

FILED

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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 4, 2020

IN RE DUSTIN M.

**Appeal from the Juvenile Court for Montgomery County
No. 63JV1-2019-JV-274 Tim Barnes, Judge**

No. M2019-01661-COA-R3-PT

This is a termination of parental rights case. Appellants, mother and father, appeal the trial court's termination of their parental rights on the grounds of: (1) abandonment; (2) failure to substantially comply with the requirements of the parenting plans; (3) persistence of the conditions that led to the child's removal from their custody; and (4) failure to manifest an ability and willingness to assume custody. Discerning no error, we affirm.

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

KENNY ARMSTRONG, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J., and ANDY D. BENNETT, J., joined.

James R. Potter, Clarksville, Tennessee, for the appellant, Dustin M.¹

Gregory D. Smith, Clarksville, Tennessee, for the appellant, Marissa D.

Herbert H. Slatery, III, Attorney General and Reporter, and Lexie A. Ward, Assistant Attorney General, for the appellee, Tennessee Department of Children's Services.

OPINION

I. Background

¹ In cases involving minor children, it is the policy of this Court to redact the parties' names so as to protect their identities.

Dustin M. (“Child”) was born in April 2015 to Appellant Marissa D. (“Mother”) and Appellant Dustin M. (“Father”). The Tennessee Department of Children’s Services (“DCS,” or “Appellee”) became involved with the Child in April 2017 after Father assaulted his brother with a machete. The Child was not present during the assault; however, after the assault, the parents’ whereabouts were unknown, and a warrant was issued for their arrest. Father was eventually charged with aggravated assault. He was on probation at the time of the hearing on the petition to terminate his parental rights.

The Child was removed from the parents’ custody by order on April 13, 2017. Thereafter, DCS filed a petition to adjudicate the Child dependent and neglected. Mother and Father waived their right to an adjudicatory hearing and stipulated that the Child was dependent and neglected. The Juvenile Court of Montgomery County (“trial court”) entered an order to this effect on July 3, 2017.

The adjudicatory order allowed Mother visitation, and the Child returned to her home in July 2017 for a trial home visit while he remained in DCS custody. Thereafter, Mother failed a drug screen testing positive for methamphetamine. After Mother failed the drug screen, she refused to submit to a mouth swab; nonetheless, DCS agreed to extend the trial home visit on the condition that Mother would participate in a clinical drug and alcohol assessment. Mother failed to participate in the assessment, failed to show up for drug screens, and failed to present for court proceedings. Eventually, she stopped interacting with DCS by ignoring calls and attempted home visits. By order of November 6, 2017, the trial court terminated the trial visit based on Mother’s noncompliance with DCS’s requirements.

Despite the trial court’s order to produce the Child, DCS was unable to gain physical custody from Mother until approximately one month after the November 6, 2017 order. Even then, DCS had to solicit help from law enforcement. DCS reported that when the Child was returned, he had scratches and bruising on his face and arms. His fingernails were dirty as were his clothes. He also smelled of urine. By order of November 27, 2017, Mother was found in contempt of court for failing to produce the Child; she was sentenced to jail time.

The Child was placed in foster care, and DCS created the first permanency plan on May 9, 2017; Mother participated in the formation of the plan and signed it. Father, who was incarcerated at the time, reviewed and signed the plan in June 2017. The plan, which was ratified by the trial court on July 24, 2017, required Mother to: (1) provide proof of stable housing and allow DCS to inspect the home; (2) maintain legal means of income and provide financially for the Child; (3) make child support payments of \$20.00 per month; (4) complete a non-self-reporting clinical assessment with parenting component and follow all recommendations thereof; and (5) work toward resolving her legal issues. Father was required to: (1) make voluntary child support payments of \$20.00 per month; (2) actively work toward resolving his legal issues; (3) maintain contact with DCS; (4)

complete a non-self-reporting clinical assessment with parenting, drug, and alcohol components and follow all recommendations thereof; and (4) address domestic violence and anger issues. The initial plan was revised on November 16, 2017 and ratified on February 5, 2018; Mother participated in this meeting and signed the revised plan. Father was incarcerated, but he received a copy of the revised plan and reviewed it with DCS case worker, Jamin Pena, in March 2018. His requirements under the revised plan remained the same. Mother's initial responsibilities remained unchanged but additional requirements were added. These included: (1) submit to random drug screens; (2) complete a hair follicle test by December 15, 2017; (3) if Mother tested positive on any drug screens, she was required to complete an alcohol and drug assessment and follow all recommendations thereof.

A third permanency plan was created on May 21, 2018 and ratified on July 9, 2018. Father, who was not in jail at the time, participated in the revision of the plan. Additional requirements were added for Father, including: (1) continue to follow up with his medical provider to receive necessary care; (2) complete a clinical assessment with parenting component on December 15, 2017; (3) complete parenting classes; (4) participate in individual therapy to address past traumas; (5) receive case management services to assist in finding employment and other resources; (6) obtain and maintain stable housing and provide proof of same to DCS; and (7) submit to random drug screens. One additional requirement was added for Mother; she was to participate in therapeutic visitation with the Child and bring diapers, wipes, change of clothes, and a meal during her visits. Two other permanency plans were created, but Mother and Father's respective responsibilities did not change.

On February 20, 2019, DCS filed a petition to terminate Mother and Father's parental rights to the Child. As grounds for termination of Mother's parental rights, DCS alleged: (1) abandonment by failure to visit; and (2) abandonment by failure to support. As grounds for termination of Father's parental rights, DCS alleged: (1) abandonment by an incarcerated parent for failure to visit;² (2) abandonment by an incarcerated parent for failure to support; (3) abandonment by an incarcerated parent by wanton disregard. DCS also alleged the following grounds as to both parents: (1) substantial non-compliance with the requirements of the permanency plans; (2) persistence of the conditions that led to the Child's removal; and (3) failure to manifest an ability and willingness to assume custody and financial responsibility for the Child. DCS also alleged that termination of Mother and Father's parental rights was in the Child's best interest. A guardian ad litem was appointed for the Child, and counsel was appointed to represent appellants.

The trial court heard DCS's petition on July 22, 2018. By order of August 26, 2019, the trial court terminated Mother's parental rights on the grounds of: (1) abandonment by failure to support; (2) substantial non-compliance with the requirements

² At the hearing, DCS withdrew the abandonment by failure to visit ground.

of the permanency plan; (3) persistence of conditions; and (4) failure to manifest an ability and willingness to assume custody or financial responsibility for the Child. By the same order, the trial court terminated Father's parental rights on the grounds of: (1) abandonment by an incarcerated parent by failure to support; (2) abandonment by an incarcerated parent by wanton disregard; (3) substantial non-compliance with the requirements of the permanency plan; (4) persistence of conditions; and (5) failure to manifest an ability and willingness to assume custody or financial responsibility for the Child. The trial court also found, by clear and convincing evidence, that termination of appellants' respective parental rights is in the Child's best interest. Both parents appeal.

II. Issues

We state the dispositive issues as follows:

1. Whether there is clear and convincing evidence to support at least one of the grounds relied upon by the trial court to terminate each appellant's respective parental rights.
2. Whether termination of appellants' respective parental rights is in the Child's best interest.

Mother raises an additional issue in her appellate brief:

The trial court abused its discretion in terminating Mother's parental rights *in absentia* instead of resetting trial until Mother was present in open court, without proof that Mother's absence was intentional avoidance of trial.

III. Standard of Review

The Tennessee Supreme Court has previously 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 507, 522-23 (Tenn. 2016) (footnote omitted). In Tennessee, termination of parental rights is governed by statute which identifies “situations in which that state’s interest in the welfare of a child justifies interference with a parent’s constitutional rights by setting forth grounds on which termination proceedings can be brought.” *In re Jacobe M.J.*, 434 S.W.3d 565, 568 (Tenn. Ct. App. 2013) (quoting *In re W.B.*, Nos. M2004-00999-COA-R3-PT, M2004-01572-COA-R3-PT, 2005 WL 1021618, at *7 (Tenn. Ct. App. Apr. 29, 2005) (citing Tenn. Code Ann. § 36-1-113(g))). Thus, a party seeking to terminate a parent’s rights must prove: (1) the existence of one of the statutory grounds; and (2) that termination is in the child’s best interest. Tenn. Code Ann. § 36-1-113(c); *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

Considering the fundamental nature of a parent’s rights, and the serious consequences that stem from termination of those rights, a higher standard of proof is required in determining termination cases. *Santosky*, 455 U.S. at 769. As such, a party must prove statutory grounds and the child’s best interest by clear and convincing evidence. Tenn. Code Ann. § 36-3-113(c); *In re Valentine*, 79 S.W. 3d at 546. Clear and convincing evidence “establishes that the truth of the facts asserted is highly probable . . . and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from evidence[,]” and “produces in a fact-finder’s mind a firm belief or conviction regarding the truth of the facts sought to be established.” *In re M.J.B.*, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004).

In termination of parental rights cases, appellate courts review a trial court’s factual findings de novo and accord these findings a presumption of correctness unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *In re Carrington H.*, 483 S.W.3d at 523-24 (citing *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010); *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)). The Tennessee Supreme Court has explained that:

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 524.

Furthermore, if the “resolution of an issue in a case depends upon the truthfulness of witnesses, the trial judge, who has had the opportunity to observe the witnesses and their manner and demeanor while testifying, is in a far better position than this Court to decide those issues.” *In re Nevada N.*, 498 S.W.3d 579, 591 (Tenn. Ct. App. 2016) (citing *McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn. 1995); *Whitaker v. Whitaker*, 957 S.W.2d 834, 837 (Tenn. Ct. App. 1997)). Therefore, this Court “gives great weight to the credibility accorded to a particular witness by the trial court.” *In re Christopher J.*, No. W2016-02149-COA-R3-PT, 2017 WL 5992359, at *3 (Tenn. Ct. App. Dec. 4, 2017) (citing *Whitaker*, 957 S.W.2d at 837).

IV. Mother’s Absence from the Trial Court Proceedings

Mother appeared at the hearing on DCS’s petition to terminate her parental rights. Before the hearing started, the trial court ordered Mother and Father to submit to a drug test; neither immediately complied. The appellants ultimately gave urine samples, but Mother left the courthouse after she gave her sample but before the hearing commenced. At the outset of the hearing, the trial court stated:

The mother . . . was here present this morning. A drug screen was ordered of both mother and the father. Both spent quite some time to give a sample. Ultimately samples were given, and at some point between the time the samples were given and our taking up this matter to be heard, the mother . . . left the courthouse and is not here. I don’t know why she left the courthouse, but she is gone.

On appeal, Mother argues that the trial court committed reversible error by continuing with the hearing in her absence. Mother’s argument is not persuasive.

In the first instance, Mother chose to leave the proceedings without explanation. We can surmise that she fled due to the administration of the drug test, which ultimately returned positive for methamphetamine. Nonetheless, she was represented by counsel, who remained present at the hearing. After it became clear that Mother had left, her counsel did not move for a continuance of the hearing or otherwise object to the hearing proceeding in Mother’s absence. Mother’s counsel stated only:

Your Honor, unfortunately my client has persistently failed and refused to maintain contact with my law firm for quite some time despite the diligent efforts to communicate with her. However, I did have an opportunity to speak with her this morning in the building, and she repeatedly stated that she objects to a termination of her parental rights.

Having failed to object to the hearing continuing, Mother has waived this issue on appeal. “Tennessee courts have long recognized that, in order to preserve an issue on appeal, an objection must be made in a timely manner before the trial court.” *Eldridge v. Eldridge*, No. 01A01-9808-CV-00451, 1999 WL 767792, *3 (Tenn. Ct. App. Sept. 29, 1999). Specifically, the *Eldridge* Court stated:

It is a general rule of trial practice that a party is not permitted to withhold objection to an occurrence during the trial, saving the objection as an “ace in the hole” to be used in event of an unfavorable outcome. Rather, parties are required to make timely objection or motion to remedy an error to enable the correction of the error and the avoidance of the expense of a new trial, and a failure to make such timely objection or motion is considered a waiver.

Id. That being said, the fault here rests with Mother not her attorney. Mother made a unilateral choice to leave the proceedings without explanation. It is a well settled maxim of equity that “No one can take advantage of his own wrong.” William Inman, Gibson’s Suits in Chancery § 27 (7th ed.). As such, the trial court’s continuation of the hearing after Mother chose to leave the proceedings is not reversible error.

V. Grounds for Termination of Parental Rights

Although only one ground must be proven by clear and convincing evidence in order to terminate a parent’s rights, the Tennessee Supreme Court has instructed this Court to review every ground relied upon by the trial court to terminate parental rights in order to prevent “unnecessary remands of cases.” *In re Angela E.*, 303 S.W.3d 240, 251 n. 14 (Tenn. 2010). Accordingly, we will review all of the foregoing grounds.

A. Abandonment by Mother

We begin with the ground of abandonment generally. In pertinent part, Tennessee Code Annotated section 36-1-113(g) provides:

(g) Initiation of termination of parental or guardianship rights may be based upon any of the grounds listed in this subsection (g). The following grounds are cumulative and nonexclusive, so that listing conditions, acts or omissions in one ground does not prevent them from coming within another ground:

(1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred . . .

Tenn. Code Ann. § 36-1-113(g)(1). As is relevant to Mother, Tennessee Code Annotated

section 36-1-102 defines “abandonment,” in relevant part, as follows:

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

- (i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding, pleading, petition, or any amended petition to terminate the parental rights of the parent or parents or the guardian or guardians of the child who is the subject of the petition for termination of parental rights or adoption, that the parent or parents or the guardian or guardians either have failed to visit or have failed to support or have failed to make reasonable payments toward the support of the child;

(B) For purposes of this subdivision (1), “token support” means that the support, under the circumstances of the individual case, is insignificant given the parent’s means.

(D) For purposes of this subdivision (1), “failed to support” or “failed to make reasonable payments toward such child’s support” means the failure, for a period of four (4) consecutive months, to provide monetary support or the failure to provide more than token payments toward the support of the child. That the parent had only the means or ability to make small payments is not a defense to failure to support if no payments were made during the relevant four-month period;

(F) Abandonment may not be repented of by resuming visitation or support subsequent to the filing of any petition seeking to terminate parental or guardianship rights or seeking the adoption of a child;

Tenn. Code Ann. § 36-1-102. Based on the statutory definition of abandonment, “[t]erminating parental rights based on failure to support presupposes: (1) that the parent is aware of his or her duty to support; (2) that the parent is able to provide financial support, either through income from private employment or qualification for government benefits; and (3) that the parent has voluntarily and intentionally chosen not to provide

financial support without a justifiable excuse.” *In re M.J.B.*, 140 S.W.3d 643, 645 (Tenn. Ct. App. Apr. 8, 2004) (citation omitted).

Prior to 2018, the statutory definition of abandonment placed the burden of proof on the petitioner to show that the parent’s failure to visit or failure to support was “willful.” However, in 2018, the General Assembly amended the statute to shift the burden of proof to the parent or guardian to show that his or her failure to support or visit was not willful. For cases filed on or after July 1, 2018, Tennessee Code Annotated section 36-1-102(1)(I) now provides that:

For purposes of this subdivision (1), it shall be a defense to abandonment for failure to visit or failure to support that a parent or guardian’s failure to visit or support was not willful. The parent or guardian shall bear the burden of proof that the failure to visit or support was not willful. Such defense must be established by a preponderance of evidence. The absence of willfulness is an affirmative defense pursuant to Rule 8.03 of the Tennessee Rules of Civil Procedure

Tenn. Code Ann. § 36-1-102(1)(I). Here, DCS filed its petition on February 20, 2019; accordingly, the parent has the burden to show that his or her failure to support the Child was not willful.

Concerning the concept of willfulness in the context of abandonment for purposes of termination of parental rights, this Court has stated:

In the statutes governing the termination of parental rights, “willfulness” does not require the same standard of culpability as is required by the penal code. Nor does it require malevolence or ill will. Willful conduct consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent. Conduct is “willful” if it is the product of free will rather than coercion. Thus, a person acts “willfully” if he or she is a free agent, knows what he or she is doing, and intends to do what he or she is doing. . . .

The willfulness of particular conduct depends upon the actor’s intent. Intent is seldom capable of direct proof, and triers-of-fact lack the ability to peer into a person’s mind to assess intentions or motivations. Accordingly, triers-of-fact must infer intent from the circumstantial evidence, including a person’s actions or conduct.

In re Audrey S., 182 S.W.3d 838, 863-64 (Tenn. Ct. App. Aug. 25, 2005) (internal citations and footnotes omitted). “Whether a parent failed to visit or support a child is a question of fact. Whether a parent’s failure to visit or support constitutes willful

abandonment . . . is a question of law.” *In re Adoption of Angela E.*, 402 S.W.3d 636, 640 (Tenn. Ct. App. 2013) (citing *In re Adoption of A.M.H.*, 215 S.W.3d 793, 810 (Tenn. 2007)). As previously discussed, this Court reviews questions of law *de novo* with no presumption of correctness. *Id.* With the foregoing in mind, we turn to address the specific findings on abandonment.

In its order terminating Mother’s parental rights, the trial court found:

In this case, the Court does find clear and convincing evidence that the mother has abandoned her child because she willfully has not supported the child in the relevant statutory period. Additionally, the mother has not paid any support towards the care of her child since he was placed in foster care. The mother was not in jail or incapacitated in any way during the four month period preceding the filing of the petition that would have prevented her from supporting the child.

The mother was aware that the child was in custody as she participated in court hearing[s] and meetings concerning the child. After the child came into DCS custody, DCS explained to mother that failure to support the child could result in a termination of her parental rights. DCS explained the Criteria and Procedures for Termination of Parental Rights to the mother on numerous occasions and the mother signed said Criteria indicating they had been explained to her and that she understood the requirements under the Criteria. The mother reported to DCS that she was employed at various times while the child is in DCS custody, but provided no proof of employment or any support to the child. Once DCS lost contact with the mother, DCS mailed correspondence including the child’s permanency plans and the criteria and procedures for termination of parental rights to the last known address of the mother. As such, the mother knew or should have known of her duty to support and the consequences of her failure to do so. Throughout the duration of this case, DCS has made diligent efforts to engage the mother, to no avail. The mother has never attempted to support her child and has abandoned him to the foster care system.

The record supports the trial court’s findings. DCS Case Manager Jamin Pena testified that Mother was aware of the permanency plan requirement that she pay \$20 per month in child support. Ms. Pena testified that she was unaware of any impediments to Mother’s ability to work; however, she had no proof of Mother’s employment since 2017. Nonetheless, Ms. Pena stated that Mother had made no payments toward the Child’s support. Ms. Pena’s testimony is undisputed and clearly shows that Mother abandoned the Child by failure to provide even token support. As such, we affirm the trial court’s termination of her parental rights on this ground.

B. Abandonment by Father

Since the time the Child came into DCS custody, Father has been incarcerated for a total of approximately fifteen months. Tennessee Code Annotated section 36-1-102 defines abandonment by an incarcerated parent as follows:

(iv) A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and either has failed to visit or has failed to support or has failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent's or guardian's incarceration, or the parent or guardian has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child. If the four-month period immediately preceding the institution of the action or the four-month period immediately preceding such parent's incarceration is interrupted by a period or periods of incarceration, and there are not four (4) consecutive months without incarceration immediately preceding either event, a four-month period shall be created by aggregating the shorter periods of nonincarceration beginning with the most recent period of nonincarceration prior to commencement of the action and moving back in time. Periods of incarceration of less than seven (7) days duration shall be counted as periods of nonincarceration. . . . A finding that the parent has abandoned the child for a defined period in excess of four (4) months that would necessarily include the four (4) months of nonincarceration immediately prior to the institution of the action, but which does not precisely define the relevant four-month period, shall be sufficient to establish abandonment. . . .

Tenn. Code Ann. § 36-1-102(1)(A)(iv). Thus, a parent who was incarcerated during all or part of the four months immediately preceding the filing of the termination petition can abandon his or her children by engaging in conduct prior to the incarceration that shows a “wanton disregard” for the children's welfare. Here, DCS filed its petition to terminate Father's parental rights on February 20, 2019. Father was incarcerated on two occasions during the four month period immediately preceding DCS's filing. Father was incarcerated on November 25, 2018 for charges related to Violation of Probation and Operating a Motor Vehicle without a License. Father was released after two month; however, on January 24, 2019, he was again incarcerated for charges related to Violation of Probation and domestic violence. Here, the trial court found that Father abandoned the Child both by failure to support the Child and by wanton disregard during the relevant time period.

Concerning abandonment by failure to support, the trial court specifically held:

In this case, the Court does find clear and convincing evidence that the father abandoned the child because he willfully has not supported the child in the relevant statutory period. Additionally, [Father] has not paid any support other than token support towards the care of the child since he was placed in foster care. The father became incarcerated on November 25, 2018 . . . and again [on] January 24, 2019 In the four months preceding his incarceration, the father provided no support toward the care of his child. [Father] was not incapacitated in any way during the four month period preceding his incarceration that would have prevented him from supporting the child. Since the child was placed in custody twenty-seven (27) months ago, FSW Pena testified that the father had paid one child support payment while the child was in DCS custody. If the Court construes that evidence most favorably to the father based on his testimony, the most the father has paid during the entire twenty-seven (27) month custodial episode is \$60-\$80 and some food and toys at his sporadic visitations. The Court would find this token support.

After the child came into DCS custody, DCS did explain to the father that a failure to support the child could result in termination of his parental rights. The father was ordered to provide support towards the care of the child while he was in foster care. The father knew his child was in DCS custody and that failure to support his child could result in a termination of his parental rights. [Father] knew of his duty to support and the consequences of his failure to do so because he signed the Criteria and Procedures for Termination of Parental Rights which were explained to him by DCS staff. Additionally, the father was provided copies of the child's permanency plan which outlined his duty to support the child. Despite this knowledge, [Father] has only paid token support towards the care of his child since he entered DCS custody.

Turning to the record, there is sufficient evidence to support the trial court's findings. Father testified that he was aware that his failure to provide support for the Child could result in DCS moving to terminate his parental rights. He stated that he was employed during the periods that he was not incarcerated and testified that he had paid approximately \$80 toward the Child's support. DCS produced documentation showing that Father, in fact, paid \$20 during the entire time the Child was in foster care. When presented with this documentation, Father explained that, although he only paid support one time, he had given money to Mother to pay the support. Regardless, by his own admission, Father provided no more than \$80 during the entire time the Child was in DCS custody. Father further testified that he smokes cigarettes, but when asked why the money he used to buy cigarettes was not tendered for support of his Child, Father downplayed his habit, stating that, "I mean, I don't smoke a whole lot" Father's

excuse was not persuasive to the trial court, nor is it persuasive to this Court. From the totality of the circumstances and Father's own testimony, we conclude that there is clear and convincing evidence to support the trial court's termination of Father's parental rights on the ground of abandonment by failure to support.

In addition to the ground of abandonment by failure to support, the trial court also found that Father abandoned the Child by wanton disregard. Tenn. Code Ann. § 36-1-102(1)(A)(iv). We note that courts are not limited to the four-month period preceding a parent's incarceration to determine whether the parent has engaged in conduct evidencing a wanton disregard for his or her children's welfare. *In re F.N.M.*, No. M2015-00519-COA-R3-PT, 2016 WL 3126077, at *3 (Tenn. Ct. App. Apr. 11, 2016); *see also Dep't of Children's Servs. v. Hood*, 338 S.W.3d 917, 926 (Tenn. Ct. App. 2009) ("parental conduct exhibiting wanton disregard for a child's welfare may occur at any time prior to incarceration and is not limited to acts occurring during the four-month period immediately preceding the parent's incarceration"). However, incarceration itself is not grounds for the termination of a parent's rights, but courts consider the incarceration a "triggering mechanism that allows the court to take a closer look at the child's situation to determine whether the parental behavior that resulted in incarceration is part of a broader pattern of conduct that renders the parent unfit or poses a risk of substantial harm to the welfare of the child." *In re Audrey S.*, 182 S.W.3d at 866.

In its order terminating Father's parental rights, the trial court made the following findings concerning wanton disregard:

Before going to jail, the father engaged in conduct that exhibits a wanton disregard for the child's welfare by engaging in criminal activity and failing to visit or support his child. These activities resulted in his multiple incarcerations and continually put him at risk for arrest and legal issues. Additionally, rather than making progress towards reunification with his child, [Father] continued to engage in criminal activities and failed to maintain any consistent contact with his child or DCS.

When the child was removed, the father was incarcerated for what he referred to as the "incident." The incident was that [Father] attacked his brother with a machete, which led to his arrest, which led to his incarceration, which led ultimately to him being charged with aggravated assault and convicted on a lesser offense. As a result of said conviction, the father was incarcerated for a year and was placed on probation for four (4) years. The child was in DCS custody during the father's year of incarceration and after the father is released from jail, while the child remains in custody, he is again incarcerated and charged with aggravated assault which is ultimately dismissed, but the father served two (2) months due to a violation of probation charge resulting from the incident. Thereafter, the father is again arrested . . . for missing a court date. Due to

his ongoing criminal behaviors, the father was incarcerated for some fifteen months (15) months of the child's twenty-seven (27) months in custody. Additionally, the father came to court on this date and after taking hours to produce a urine sample, he tested positive for methamphetamine, which he attributes to being exposed to when he rode in the car with someone who was smoking the substance. The father, who at the age of thirty (30), had a heart attack, is in an enclosed vehicle with someone smoking methamphetamine while he is on probation, and again is exposing himself to the possibility of being incarcerated by riding in a vehicle with someone smoking methamphetamine. That's if the Court believes the father's excuse as to why he tested positive for methamphetamine at this hearing. Additionally, the father testified to another incident where he was in a vehicle with someone using methamphetamine and was arrested by law enforcement. The Court would find that most persons on probation are going to be living at the foot of the cross, however, the father does not have regard for this as he tested positive for methamphetamine today and admits to being around persons using methamphetamine on multiple occasions.

Based upon the above information, this Court finds that the father has engaged in conduct that constitutes a wanton disregard for the welfare of his child while he has been in foster care, resulting in his incarceration.

As set out above, the statute does not define "wanton disregard." *In re H.A.L.*, No. M2005-00045-COA-R3-PT, 2005 WL 954866, at *6 (Tenn. Ct. App. Apr. 25, 2005). Nonetheless, Tennessee courts have held that "probation violations, repeated incarceration, criminal behavior, substance abuse, and the failure to provide adequate support or supervision for a child can, alone or in combination, constitute conduct that exhibits a wanton disregard for the welfare of a child." *In re Audrey S.*, 182 S.W.3d at 867-68. "Our courts have consistently held that an incarcerated parent who has multiple drug offenses and wastes the opportunity to rehabilitate themselves by continuing to abuse drugs, resulting in revocation of their parole and reincarceration, constitutes abandonment of the child, and demonstrates a wanton disregard for the welfare of the child." *Dep't of Children's Servs. v. J.M.F.*, No. E2003-03081-COA-R3-PT, 2005 WL 94465, at *7 (Tenn. Ct. App. Jan. 11, 2005) (citing *In re C.T.S.*, 156 S.W.3d 18, 25 (Tenn. Ct. App. 2004); *Dep't of Children's Servs. v. J.S.*, No. M2000-03212-COA-R3-JV, 2001 WL 1285894, at *3 (Tenn. Ct. App. Oct. 25, 2001); *In re C.W.W.*, 37 S.W.3d 467, 473 (Tenn. Ct. App. 2000). Indeed, the enactment of Tenn. Code Ann. § 36-1-102(1)(A)(iv), *supra*, reflects the General Assembly's recognition that "parental incarceration is a strong indicator that there may be problems in the home that threaten the welfare of the child" and that "[i]ncarceration severely compromises a parent's ability to perform his or her parental duties." *In re Audrey S.*, 182 S.W.3d at 866. "The actions that our courts have commonly found to constitute wanton disregard reflect a 'me first' attitude involving the intentional performance of illegal or unreasonable acts and indifference to the consequences of the actions for the child." *In re Anthony R.*, No.

M2014-01753-COA-R3-PT, 2015 WL 3611244, at *3 (Tenn. Ct. App. June 9, 2015).

Here, the record is replete with evidence of Father's poor decision making. After he was released from incarceration following the assault on his brother, Father was placed on probation. At this point, the Child was in DCS custody. However, rather than work on reunification with his Child, Father engaged in activity that violated the terms of his probation and resulted in further incarceration. The decision to engage in such activities has resulted in Father not having stable employment or housing.

Perhaps most disturbing is the fact that Father tested positive for methamphetamine on the day of the hearing to terminate his parental rights. Father's excuse was of no help to his case. As found by the trial court, although Father denied that he had used methamphetamine, he readily admitted to being in a vehicle with people who were using. Even taking Father's explanation as true, he was undisputedly in very close contact with persons who used illegal drugs. His engagement with these people not only shows poor judgment, but also puts Father at risk for further incarceration. From the totality of the circumstances, there is clear and convincing proof to support the trial court's termination of Father's parental rights on the ground of abandonment by wanton disregard.

C. Persistence of Conditions

The trial court also found that termination of Mother and Father's parental rights was appropriate under Tennessee Code Annotated § 36-1-113(g)(3), a ground commonly referred to as "persistence of conditions." *In re Audrey S.*, 182 S.W.3d at 871. The persistence of conditions ground focuses "on the results of the parent's efforts at improvement rather than the mere fact that he or she had made them." *Id.* at 874. The goal is to avoid having a child in foster care for a time longer than reasonable for the parent to demonstrate the ability to provide a safe and caring environment for the child. *In re Arteria H.*, 326 S.W.3d 167, 178 (Tenn. Ct. App. 2010), *overruled on other grounds* by *In re Kaliyah S.*, 455 S.W.3d 533, 555 (Tenn. 2015). Thus, the question before the court is "the likelihood that the child can be safely returned to the custody of the [parent], not whether the child can safely remain in foster care." *In re K.A.H.*, No. M1999-02079-COA-R3-CV, 2000 WL 1006959, at *5 (Tenn. Ct. App. July 21, 2000).

There are several elements to the ground of persistence of conditions. When the termination petition was filed, the ground applied as a basis to terminate parental rights when:

The child has been removed from the home or the physical and legal custody of a parent or guardian for a period of (6) months by a court order entered at any stage of proceedings in which a petition has been filed in the

juvenile court alleging that a child is dependent and neglected,³ and:

- (A) The conditions that led to the child's removal still persist, preventing the child's safe return to the care of the parent or guardian, or other conditions exist that, in all reasonable probability, would cause the child to be subjected to further abuse or neglect, preventing the child's safe return to the care of the parent or guardian;
- (B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent or guardian in the near future; and
- (C) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home[.]

Tenn. Code Ann. § 36-1-113(g)(3)(A) (2018). Each of the statutory elements must be established by clear and convincing evidence. *In re Valentine*, 79 S.W.3d 539, 550 (Tenn. Ct. App. 2002). Here, as noted above, the parents stipulated to dependency and neglect due to Father's arrest and DCS's previous history with the appellants due to drug abuse and environmental neglect. The trial court entered its dependency and neglect order on July 3, 2017.

Concerning the persistence of the conditions that led to the Child's removal, the trial court held:

The Court finds that the conditions that led to the removal still persist. The Respondents . . . have had no contact with the child or DCS in nearly 6 months. The father was incarcerated for much of the duration of the case, having been released in February 2018, but again becoming incarcerated in November 2018 and then [on] January 24, 2019. The father has had no contact with DCS since November 2018 and has failed to maintain visitation or a relationship with his child. The father was charged with violation of probation in November 2018 and said charges are pending at this time. The mother was initial compliant with DCS, but after the child was placed on a trial home visit with mother, the mother failed to comply with the terms of the trial home visit and did not allow DCS access to the child or the home. The Juvenile Court disrupted the trial home visit and issued an attachment for the child due to the concerns with the mother, and the child was only recovered after law enforcement executed a search warrant of the mother's residence. At the time of the child's recovery, the child was filthy and clearly not properly cared for and the residence was an

³ "The six (6) months must accrue on or before the first date the termination of parental rights petition is set to be heard." Tenn. Code Ann. § 36-1-113(g)(3)(B).

environmental hazard. The mother was found in contempt of the Court and served seven (7) days . . . due to her failure to comply with the Court orders disrupting the trial home visit and requiring her to return the child to DCS. Thereafter, the mother was ordered to complete a hair follicle drug screen due to concerns of substance abuse, and to date the mother has failed to comply with the screen. The mother and father continue to engage in criminal activity, resulting in their repeated incarcerations. It is unknown at this time, due to mother's failure to maintain contact with DCS, if she has suitable housing or a legal source of income to support the child. The father admits today that he does not have a stable housing or a legal source of income and cannot reunify with the child at this time. Additionally, after both parents took several hours to produce a urine sample, they both tested positive for methamphetamine on the date of their Court hearing to regarding the termination of their parental rights. Due to the stated concerns, the Respondents cannot reunify with the child and provide him a safe and stable environment.

These observations show that the conditions that necessitated foster care for the child persist. There is little chance that those conditions will be remedied soon so that the child[] can be returned safety to the home.

We agree with the trial court that the record contains clear and convincing evidence that the conditions preventing the Child's safe return to either parent persist. "A parent's continued inability to provide fundamental care to a child, even if not willful, . . . constitutes a condition which prevents the safe return of the child to the parent's care." *In re A.R.*, No. W2008-00558-COA-R3-PT, 2008 WL 4613576, at *20 (Tenn. Ct. App. Oct. 13, 2008) (citing *In re T.S. & M.S.*, No. M1999-01286-COA-R3-CV, 2000 WL 964775, at *7 (Tenn. Ct. App. July 13, 2000)). The failure to remedy the conditions which led to the removal need not be willful. *In re T.S. & M.S.*, 2000 WL 964775, at *6 (citing *State Dep't of Human Servs. v. Smith*, 785 S.W.2d 336, 338 (Tenn. 1990)). "Where . . . efforts to provide help to improve the parenting ability, offered over a long period of time, have proved ineffective, the conclusion is that there is little likelihood of such improvement as would allow the safe return of the child to the parent in the near future is justified." *Id.* The purpose behind the "persistence of conditions" ground for terminating parental rights is "to prevent the child's lingering in the uncertain status of foster child if a parent cannot within a reasonable time demonstrate an ability to provide a safe and caring environment for the child." *In re A.R.*, No. W2008-00558-COA-R3-PT, 2008 WL 461675, at *20 (Tenn. Ct. App. Oct. 13, 2008) (quoting *In re D.C.C.*, No. M2007-01094-COA-R3-PT, 2008 WL 588535, at *9 (Tenn. Ct. App. Mar. 3, 2008)).

Turning to the record, both parents tested positive for methamphetamine on the day of the hearing. Whether they personally consumed the illegal drugs is not dispositive as it is clear they have been around drugs and people who use them. Despite the fact that Mother did not participate at the hearing, Ms. Pena's undisputed testimony concerning

the trial home visit was persuasive. Ms. Pena testified that toward the end of the home visit period, Mother tested positive for methamphetamine, which likely meant that she used methamphetamine while the Child was in her physical custody. Although DCS continued to work with Mother, she refused to submit to further drug screens. Mother also stopped taking Ms. Pena's phone calls and failed to appear in court. Even after the court revoked the home visit and she was ordered to return the Child, Mother refused. It was not until almost a month later, and with law enforcement's involvement, that the Child was located. Ms. Pena testified that the Child's condition on return was poor. He was dirty, with bruises and scratches on his arms and face. Thereafter, Mother was largely absent and refused to cooperate with DCS. As set out above, on the day of the hearing, Mother tested positive for methamphetamine before fleeing the courthouse without notice or excuse. These facts, alone, show that the conditions that led to the Child's removal from Mother's custody persist. From the totality of the circumstances, we conclude that the trial court's termination of Mother's parental rights on the ground of persistence of the conditions that led to the Child's removal is supported by clear and convincing evidence in the record.

Concerning Father, his own testimony provides clear and convincing proof that the conditions that led to the Child's removal from his custody persist. In addition to violating his probation and fraternizing with drug users, Father testified that he has been unable to secure appropriate housing or employment.

Like Mother, Father tested positive for methamphetamine on the day of the hearing. Nonetheless, he insisted that he did not use drugs and that there was no need for him to submit to drug and alcohol assessment. Concerning the issues of domestic violence and anger, Father stated that the incident with his brother was "over with and done" and maintained that he had no need of counseling. Father's cavalier attitude toward his lifestyle choices, his lack of even the smallest concession of his own fault, and his resistance to DCS's unilateral efforts of assistance him not only show that the conditions that led to the Child's removal persist, but also indicate that no matter how long the Child remains in DCS custody, Father will likely take no steps to remedy those conditions. From the totality of the circumstances, we conclude that there is clear and convincing evidence to support the trial court's termination of Father's parental rights on the ground of persistence of conditions.

D. Failure to Substantially Comply with the Requirement of the Permanency Plan

The trial court found, by clear and convincing evidence, that appellants' respective parental rights should be terminated on the ground of failure to substantially comply with the requirements of the permanency plan. Tennessee Code Annotated Section 36-1-113(g)(2) provides that a parent's rights may be terminated when "[t]here has been substantial noncompliance by the parent . . . with the statement of responsibilities in a permanency plan."

“[T]he permanency plans are not simply a series of hoops for the biological parent to jump through in order to have custody of the children returned.” *In re C.S., Jr., et al.*, No. M2005-02499-COA-R3-PT, 2006 WL 2644371, at *10 (Tenn. Ct. App. Sept. 14, 2006). Rather,

the requirements of the permanency plan are intended to address the problems that led to removal; they are meant to place the parent in a position to provide the children with a safe, stable home and consistent appropriate care. This requires the parent to put in real effort to complete the requirements of the plan in a meaningful way in order to place herself in a position to take responsibility for the children.

Id. As discussed by this Court in *In re M.J.B.*, 140 S.W.3d 643 (Tenn. Ct. App. 2004):

Terminating parental rights based on Tenn. Code Ann. § 36-1-113(g)(2) requires more proof than that a parent has not complied with every jot and tittle of the permanency plan. To succeed under Tenn. Code Ann. § 36-1-113(g)(2), the Department must demonstrate first that the requirements of the permanency plan are reasonable and related to remedying the conditions that caused the child to be removed from the parent’s custody in the first place, *In re Valentine*, 79 S.W.3d 539, 547 (Tenn. 2002); *In re L.J.C.*, 124 S.W.3d 609, 621 (Tenn. Ct. App. 2003), and second that the parent’s noncompliance is substantial in light of the degree of noncompliance and the importance of the particular requirement that has not been met. *In re Valentine*, 79 S.W.3d at 548-49; *In re Z.J.S.*, No. M2002-02235-COA-R3-JV, 2003 WL 21266854, at *12 (Tenn. Ct. App. June 3, 2003). Trivial, minor, or technical deviations from a permanency plan’s requirements will not be deemed to amount to substantial noncompliance. *In re Valentine*, 79 S.W.3d at 548.

Id. at 656-57.⁴ The Tennessee Supreme Court has explained that

[s]ubstantial noncompliance is not defined in the termination statute. The statute is clear, however, that noncompliance is not enough to justify termination of parental rights; the noncompliance must be substantial. Black’s Law Dictionary defines “substantial” as “[o]f real worth and

⁴ The trial court ratified all iterations of the parenting plans finding that the appellants’ respective requirements thereunder were reasonable and related to remedying the conditions that caused the Child to be removed from their custody. In its final order terminating appellants’ parental rights, the trial court specifically held that the requirements under the plans were “reasonably related to remedying the conditions that led to foster care, and in the best interests of the child.” Neither party appeals this finding. From our review, we agree with the trial court that the appellants’ respective requirements under the plans was reasonable and, in fact, necessary to remedy the conditions that led to the Child’s removal.

importance.” Black’s Law Dictionary 1428 (6th ed. 1990). In the context of the requirements of a permanency plan, the real worth and importance of noncompliance should be measured by both the degree of noncompliance and the weight assigned to that requirement.

In re Valentine, 79 S.W.3d 539, 548 (Tenn. 2002).

As discussed above, Mother’s requirements under the permanency plans were to: (1) provide proof of stable housing and allow DCS to inspect the home; (2) maintain legal means of income and provide financially for the Child; (3) make child support payments of \$20.00 per month; (4) complete a non-self-reported clinical assessment with parenting component and follow all recommendations thereof; (5) work toward resolving her legal issues; (6) submit to random drug screens; (7) complete a hair follicle test by December 15, 2017; (8) if Mother tested positive on any drug screens, she was required to complete an alcohol and drug assessment and follow all recommendations thereof; and (9) participate in therapeutic visitation with the Child and bring diapers, wipes, change of clothes, and a meal during her visits.

Concerning Mother’s failure to substantially comply with the foregoing requirements, in its order terminating her parental rights, the trial court found:

The mother has not substantially complied with the responsibilities and requirements set out for her in the permanency plans. The mother initially completed tasks on the plan leading to the child being placed on a trial home visit with her[;] however, said trial home visit was disrupted due to the mother failing to maintain contact with DCS and allow DCS to see the child, the mother’s drug use, and environmental neglect in the family home. Following the trial home visit disruption, the mother was required to complete the initial tasks again and new tasks were added to address concerns with substance abuse and environmental neglect. The mother has not completed the following tasks: a new clinical assessment and recommendations; an alcohol and drug assessment and recommendations; hair follicle drug screen; random drug screens as requested by DCS; regular visitation with the child; pay child support; maintain contact with DCS; resolve pending legal issues; and refrain from participating in criminal activity. Additionally, the mother has not obtained a legal source of income to support herself and the child and she has not obtained stable housing.

The record supports the trial court’s findings. Ms. Pena testified that the only requirement Mother completed was the parenting component of the clinical assessment. Otherwise, Mother made no progress on the permanency plans. Ms. Pena testified that Mother was not employed and had no housing. In addition, during the time that the Child was in DCS custody, Ms. Pena testified that Mother “had some new citations for

possession of drugs.” Mother has declined DCS’s requests for drug tests. She has failed to submit to alcohol or drug assessment. Mother has not provided any support for the Child and has failed to maintain contact with DCS or her appointed counsel. The record clearly and convincingly supports the trial court’s findings, and we conclude that the trial court did not err in terminating Mother’s parental rights on the ground of failure to substantially comply with the reasonable requirements of the permanency plans.

Turning to Father, as discussed above, his requirements under the permanency plans were to: (1) make voluntary child support payments of \$20.00 per month; (2) actively work toward resolving his legal issues; (3) maintain contact with DCS; (4) complete a non-self-reporting clinical assessment with parenting, drug, and alcohol components and follow all recommendations thereof; and (4) address domestic violence and anger issues; (5) continue to follow up with his medical provider to receive the necessary care; (6) complete a clinical assessment with parenting component on December 15, 2017; (7) complete parenting classes; (8) participate in individual therapy to address past traumas; (9) receive case management services to assist in finding employment and other resources; (10) obtain and maintain stable housing and provide proof of same to DCS; and (11) submit to random drug screens.

Concerning Father’s failure to substantially comply with the foregoing requirements, the trial court found:

The father has not substantially complied with the responsibilities and requirements set out for him in the permanency plans. The father has only completed one task on the plan which was the clinical assessment and parenting classes recommended from said assessment. The father continues engaging in criminal activity, resulting in repeated incarcerations. The father has not maintained regular visitation with the child. The father has not paid any support towards the care of the child since he has been in DCS custody. The father has not consistently maintained contact with DCS, with his whereabouts being unknown to the Department throughout much of the duration of the case. The father has not completed an alcohol and drug assessment or participated in any alcohol and drug treatment. The father failed to submit to any requested drug screens or pill counts. The father has not completed any tasks to address his domestic violence and anger management issues, to include individual therapy and case management services, which the Court finds are imperative based on his past conduct although the father testified he didn’t need to address either. Additionally, the father has not obtained a legal source of income to support himself and the child and he has not obtained and maintained stable housing.

Like Mother, Father has failed to make any substantial progress toward completion of his requirements under the permanency plans. As discussed above, Father has no stable housing or employment. He has violated his probation and served additional jail time. He has paid no more than token support for the Child. Furthermore, he has been non-compliant with assessments, counseling, and treatment. He maintains that he has no issues with domestic violence or anger despite the fact that he was arrested for aggravated assault against his own brother. Father is likely using illegal drugs based on his positive test for methamphetamine. Father has not maintained visitation with the Child. There is no indication that Father has availed himself of any of the resources offered by DCS. As such, there is clear and convincing evidence that Father has failed to substantially comply with the reasonable requirements of the permanency plans. Accordingly, we affirm the trial court's termination of his parental rights on this ground.

E. Failure to Manifest an Ability and Willingness to Assume Custody or Financial Responsibility

Tennessee Code Annotated section 36-1-113(g)(14) provides a ground for termination of a parent's parental rights when he or she

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

Tenn. Code Ann. § 36-1-113(g)(14). This ground for termination of parental rights was added to the statute effective July 1, 2016. *See* 2016 Tenn. Pub. Acts, c. 919, § 20. Concerning the substantive requirements to meet the burden of proof, in *In re Maya R.*, No. E2017-01634-COA-R3-PT, 2018 WL 1629930, at *7 (Tenn. Ct. App. Apr. 4, 2018), we explained that, first, the petitioner must 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.” Tenn. Code Ann. § 36-1-113(g)(14). Second, the petitioner must prove that placing the child in the parent's custody “would pose a risk of substantial harm to the physical or psychological welfare of the child.” *Id.*

Concerning the first prong, i.e., whether the parent has failed to manifest an ability and willingness to personally assume custody and financial responsibility of the Child, there has been some disagreement in this Court regarding the measure of proof required to satisfy this burden. In *In re Ayden S.*, No. M2017-01185-COA-R3-PT, 2018 WL 2447044, at *7 (Tenn. Ct. App. May 31, 2018), a panel of this Court held:

As to the first prong [of Tennessee Code Annotated Section 36-1-113(g)(14)], the statute requires the party seeking termination to prove a

negative: that the parent failed to manifest an ability and willingness to personally assume legal and physical custody or financial responsibility of the child. Here, despite finding that the parents “ha[d not] failed to manifest a willingness to assume custody” and that the “parents want these children,” the juvenile court concluded DCS proved by clear and convincing evidence this ground against both parents. The court based its conclusion on the finding that the parents “d[id not] have the ability” to personally assume custody of the children.

In general, “statutory phrases separated by the word ‘and’ are usually to be interpreted in the conjunctive.” *Stewart v. State*, 33 S.W.3d 785, 792 (Tenn. 2000). In the context of a “negative proof” connected by the word “and,” a party “must prove that . . . all” of the listed items were not met. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 120 (2012).

At oral argument, DCS urged that we interpret the word “and” in the disjunctive so that it only had to prove an inability or unwillingness of the parents to assume custody of the children. Our supreme court has “recognized that the word ‘and’ can also be construed in the disjunctive where such a construction is necessary to further the intent of the legislature.” *Stewart v. State*, 33 S.W.3d at 792. But because “we generally presume that the General Assembly purposefully chooses the words used in statutory language,” *id.*; *cf.* Scalia & Garner, *supra*, at 116 (“Under the conjunctive/disjunctive canon, and combines items while or creates alternatives.”), and the presumption has not been rebutted, we decline to adopt DCS’s interpretation here.

We conclude that Tennessee Code Annotated § 36-1-113(g)(14) could not serve as a basis for terminating Mother’s and Father’s parental rights. The proof at trial negated a required element of the statutory ground. The juvenile court found: “In this case, these parents definitely want to assume legal and physical custody of the children and are willing to assume financial responsibility for the children.”

However, in the subsequent case of *In re Amynn K.*, No. E2017-01866-COA-R3-PT, 2018 WL 3058280 (Tenn. Ct. App. June 20, 2018), a panel of this Court parsed the conjunctive (as opposed to disjunctive) language used in Tennessee Code Annotated section 36-1-113(g)(14) and compared the statutory language to other similar statutes before holding that

[u]pon consideration of the statutory language and the relevant legal authority, we hold that the first prong of Tennessee Code Annotated § 36-1-

113(g)(14) requires that the petitioner prove that a parent has failed to meet the requirement of manifesting both a willingness and an ability to assume legal and physical custody of the child or has failed to meet the requirement of manifesting both a willingness and an ability to assume financial responsibility of the child.

Id. at *14. This dispute continues in cases where a parent manifests a willingness to assume custody and financial responsibility but is simply unable to do so; however, this is not such a case. In cases, such as the one at bar, where the parent has manifested neither a willingness nor an ability to assume custody and responsibility, this Court has upheld termination of the parent’s parental rights on this ground. *See, e.g., In re J’Khari F.*, No. M2018-00708-COA-R3-PT, 2019 WL 411538, at *15 (Tenn. Ct. App. Jan. 31, 2019) (noting both *In re Ayden S.* and *In re Amynn K.* but ultimately concluding that DCS presented sufficient evidence that “Mother was not able or willing to assume physical or legal custody of or financial responsibility for the Child”); *In re Colton B.*, No. M2018-01053-COA-R3-PT, 2018 WL 5415921, at *9-10 (Tenn. Ct. App. Oct. 29, 2018) *perm. app. denied* (Tenn. Jan. 22, 2019) (noting the split in authority but holding that it was unnecessary to choose one approach where the parent had manifested neither an ability nor a willingness to parent the child).

Turning to the second prong of Tennessee Code Annotated section 36-1-113(g)(14), i.e., whether placing the child in the parent’s custody “would pose a risk of substantial harm to the physical or psychological welfare of the child,” this Court has 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)).

Here, the trial court found that both appellants have 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 that placing the Child in their legal and physical custody would pose a risk of substantial harm to him, to-wit:

As previously discussed, during the entire custodial episode the mother and father have paid no support towards the care of the child. Neither parent has completed any substantive services on the permanency plan and both the mother and father tested positive for methamphetamine at Court today. The mother and father are not currently available to assume custody of the child due to their continued drug use and instability.

Although the child was placed on a trial home visit with the mother shortly after the child was removed, that trial home visit was disrupted due to the mother's failure to comply with DCS and ensure the child was properly cared for. At no point during the custodial episode has the father exercised physical or legal custody of the child. The Court finds that under the circumstances, it would not be appropriate and would pose a risk of substantial harm to the welfare of the child for either parent to have exercised custody.

For many of the reasons discussed above, there is clear and convincing evidence to support the trial court's finding that Mother and Father have failed to manifest an ability and willingness to assume custody. Both parents have failed to provide a suitable home for the child. Both have failed to engage in meaningful visitation with the child and have failed to provide support. More importantly, however, both parents have failed to engage in the process (as outlined in the parenting plans) that would allow them to resume custody. The record shows that from the time it assumed custody, DCS made numerous efforts to engage and help the appellants, but both have failed to take advantage of these opportunities. Rather, appellants continue to use illegal drugs and to engage in other behaviors that would pose a substantial risk to the Child. The parents' unwillingness to change their behaviors unquestionably shows an unwillingness to assume custody. In fact, in Mother's case, she fled the courthouse on the day of the hearing to terminate her parental rights. Perhaps there is no better example of her unwillingness to assume custody than that. We affirm the trial court's termination of appellants' parental rights on this ground.

VI. Best Interest

When at least one ground for termination of parental rights has been established, the petitioner must then prove, by clear and convincing evidence, that termination of the parent's rights is in the child's best interest. *White v. Moody*, 171 S.W.3d 187, 192 (Tenn. Ct. App. 1994). As the Tennessee Supreme Court recently explained:

Facts considered in the best interest analysis must be proven by "a preponderance of the evidence, not by clear and convincing evidence." *In re Kaliyah S.*, 455 S.W.3d at 555 (citing *In re Audrey S.*, 182 S.W.3d at 861). "After making the underlying factual findings, the trial court should then consider the combined weight of those facts to determine whether they

amount to clear and convincing evidence that termination is in the child's best interest[s].” *Id.* When considering these statutory factors, courts must remember that “[t]he child’s best interests [are] viewed from the child’s, rather than the parent’s, perspective.” *In re Audrey S.*, 182 S.W.3d at 878. Indeed, “[a] focus on the perspective of the child is the common theme” evident in all of the statutory factors. *Id.* “[W]hen the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child. . . .” Tenn. Code Ann. § 36-1-101(d)(2017).

In re Gabriella D., 531 S.W.3d 662, 681-82 (Tenn. 2017).

The Tennessee Legislature has codified certain factors that courts should consider in ascertaining the best interest of the child in a termination of parental rights case. As is relevant to this appeal, these factors include, but are not limited to, the following:

- (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 made such an 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;

- (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

Tenn. Code Ann. § 36-1-113(i). This Court has noted that “this list [of factors] is not exhaustive, and the statute does not require a trial court to find the existence of each

enumerated factor before it may conclude that terminating a parent's rights is in the best interest of a child." *In re M.A.R.*, 183 S.W.3d 652, 667 (Tenn. Ct. App. Aug. 11, 2005), *perm. app. denied* (Tenn. Nov. 21, 2005). 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. *In re Audrey S.*, 182 S.W.3d at 877. As explained by this Court:

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. The relevancy and weight to be given each factor depends on the unique facts of each case. 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.

White v. Moody, 171 S.W.3d at 194.

From the trial court's order, it is clear that it considered many of the foregoing statutory factors in reaching the following conclusions concerning the Child's best interest:

The Court finds that the mother and father have not made the changes in their circumstances that would make it safe for the child to be placed in their care. The parents continue to abuse drugs, both testing positive for methamphetamine at this hearing and living an unstable lifestyle. The father has been incarcerated on multiple occasions during the pendency of this case, has failed to complete the services as outlined in the child's permanency plans, and has failed to show an ability and willingness to have custody. The mother and father have not made any lasting changes in their conduct, so it does not appear that lasting change is reasonably possible. The mother and father have not maintained regular visitation with their child, abandoning him to the foster care system. They have not paid any child support, have shown a lack of interest in their child's welfare, and have no meaningful relationship with their child at this point.

It has been twenty-seven (27) months since the child was placed in DCS custody and the conditions that led to the removal still persist as to the mother and father. The parents have made no attempts to reunify with their child, instead choosing to engage in criminal activity and abuse illegal substances. The mother and father are both currently unable to care for the child as they do not have stable housing or income. Both parents have continued to have issues with substance abuse with them both testing positive for methamphetamine prior to the commencement of this hearing. Neither parent has exercised regular visitation with the child or paid any

support towards the care of the child.

The parents continue to engage in illicit substance abuse, testing positive for methamphetamine today. The father admits he's been engaging with persons who abuse illegal substances and has been incarcerated on multiple occasions due to his criminal behaviors since the child entered custody. The mother did not even remain for the hearing after testing positive today. The parents do not have stable housing, a legal source of income, nor have they completed the tasks on the permanency plan. Neither parent is in a position to take custody of the child as of today and it does not appear that the ongoing concerns with the parents are going to be remedied at an early date.

The child is doing well and thriving in his foster home and changing caregivers at this time would not be in his best interests. The child and the foster parents have bonded and love each other and the foster parents have expressed their desire to adopt the child. In contrast, the child has a limited bond with either of the parents due to the length of time he's been in foster care the parents' failure to make regular efforts to visit with him or reunify with him. The foster home is providing for the child, ensuring his needs are met, and love him as one of their own. They ensure the child attends his occupational therapy and speech therapy and have assured his educational needs are addressed If the child would be returned to the home of the mother or father, it is clear that he would not receive appropriate care as evidenced by the care he received when on the trial home visit with mother and when he was previously residing with the mother and father prior to his removal.

For all of the foregoing reasons, it is in the best interest of the child . . . that any and all parental rights [of the appellants] . . . be . . . terminated.

The evidence supports the trial court's findings. As discussed above, neither appellant has made an adjustment of circumstance, conduct, or conditions so as to make it safe and in the Child's best interest to be in their custody. Despite reasonable efforts on the part of DCS, it does not appear that either appellant is willing to engage in the process so as to make the necessary changes at any early date. Neither Mother nor Father has addressed his or her drug use, and both continue to test positive for illegal drugs. Father fraternizes with drug users, thereby creating an environment that is not appropriate for the Child. Neither appellant has stable housing or employment.

There is no evidence that the Child has a bond with either Mother or Father. However, the Child's foster mother testified that he has bonded with the foster family. The undisputed testimony indicates that all of the Child's needs are met in his current

environment, and the foster family wishes to adopt him. To remove the Child from this home would likely cause him great distress. From the totality of the circumstances, there is clear and convincing proof to support the trial court's finding that termination of Mother and Father's parental rights is in the Child's best interest.

VII. Conclusion

For the foregoing reasons, we affirm the trial court's order. The case is remanded for such further proceedings as may be necessary and are consistent with this opinion. Costs of the appeal are assessed one-half to each appellant. Because the appellants are proceeding *in forma pauperis* in this appeal, execution for costs may issue if necessary.

KENNY ARMSTRONG, JUDGE