

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
March 22, 2016 Session

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

**Appeal from the Juvenile Court for Macon County  
No. 2014-JV-155 Ken Witcher, Judge**

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**No. M2015-00842-COA-R3-PT – Filed May 31, 2016**

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This appeal involves the termination of a father’s parental rights to his child. Following a bench trial, the trial court found that clear and convincing evidence existed to support the termination of his rights on the statutory grounds of abandonment for failure to remit child support, substantial noncompliance with the permanency plans, and the persistence of conditions which led to removal. The court further found that termination was in the best interest of the child. The father appeals. We affirm the judgment of the trial court as modified in this opinion.

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

JOHN W. MCCLARTY, J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., and ANDY D. BENNETT, JJ., joined.

A. Tyler Whitaker, Lebanon, Tennessee, and Connie Reguli, Brentwood, Tennessee, for the appellant, Matthew M.

Herbert H. Slatery, III, Attorney General and Reporter; Andree S. Blumstein, Solicitor General; and Kathryn A. Baker, Assistant Attorney General, Nashville, Tennessee, for the appellee, State of Tennessee, Department of Children’s Services.

Lisa C. Cothron, Lafayette, Tennessee, guardian ad litem for the minor child, Hailey S.

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

## OPINION

### I. BACKGROUND

Hailey S. (“the Child”) was born to Aren S. (“Mother”) and Matthew M. (“Father”) in August 2012 in Tennessee. Father was listed on the birth certificate and later signed a voluntary acknowledgment of paternity. Mother, a minor, lived in Tennessee with the Child. Father, who was 18 years old at the time of the Child’s birth, returned to his home in Michigan, while the maternal grandmother, Michelle S. (“Grandmother”), served as the legal custodian to the Child.

Approximately ten months later, the Child was severely injured while in Mother’s care. The Child was taken to the hospital. The Tennessee Department of Children’s Services (“DCS”) was present at the hospital after receiving a referral indicating drug exposure and lack of supervision. Mother admitted to extensive drug use but denied knowledge as to how the Child sustained her severe injuries. She believed that a two-year-old was responsible for the injuries. Grandmother informed the caseworker that she left the Child with Mother for the weekend. The Child was removed and placed into DCS custody on June 23, 2013.<sup>2</sup> She was immediately placed into the care of Dana D. (“Foster Mother”) and Brandon G. (“Foster Father”) (collectively “Foster Parents”). Mother did not inform DCS of Father’s existence and listed the Child’s father as “unknown” on documents provided by DCS.

Upon learning of the Child’s injuries, Father contacted DCS. He later participated in the development of two permanency plans, one on September 9, 2013, and another on March 4, 2014.<sup>3</sup> Father was required to (1) complete an alcohol and drug assessment and follow recommendations; (2) develop a relapse prevention plan; (3) submit to random drug screens; (4) demonstrate a minimum of six months of sobriety; (5) sign releases of information; (6) discontinue use of illegal drugs and demonstrate correct usage of prescription medication; (7) obtain and maintain suitable housing for six months; (8) contact community resources for help in obtaining housing; (9) remit payment for food and housing utilities on time; (10) have a contingency plan; (11) establish and maintain legal income; (12) notify DCS of changes in employment and provide proof of income; (13) take a parenting class; (14) develop and maintain a relationship with the Child; (15) remit child support; (16) obtain a medical clearance for his seizure disorder; and (17) complete a mental health assessment and follow recommendations.

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<sup>2</sup> Mother was also placed into DCS custody due to her status as a minor.

<sup>3</sup> These plans were ratified by the trial court. A third plan, dated September 29, 2014, was also ratified by the court at the termination hearing.

A dependency and neglect petition was filed on June 24, 2013, and later amended on September 15, 2013. Meanwhile, Father completed a mental health assessment with an alcohol and drug component on February 10, 2014. He was diagnosed with post-traumatic stress disorder (“PTSD”) and depressive disorder, not otherwise specified. He was directed to address his PTSD and depression through counseling and to complete parenting classes, secure employment, obtain his graduate equivalency (“GED”) diploma, and maintain involvement with the Child’s medical and therapeutic care.

Father sought approval as a placement for the Child in Michigan pursuant to the Interstate Compact for the Placement of Children (“the ICPC”). His request was denied on March 15, 2014, based upon his lack of employment and dependence upon his grandmother for housing and basic needs. Father’s aunt and uncle, Will and Bobbi D., also sought approval as a potential relative placement in Michigan. Their request was approved on April 28, 2014. On July 25, 2014, DCS requested permission to begin a trial home placement. The trial court denied the request, finding “that it [was] not in the best interest of the [C]hild to be placed in Michigan.”

A petition to terminate Father’s parental rights was filed on September 18, 2014.<sup>4</sup> DCS alleged that termination was supported by the statutory grounds of (1) abandonment for failure to remit support, (2) substantial noncompliance with the permanency plans, and (3) the persistence of conditions which led to removal. During the pendency of the hearing on the termination petition, Father stipulated to a finding of dependency and neglect. The Child was adjudicated as dependent and neglected by order, entered on January 20, 2015. Father appealed the order to the Circuit Court for Macon County and filed a motion to continue the termination proceeding. The trial court denied the motion to continue, finding that the termination proceeding was an independent action.<sup>5</sup>

The hearing on the termination petition was held over the course of two days in March and April 2015. Gale Smith, who was employed by DCS as a family service worker at the time in question, testified that the Child was placed into DCS custody as a result of physical abuse. She first learned of Father’s existence at the initial child and family team meeting on June 24, 2013; however, she was not provided with his contact information. She noted that her review of the Sumner County<sup>6</sup> court docket revealed that a hearing had been previously scheduled to address Father’s visitation rights with the Child. She stated that Father initiated contact on July 1, a few days before the hearing.

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<sup>4</sup> Mother voluntarily surrendered her parental rights.

<sup>5</sup> The circuit court affirmed the dependency and neglect finding in January 2016.

<sup>6</sup> Venue was later transferred to the Macon County Juvenile Court.

Ms. Smith testified that Father expressed concern for the Child but initially refused to cooperate in the development of a permanency plan. Nevertheless, he met with her and accepted various materials, including books, DVDs, and printouts providing information on parenting. She explained the process to obtain custody pursuant to the ICPC and advised him to establish paternity<sup>7</sup> and address any issues of substance abuse.<sup>8</sup> She further advised him to complete parenting classes, an alcohol and drug assessment, and a mental health assessment and to obtain a medical clearance for his seizure disorder. She asserted that he never indicated an inability to understand the information they discussed and further explained that the materials she routinely provides are written at a fifth to sixth grade level. She mailed him additional materials, including a copy of an initial permanency plan and articles providing information on how to obtain employment.

Lindsey Kenyon, who was employed by DCS as a family service worker, testified that the Child's case was transferred to her in July 2013. She initiated contact with Father in August 2013 to advise him of her position as the new caseworker. She initially assisted him in creating a household budget to evidence his need for financial assistance in arranging transportation for visitation. Once funding was approved, she scheduled his visitations and arranged transportation and lodging when necessary.<sup>9</sup>

Ms. Kenyon recalled that Father participated in visitation on a monthly basis. She initially found Father's basic child care skills lacking. She explained that he required prompting to feed the Child, change her diaper, and transition to naptime. She also expressed concern regarding his ability to care for the Child's hygiene as evidenced by his own hygiene. She stated that his skills had improved once they began facilitating therapeutic visitation. She agreed that she was never concerned for the Child's safety while in Father's care.

Ms. Kenyon acknowledged that Father evidenced an inability to understand and comprehend concepts. She asserted that she routinely asked him if he understood the information she provided and directed him to his attorney if he continued to express confusion on legal matters. She did not require Father to complete a parenting assessment to gauge his capacity to parent or his overall competency. She encouraged him to complete parenting classes and provided individual instruction throughout his visitation with the Child. She believed that he could have addressed his competency issues by complying with the recommendations from his mental health assessment.

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<sup>7</sup> She acknowledged that he was listed as the father on the birth certificate.

<sup>8</sup> She explained that the maternal grandfather informed her that Father exposed Mother to drugs.

<sup>9</sup> She agreed that funding was not provided when his family traveled with him.

Ms. Kenyon testified that she offered to obtain funding for Father's travel expenses to facilitate his attendance at the Child's various medical appointments. He attended two appointments. She stated that she also facilitated his telephone contact with the Child, administered drug screens, scheduled his assessments, obtained a release of information, and provided him with her contact information.

Ms. Kenyon testified that Father did not participate in counseling as recommended and that he never submitted a relapse prevention plan. She agreed that his assessments did not indicate a need for treatment for substance abuse issues and that he never failed a drug screen. She claimed that he had not obtained stable housing beyond that provided by his family. He also did not submit proof of payment of utilities and never remitted payment for child support. She recalled that he reported income from various jobs and never indicated that he was unable to work. She conceded that he continually searched for employment throughout his involvement with DCS.

Ms. Kenyon testified that Father never identified his aunt and uncle as a potential relative placement. She recalled that Bobbi D. ("Aunt") contacted her in November 2013 and expressed a desire to serve as a relative placement. She welcomed Aunt's involvement and invited her to the child and family team. She agreed that she did not immediately begin the ICPC process because the initial goal was to return the Child to Mother if possible, despite the requirement to maintain a concurrent goal of return to parent and exit custody to relative as a result of the nature of the case.

Felecia Harris testified that she was employed as a team coordinator by DCS and was involved in the peer review process during the pertinent time period. She recalled that Aunt contacted her directly to indicate her desire to serve as a potential placement for the Child. She asserted that they initiated the ICPC process when Mother failed to achieve stability and that the trial court ultimately denied the request for a trial home placement with Father's relatives.

Jerri Cross, Ed.S., CPSII, regional director at Health Connect America, was accepted by the trial court as expert in the field of mental health. She conducted Father's mental health assessment with an alcohol and drug component and filed a completed report with her findings on March 2, 2014. She recalled that Father had difficulty processing information, had suffered from a head trauma and seizure disorder, and refused to discuss issues of his childhood pertaining to his removal from his mother's home. She provided a provisional Axis I diagnosis of PTSD with a depressive disorder, not otherwise specified. As pertinent to this appeal, she recommended that he "participate in individual counseling to address symptoms of [PTSD], depressive symptoms, and past history of trauma" and further found that it was "imperative [that he] be involved in [the Child's medical care] through occupational therapy, speech therapy,

feeding therapy, and physical therapy so that he [is] able to clearly understand the complexity and needs involved with [the Child's] care." She also recommended that he obtain his GED diploma and proceed with his plan of obtaining employment to better care for himself and the Child. She stated that he acknowledged his current inability to parent independently. She acknowledged that his results did not indicate a need for substance abuse treatment or a relapse prevention plan because he had demonstrated two years of sobriety.

Eric Macleod, Ph.D., L.P testified by deposition that Father attended counseling with him at Grace Health in Battle Creek, Michigan on an irregular basis. He recalled meeting with Father on two occasions in 2010, one occasion in December 2013, two occasions in 2014, and two occasions in 2015. He noted that Father was scheduled to attend another session in May 2015. He recalled attempting to provide treatment for a provisional diagnosis of depression, not otherwise specified. He claimed that Father "really just wasn't very interested in identifying goals for treatment" in 2010.

Dr. Macleod stated that Father returned in December 2013 to request a "comprehensive examination and letter providing that he would not, nor would be ever a risk to his daughter." He stated that he could not provide such a letter when Father had not maintained a regular course of treatment with him. He explained that providing such a letter with a future perspective was also outside of his realm of expertise. He recalled that Father rebuffed his suggestion to obtain an independent personality assessment and that he ultimately referred Father to a colleague that could possibly provide the documentation requested by Father.

Dr. Macleod testified that his sessions in 2014 were hindered by Father's evasiveness and refusal to provide specific information. He noted that Father also refused to provide him with a copy of the assessments completed in Tennessee. He stated that he was unable to provide a continuing course of treatment and explained as follows:

I think a thorough assessment with his full cooperation would be the first place to start, and I've not been afforded that opportunity. That's largely been because he has been repeatedly so guarded with me that I really haven't gotten an opportunity to get to know him, other than the fact that he appears highly defensive. Now, given the fact that, you know, he's undergoing this proceeding, I'm not surprised that he's defensive, but he's not really allowed me to help him.

Relative to the Child, Autumn Joy Hurt was accepted by the trial court as an expert in the field of physical therapy. She provided that the Child suffered from cerebral palsy as a result of severe abuse. She met with the Child on a weekly basis since January

2014. She believed that the Child had shown significant progress and was high functioning but could not definitely state how long the Child would require continued therapy. Her observations revealed evidence of a gait dysfunction with decreased function in the Child's left upper and lower extremities and a balance dysfunction. She worked to normalize the Child's gait, improve her balance, integrate ball skills, and improve strength and coordination. She also worked with the Child's foster mother to establish a home exercise program tailored specifically to address the Child's every day needs. She provided that Foster Mother was very engaged in the process and routinely asked questions and performed activities to successful completion. She observed positive interactions between the Child and Foster Mother and believed that Foster Mother was able to meet the Child's therapeutic needs. She stated that Father had not attended any of her sessions or engaged in communication concerning the Child's therapeutic needs.

Taylor Gordon, who was employed by Rainbow Early Intervention as a developmental therapist, testified that he worked with the Child on a weekly basis. He acknowledged that Foster Mother often attended the sessions and had learned how to continue his treatments to address the Child's unique needs. He observed an attachment between the Child and Foster Mother and explained that the Child often incorporated Foster Mother into the therapy sessions. He acknowledged that the Child could receive the same services from a similar facility in a different state.

Lindsey McFarland testified that she had been employed by Camelot as an in-home therapist during the pertinent time period. She recalled supervising Father's therapeutic visitation with the Child on four occasions and attending several child and family team meetings and foster care review board meetings. She provided that Father was able to appropriately and safely care for the Child during visitation. However, she noted that he needed assistance on occasion, that the Child appeared overstimulated during one of the visits, and that the Child asked for Foster Mother during at least two of the visits. She acknowledged that Father expressed a desire to gain parenting skills and to schedule his visitation during the Child's various therapy sessions.

Foster Parents testified concerning their life with the Child and their biological children. They expressed a desire to adopt the Child and claimed that she interacted well with their children and had shown signs of improvement since her arrival. Foster Father recalled the extensive injuries he observed when the Child was first placed into his care and asserted that as a result of her injuries, she suffered from sensory issues that necessitated the use of specialized toys and objects to prevent a "sensory meltdown." He explained that they established a routine and found specialized items to ensure her security in an attempt to avoid such events.

Foster Father provided his education and employment history and asserted that he was financially able to provide for his family while Foster Mother stayed home with the Child. He testified concerning his daily interaction with the Child and the bond that they established. He explained that the Child referred to him as “Daddy” and routinely expressed her love for him. He agreed that the Child also interacted well with Father but noted that she interacted well with most people. He provided that she showed signs of confusion when Father insisted that she refer to him as “Daddy.” He alleged that the Child referred to Father as “Matt.”

Foster Father stated that the Child engaged in regular telephone contact with Father but provided that there was no structure to the conversation due to her age and limited attention span. He recalled supervising Father’s visitation with the Child on September 28, 2014. He provided some instruction to Father concerning his placement of sunscreen on the Child, his attempt to use paint that was inappropriate for the Child’s age, and his method of changing the Child’s diaper. He recalled that the Child fell off the park bench while in Father’s care and that she began to suffer from heat exhaustion. He claimed that Father provided the Child with more juice but rebuffed his suggestion to move inside to normalize the Child’s temperature. He noted that Father also brought a jacket that was too large for the Child.

Foster Mother testified concerning her education and employment history and provided that she currently stayed home with the Child. She explained that they established a detailed routine to address the Child’s sensory development issues. She stated that the Child attended numerous medical appointments throughout the week and also completed daily exercises to address her unique needs. She worked with the Child’s therapists to ensure her understanding of the Child’s exercises. She provided that the Child began having seizures and had been placed on medication. She stated that the Child attended day care twice a week and had progressed well. She believed that the facility accommodated the Child’s needs and also engaged with the Child’s various therapists when sessions occurred at the facility.

Foster Mother testified that she provided Father with regular updates on the Child’s progress, schedule, and continuing needs. She claimed that Father had become less responsive to her attempts at communication and failed to attend all but two medical appointments even when specifically invited. She recalled supervising visitation between Father and the Child on occasion. She noted that he brought a key lime pie to one visitation and advised her that he had been given the pie on the bus.<sup>10</sup> She asserted that he engaged in an inappropriate conversation with Mother during another visitation. She stated that Father never offered to bring clothes, diapers, or gifts to visitation but that his

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<sup>10</sup> Father testified that he never intended to share the pie with the Child.

relatives provided these items. She also noted a decline in the Child's behavior following telephone contact and visitation with Father. She agreed that Father played well with the Child during visitation but asserted that he failed to demonstrate an understanding of the Child's condition and needs.

Father, who was 20 years old at the time of trial, could not provide any specific details concerning his employment. He stated that he worked for Denso, an automotive supplier, at a rate of \$8.15 per hour for "a couple of weeks" until he transferred to another facility within the same corporation, where he remained for "almost a month." He stated that he was eventually "let go because of the fact that [he] was traveling so much" to visit the Child. He stated that he also worked for EPI, a packing company at a rate of \$7.50 per hour. He asserted that he was currently searching for employment and hoped to obtain a position through Aerotek, a staffing agency, "in the next couple of weeks."

Father identified four monthly budgets completed by Ms. Kenyon with information provided by him in which he provided his income and expenses for the applicable month. The first budget, dated August 29, 2013, reflected an income of \$200 and expenses of \$162. The second budget, dated November 4, 2013, reflected an income of \$20 and expenses of \$240, with an additional note providing that his mother and grandmother remitted payment for his expenses. The third budget, dated July 22, 2014, reflected an income of \$30 and expenses of \$110. The fourth budget, dated September 26, 2014, reflected a total income of \$840, a net income of \$210, and expenses of \$300, with an additional note providing that he obtained employment two weeks prior and had received two paychecks. He conceded that despite his periods of employment, he never remitted payment for child support. He claimed that he remitted payment for child support before the Child was placed in DCS custody and that he provided diapers, wipes, food, and clothing once she was placed in DCS custody.

Father testified that it was difficult for him to obtain and maintain employment because he had not obtained his GED diploma and because he did not have a driver's license. He explained that he was reliant upon others to satisfy the requirements to obtain his license. Despite his limitations, he submitted approximately 15 applications in the last six months.

Father testified that he lives with his grandmother and father, who support him financially and provide him with housing and other basic necessities. He asserted that he contributed \$150 to the household "every chance that [he] had" and completed chores, e.g., shoveling the road and driveway, burning trash, washing dishes and laundry, and cooking microwavable meals. He estimated that he spent two or three hours each day completing general housekeeping duties for the family and another three hours attending

class. He agreed that he had been attending GED classes since at least June 2013. He alleged that it was also difficult for him to learn and understand concepts.

Relative to the permanency plans, Father testified that he completed parenting classes and assessments, obtained a medical clearance, attended counseling on five or six occasions, signed medical release forms, and submitted to random drug screens. He alleged that it had been three years since he last used an illegal substance. He agreed that he had not obtained and maintained a legal source of income, obtained a driver's license, developed a viable relapse prevention plan, regularly remitted payment for food, housing, and utilities, or complied with the recommendations from his mental health assessment. He explained that it was difficult for him to find services in Michigan. He acknowledged that he signed the Criteria and Procedures for Termination of Parental Rights, advising him that his failure to remit child support or complete the requirements contained in the permanency plans could result in the termination of his rights.

Father testified concerning his understanding of the Child's special needs and acknowledged that she would likely require continued treatment for the rest of her life. He agreed that he had only attended two appointments. He explained that he was unable to attend on a regular basis because he lived in Michigan. He testified concerning the effort made to attend visitation on a monthly basis by stating:

My grandmother needs to make sure that I'm prepped and ready to head out. And then my mom needs to make sure that she is off of work and, you know, not going to get fired for being off. And my aunt has got to make sure that she does the same.

He explained that he asked his grandmother for help as a precaution. He agreed that DCS arranged his transportation when he did not travel with his family.

Father believed that he maintained a meaningful relationship with the Child despite his limited visitation with her. He explained,

She definitely understands I'm Dad, and she makes that well known when I walk into our visits because she'll come up to me and she will give me a hug. And I'll tell her I love her, and she says I love you. And then she'll refer to me as Daddy or Dad.

He acknowledged that the Child also referred to him as "Matt" or "Daddy Matt." He claimed that "she always looks happy and excited to see" him and his family.

Father acknowledged that he is unable to independently care for the Child. He believed that his parenting skills had improved but agreed that he would be reliant upon his family if he were to obtain custody. He acknowledged that the Child is currently “in a great place” but asserted that the Child could also thrive and receive comparable services in Michigan. He sought placement of the Child with his aunt and uncle, who were qualified to care for a child with special needs. He intended to contribute to her care and remain involved as permitted by them.

Mother testified that Father never provided her with drugs or used drugs in her presence during her pregnancy. He also provided “a pack of diapers and some wipes and a few toys” prior to the Child’s entry into DCS custody. She recalled that Father visited the Child in Tennessee “once or twice” and that she took the Child to Michigan for visitation “once or twice.” She stated that he never parented the Child without assistance from his family. She admitted that Father was not present when the Child was injured and that she had not informed him of the severity of her substance abuse issues.

Mother acknowledged Father’s love and concern for the Child and his extensive family support in Michigan. However, she believed that the Child should remain with Foster Parents. She agreed that she had been permitted to maintain contact with the Child but denied that she had been promised continued contact in exchange for the voluntary surrender of her parental rights and favorable testimony at trial.

Aunt described a loving relationship between the Child and Father. She expressed a desire to either assist Father if he were to gain custody of the Child or to serve as a placement for the Child while allowing Father to remain involved. She stated that she provided DCS with a list of suggested medical providers in the area.

Following the hearing, the trial court found clear and convincing evidence to support the following statutory grounds of termination: (1) abandonment for failure to remit child support, (2) substantial noncompliance with the permanency plans, and (3) the persistence of conditions which led to removal. The court also found clear and convincing evidence that termination of Father’s parental rights was in the best interest of the Child. This appeal followed. Father later filed a motion to stay the appeal pending full adjudication of the dependency and neglect action. We declined to stay the appeal pursuant to Tennessee Code Annotated section 36-1-124(b).<sup>11</sup>

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<sup>11</sup> “In all cases that are appealed from the decision of a trial court, the appellate court shall, consistent with its rules, expedite the contested termination of parental rights or adoption case by entering such scheduling orders as are necessary to ensure that the case is not delayed, and such case shall be given priority over all other civil litigation in reaching a determination on the status of the adoption, other than child protective services cases arising under title 37, chapter 1, parts 1, 4 and 6.”

## II. ISSUES

We consolidate and restate the issues raised on appeal as follows:

- A. Whether the court erred in declining to stay the termination proceeding pending the outcome of Father's appeal of the dependency and neglect proceeding.
- B. Whether clear and convincing evidence supports the court's termination based upon the statutory ground of abandonment for failure to remit support pursuant to Tennessee Code Annotated section 36-1-102(1)(A)(i).
- C. Whether clear and convincing evidence supports the court's termination based upon the statutory ground of substantial noncompliance with the permanency plans pursuant to Tennessee Code Annotated section 36-1-113(g)(2).
- D. Whether clear and convincing evidence supports the court's termination based upon the persistence of conditions which led to removal pursuant to Tennessee Code Annotated section 36-1-113(g)(3).
- E. Whether clear and convincing evidence supports the court's finding that termination was in the best interest of the Child pursuant to Tennessee Code Annotated section 36-1-113(i).
- F. Whether Father's constitutional rights as found in the Americans with Disabilities Act were violated.

## III. STANDARD OF REVIEW

Parents have a fundamental right to the care, custody, and control of their children. *Stanley v. Illinois*, 405 U.S. 645 (1972); *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988). This right "is among the oldest of the judicially recognized liberty interests protected by the Due Process Clauses of the federal and state constitutions." *In re M.J.B.*, 140 S.W.3d 643, 652-53 (Tenn. Ct. App. 2004). "Termination of a person's rights as a parent is a grave and final decision, irrevocably altering the lives of the parent and child involved and 'severing forever all legal rights and obligations' of the parent." *Means v. Ashby*, 130 S.W.3d 48, 54 (Tenn. Ct. App. 2003) (quoting Tenn. Code Ann. § 36-1-113(I)(1)). "[F]ew consequences of judicial action are so grave as the severance of

natural family ties.” *M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996) (quoting *Santosky v. Kramer*, 455 U.S. 745, 787 (1982)).

While parental rights are superior to the claims of other persons and the government, they are not absolute and may be terminated upon appropriate statutory grounds. *See Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002). Due process requires clear and convincing evidence of the existence of the grounds for termination of the parent-child relationship. *In re Drinnon*, 776 S.W.2d at 97. A parent’s rights may be terminated only upon

- (1) [a] finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and
- (2) [t]hat termination of the parent’s or guardian’s rights is in the best interest [ ] of the child.

Tenn. Code Ann. § 36-1-113(c). “[A] court must determine that clear and convincing evidence proves not only that statutory grounds exist [for the termination] but also that termination is in the child’s best interest.” *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). The existence of at least one statutory basis for termination of parental rights will support the trial court’s decision to terminate those rights. *In re C.W.W.*, 37 S.W.3d 467, 473 (Tenn. Ct. App. 2000), *abrogated on other grounds by In re Audrey S.*, 182 S.W.3d 838 (Tenn. Ct. App. 2005).

The heightened burden of proof in parental termination cases minimizes the risk of erroneous decisions. *In re C.W.W.*, 37 S.W.3d at 474; *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Evidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable. *State v. Demarr*, No. M2002-02603-COA-R3-JV, 2003 WL 21946726, at \*9 (Tenn. Ct. App. Aug. 13, 2003). This evidence also eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence. *In re Valentine*, 79 S.W.3d at 546; *In re S.M.*, 149 S.W.3d 632, 639 (Tenn. Ct. App. 2004); *In re J.J.C.*, 148 S.W.3d 919, 925 (Tenn. Ct. App. 2004). It produces in a fact-finder’s mind a firm belief or conviction regarding the truth of the facts sought to be established. *In re A.D.A.*, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002); *Ray v. Ray*, 83 S.W.3d 726, 733 (Tenn. Ct. App. 2001); *In re C.W.W.*, 37 S.W.3d at 474.

In 2016, the Tennessee Supreme Court provided guidance to this court in reviewing cases involving the termination of parental rights:

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). 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 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. 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. 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 Carrington H.*, -- S.W.3d --, No. M2014-00453-SC-R11-PT, 2016 WL 819593, at \*12 (Tenn. Jan. 29, 2016) (internal citations omitted).<sup>12</sup>

#### IV. DISCUSSION

##### A.

Father argues that the court abused its discretion by denying his motion to continue pending the outcome of his appeal of the dependency and neglect finding. He alleges that DCS purposefully initiated the termination proceeding in an effort to deprive him of his constitutional right to due process. DCS responds that the court properly denied the motion given the legislature's establishment of simultaneous proceedings.

“This court reviews a trial court's decision to deny a motion for a continuance under the abuse of discretion standard of review.” *In re A'Mari B.*, 358 S.W.3d 204, 213 (Tenn. Ct. App. 2011) (citing *State Dep't of Children's Servs. v. V.N.*, 279 S.W.3d 306, 317 (Tenn. Ct. App. 2008)). “A trial court abuses its discretion only when it ‘applie[s] an incorrect legal standard or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.’” *Eldridge v. Eldridge*, 42 S.W.3d 82, 85

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<sup>12</sup> Father argues that this court must first determine whether the oral findings made by the trial court from the bench conflict with the findings confirmed in the final order. While the trial court is tasked with issuing specific findings of fact and conclusions of law, this court must make its own determination as to whether clear and convincing evidence exists to support the applicable ground of termination. Our review of the final order reflects that the court issued specific findings of fact and conclusions of law pursuant to Tennessee Code Annotated section 36-1-113(k).

(Tenn. 2001) (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)). If a discretionary decision is within a range of acceptable alternatives, we will not substitute our judgment for that of the trial court simply because we may have chosen a different alternative. *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999).

“A termination of parental rights proceeding is not simply a continuation of a dependent-neglect proceeding. It is a new and separate proceeding involving different goals and remedies, different evidentiary standards, and different avenues for appeal.” *In re M.J.B.*, 140 S.W.3d at 651. Additionally, the legislature specifically instructed trial courts to expedite such proceedings as follows:

In all cases where the termination of parental rights or adoption of a child is contested by any person or agency, the trial court shall, consistent with due process, expedite the contested termination or adoption proceeding by entering such scheduling orders as are necessary to ensure that the case is not delayed, and such case shall be given priority in setting a final hearing of the proceeding and shall be heard at the earliest possible date over all other civil litigation other than child protective services cases arising under title 37, chapter 1, parts 1, 4 and 6.

Tenn. Code Ann. § 36-1-124(a). In light of the legislature’s specific instruction to expedite termination proceedings, we conclude that the trial court did not abuse its discretion in denying Father’s attempts to continue the proceeding.

## B.

As relevant to this case, abandonment for failure to remit child support means that:

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

Tenn. Code Ann. § 36-1-102(1)(A)(i).

Father first takes issue with the court’s authority to impose an obligation of child support when the State usurped his authority to parent the Child. “A parent’s obligation to support his or her child exists regardless of a court order requiring the parent to pay

support.” *In re Jacob M.J.*, 434 S.W.3d 565, 572 (Tenn. Ct. App. 2013) (citation omitted). Furthermore, “[e]very parent who is eighteen (18) years of age or older is presumed to have knowledge of a parent’s legal obligation to support such parent’s child or children.” Tenn. Code Ann. § 36-1-102(1)(H).

Next, Father claims that his failure to remit support was not willful when he was unable to obtain and maintain employment and when DCS required him to remit payment for utilities and housing as a requirement of the permanency plan. A parent’s willful failure to support the child “means the willful failure, for a period of four (4) consecutive months, to provide monetary support or the willful failure to provide more than token payments toward the support of the child.” Tenn. Code Ann. § 36-1-102(1)(D). Token support is defined as “support, under the circumstances of the individual case, [that] is insignificant given the parent’s means.” Tenn. Code Ann. § 36-1-102(1)(B). This court has consistently held that the term willfulness as it applies to a party’s failure to support must contain the element of intent. *In re Swanson*, 2 S.W.3d 180, 188-89 (Tenn. 1999). “Willful conduct consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent.” *Audrey S.*, 182 S.W.3d at 863. Additionally, “[f]ailure to support a child is ‘willful’ when a person is aware of his or her duty to support, has the capacity to provide the support, makes no attempt to provide the support, and has no justifiable excuse for not providing the support.” *In re M.L.D.*, 182 S.W.3d 890, 896 (Tenn. Ct. App. 2005) (quoting *In re Adoption of T.A.M.*, No. M2003-02247-COA-R3-PT, 2004 WL 1085228, at \*4 (Tenn. Ct. App. May 12, 2004)).

The relevant time period was from May 18, 2014, through September 17, 2014.<sup>13</sup> We acknowledge Father’s limited education and difficulty in securing employment. However, this was not a case where a parent had extenuating circumstances but faithfully provided support when he or she was able. *See In re Dylan H.*, No. E2010-01953-COA-R3-PT, 2011 WL 6310465, at \*7 (Tenn. Ct. App. Dec. 16, 2011) (reversing the termination decision because mother was simply unable to fulfill her child support obligation during the relevant time period). In this case, Father never paid child support, other than token support or small gifts, throughout the entirety of the Child’s lifetime even when he was admittedly capable of working and actually employed at various times. With these considerations in mind, we conclude that there was clear and convincing evidence to establish that Father abandoned the Child by willfully failing to remit child support before, during, and after the relevant time period and that a statutory ground existed for termination of Father’s parental rights.

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<sup>13</sup> “The applicable four month window . . . includes the four months preceding the day the petition to terminate parental rights is filed but excludes the day the petition is filed.” *In re Jacob C.H.*, No. E2013-00587-COA-R3-PT, 2014 WL 689085, at \*6 (Tenn. Ct. App. Feb. 20, 2014).

### C.

Only one statutory ground must be established by clear and convincing evidence to justify termination of each parent's parental rights. Tenn. Code Ann. § 36-1-113(c). In the event of further appellate review, we will also consider the remaining two grounds, substantial noncompliance with the permanency plans and the persistence of conditions which led to removal.

Tennessee law requires the development of a plan of care for each foster child and further requires that the plan include parental responsibilities that are reasonably related to the plan's goal. Tenn. Code Ann. § 37-2-403(a)(2)(A). A ground for termination of parental rights exists when a petitioner proves by clear and convincing evidence that "[t]here has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan." Tenn. Code Ann. § 36-1-113(g)(2). To establish noncompliance, the trial court must initially find "that the requirements of the permanency plans 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 M.J.B.*, 140 S.W.3d at 656; *see In re Valentine*, 79 S.W.3d at 547. When the trial court does not make such findings, the appellate court should review the issue de novo. *In re Valentine*, 79 S.W.3d at 547. Second, the court must find that the parent's noncompliance is substantial, *In re M.J.B.*, 140 S.W.3d at 656, meaning that the parent must be in "noncompliance with requirements in a permanency plan that are reasonable and related to remedying the conditions that warranted removing the child from the parent's custody." *In re Z.J.S.*, No. M2002-02235-COA-R3-JV, 2003 WL 21266854, at \*12 (Tenn. Ct. App. June 3, 2003). To assess a parent's substantial noncompliance with a permanency plan, the court must weigh "both the degree of noncompliance and the weight assigned to that particular requirement." *Id.* at \*12. Conversely, "[t]erms which are not reasonable and related are irrelevant, and substantial noncompliance with such terms is irrelevant." *In re Valentine*, 79 S.W.3d at 548-49.

Pursuant to the permanency plans, Father was required to (1) complete an alcohol and drug assessment and follow recommendations; (2) develop a relapse prevention plan; (3) submit to random drug screens; (4) demonstrate a minimum of six months of sobriety; (5) sign releases of information; (6) discontinue use of illegal drugs and demonstrate correct usage of prescription medication; (7) obtain and maintain suitable housing for six months; (8) contact community resources for help in obtaining housing; (9) remit payment for food and housing utilities on time; (10) have a contingency plan; (11) establish and maintain legal income; (12) notify DCS of changes in employment and provide proof of income; (13) take a parenting class; (14) develop and maintain a relationship with the Child; (15) remit child support; (16) obtain a medical clearance for his seizure disorder; and (17) complete a mental health assessment and follow

recommendations. Despite Father's claim to the contrary, these requirements were reasonable and related to remedying the conditions that led to the Child's placement in DCS custody.

The record reflects that Father completed a mental health assessment with an alcohol and drug component, submitted to random drug screens, demonstrated a minimum of six months of sobriety, signed releases of information, discontinued his use of illegal drugs, completed parenting classes, and obtained a medical clearance for his seizure disorder. He also maintained visitation with the Child on a monthly basis. Father does not claim that he substantially complied with the remainder of the requirements. Instead, he asserts that he attempted to complete the requirements with little assistance from DCS. While the record reflects that DCS expended a substantial amount of effort in assisting Father, "proof of reasonable efforts is not a precondition to termination of the parental rights of the respondent parent." *In re Kaliyah S.*, 455 S.W.3d 533, 555 (Tenn. 2015). We conclude that there was clear and convincing evidence to support termination based upon Father's substantial noncompliance with the permanency plan requirements. Accordingly, a second statutory ground supported the termination of his parental rights.

D.

Under Tennessee law, a court may terminate parental rights when:

(3) The child has been removed *from the home of the parent or guardian* by order of a court for a period of six (6) months and:

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

(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(s) or guardian(s) 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) (emphasis added). Termination of parental rights requires clear and convincing evidence of all three factors. *In re Valentine*, 79 S.W.3d at 550. Additionally, the persistence of conditions ground may only be applied "where the

prior court order removing the child from the parent's home was based on a judicial finding of dependency, neglect, or abuse." *In re Audrey S.*, 182 S.W.3d at 874.

Father claims that termination on this ground may only be sustained when the order removing the subject child from the home was based upon a final order adjudicating the child as dependent and neglected. He provides that the Child was not removed from his home and that the finding of dependency and neglect was not final as evidenced by his *de novo* appeal. DCS does not defend this ground of termination because there was no final order adjudicating the Child as dependent and neglected at the time of the hearing.

We agree that this ground was inapplicable to Father at the time of the hearing when a final order had not yet been entered. The Child was also not removed from Father's home. Application of this statutory ground in such cases is generally prohibited pursuant to the plain meaning of the statute. *See In re K.M.K.*, No. E2014-00471-COA-R3-PT, 2015 WL 866730, at \*7 (Tenn. Ct. App. Feb. 27, 2015) (reversing termination of a father's parental rights based upon the persistence of conditions when the children were not removed from his home). Accordingly, we conclude that the trial court erred in relying on section 36-1-113(g)(3) as a statutory ground for termination. We reverse the trial court's finding that termination of Father's parental rights was appropriate based upon the alleged persistence of conditions that led to removal. This conclusion does not require reversal of the termination decision because only one statutory ground listed in section 36-1-113(g) is sufficient to support an order terminating parental rights when termination is in the best interest of the child. *In re Audrey S.*, 182 S.W.3d at 860.

#### E.

Having concluded that there was clear and convincing evidence supporting at least one statutory ground to terminate Father's parental rights, we must consider whether termination was in the best interest of the Child. In making this determination, we are guided by the following non-exhaustive list of factors:

(i) In determining whether termination of parental or guardianship rights is in the best interest of the child . . . the court shall consider, but is 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 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;<sup>14</sup>

(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 or controlled substances 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 [section] 36-5-101.

Tenn. Code Ann. § 36-1-113(i). "This list 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 parental rights is in the best interest of a child." *In re M.A.R.*, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005). The General Assembly has also

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<sup>14</sup> *In re Kaliyah S.*, 455 S.W.3d at 555 ("[I]n a termination proceeding, the extent of DCS's efforts to reunify the family is weighed in the court's best-interest analysis, but proof of reasonable efforts is not a precondition to termination of the parental rights of the respondent parent.").

stated that “when the best interest[] of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interest[] of the child, which interests are hereby recognized as constitutionally protected.” Tenn. Code Ann. § 36-1-101(d); *see also White v. Moody*, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004) (holding that when considering a child’s best interest, the court must take the child’s perspective, rather than the parent’s).

A number of the best interest factors weigh against Father. He had not made the adjustment of circumstances necessary to make it safe and in the Child’s best interest to be in his home as evidenced by his inability to provide housing independent from his family or meet the Child’s basic needs. He was also unable to parent the Child without assistance or prompting. Tenn. Code Ann. § 36-1-113(i)(1). Relative to DCS’s efforts, the record was replete with information concerning their effort to accommodate Father in light of his location. Having reviewed the evidence, we conclude that DCS expended more than reasonable efforts in attempting to assist Father but that he had simply failed to make a lasting adjustment. Tenn. Code Ann. § 36-1-113(i)(2). The Child resides in a safe and stable foster home that expressed a desire to adopt her. Removing the Child from the home would negatively affect her emotional, psychological and medical condition. Tenn. Code Ann. § 36-1-113(i)(5). Father failed to address his mental health issues by refusing to engage in counseling on a regular basis as recommended. Tenn. Code Ann. § 36-1-113(i)(8). He also failed to remit child support. Tenn. Code Ann. § 36-1-113(i)(9).

We acknowledge that Father loves the Child and enjoys her company. However, even he agreed that he is currently unable to parent her independently. The Child has simply languished in custody for far too long and should be allowed to achieve permanency and stability through adoption with the family she has grown to love. Foster Parents are also familiar with the Child’s special needs and are able and willing to ensure that she receives the care necessary to experience continued improvement. With all of the above considerations in mind, we conclude that there was clear and convincing evidence to establish that termination of Father’s parental rights was in the best interest of the Child. Accordingly, we affirm the decision of the trial court.

#### F.

Father argues that DCS’s failure to provide an independent assessment of his ability to parent the Child and the need for additional resources was a violation of his constitutional rights as found in the Americans with Disabilities Act (“the ADA”). This constitutional issue was not raised by Father or addressed by the trial court. This issue is now waived on appeal. *Lane v. Becker*, 334 S.W.3d 756, 764 (Tenn.Ct.App.2010).

## V. CONCLUSION

This judgment of the trial court is affirmed as modified, and the case is remanded for such further proceedings as may be necessary. Costs of the appeal are taxed to the appellant, Matthew M.

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JOHN W. McCLARTY, JUDGE