IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 5, 2014

IN RE KADEAN T.

Appeal from the Chancery Court for Dickson County
No. 2013-CV-119 Robert E. Burch, Judge

No. M2013-02684-COA-R3-PT - Filed October 31, 2014

The father and step-mother of the child at issue commenced this action to terminate the parental rights of the child's mother and for step-parent adoption. The trial court terminated Mother's parental rights on the grounds of abandonment by willful failure to support and by willful failure to visit the child, pursuant to Tenn. Code Ann. § 36-1-102(1)(A)(i), and upon the determination that termination of Mother's rights was in the best interest of the child, pursuant to Tenn. Code Ann. §§ 36-1-113(c)(2) and (i). The trial court further determined that step-parent adoption was in the best interest of the child. Mother appeals. We affirm the determination that Mother abandoned her child pursuant to Tenn. Code Ann. § 36-1-113(g)(1) by willfully failing to visit her child and by willfully failing to support her child during the four-month period preceding the filing of this petition. However, because the trial court failed to provide written findings of fact as mandated by Tenn. Code Ann. § 36-1-113(k), we reverse the trial court's determination that termination of Mother's parental rights was in the best interest of the child. Accordingly, we remand the issue of the child's best interest to the trial court with instructions to provide written findings of fact on the issue of the child's best interest and to enter judgment consistent with its findings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Affirmed in Part, Reversed in Part, and Remanded

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Kelly Jackson Smith, Dickson, Tennessee, for the appellant, Heather N. C.[1]

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[1]This court has a policy of protecting the identity of children in parental termination cases by initializing the last names of the parties.

M. Allen Ehmling and Elizabeth Renee McClellan, Gallatin, Tennessee, for the appellees, Robert T. T. and Tonya G. T.

OPINION

The facts of this case were largely undisputed. Robert T. T. ("Father") and Heather N. C. ("Mother") are the unmarried biological parents of one child, Kadean T., born in May 2008. For reasons not disclosed by the record, the child's maternal grandmother had temporary custody of the child until 2010. Father was then granted full custody, and the grandparents were awarded regular visitation. Mother's contact with the child, however, was restricted by the court to visits supervised by Father. As the custody order did not specify any further parameters for visitation, Mother was responsible for coordinating visits with Father. However, over the ensuing years, Mother made no requests for visitation with the child and her contact with the child was limited to happenstance, such as a passing interaction at the local grocery store.

After Father obtained custody of the child from the maternal grandparents, he filed an action for child support in which Mother was ordered to pay support in the amount of $25 per week. Father has since obtained two judgments against Mother for child support arrearages. For a brief period of time in 2012, Mother paid support through the Child Support Receipting Unit, but the checks tapered off, with her last payment documented on November 16, 2012.

In July 2012, Father married Tonya G. T. ("Step-mother"). The couple initially resided in Gallatin, Tennessee, with the child and his older half-sister from Father's prior marriage. A short time later, Father earned a job promotion that required relocation, and the family moved to Dickson, Tennessee.

In March 2013, Father and Step-mother commenced this action seeking to terminate Mother's parental rights on the grounds of abandonment for willful failure to visit and willful failure to support the child in the four months preceding their petition. Step-mother also requested to adopt the child.[2] The court appointed counsel to represent Mother and a Guardian Ad Litem to represent the interest of the child. The petition was tried in November

[2] As we noted in *In re Adoption of Z.J.D.*, No. M2012-01596-COA-R3-PT, 2013 WL 870654 (Tenn. Ct. App. Mar.7, 2013), a parent has no standing to petition for the termination of the other parent's parental rights but is a necessary party to the petition for adoption by a step parent. *Id*. at *1, n.1 (citing Tenn. Code Ann. § 36-1-113(b); Tenn. Code Ann. § 36-1-115(c); *Osborn v. Marr*, 127 S.W.3d 737, 739-40 (Tenn. 2004)).

2013, with Mother, Father, and Step-mother testifying. Also testifying was Father's first wife, Lisa B., who is the mother of his first child.

At the time of trial, Mother was living in a mobile home in Old Hickory, Tennessee, with her fiancé, a registered sex offender. It was undisputed that Mother had not lived with the child since he was two and a half months old, and Mother admitted that she had never established a relationship with her son. Father testified that he had never denied Mother visitation, and that Mother did not request visitation with the child until the petition was filed in 2013. Additional testimony was elicited that during the pendency of this suit, Mother, Father, and Step-mother attempted to coordinate visitation, but that Mother canceled two visits, attended one brief supervised visit at McDonald's, and then failed to show up at a final visit. The scheduled visit at McDonald's was Mother's first visit with the child since 2010.

With respect to child support, the evidence established that Mother had only paid $835 during the child's lifetime and that all of these payments were made between January and November 2012. Mother was also under court order to pay half of the child's uncovered medical bills, and although she received several requests by Father and Step-mother for reimbursement, she never paid her share.

In the days before suit was filed, Father received remuneration for Mother's substantial child support arrearage in the form of a federal income tax intercept of $838. Prior to the four-month statutory window, Mother was approximately $2,425 in arrears, and by trial, she was over $4,000 in arrears. Mother claimed she had been unable to provide support, after she was terminated from a factory position in 2012 due to a pregnancy fathered by her current boyfriend. Their child was born in August 2013.

In the trial court's ruling from the bench, a verbatim transcript of which is in the record, the court stated:

> The proof in this case, the standard is clear and convincing evidence which is a much higher standard than the normal preponderance of the evidence.
>
> The clear and convincing evidence in this case establishes that the petition filed was filed March 19th of 2013. The four-month period next preceding the filing of the petition began on November 19th, 2012. That's the pivotal period.
>
> Anything that happened after the filing of the petition does not go to abandonment but goes to showing the parental fitness of the prospective parent.

With regard to failure to support the evidence shows that the last child support payment prior to the four-month period of time made by [Mother] was on November 16th of 2012. As I've said before, the four-month period would [begin] November 19th. The amount was $36.54.

The next child support payment was made March 8th of 2013. This was an $838 IRS intercept. It is within the roughly 11 days prior to the time of the filing of the petition. It is within the four-month period.

But the Court rules that that is not a voluntary child support payment. That is totally beyond her control. She had nothing to do with it. The IRS automatically took out a refund to which she was apparently due and diverted to the child's welfare without her consent or cooperation.

The next child support payment made was October the 11th of 2013 in the amount of $38. The Court finds that during the four-months next preceding the filing of the petition there was a willful failure to pay child support during that time . . . [I]t could be said that part of that was [Mother's] pregnancy but, again, that's a pretty fair period of time. Most ladies that I know work for at least the first six months and I think she was certainly able to make payments.

With regard to willful failure to visit, there was no visitation at all from 2010 until the filing of the petition. That's uncontroverted. Only after the filing of the petition did [Mother] begin requesting visitation. Now, she states that she did not know how to get in touch with the child's father and stepmother. Her parents had regular visitation with the child. This information was readily available to her if she had just asked. She was never out and out refused visitation. She was never denied phone calls.

So during this four-month period of time there was willful failure to visit admittedly. Supervision made it harder to visit but not impossible because we did have the one visit [post-petition]. And I agree with [Mother] that supervision [post-petition] could have been a little more cooperative. The statements made about not allowing her parents to come with her for visitation because they already had visitation that really doesn't make sense. The fact that the child got to see the grandparent one time doesn't mean they don't get to see them again. Visitation is the right of the child not of the [visitor].

For that reason, the Court finds by clear and convincing evidence that this child has been abandoned by his mother for the grounds of both non-support

> and failure to visit. The proof also establishes by clear and convincing evidence that it is in this child's best interests that the parental rights of [Mother] be terminated and that the child be adopted by [Step-mother]. Which the Court finds by clear and convincing evidence would be manifestly in the child's best interests.

In its final order, the trial court found that Father and Step-mother had proven by clear and convincing evidence, pursuant to Tenn. Code Ann. § 36-1-113(g)(1) and Tenn. Code Ann. § 36-1-102(1)(A)(i), that Mother willfully failed to support her child in the four months preceding the filing of the petition, in that she made no voluntary child support payments or voluntary payments of any kind to Father and that she had willfully failed to visit her child in the four months preceding the filing of the petition and, therefore, concluded that Mother abandoned her child. More specifically, the court found that Father and Step-mother had proven by clear and convincing evidence that Mother never requested visitation with her child until after the petition to terminate was filed, despite having knowledge of the location of the child's residence and knowing that her parents also had the child's address, but never requesting it from them. The trial court additionally concluded, but provided no findings of fact to support the conclusion, that Father and Step-mother had proven by clear and convincing evidence that it was in the child's best interest that Mother's parental rights be terminated and that the step-parent adoption be allowed to proceed.

Based upon the above findings, the court granted the petition to terminate the parental rights of Mother. The court additionally ordered that "all waiting periods are hereby waived and that the relationship of parent-child be established between [Step-mother] and Kadean T.T." and "that [Step-mother] shall be for all intents and purposes considered as the natural parent of the adopted child, Kadean T. T., and shall assume any and all responsibilities as they related to said child." This appeal followed.

I. STANDARD OF REVIEW

Parents have a fundamental right to the care, custody and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Hawk v. Hawk*, 855 S.W.2d 573, 577 (Tenn. 1993). "This right is superior to the claims of other persons and the government, yet it is not absolute." *In re S.L.A.*, 223 S.W.3d 295, 299 (Tenn. Ct. App. 2006).

To terminate parental rights, a court must determine by clear and convincing evidence the existence of at least one of the statutory grounds for termination and that termination is the best interest of the child. *See* Tenn. Code Ann. § 36-1-113(c); *In re Adoption of Angela E.*, 402 S.W.3d 636, 639 (Tenn. 2013) (citing *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002)). When a trial court has made findings of fact, we review the findings de novo on the

record with a presumption of correctness unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d); *In re Adoption of Angela E.*, 402 S.W.3d at 639 (citing *In re Taylor B.W.*, 397 S.W.3d 105, 112 (Tenn. 2013)). We next review the trial court's order de novo to determine whether the facts amount to clear and convincing evidence that one of the statutory grounds for termination exists, and, if so, whether the termination of parental rights is in the best interests of the children. *In re Adoption of Angela E.*, 402 S.W.3d at 639-40. Clear and convincing evidence is "evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Id*. at 640 (citing *In re Valentine*, 79 S.W.3d at 546) (internal quotation marks omitted).

II. GROUNDS FOR TERMINATION

As noted above, the termination of Mother's parental rights was premised on two grounds. We will examine each of these statutory grounds in turn, beginning with the trial court's finding of abandonment for willful failure to visit.

A. WILLFUL FAILURE TO VISIT THE CHILD

Parental rights may be terminated for abandonment under Tenn. Code Ann. § 36-1-102(1)(A)(i) and § 36-1-113(g)(1) where a parent "willfully" fails to visit their child for the four months preceding the filing of the petition to terminate that parent's rights. Failure to visit a child is "willful" when a parent is aware of his or her duty to visit, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so. *In re Mark A.L.*, No. M2013-00737-COA-R3-PT, 2013 WL 5536801, at *6 (Tenn. Ct. App. Oct. 4, 2013) (citing *In re Audrey S.*, 182 S.W.3d 838, 864 (Tenn. Ct. App. 2005)). However, where the failure to visit is *not* willful, a failure to visit a child during the applicable four-month window does not constitute abandonment. *R.G.W. v. S.M.*, No. M2009-01153-COA-R3-PT, 2009 WL 4801686, at * 7 (Tenn. Ct. App. Dec. 14, 2009) (citing *In re Adoption of A.M.H.*, 215 S.W.3d 793, 810 (Tenn. 2007)).

Mother challenges the trial court's finding of "willful" failure to visit on three grounds: (1) that she was not aware of her duty to visit, (2) that she was not aware that her parental rights could be terminated for failure to visit, and (3) that she had justifiable reason for not visiting.

Mother's first two contentions were addressed by our Supreme Court in *In re M.L.P.*, 281 S.W.3d 387, 392 (Tenn. 2009), wherein the father similarly argued that termination was in error as he was not aware of his duty to visit his child or the consequences of his failure to visit. The Supreme Court was not persuaded, stating:

> We decline to hold that a parent must be aware of the consequences of his failure to visit for such a failure to be willful. The plain language of the statute [Tenn. Code Ann. § § 36-1-102 (1)(A)(I)] requires that the failure to visit be "willful," not that the parent be fully apprised of every consequence the failure to visit might produce. Persons are presumed to know the law, *see Wallace v. Nat'l Bank of Commerce*, 938 S.W.2d 684, 686 (Tenn. 1996); *Bd. of Educ. v. Shelby Co.*, 339 S.W.2d 569, 584 (Tenn. 1960), and parents should know that they have a responsibility to visit their children.[3]

Id.

Based on the foregoing, Mother's first two contentions are unfounded.

For her third contention, Mother asserts that her failure to visit was not "willful" because she had justifiable reasons for not visiting. Although Mother admitted that she had no scheduled visits with the child for the three years preceding the March 2013 petition, she contends that Father and Step-mother impeded her efforts to visit the child and that she was "restrained from seeing her son" by court order.

Mother correctly notes that when a parent attempts to visit her child or maintain relations with her child and is thwarted by the conduct of others, the failure to visit is not necessarily willful. *See In re Adoption of A.M.H.*, 215 S.W.3d 793, 810 (Tenn. 2007); however, the restraint or interference with visitation must constitute "a *significant* restraint or interference." *In re Adoption of Kleshinski*, No. M2004-00986-COA-R3-CV, 2005 WL 1046796, at *22 (Tenn. Ct. App. May 4, 2005) (citing *V.D. v. N.M.B.*, No. M2003-00186-COA-R3-CV, 2004 WL 1732323, at *6 (Tenn. Ct. App. July 26, 2004)); *see also In re Adoption of Alexander M.S.F.*, No. M2012-02706-COA-R3-PT, 2013 WL 4677886, at *3 (Tenn. Ct. App. Aug. 27, 2013) (emphasis added).

The trial court expressly found that Mother was never refused visitation or phone calls by Father or Step-mother, that she did not request visitation with the child until after the petition to terminate was filed, and that the custody order, which required supervised visits, "made it harder to visit but not impossible."

Our review of the record confirms the trial court's findings. The evidence does not support Mother's assertions that she attempted to visit the child, to maintain or have any relationship with the child, or that Father and Step-mother "significantly" restrained or

[3]The foregoing is limited to termination proceedings initiated *by an individual person* versus those initiated by the Tennessee Department of Children's Services. *See In re Keri C.*, 384 S.W. 3d 731, 745-46 (Tenn. Ct. App. 2010); *see also* Tenn. Code Ann. § 37-2-403(a)(2)(A) and (B).

interfered with Mother's efforts to visit the child. Mother did not identify specific occasions when her attempts to visit were denied; she merely stated that she encountered difficulties over the years "getting anyone to allow [her] to see Kadean." Father's testimony expressly contradicted that of Mother; he stated that she did not request visitation and she did not telephone the child until after the petition was filed in 2013. It was acknowledged that Mother made one unannounced visit to the child's home on Easter Sunday 2012 and she was denied visitation because the child was asleep and a family event was planned. Moreover, when Father asked Mother to leave, she refused and the conflict escalated such that Father called the police. Except for this lone incident in early 2012, Mother identified no efforts by Father, Step-mother, or anyone else to impede her visitation in the years preceding the petition, and certainly none in the relevant four-month time period. To the contrary, there is evidence that when Mother requested visitation post-petition, Father and Step-mother cooperated with her to set up scheduled visits and telephone calls. We also find it significant that Lisa B., the mother of Father's ten-year old daughter, who lives with Father, testified that she has never had any problem visiting her child. Furthermore, Lisa B. testified that Father has afforded her additional visitation that was not required under their parenting plan.

With respect to Mother's contention that she was "restrained" from seeing her son by the terms of the court order, the evidence clearly reveals that Mother merely had to coordinate such visits with Father; thus, her court-authorized opportunities to visit with her child were not "significantly restrained," and the court order did not prevent Mother from visiting her child. Further, and more significantly, the evidence clearly and convincingly established that Mother did not attempt to visit her child in the four months preceding the filing of the petition.

We, therefore, affirm the finding that Mother willfully failed to visit the child during the determinative four-month period preceding the filing of the petition. We next consider whether Mother willfully failed to support her child.[4]

B. Willful Failure to Support the Child

An additional ground upon which a parent's rights may be terminated is when the parent willfully fails to support their child for the four consecutive months preceding the filing of the petition. *See* Tenn. Code Ann. §§ 36-1-102(1)(A)(i) and 36-1-113(g)(1); *see also In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003). As noted in numerous cases, the

[4] Although only one ground is necessary to justify terminating parental rights, our Supreme Court has asked this court to review each grounds for termination as a matter of policy to prevent unnecessary remands of cases in light of "the importance of permanently placing children and the just, speedy resolution of [termination] cases." *In re Adoption of Angela E.*, 303 S.W.3d at 251. n14.

failure to support must be "willful" and a parent's "[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)).

Mother challenges this ground on several fronts. She contends the trial court erred by not considering the $838 federal tax intercept as payment of support during the four-month period preceding the filing of the petition. She contends she was not aware of her duty to support or that her parental rights could be terminated for willfully failing to support her child. She also insists she did not have a job or funds to pay support; thus, her non-payment of support was not willful.

(1) The Tax Intercept

We will first address the federal tax intercept. The statutory four-month period began on November 18, 2012, and ended March 18, 2013,[5] the day before the petition was filed. But for the $838 tax intercept which was received during the relevant period, it is uncontroverted that Mother provided no support during the four-month period. The trial court found that the tax intercept did not qualify as a support payment by Mother; because it was not a voluntary payment of child support. Mother contends this was error, however, she cites no authority that supports her position and we have identified authority that supports the trial court's ruling.

In *In re Lavanie L.*, No. E2008-02622-COA-R3-PT, 2009 WL 3231091 (Tenn. Ct. App. Oct. 8, 2009), the mother made a similar argument; she contended that Tenn. Code Ann. § 36-1-113(g)(1) does not require that child support payments *be made* willfully or voluntarily. *Id*. at *6 (emphasis added). It was her contention all that mattered was that support was received during the relevant period, and "as long as a payment is made, it does not matter how that payment was made, nor does it matter whether it was made willingly." *Id*. We found the assertion without merit, stating:

[5]The abandonment statute directs that the relevant period is "the four (4) months immediately *preceding* the institution" of an action to terminate a parent's parental rights. Tenn. Code Ann. § 36-1-102(1)(A)(iv) (emphasis added). Thus, the four-month period does not include the date the petition was filed. The petition in this action was filed on March 19, 2013, thus, the relevant period is November 18, 2012 to March 18, 2013. Although the trial court erroneously calculated the relevant period beginning on November 19, 2012, the error is harmless as Mother's last child support payment was November 16, 2012.

> As far as this court is concerned, she did willfully fail to make her child support payments. As a result, the State had to resort to other measures and intercept her income tax return to recoup those payments. Furthermore, her failure to pay child support is particularly disturbing because she had a tax refund for the State to intercept, showing that she had earnings from which she could have paid support. Due to her willful failure to make appropriate child support payments for a period of four months preceding the filing of the Petition for Termination, we affirm the trial court's ruling that Mother was in violation of Tenn. Code Ann. § 36-1-113(g)(1).

Id.

The above rationale was followed in *In re Alyssa Y.*, No. E2012-02274-COA-R3-PT, 2013 WL 3103592, at *10 (Tenn. Ct. App. June 17, 2013), in which we stated:

> The fact that Mother's tax refund was intercepted and applied to her child support obligation is not relevant. *In re Lavanie L.*, No. E2008-02622-COA-R3-PT, 2009 WL 3231091, at *6 (Tenn. Ct. App. Oct. 8, 2009). As this Court noted in *Lavanie*, the interception of a tax refund does not constitute a voluntary payment of child support. *Id.*

Id.; *see also In re Adoption of Alexander M.S.F.*, 2013 WL 4677886, at *5 (holding a tax intercept is "irrelevant to the issue of willful failure to support" and does not constitute a voluntary payment of support).

Based on the foregoing authority, the trial court correctly concluded that the tax intercept would not be considered in determining whether Mother failed to support her child during the relevant period.

(2) Awareness of Duty to Support

Mother contends the proof did not show her conduct was "willful," because there is no "clear admission" in the record that she was "aware of her duty to support." We find this contention without merit because Mother has misconstrued who has the burden of proof on this issue. Contrary to her contention, "parents are presumed to know that they have a duty to support their children." *In re Kiara C.*, No. E2013-02066-COA-R3-PT, 2014 WL 2993845, at *8 (Tenn. Ct. App. June 30, 2014) (citing Tenn. Code Ann. § 36-1-102(1)(H) ("Every 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."); *Kirkpatrick v. O'Neal*, 197 S.W. 3d 674, 680 (Tenn. 2006) (holding that "[a] parent is liable for the support

of his or her child throughout their minority with or without the existence of a court order. . . .")). Morever, circumstantial evidence may be used to satisfy the clear and convincing evidence burden of proof in parental termination cases. *In re M.O.*, 173 S.W.3d 13, 20 (Tenn. Ct. App. 2005); *In re S.M.*, 149 S.W.3d 632, 643 (Tenn. Ct. App. 2004). Mother readily concedes in her brief that two child support orders directed her to pay support and she paid support as directed in the 2012 order for a period of time. Further, the two petitions Father filed to obtain arrearage judgments for past-due support and the resulting judgments are more than sufficient to establish that she was aware of her duty to support her child at all times material to this appeal. Applying the foregoing, Mother was fully aware of her duty to support her child.

(3) Awareness of Consequence of Failure to Support

Mother next contends it was error to find that her failure to support was "willful," because she was not notified that her parental rights could be terminated as a consequence of a failure to support. Employing, again, the rationale expressed by our Supreme Court in *In re M.L.P.*, and recognizing that the Department of Children's Services is not the petitioner, Mother was not entitled to such notification. *See In re M.L.P.*, 281 S.W.3d at 392. Thus, this contention is without merit.

(4) Inability to Pay Support

Mother's final support contention is that she did not have a job nor sufficient funds to pay support; thus, her non-payment of support was not willful. We have repeatedly held that a parent who fails to support his or her child because the parent is financially unable to provide support is not willfully failing to provide support. *See e.g. In re Aspyn S.J.*, No. M2013-00855-COA-R3-PT, 2013 WL 4677942, at *3 (Tenn. Ct. App. Aug. 27, 2013); *In re Mariah K.D.*, No. M2011-02655-COA-R3-PT, 2012 WL 3090313, at *8 (Tenn. Ct. App. July 30, 2012); *In re Shaolin P.*, No. M2010-02549-COA-R3PT, 2011 WL 1876123, at *6 (Tenn. Ct. App. May 13, 2011); *O'Daniel v. Messier*, 905 S.W.2d 182, 188-89 (Tenn. Ct. App. 1995); *Pierce v. Bechtold*, 448 S.W.2d 425, 429 (Tenn.Ct.App.1969).

Father and Step-mother had the burden to prove that Mother had the ability to pay support during the relevant four-month period and that her failure to pay support was willful. The evidence relevant to whether Mother's failure to pay support was willful reveals a history of her not paying support, even during times she was employed. As the record reveals, although Kadean was only five years old at the time of trial, the petitioners filed two previous petitions to enforce Mother's obligation to support her child. On the first occasion, the court issued an arrearage judgment against Mother of $2,500. Although this is not a large judgment, it must be noted that her support obligation was only $25 per week, and it

takes one hundred weeks, or twenty-three months to build up an arrearage of $2,500. The second time they went to court, Mother was in arrears by an additional $1,500, for which a new arrearage judgment of $4,000 was entered against Mother. Thus, prior to the commencement of the four-month period at issue, Mother had established a solid record of failing to pay support, yet the evidence reveals clearly that she had been working prior to the beginning of the relevant period. In fact, she had earned enough to receive a tax refund of in excess of $800. Mother's admission that she had been working prior to the beginning of the relevant four-month period, but not paying support fully and timely, brings us back to a fact we observed in *In re Lavanie L*. As noted in *Lavanie*, the interception of a tax refund did not constitute a voluntary payment of child support; however, we recognized the fact that she had a tax refund for the State to intercept showed that she had earnings from which support could have been paid. *In re Lavanie L*., 2009 WL 3231091, at *6; *see also In re Alyssa Y.*, 2013 WL 3103592, at *10.

Although Mother testified that she was laid off from work "due to her pregnancy," and that she could not work during her pregnancy, the trial court found Mother's testimony less than credible. The trial court expressly rejected her contention that she could not work during the very early stages of her pregnancy, and Mother gave no specialized reasons for not being able to work during the early phases of her pregnancy for another employer. In fact, Mother did not identify the employer that she claimed laid her off from work due to her pregnancy. Nevertheless, her layoff appears to have coincided with the beginning of the statutory four-month period, perhaps in November or December 2012, at which time she might have been one month pregnant, if not less.[6] In any event, there is no evidence that Mother had any problems with her pregnancy, that she suffered from morning sickness, or her pregnancy was high risk, and there is no evidence that a physician restricted her work or other activities. Mother gave no reason why, when she was laid off so early in her pregnancy, that she could not work elsewhere, realizing she was within the first couple of weeks of her pregnancy.

What is significant, however, are the trial court's findings that Mother's testimony was less than credible and that Mother had the ability to work during the relevant four-month period, which would have coincided with the first four or five months of her pregnancy. A parent's demeanor and credibility as a witness plays an important role in

[6]This assumes a full term, nine-month pregnancy and there is no evidence to the contrary. The record is silent as to when her newborn child was born. Surprisingly, no one addressed this issue during Mother's testimony; however, she testified at trial that her newborn child was "three months old," when the case was tried on November 13, 2013. Therefore, using the very general information provided by Mother, it appears her newborn child was born in the month of August of 2013, possibly as early as July; thus, the child may have been conceived by only a few days when the relevant four-month period began on November 18, 2012.

determining intent and the trial court is in the best position to make credibility determinations. *In re D.L.B.*, 118 S.W.3d at 367. To the extent the trial court's determinations rest upon an assessment of the credibility of witnesses, these determinations will not be overturned absent clear and convincing evidence to the contrary. *In re Kaitlynne D.*, No. M2013-00546-COA-R3-JV, 2014 WL 2168515, at *2 (Tenn. Ct. App. May 21, 2014) (citing *Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn.1999)).

Recognizing the only evidence that would excuse Mother from working during the relevant four-month period was her own testimony, and that the trial court found her testimony less than credible, we affirm the finding that Mother's failure to pay support during the relevant period was wilful. The evidence in this record does not overcome the trial court's negative assessment of Mother's credibility.

For the foregoing reasons, we affirm the trial court's finding that Mother abandoned her child pursuant to Tenn. Code Ann. § 36-1-113(g)(1) by willfully failing to support her child during the four-month period preceding the filing of this petition.

III. BEST INTEREST OF THE CHILD

When at least one statutory ground for termination has been found, the trial court is to engage in a best interest analysis using the statutory factors set forth at Tenn. Code Ann. § 36-1-113(c)(2) and § 36-1-113(i). *See In re Marr*, 194 S.W.3d 490, 498 (Tenn. Ct. App. 2005); *White v. Moody*, 171 S.W.3d 187, 192 (Tenn. Ct. App. 2004).

The trial court concluded that Step-mother and Father had proven by clear and convincing evidence that termination of Mother's parental rights was in the child's best interest; however, as Mother correctly notes, neither the written order nor the trial court's ruling from the bench specifically identify any findings of fact that form the basis for this conclusion.

In an opinion filed twelve years ago, we stated unequivocally that a trial court's responsibility to make findings of fact and conclusions of law in termination cases is mandated by statute. *See In re Adoption of Muir*, No. M2002-02963- COA-R3-CV, 2003 WL 22794524, at *3 (Tenn. Ct. App. Nov. 25, 2003) (discussing Tenn. Code Ann. § 36-1-113(k)). As noted in *Muir*, Tenn. Code Ann. § 36-1-113(k) explicitly requires trial courts to "enter an order which makes specific findings of fact and conclusions of law" in termination cases. *Muir*, 2003 WL 22794524, at *3.

In a more recent opinion by our Supreme Court, the mandate concerning specific findings of fact and conclusions of law concerning each ground for termination and whether

termination is in the child's best interest was reaffirmed. *See In re Angela E.*, 303 S.W.3d 240 (Tenn. 2010). As the court stated:

> The termination statute clearly and unequivocally requires the trial court to make the statutorily required findings and conclusions before granting a petition to terminate parental rights, regardless of whether that petition is opposed. Tenn. Code Ann. § 36-1-113. In two places, subsections (c) and (k), the statute uses mandatory language to describe the trial court's responsibility to make findings of fact and conclusions of law before terminating parental rights. . . . We must adhere to the statute's plain language. Otherwise, we risk infringing on parents' fundamental right to the care and custody of their children, which we deny through the termination of parental rights "only upon a determination of [a] parent's unfitness to be a parent." *In re D.A.H.*, 142 S.W.3d 267, 274 (Tenn. 2004). Explicitly reaching those determinations by clear and convincing evidence is also necessary to protect a parent's due process rights. *See Santosky*, 455 U.S. at 747-48, 102 S.C. 1388.

Id. at 254.

When the mother and stepfather in *Angela E*. attempted to distinguish the facts and unique circumstances of their case to avoid the consequence of there being no written findings of fact and conclusions of law concerning each ground for termination and the best interest analysis, the Supreme Court rejected their argument, leaving few, if any, exceptions to the requirement. *Id*. at 254-55. As the court explained:

> The problem with Mother and Stepfather's argument is that it leapfrogs to the best interests analysis without addressing the trial court's fatal omission of findings and conclusions relative to the grounds for termination. The best interests analysis is *separate from* and subsequent to the determination that there is clear and convincing evidence of grounds for termination. *In re Marr*, 194 S.W.3d at 498; *see In re C.B.W.*, No. M2005-01817-COA-R3-PT, 2006 WL 1749534, at *6 (Tenn. Ct. App. June 26, 2006) ("existence of a ground does not inexorably lead to the conclusion that termination of a parent's rights is in the best interest of the child"). Here, because the trial court failed to make the findings and conclusions relative to grounds for termination, we are unable to reach the trial court's determination that termination of Father's parental rights was in the children's best interests. *See D.L.B.*, 118 S.W.3d at 368.
> . . . .

> Having determined that the required findings regarding grounds for termination were not made in this case, we are constrained to remand it to the trial court for further expedited proceedings.

Id. (emphasis added) (footnote omitted). Thus, specific findings of fact and conclusions of law concerning each ground for termination and whether termination is in the child's best interest are required. *See id*.

In the instant case, the trial court made specific findings of fact regarding two grounds for termination; however, the trial court made no specific findings of fact regarding the child's best interest. The trial court's only determination regarding the best interest issue reads as follows: "The proof also establishes by clear and convincing evidence that it is in this child's best interests that the parental rights of [Mother] be terminated and that the child be adopted by [Step-mother]. Which the Court finds by clear and convincing evidence would be manifestly in the child's best interests."

Based on the record and the brief conclusory statement regarding the child's best interest immediately above, we have determined the statutorily mandated findings of fact and conclusions of law regarding the best interest of the child were not made in this case. Accordingly, and following the protocol set forth in *Angela E.*, we are constrained to remand the issue of the child's best interest to the trial court for "we may not conduct a de novo review of the termination decision in the absence of such findings." *Id*. at 255 (citing *Adoption Place, Inc. v. Doe*, 273 S.W.3d 142, 151 & n.15 (Tenn. Ct. App. 2007)).

As a final note, and consistent with our Supreme Court's acknowledgment in *Angela E.*, we are mindful that our decision will unfortunately prolong the uncertainty for the child and parties; however, the termination statute and the constitutional implications require remand. *See In re Angela E.*, 303 S.W.3d at 255 (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)).

IN CONCLUSION

We affirm the finding by the trial court that Mother willfully failed to visit her child during the four-month period preceding the filing of this petition, therefore the ground of abandonment for failure to visit under Tenn. Code Ann. § 36-1-113(g)(1) has been established. We also affirm the finding that Mother willfully failed to support her child during the four-month period preceding the filing of this petition, therefore the ground of abandonment for failure to support under Tenn. Code Ann. § 36-1-113(g)(1) has been established. As for the trial court's determination that termination of Mother's parental rights is in the best interest of the child, we reverse because the trial court failed to make

specific findings of fact and conclusions of law as mandated by Tenn. Code Ann. § 36-1-113(k). We, therefore, reverse the judgment terminating Mother's parental rights and remand with instructions for the trial court to make specific findings of fact, as mandated by Tenn. Code Ann. § 36-1-113(k), on the issue of the child's best interest.[7] Costs on appeal are assessed to both parties equally.

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FRANK G. CLEMENT, JR., JUDGE

[7]We are aware the trial judge who presided over this case retired August 31, 2014. We take no position on whether the retired judge may make the requisite findings and enter judgment accordingly, or whether a successor judge must be designated to preside over this matter, in which event the successor judge "may proceed upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties." *See* Tenn. R. Civ. P. 63. The rule reads as follows:

> If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. In a trial or hearing without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. In any trial or hearing, with or without a jury, the successor judge may recall any witness.