

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
Assigned on Briefs August 2, 2016

**IN RE JASON S., ET AL.**

**Appeal from the Juvenile Court for Macon County  
No. 2015JV133      Ken Witcher, Judge**

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**No. M2016-00226-COA-R3-PT – Filed September 23, 2016**

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This case involves termination of the parental rights of a mother and father to their three children. Following a report of drug exposure and environmental neglect, the Tennessee Department of Children’s Services (“DCS”) obtained emergency temporary custody of the children. Approximately nine months after the children were removed from the parents’ home, DCS filed a petition to terminate the parental rights of both parents on the grounds of substantial noncompliance with the permanency plan, persistence of conditions, and severe child abuse. The petition also sought to terminate the mother’s parental rights on the additional ground of abandonment by willful failure to visit, and it sought to terminate the father’s parental rights on the ground of abandonment by an incarcerated parent. The juvenile court found all grounds were established by clear and convincing evidence and that termination of both parents’ parental rights was in the children’s best interests. Although we conclude that DCS did not prove by clear and convincing evidence that the mother abandoned the children by willful failure to visit, we affirm the termination of parental rights.

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

W. NEAL MCBRAYNER, J., delivered the opinion of the court, in which JOHN W. MCCLARTY and BRANDON O. GIBSON, JJ., joined.

G. Scott Binkley, Westmoreland, Tennessee, for the appellant, Jason S.

Kara L. Everett, Nashville, Tennessee, for the appellant, Amanda B.

Herbert H. Slatery III, Attorney General and Reporter, and W. Derek Green, Assistant Attorney General for the appellee, Tennessee Department of Children’s Services.

## OPINION

### I. FACTUAL AND PROCEDURAL BACKGROUND

Amanda B. (“Mother”) and Jason S. (“Father”) are the biological parents of three children, Jason, born May 2009, Jalyn, born February 2011, and Jaden, born May 2012. After receiving a report of drug exposure and environmental neglect, DCS removed all three children from the parents’ home on December 19, 2014. At that time, Mother and Father were arrested for filing a false police report. Their arrest left the children without proper care or guardianship.

Pictures taken at the time of removal showed the home to be filthy and cluttered. The pictures also showed that the children were dirty and infected with lice. After the children were removed from the home, DCS conducted hair follicle drug screens on the children, and all three tested positive for methamphetamine. It was also reported that the children had medical issues requiring attention. None of the children had visited a dentist, and therefore, each needed dental work. Jalyn was found to have a club foot, which required surgery. And both of the oldest children had speech problems, which required speech therapy.

Following their arrest, a Child Protective Services Investigator conducted perpetrator interviews with Mother and Father at the Macon County Jail. Mother was unable to supply a urine sample. Father was argumentative with law enforcement and refused a drug screen. However, later drug screens revealed Mother tested positive for methamphetamine and Father tested positive for benzodiazepines and opiates.

On December 22, 2014, DCS filed a petition in the Juvenile Court of Macon County, Tennessee to declare the children dependent and neglected and for emergency temporary legal custody. On that date, the court entered a protective custody order placing the children in the temporary custody of DCS, finding probable cause to believe that the children were dependent and neglected. On May 11, 2015, the juvenile court issued a final order adjudicating the children dependent and neglected. The court also found the children to be victims of severe child abuse, perpetrated by Mother and Father, due to the exposure of the children to methamphetamine.

On September 18, 2015, DCS petitioned to terminate the parental rights of Mother and Father to all three children. As grounds against both parents, DCS asserted substantial noncompliance with the permanency plan, persistence of conditions, and severe child abuse. Against Mother alone, DCS asserted abandonment by willful failure to visit,<sup>1</sup> and against

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<sup>1</sup> In its petition, DCS also alleged that Mother abandoned her children by willful failure to support; however, this ground was not argued at trial, presumably because both parents are disabled and receive disability payments.

Father alone, DCS asserted abandonment by wanton disregard of an incarcerated parent.<sup>2</sup> The juvenile court held trial on December 11, 2015. Mother, Father, two DCS caseworkers, and the children's foster parent testified.

DCS and the parents developed a permanency plan on December 23, 2014, which had the twin goals of return to parents or exit custody with a relative. The plan outlined a series of requirements to help the parents achieve the desired outcome of permanency, including: (1) completing a mental health assessment and following any recommendations; (2) completing an alcohol and drug assessment and following any recommendations; (3) participating in alcohol and drug treatment; (4) signing releases of medical information to allow DCS to monitor their progress; (5) establishing a permanent home for a minimum of three months; (6) obtaining necessary household items; (7) providing proof of paid utilities; (8) providing proof of a stable income and demonstrating ability to provide for the family; (9) complying with and passing random drug screens and prescription medication counts; and (10) regularly attending visitation with the children. It is not clear from the record if this plan was amended, but DCS caseworkers testified that the requirements were essentially the same for Mother and Father and remained the same throughout the life of the case.

Both parents completed their mental health assessments in February 2015. Following the assessment, the counselor's report raised concerns about Mother's learning disability. The report also recommended that Mother and Father first attend treatment for their drug abuse, followed by parenting and homemaker classes.

The DCS caseworkers assigned to the parents' case testified that they repeatedly discussed with Mother and Father that their receiving alcohol and drug treatment was the first priority. In January 2015, Mother and Father completed an over-the-phone prescreening in the presence of their caseworker that would have allowed them to begin alcohol and drug treatment. However, they did not attend. Again, in March 2015, Mother and Father scheduled treatment at a facility where their caseworker found an opening, but they were arrested on charges related to the children's removal shortly before their entry date and failed to reschedule after their release.

Despite repeated encouragement and offers of assistance with transportation and making appointments from their caseworkers, neither parent had taken additional steps to attend treatment at the time of trial. Mother and Father often assured caseworkers that they were planning to attend and offered various excuses when they failed to do so. Mother testified that, due to her learning disability, she often had trouble communicating with and understanding her caseworkers. For their part, the caseworkers testified that they took Mother's learning disability into consideration when speaking to the parents about what was

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<sup>2</sup> DCS argued, in the alternative, that Father abandoned his children by willful failure to visit for the four consecutive months prior to the filing of the petition.

required of them. At trial, Mother testified that she understood that she was required to go to rehab and pass drug screens.

Additionally, DCS caseworkers testified that neither parent has been able to consistently supply clean drug screens. Father often refused to submit to drug screens when requested. Mother complied with the drug screens, but she tested positive for the majority. On November 25, 2015, just two weeks before their trial date, Father tested positive for oxycodone and THC,<sup>3</sup> and Mother tested positive for oxycodone. Both admitted to taking un-prescribed medication.

DCS caseworkers also testified that Mother and Father's failure to obtain stable housing was a barrier to compliance with the permanency plan. Mother and Father moved residences at least three times in the year following the children's removal into DCS custody. Although Mother testified that she kept DCS informed of her addresses, their caseworker testified that Mother and Father often claimed to be staying with friends or family and failed to give DCS specific addresses. DCS workers were only able to locate one of the parents' residences, in May 2015, but upon arrival, the parents' caseworker found an eviction notice posted on the door. This prevented DCS from conducting home visits and providing the parents with parenting and homemaker skills classes. As for income, Mother and DCS caseworkers testified that both Mother and Father draw disability.

Finally, regarding visitation, DCS caseworkers testified that, early in the case, both parents regularly visited the children. Father was very emotional during the visits, which upset the children. Nevertheless, caseworkers testified that the parents brought snacks and clothes along to visits and generally interacted well with the children. At a hearing on April 16, 2015, the juvenile court entered an order requiring Father to submit to drug screens as a prerequisite to visiting with the children due to Father's refusal to submit to drug screens. As a result, Father last visited with the children in April 2015. Despite Father's absence, Mother attended a supervised visit on April 20, 2015, and again on May 4, 2015, which was the last day she visited the children.

Afterwards, DCS scheduled visits for May 18, June 3, June 29, July 15, and July 31, but Mother and Father failed to attend. On June 3, 2015, Mother sent a text message to the caseworker, explaining that they had a flat tire and would not make the visit. On June 29, 2015, the caseworker received a text message from Father about 15 minutes prior to the scheduled time, explaining that they had been pulled over by police and would likely be arrested. Father's prediction proved accurate.

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<sup>3</sup> THC, or tetrahydrocannabinol, "is a marijuana metabolite that is stored in fat cells and can be detected in the body up to thirty days after smoking marijuana." *Interstate Mech. Contractors, Inc. v. McIntosh*, 229 S.W.3d 674, 677 (Tenn. 2007).

For the remaining scheduled visits, the parents failed to inform their caseworker that they would be absent and did not respond to calls or text messages. The parents also failed to attend scheduled meetings with their caseworker in July and August of 2015. As a result, the caseworker stopped scheduling visits and requested that Mother and Father contact her to set up another schedule. On September 14, 2015, four days before the petition to terminate was filed, Mother and Father attended a meeting with their caseworker. Then on September 25, 2015, over a week after the petition was filed, Mother contacted the caseworker requesting a visit with her children.

Mother testified that she was forced to miss some of the scheduled visits with her children because of trouble with their vehicle and a lack of gas money. She stated that although her caseworkers offered to assist with transportation on a couple of occasions, the parents' vehicle was working at the time of the offers. As explanation for her lack of communication with DCS caseworkers, she stated that she had lost her phone for a short time. DCS caseworkers testified that, at times, they offered to assist Mother and Father with transportation so that they could attend rehab. Their caseworker also testified that she did not provide them with alternative resources for transportation but did occasionally offer assistance when Mother would tell her about having car trouble, which the parents always declined.

By order entered on January 11, 2016, the court terminated the parental rights of both Mother and Father on the grounds of substantial noncompliance with the permanency plan, persistence of conditions, and severe child abuse. Additionally, the court found Mother abandoned the children by willful failure to visit and Father abandoned the children by wanton disregard by an incarcerated parent. The court specifically found DCS witnesses to be credible. The court also found, after reviewing the statutory factors, that it was in the children's best interest to terminate Mother and Father's parental rights.

On appeal, Mother and Father each argue that the juvenile court erred in finding clear and convincing evidence of the grounds for termination and in finding clear and convincing evidence that termination was in the children's best interest.

## II. ANALYSIS

A parent has a fundamental right, based in both the federal and State constitutions, to the care and custody of his or her own child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010); *Nash-Putman v. McCloud*, 921 S.W.2d 170, 174-75 (Tenn. 1996); *In re Adoption of a Female Child*, 896 S.W.2d 546, 547-48 (Tenn. 1995). However, parental rights are not absolute. *In re Angela E.*, 303 S.W.3d at 250. Our Legislature has identified those situations in which the State's interest in the welfare of a child justifies interference with a parent's constitutional rights by setting forth the grounds

upon which termination proceedings may be brought. Tenn. Code Ann. § 36-1-113(g) (Supp. 2015).

Tennessee Code Annotated § 36-1-113 sets forth the grounds and procedures for terminating parental rights. *In re Kaliyah S.*, 455 S.W.3d 533, 546 (Tenn. 2015). First, parties seeking termination of parental rights must prove the existence of at least one of the statutory grounds for termination listed in Tennessee Code Annotated § 36-1-113(g). Tenn. Code Ann. § 36-1-113(c)(1). Second, they must prove that terminating parental rights is in the child's best interest. *Id.* § 36-1-113(c)(2).

Because of the constitutional dimension of the rights at stake in a termination proceeding, the parties seeking to terminate parental rights must prove both the grounds and the child's best interest by clear and convincing evidence. *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010) (citing Tenn. Code Ann. § 36-1-113(c); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 808-09 (Tenn. 2007); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002)). This heightened burden of proof serves "to minimize the possibility of erroneous decisions that result in an unwarranted termination of or interference with these rights." *In re Bernard T.*, 319 S.W.3d at 596. "Clear and convincing evidence" leaves "no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992). It produces a firm belief or conviction in the fact-finder's mind regarding the truth of the facts sought to be established. *In re Bernard T.*, 319 S.W.3d at 596.

On appeal, we review the trial court's findings of fact "de novo on the record, with a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise." *In re Taylor B.W.*, 397 S.W.3d 105, 112 (Tenn. 2013); Tenn. R. App. P. 13(d). Additionally, as this Court has recently explained, "[w]hen 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.*, No. M2015-01400-COA-R3-PT, 2016 WL 3090908, at \*7 (Tenn. Ct. App. May 23, 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)). Thus, this Court gives great weight to the credibility accorded to a particular witness by the trial court. *Id.* (citing *Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997)).

In termination proceedings, "the reviewing court must then make its own determination regarding whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, provide clear and convincing evidence that supports all the elements of the termination claim." *In re Bernard T.*, 319 S.W.3d at 596-97. We review the trial court's conclusions of law de novo with no presumption of correctness. *In re J.C.D.*, 254 S.W.3d 432, 439 (Tenn. Ct. App. 2007). We "review the trial court's findings as to each

ground for termination and as to whether termination is in the child's best interests, regardless of whether the parent challenges these findings on appeal." *In re Carrington H.*, 483 S.W.3d 507, 525 (Tenn. 2016), *petition for cert. filed sub. nom. Vanessa G. v. Tenn. Dep't of Children's Servs.*, (U.S. Apr. 22, 2016) (No. 15-1317).

## A. GROUNDS FOR TERMINATION OF PARENTAL RIGHTS

### 1. Abandonment by Failure to Visit

We begin with the ground of abandonment by willful failure to visit, which the juvenile court found applicable to Mother alone. Tennessee Code Annotated § 36-1-113(g)(1) enumerates abandonment as the first ground for termination of parental rights. Tenn. Code Ann § 36-1-113(g)(1). There are five alternative definitions of abandonment listed in Tennessee Code Annotated § 36-1-102(1)(A). Abandonment, under Tennessee Code Annotated § 36-1-102(1)(A)(i), "is defined as the willful failure to visit, to support, or to make reasonable payments toward the support of the child during the four-month period preceding the filing of the petition to terminate parental rights." *In re Adoption of Angela E.*, 402 S.W.3d 636, 640 (Tenn. 2013); *see also* Tenn. Code Ann. § 36-1-102(1)(A)(i) (Supp. 2015). Here, because the petition was filed on September 18, 2015, the relevant four-month period is May 17, 2015, to September 17, 2015, the day before the petition was filed. *See In re Jacob C.H.*, No. E2013-00587-COA-R3-PT, 2014 WL 689085, at \*6 (Tenn. Ct. App. Feb. 20, 2014) (concluding that the day before the petition is filed is the last day in the relevant four-month period).

In order to terminate parental rights on the ground of abandonment, the court must find the abandonment to be willful. "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, however, is a question of law." *In re Adoption of Angela E.*, 402 S.W.3d at 640 (citing *In re Adoption of A.M.H.*, 215 S.W.3d at 810). "Failure to visit or support a child is 'willful' when a person is aware of his or her duty to visit or support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so." *In re Audrey S.*, 182 S.W.3d 838, 864 (Tenn. Ct. App. 2005).

The record reflects that Mother did not visit the children during the relevant four month window. She last visited with the children May 4, 2015. On appeal, Mother argues, however, that her failure to visit was not willful because car trouble and communication issues with the DCS caseworker contributed to her failure to attend scheduled visitations with the children. After reviewing the record, we agree that DCS failed to prove by clear and convincing evidence that Mother's failure to visit was willful.

There is sufficient evidence that Mother attempted to visit the children on two occasions in June 2015. On June 3, 2015, Mother contacted DCS, stating she was unable to

make the scheduled visit due to car trouble. We note that DCS caseworkers, both of whom the juvenile court found to be credible witnesses, had offered to provide the parents with transportation to attend drug treatment in the past and occasionally had offered assistance when the parents had car trouble. However, the record contains no evidence that the parents were offered assistance or alternative transportation on this particular occasion. Neither does the record suggest that Mother and Father were ever offered transportation for the purpose of attending visitation with their children.

Again, on June 29, 2015, the parents contacted DCS en route to a scheduled visitation, this time from Father's phone, explaining that they had been pulled over by police and that Father was likely to be arrested. Father was actually arrested at that time, and again, the record does not suggest that Mother was offered alternative transportation or the opportunity to reschedule the visit. While Mother could have shown more persistence in exercising visitation, we conclude that DCS did not carry its burden of proving by clear and convincing evidence that Mother's failure to visit her children was willful in the month of June 2015.

Rather, the record supports a finding that Mother's failure to visit became willful on July 15, 2015, when she began missing scheduled visits without explanation and without contacting DCS. Although Mother suggested that she lost her phone for a time, this is not a justifiable excuse for missing two scheduled visits with her children or for failing to contact her DCS caseworker for approximately a month.

Thus, while we recognize that there is sufficient evidence that Mother willfully failed to visit her children July 15, 2015, through September 17, 2015, this only accounts for two months of the relevant time period. Accordingly, we hold that the juvenile court erred in finding that Mother abandoned her children under Tennessee Code Annotated § 36-1-102(1)(A)(i).

## 2. Abandonment by Incarcerated Parent

Next, the juvenile court found Father had abandoned the children, through his incarceration and pre-incarceration conduct, under the fourth statutory definition of abandonment. To establish this ground for termination, DCS must prove "[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 . . . the parent or guardian has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child." Tenn. Code Ann. § 36-1-102(1)(A)(iv).

"Incarceration severely compromises a parent's ability to perform his or her parental duties. A parent's decision to engage in conduct that carries with it the risk of incarceration



is itself indicative that the parent may not be fit to care for the child.” *In re Audrey S.*, 182 S.W.3d at 865-66. Incarceration, by itself, is not enough to meet this statutory definition. The court must also find, by clear and convincing evidence, “that the parent’s pre-incarceration conduct displayed a wanton disregard for the welfare of the child.” *Id.* The court may consider all evidence relevant to determining “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.” *Id.*

Since the children were born, Father has been incarcerated three times. Though the length of his confinement cannot be determined from the record, Father was most recently jailed on July 29, 2015, during the four month period preceding the filing of the petition. The juvenile court found, and we must agree, that prior to incarceration Father exhibited a wanton disregard for the welfare of the children by exposing them to methamphetamine at such levels that it showed positive in the children’s hair drug screen. Additionally, we note that Father’s repeated incarceration, criminal behavior, and substance abuse exhibit a wanton disregard for the welfare of the children. *See id.* at 867-68 (“We have repeatedly 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.”). Therefore, we find clear and convincing evidence that Father abandoned his children by exhibiting wanton disregard for their welfare prior to his incarceration.

### 3. Substantial Noncompliance with Permanency Plan

As grounds for termination against both parents, the juvenile court found that Mother and Father had not substantially complied with the permanency plan. Under Tennessee Code Annotated § 36-1-113(g)(2), parental rights may be terminated when “[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). But before analyzing whether a parent complied with the permanency plan, the court must find that the permanency plan requirements that the parent allegedly failed to satisfy are “reasonable and related to remedying the conditions which necessitate foster care placement.” *In re Valentine*, 79 S.W.3d at 547 (quoting Tenn. Code Ann. § 37-2-403(a)(2)(C) (2014)). Next, if the permanency plan requirements are reasonable, the court must determine if the parent’s noncompliance was substantial. *Id.* at 548-49. In other words, the unsatisfied requirements must be important in the plan’s scheme. *Id.* A “[t]rivial, minor, or technical” deviation from the permanency plan’s requirements does not qualify as substantial noncompliance. *In re M.J.B.*, 140 S.W.3d 643, 656 (Tenn. Ct. App. 2004).

We first consider whether the parents’ responsibilities in the permanency plan were reasonably related to remedying the issues that caused the removal of the children. The children were removed from the home because of environmental neglect and drug abuse. At

the time of removal, the home was filthy and cluttered, and the children were also filthy and infected with lice. All three tested positive for methamphetamine, presumably due to Mother and Father permitting their exposure to the drug. Consequently, Mother and Father were required to be evaluated and seek treatment for substance abuse and parenting concerns. They were also required to complete a mental health assessment, obtain safe housing, provide financial support for the children, and pass drug screens. We conclude that the juvenile court correctly found these requirements to be reasonably related to reducing the risk of harm to the children so that the children could be safely returned to the parents' care.

Next, we must determine whether the parents' noncompliance with these reasonable requirements was substantial. The juvenile court found that Mother and Father failed to comply with any of the requirements in the permanency plan. But we conclude that the evidence preponderates against this finding. Mother and Father should be credited with maintaining sufficient income. Each is disabled, and they drew a monthly disability check, which was likely sufficient. Mother and Father also completed a mental health assessment and made some efforts to comply with the resulting recommendations. It is not clear from the record if the over-the-phone pre-screening that took place in January 2015 fulfilled the alcohol and drug assessment requirement; however, at a minimum, the parents' participation in the pre-screening indicates efforts to comply with the recommendations in their mental health evaluations to attend rehab. *See In re B.D.*, No. M2008-01174-COA-R3-PT, 2009 WL 528922, at \*8 (Tenn. Ct. App. Mar. 2, 2009) (explaining that in analyzing this ground, the court's focus is on the parent's efforts to comply with the plan, not the achievement of the plan's desired outcomes).

Despite these efforts, proof at trial established that Mother and Father failed to comply with the reasonable responsibilities contained in the permanency plan. They did not obtain suitable housing or manage to consistently pass drug screens. These responsibilities were substantial in light of the plan's overall goals. DCS caseworkers repeatedly communicated to the parents that attending alcohol and drug treatment was their utmost concern. Due to the conditions that necessitated the children's removal, DCS was also concerned with the parents obtaining and maintaining a stable home. Mother contends that at times she was unable to understand what was required of her, due to her learning disability. But DCS caseworkers testified that they were confident that Mother understood that she needed to attend treatment and address her substance abuse issues, and the juvenile court specifically found their testimony to be credible. We will not overturn the court's credibility assessment on appeal "absent clear and convincing evidence to the contrary." *Hughes v. Metro. Gov't of Nashville & Davidson Cty.*, 340 S.W.3d 352, 360 (Tenn. 2011). Mother also admitted at trial to understanding that she needed to attend treatment.

#### 4. Persistence of Conditions

The juvenile court also found that the parental rights of both Mother and Father should be terminated based on persistence of conditions. This ground for termination applies where:

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 . . . 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 . . . in the near future; and

(C) The continuation of the parent . . . 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). Each of the statutory elements must be established by clear and convincing evidence. *In re Valentine*, 79 S.W.3d at 549.

DCS removed the children from the home because of environmental neglect and drug abuse nearly nine months before the filing of the petition. In its order terminating parental rights, the juvenile court found that the conditions that prevented the children's return to Mother and Father were the parents' failure to regularly visit the children, failure to demonstrate sobriety by providing clean drug screens, and failure to provide safe and stable housing. As to the first statutory element, we also find that these conditions remained at the time of the hearing and would cause the children to be subjected to further abuse or neglect.

Moving to the second statutory element, we conclude that there is little likelihood Mother and Father will remedy these conditions in the near future. At trial, nearly a year had elapsed since the children's removal, and despite evidence of sufficient income through disability benefits, Mother and Father had not obtained stable housing. Rather, they were staying with relatives. Moreover, as late as November 2015, Mother and Father were still failing drug screens and neither had participated in alcohol and drug treatment. Although the record suggests that the parents wish to be reunited with their children, the fact remains that neither has taken the steps necessary to do so, despite their understanding of DCS's requirements.

Third, prolonging this case will greatly diminish the children's chances of having a safe and stable home at an early date. The children have been in foster care since December 2014. When removed from Mother and Father, Jason, Jalyn, and Jaden were five, three, and two years old, respectively. The children were placed in their current, pre-adoptive foster home the following month. Their foster family has met all of the children's medical needs and has ensured the children's success in school. Although the foster parent stated that the children miss and love their parents, it is unlikely that Mother and Father will remedy their issues in the near future. Thus, we conclude that DCS met its burden of proving all three elements of this ground for termination.

## 5. Severe Child Abuse

Finally, the juvenile court found DCS had proven severe child abuse as a ground for termination of both parents' rights. Under Tennessee Code Annotated § 36-1-113(g)(4), it is a ground for termination if "[t]he parent or guardian has been found to have committed severe child abuse as defined in § 37-1-102, under any prior order of a court . . . ." Tenn. Code Ann. § 36-1-113(g)(4). As this Court has previously explained, "under this provision in the termination statutes, once the finding of severe child abuse in the dependency and neglect proceedings becomes final, '[t]he ground itself is proved by [the] prior court order finding severe child abuse, and the issue of whether abuse occurred is not re-litigated at the termination hearing.'" *In re J.C.H.*, No. W2012-01287-COA-R3-PT, 2012 WL 6466631, at \*10 (Tenn. Ct. App. Dec. 14, 2012); *see also In re Heaven L.F.*, 311 S.W.3d 435, 439 (Tenn. Ct. App. 2010) (holding the issue of whether a mother committed severe child abuse was *res judicata* where the issue was fully litigated in a previous dependency and neglect action).

The record reflects that, on May 11, 2015, the juvenile court adjudicated the children to be dependent and neglected after finding, by clear and convincing evidence, that all three children were victims of severe child abuse, as defined in Tennessee Code Annotated § 37-1-102. The juvenile court's order of dependency and neglect is final and was not appealed, and therefore, grounds for termination exist based on severe abuse.

### B. BEST INTEREST OF THE CHILDREN

Having found that DCS has proven more than one ground for termination of the parental rights of both Mother and Father, we turn to the issue of whether termination is in the best interest of the children. Because "[n]ot all parental misconduct is irredeemable, . . . Tennessee's termination of parental rights statutes recognize the possibility that terminating an unfit parent's parental rights is not always in the child's best interests." *In re Marr*, 194 S.W.3d 490, 498 (Tenn. Ct. App. 2005). Tennessee Code Annotated § 36-1-113(i)<sup>4</sup> lists nine

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<sup>4</sup> The statutory factors include, but are not limited to, the following:

factors that courts may consider in making a best interest analysis. The focus of this analysis is on what is best for the child, not what is best for the parent. *Id.* at 499. Additionally, “the inquiry should address itself to the impact on the child of a decision that has the legal effect of reducing the parent to the role of a complete stranger.” *In re C.B.W.*, No. M2005-01817-COA-R3-PT, 2006 WL 1749534, at \*6 (Tenn. Ct. App. June 26, 2006)

Like the juvenile court, we conclude DCS has proven termination of the parental rights of both Mother and Father is in the children’s best interests. The parents have made little progress and have failed to make such an adjustment that it would be safe to return the children to their care. It appears unlikely that they will do so in the near future based upon their unwillingness or inability to attend drug and alcohol treatment. Mother and Father have not maintained regular visitation, and as a result, their relationships with the children have deteriorated over time. The parents have also failed to obtain a stable home for a sufficient period of time for DCS to determine if the home is sufficient.

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(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 affect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;

(3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

(4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;

(5) The effect a change of caretakers and physical environment is likely to have on the child’s emotional, psychological and medical condition;

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent’s or guardian’s home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol, controlled substances, or controlled substance analogues as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent’s or guardian’s mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i).

Further, we agree with the juvenile court that Mother and Father “have shown brutality by allowing the children to reside in an environment where all three children tested positive for methamphetamine,” and the parents’ continued use of controlled substances “renders them consistently unable to care for the children [in] a safe and stable manner.” Finally, the children are well adjusted in their foster home. They have developed a strong bond with their foster family, and the foster parents wish to adopt the children. Thus, we conclude that the evidence does not preponderate against the finding of the juvenile court that it would be detrimental to the children to take them away from this structured environment where their physical and emotional needs are met.

### **III. CONCLUSION**

We conclude DCS failed to meet its burden of proving that Mother willfully abandoned her children by failure to visit. Still, the record contains clear and convincing evidence to support terminating Mother’s parental rights on the remaining three grounds and to support terminating Father’s parental rights on the four grounds alleged against him. We also find clear and convincing evidence to support the juvenile court’s conclusion that terminating the parental rights of both Mother and Father is in the children’s best interest. Therefore, we affirm the decision to terminate parental rights.

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W. NEAL MCBRAYNER, JUDGE