, etc. from neglect and further that she was "scared and numb" immediately upon her removal from [Father].

The record does not preponderate against the trial court's findings. Despite Father's contentions that he hopes to reunite his family once released from prison, Father had ample opportunity to parent his Child but instead chose to continue selling drugs in violation of his Community Corrections conditions. Father's behavior appears to be a pattern and lifestyle rather than an aberration. *See In re Cynthia P.*, No. E2018-01937-COA-R3-PT, 2019 WL 1313237, at *8 (Tenn. Ct. App. Mar. 22, 2019) ("Ability focuses on the parent's lifestyle and circumstances." (citing *In re Maya R.*, 2018 WL 1629930, at *7)). Not only did Father admit to selling marijuana and exposing the Child to drugs, but perhaps more importantly, Father's attitude at trial regarding these issues was flippant. For example, Father testified that although he snorted hydrocodone while he had custody of his daughter, he did this on his "private time" and not "in the presence of" the Child. In that vein, Father justified the Child living in a home where marijuana was abused by stating that "what somebody does on their private time doesn't necessarily make them a bad parent." Rather than assuming any responsibility for placing the Child in such circumstances, Father was argumentative and stated that "the lab tech also said it could have been smoked in the room and [the Child] came in." Father also stated that he does not have substance abuse problems because "addiction is in your mind." Father's testimony indicates that he lacks the present ability to safely parent the Child, and based on his testimony, this Court is not confident Father's circumstances are likely to significantly improve. Indeed, Father had the opportunity to improve his lifestyle and circumstances while on probation and continued to engage in the same behavior.

For many of the same reasons, we also conclude that Father failed to manifest a willingness to assume custody of the Child, inasmuch as Father put little to no effort towards complying with his probation and providing a safe, suitable home for the Child. *See In re Jaxx M.*, No. E2018-01041-COA-R3-PT, 2019 WL 1753054, at *9 (Tenn. Ct. App. Apr. 17, 2019) ("A lack of effort can undercut a claim of willingness."). "Parents demonstrate willingness by attempting to overcome the obstacles that prevent them from

assuming custody or financial responsibility for the child[,]" and Father failed to take those steps. *In re Cynthia P.*, 2019 WL 1313237, at *8 (citing *In re Isaiah B.*, No. E2017-01699-COA-R3-PT, 2018 WL 2113978, at *18 (Tenn. Ct. App. May 8, 2018)). Again, Father's glib attitude about the circumstances giving rise to his present incarceration do not demonstrate a willingness to address these issues. *See In re Kaylene J.*, No. E2019-02122-COA-R3-PT, 2021 WL 2135954, at *17 (Tenn. Ct. App. May 26, 2021) (citing *In re Amynn K.*, 2018 WL 3058280, at *15) (noting that "[c]riminal activity . . . raise[s] doubt as to a parent's actual willingness to assume custody or financial responsibility for the child"); *see also In re Brayden E.*, No. M2020-00622-COA-R3-PT, 2020 WL 7091382, at *5 (Tenn. Ct. App. Dec. 4, 2020) (explaining that father's "willful disregard for authority put him in a position where he was unable to care for" his children, which supported termination under section (g)(14)).

The second prong of section 36-1-113(g)(14) asks whether "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." Regarding this prong, this Court has previously explained:

> The courts have not undertaken to define the circumstances that pose a risk of substantial harm to a child. These circumstances are not amenable to precise definition because of the variability of human conduct. However, the use of the modifier "substantial" indicates two things. First, it connotes a real hazard or danger that is not minor, trivial, or insignificant. Second, it indicates that the harm must be more than a theoretical possibility. While the harm need not be inevitable, it must be sufficiently probable to prompt a reasonable person to believe that the harm will occur more likely than not.

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

We have no difficulty agreeing with the trial court's conclusion that placing the Child in Father's custody poses a risk of substantial harm to the Child. Numerous photographs in the record support Petitioners' testimony that the Child's overall physical condition was poor upon her removal from Father. Moreover, the record clearly establishes that the Child was exposed to and ingested illegal drugs while in Father's custody. Petitioners testified at length regarding the great strides the Child has taken since being in their custody and how she benefitted from therapy. Given the Child's progress while in Petitioners' care, it is also sufficiently probable that removing the Child from her present situation would cause substantial harm to her psychological welfare. *See, e.g.*, *In re Braelyn S.*, No. E2020-00043-COA-R3-PT, 2020 WL 4200088, at *17 (Tenn. Ct. App. July 22, 2020) (risk of substantial harm shown by evidence that child was "bonded and thriv[ing] in his current family situation"); *In re Antonio J.*, No. M2019-00255-COA-R3-PT, 2019 WL 6312951, at *9 (Tenn. Ct. App. Nov. 25, 2019) (holding that substantial harm

could be established based in part on child's expressed fear of being removed from his foster family and tender age of removal); *In re Ken'bria B.*, No. W2017-01441-COA-R3-PT, 2018 WL 287175, at *10 (Tenn. Ct. App. Jan. 4, 2018) (concluding that risk of substantial harm was proven when "testimony in the record establish[ed] the strong bond" between the child and her foster family).

Consequently, we affirm the trial court's decision to terminate Father's parental rights pursuant to Tennessee Code Annotated section 36-1-113(g)(14).

II. Best Interest

In addition to proving at least one statutory ground for termination, a party seeking to terminate a parent's rights must prove by clear and convincing evidence that termination is in the child's best interest. Tenn. Code Ann. § 36-1-113(c). Indeed, "a finding of unfitness does not necessarily require that the parent's rights be terminated." *In re Marr*, 194 S.W.3d 490, 498 (Tenn. Ct. App. 2005) (citing *White v. Moody*, 171 S.W.3d 187 (Tenn. Ct. App. 2004)). Rather, our termination statutes recognize that "not all parental conduct is irredeemable[,]" and that "terminating an unfit parent's parental rights is not always in the child's best interests." *Id.* As such, the focus of the best interest analysis is not the parent but rather the child. *Id.*; *see also White*, 171 S.W.3d at 194 ("[A] child's best interest must be viewed from the child's, rather than the parent's, perspective.").

We consider nine statutory factors when analyzing a child's best interest:

> (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
>
> (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
>
> (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
>
> (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
>
> (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
>
> (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or

> psychological abuse, or neglect toward the child, or another child or adult in the family or household;
>
> (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol, controlled substances or controlled substance analogues as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
>
> (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
>
> (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i) (Supp. 2020).

This list is non-exhaustive.[9] *In re Marr*, 194 S.W.3d at 499. "Ascertaining a child's best interests does not call for a rote examination of each of Tenn. Code Ann. § 36-1-113(i)'s nine factors and then a determination of whether the sum of the factors tips in favor of or against the parent." *Id.* "The relevancy and weight to be given each factor depends on the unique facts of each case." *Id.* "Thus, depending upon the circumstances of a particular child and a particular parent, the consideration of one factor may very well dictate the outcome of the analysis." *Id.* (citing *In re Audrey S.*, 182 S.W.3d at 877).

The trial court made detailed findings of fact and conclusions of law regarding the Child's best interest. As to the first factor, the trial court found that Father "has a continuing record of two years of criminal conduct. He had convictions and was placed on probation, then his probation was revoked, then he incurred new charges, before he was finally confined to the Tennessee Department of Corrections." The record does not preponderate against this finding. While Father did testify that he has participated in some "pro-social" classes while incarcerated, the record also reflects that Father incurred new criminal charges for assault while in prison. Further, as detailed above, Father exhibited a troubling attitude at trial regarding his history of serious criminal activity and substance abuse. We therefore agree with the trial court that factor one militates in favor of termination.

[9] The Tennessee General Assembly recently amended the statutory best interest factors provided in Tennessee Code Annotated section 36-1-113(i). *See* 2021 Tenn. Pub. Acts, ch. 190 § 1. This amendment does not affect the instant case because we apply the version of the statute in effect at the time the petition for termination was filed. *See In re Braxton M.*, 531 S.W.3d 708, 732 (Tenn. Ct. App. 2017).

Next, the trial court found that factor two favors Petitioners. However, our review of the record reveals no information as to any "efforts by available social services agencies" to help Father. As such, we conclude that factor two favors neither party. Further, because of the no-contact order prohibiting Father from communicating with the Child, we also conclude that factor three favors neither party.

Factor four addresses the relationship between child and parent. The trial court found the following:

> [Father] was placed in jail in August, 2018, December, 2018, and July, 2019. Almost half of the [C]hild's life has been with [Petitioners]. By the time [Father] gets out on probation, under the best of circumstances, it will be over half the [C]hild's life. The court credits [Cara S.'s] testimony that the [C]hild never asks for [Father]. The court finds there is no meaningful relationship between [Father] and the [C]hild. The court notes from testimony and photo exhibits, that the [C]hild has bonded with and established a meaningful relationship with them. The Court credits this factor to [Petitioners].

Here, the record does not preponderate against the trial court's findings. The trial court credited the testimony of Cara S. that the Child is bonded in her current home and does not ask about Father. Rather, the Child refers to Bradley S. as "daddy." Although Father testified that he has a meaningful relationship with the Child, it is incumbent upon this Court to consider these factors from the perspective of the Child. Accordingly, this factor favors termination.

The trial court also concluded that factors five, six, and seven favor termination and we agree. As addressed already, the record shows that the Child's physical and emotional well-being has improved since being in the care of Petitioners, and removing her from her placement at this juncture would most likely harm her emotional, psychological and physical condition. Factor five dovetails with factors six and seven in this case because the record establishes that the Child suffered severe neglect at the hands of Father. As the trial court notes, "[t]here are at least two pleas of guilty by [Father] to child abuse or neglect[,]" and there is no dispute that Father exposed the Child to various drugs while she was in Father's custody. The trial court found that "there has not been a change in [Father]." The record does not preponderate against these findings, and we also conclude that factors five, six, and seven militate heavily in favor of termination.

Turning to factor eight, the trial court found that this factor favors Petitioners because Father admitted to voluntarily engaging in the criminal acts leading to his present incarceration. The record does not preponderate against this finding. Moreover, Father showed some remorse at trial regarding the Child's situation but ultimately took the position that what he "does on [his] private time" has no bearing on his parenting ability.

This Court is also troubled by Father's statement that "addiction is in [the] mind[,]" as this suggests Father does not acknowledge the problems that led him to this point. Accordingly, we agree with the trial court that factor eight also favors termination.

Finally, the trial court concluded that factor nine also weighs against Father, noting that Father has not paid child support. As we have already explained, however, there is no dispute that Father supported the Child financially prior to his incarceration, and there was no further proof as to this issue at trial. We therefore disagree that factor nine weighs against Father.

Based on all of the foregoing, we conclude that the trial court correctly found, by clear and convincing evidence, that termination of Father's parental rights is in the Child's best interest.

CONCLUSION

The judgment of the Juvenile Court for Franklin County is hereby affirmed in part and vacated in part, and remanded for further proceedings consistent with this opinion. Costs of this appeal are assessed to the appellant, Austin B., for which execution may issue if necessary.

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KRISTI M. DAVIS, JUDGE