

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs January 21, 2010

IN RE AUTUMN K. ET AL.

**Appeal from the Juvenile Court for Davidson County
No. PT 81035 Betty K. Adams, Judge**

No. M2009-01579-COA-R3-PT - Filed March 1, 2010

Brandy B.-K., (“Mother”) and Joseph K. (“Father”) appeal the termination of their parental rights to their six minor children: Autumn K. (DOB: 2/19/97), River K. (DOB: 4/19/00), Micah K. (DOB: 10/17/01), Summer K. (DOB: 7/16/03), Christopher B.-K. (DOB: 12/24/06), and Kayden B.-K. (DOB: 12/24/06) (collectively, “the Children”).¹ In separate appeals, Mother and Father challenge the juvenile court’s finding that multiple grounds for termination were established by clear and convincing evidence and that termination was in the best interests of the Children. In addition, Father contends that DCS failed to make reasonable efforts toward reunification. We affirm the judgment as to both Mother and Father.

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

CHARLES D. SUSANO, JR., J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., and ANDY D. BENNETT, JJ., joined.

Nick Perenich, Nashville, Tennessee, for the appellant, Joseph K.

Dennis L. Nordhoff, Franklin, Tennessee, for the appellant, Brandy B.-K.

¹The juvenile court also terminated the parental rights of Christopher L.C., the alleged biological father of the two youngest children, Christopher B.-K and Kayden B.-K. Conroy, whose paternity was never legally established, made no appearance in the juvenile court proceeding, and is not a party to this appeal. At all times relevant to the underlying case, Father was the legal parent of all six minor children as he and Mother were married at the time of the birth of the children. *See* Tenn. Code Ann. § 36-1-102(28).

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; and Amy T. McConnell, Assistant Attorney General, Nashville, Tennessee, for the appellee, Tennessee Department of Children's Services.

Jennifer L. Evans, Springfield, Tennessee, Guardian Ad Litem.

OPINION

I.

On November 16, 2007, the Tennessee Department of Children's Services ("DCS") petitioned to terminate the parental rights of Mother and Father with respect to the Children. By that time, DCS had long been involved with the family. In fact, the two youngest of the Children, who are twins, had been in foster care since birth, while the others had not lived together with Mother or Father for several years.

Between July 1997 and November 2004, Child Protective Services ("CPS") responded to allegations that the Children were being neglected on no less than seven times. Although some allegations were determined to be unfounded, CPS validated allegations of neglect by Mother on more than one occasion and also substantiated that Father had exposed the Children to drugs. With the last of these incidences in 2004, CPS, citing environmental neglect of the Children, drug exposure, and domestic violence in the home, enacted a safety plan by which the Children were placed in the care of their maternal grandmother. For the next 18 months, DCS began providing intensive in-home services designed to assist both parents to regain custody. By June 2005, the Children remained at the maternal grandmother's home. Mother was permitted unsupervised visitation and Father began supervised visitation. In August, Mother reported to DCS that Father had been drinking and had come to her house and threatened her, but she did not call the police. Mother obtained a protective order prohibiting contact by Father in September 2005. In November 2005, the Children were adjudicated dependent and neglected due to a history of domestic violence between the parents that led to instability in the home and environmental neglect of the Children. By the end of 2005, Father had completed a drug detoxification and was working. As a result, it was decided to return the Children to Father's temporary custody. Father and the Children moved in with Father's mother. The Children's case was closed on February 28, 2006.

On May 7, 2006, Father was arrested and taken into custody for reckless aggravated assault against Mother, leaving the Children without a legal guardian at that time. By agreement of all parties, the Children were adjudicated dependent and neglected and they were taken into DCS's emergency custody "due to the continual history of domestic violence

between the parents which has maintained an unstable and unsafe environment for the [Children].” At a June 2006 DCS team meeting, Mother reported a history of domestic violence between her and Father. Mother told her case worker that she did not want the order of protection for Father removed because she was then pregnant with the twins by another man. On June 16, 2006, both Mother and Father were shot in an incident they described as being in the “wrong place at the wrong time.” Mother told their case manager that she and Father were then living together despite the order of protection. She continued to waiver about having the order of protection resolved, telling the case manager she had no money to go to court.

At the DCS team meeting on June 30, 2006, a permanency plan with a dual goal of reunification with the parents and placement with a relative was created for the Children with the participation of both parents.² Initially, it was decided that the Children would live with Father’s sister, but remain in the custody of DCS. Father had just been released on probation and reported that he was trying with the help of his probation officer to find a job and address his drug problem. He was living part of the time with his mother and part of the time with Mother, despite the order of protection. Mother was working and had no apparent drug problems. Through her insurance, she had obtained medication to control her mental health issues; according to Mother, she had been diagnosed as bi-polar. Under the plan, both parents were to receive individual and marital counseling to assist them in becoming better parents. In September 2006, Father’s drug screen performed by DCS was positive for cocaine, opiates, and marijuana. He refused to take a test the following month. DCS received allegations that Father’s mother was allowing other drug users to live in her home and that she was “assisting” Father to successfully pass some drug screens. As neither Father nor his mother would admit or deny the latter allegation, the case worker took it to be true and Father was advised that he needed to find other suitable housing. Ultimately, Father’s sister proved unable to care for the Children and they were removed from her care after she was evicted from her home.

In October 2006, the Children were placed in foster care with Barbara Fox and her husband. Mrs. Fox and Mother’s mother were first cousins and had been close as children. Mother’s mother had recently passed away, and upon learning that the Children were in foster care, the Foxes had contacted DCS to express their interest in serving as the Children’s foster parents. In December 2006, the twins were born and also taken into DCS custody and placed with the Foxes. Permanency plans approved for them in February 2007 were virtually identical to their siblings’ plans, except that the plans for all the Children were changed at that time to reflect the revised dual goals of reunification and adoption.

²Although a separate plan was developed for each Child, each plan shared the same objectives, requirements, and essential terms.

In November 2007, DCS moved to terminate both parents' rights with respect to the Children. As to both Mother and Father, the petition alleged abandonment of the Children by failure to provide them with a suitable home, substantial noncompliance with the terms of the plans, and persistent conditions. As to Father, the petition additionally alleged abandonment by his willful failure to pay support and his wanton disregard for the Children's welfare prior to his incarceration.

Mother and Father underwent parenting assessments at Family Solutions in March 2008. According to the assessor, both reported that they were separated. Mother described her relationship with Father as "on and off," but also said she was divorcing Father. Mother reported being dyslexic, abused, and bi-polar, but stated she had not been taking her medications since October 2007 because she could not afford them. The assessor noted that Mother's home was very unclean and that Mother was distracted and took and received many cell phone calls during the interview. The assessor was of the opinion that Mother would be unable to complete the objectives of the permanency plan until she stayed on her medication and was able to focus. Mother stated that DCS had provided a referral to an agency to help her to get medications, but said she needed help with transportation as well. As to Father, he admitted the 2006 assault on Mother, but said it was Mother's fault. Asked about his drug use within the past year, Father reported it was "monthly or less." At the time of the assessment, Mother had at least partially accomplished her stated responsibilities under the permanency plan, while Father stated that he intended to cooperate with DCS for the return of the Children.

A hearing on the termination petition was held over four days beginning on August 20, 2008, and concluding on March 12, 2009. The trial court entered its order terminating both parents' rights to the Children on June 22, 2009. Father and Mother each filed a timely notice of appeal.

II.

Father and Mother, in separate briefs, raise the following issues for our review:

1. The trial court erred in finding that both Father and Mother abandoned the Children by failing to provide them with a suitable home.
2. The trial court erred in finding that both Father and Mother were in substantial noncompliance with the permanency plan.

3. The trial court erred in finding that persistent conditions prevented the Children's return to the custody of Father or Mother.

4. The trial court erred in finding that termination of Father's and Mother's parental rights was in the best interests of the Children.

Father raises the following additional issues:

5. The trial court erred in finding that Father abandoned the Children by failing to pay child support and by showing wanton disregard for their welfare prior to his incarceration.

6. The trial court erred in finding that DCS made reasonable efforts to reunify Father with the Children.

III.

We employ the following standard of review in cases involving the termination of parental rights:

[T]his Court's duty. . . is to determine whether the trial court's findings, made under a clear and convincing standard, are supported by a preponderance of the evidence.

In re F.R.R., III, 193 S.W.3d 528, 530 (Tenn. 2006).

The trial court's findings of fact are reviewed de novo upon the record accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. *Id.*; Tenn. R. App. P. 13(d). In weighing the preponderance of the evidence, great weight is accorded to the trial court's determinations of witness credibility, which shall not be reversed absent clear and convincing evidence to the contrary. See *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002). Questions of law are reviewed de novo with no presumption of correctness. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 744-45 (Tenn. 2002).

It is well established that parents have a fundamental right to the care, custody, and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988). While parental rights are superior to the claims of other persons and the government, they are not absolute, and they

may be terminated upon appropriate statutory grounds. See *Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002). 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 interests of the child." T.C.A. § 36-1-113(c)(Supp. 2007); *In re F.R.R., III*, 193 S.W.3d at 530. Both of these elements must be established by clear and convincing evidence. See T.C.A. § 36-1-113(c)(1); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). 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. M.S., filed Aug. 13, 2003), and 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).

IV.

In the present case, the trial court terminated both parents' parental rights pursuant to Tenn. Code Ann. § 36-1-113 (g)(1),(2), and (3)(Supp. 2009). These statutory provisions provide as follows:

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

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

(2) There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan. . . ;

(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;

As relevant to the present case, Tenn. Code Ann. § 36-1-102 (2009), referenced in subsection (g)(1), above, provides for the termination of parental rights on the ground of abandonment as follows:

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

* * *

(ii) The child has been removed from the home of the parent(s) or guardian(s) as the result of a petition filed in the juvenile court in which the child was found to be a dependent and neglected child, as defined in § 37-1-102, and the child was placed in the custody of the department or a licensed child-placing agency, that the juvenile court found, or the court where the termination of parental rights petition is filed finds, that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child's situation prevented reasonable efforts from being made prior to the child's removal; and for a period of four (4) months following the removal, the department or agency has made reasonable efforts to assist the parent(s) or guardian(s) to establish a suitable home for the child, but that the parent(s) or guardian(s) have made no reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely

that they will be able to provide a suitable home for the child at an early date;

Tenn. Code Ann. § 36-1-102(1)(A)(ii).

V.

Father and Mother challenge the juvenile court's finding of abandonment based upon the court's determination that the parents "made no reasonable efforts to provide a suitable home [for the Children] and . . . demonstrated a lack of concern for the [Children] to such a degree that it appears unlikely that they will be able to provide a suitable home for the [Children] at an early date." *See* Tenn. Code Ann. § 36-1-102(1)(A)(ii).

The trial court stated its findings with respect to this ground as follows:

The Department has a long history of involvement with the [C]hildren and [Father and Mother] dating to 2002 due to allegations of environmental neglect, drug exposure and domestic violence. After referring [them] to community services, they relocated and the Department was unable to locate the family. In December of 2004, the Department provided services in the home of the family

The [C]hildren were removed from the [parental] home on May 30, 2006 after the Department had provided reasonable efforts to assist [Father and Mother] for the preceding four months, including but not limited to development of permanency plans which provided domestic violence counseling and marital counseling Further, the Department provided [Father] with an alcohol and drug assessment and [Mother] with medication management appointments through LifeCare.

However, [Father and Mother] made no reasonable efforts to provide a suitable home for the [C]hildren and demonstrated such a lack of concern for the [C]hildren to such a degree that it appeared unlikely that [Father and Mother] would be able to provide a suitable home for the [C]hildren at an early date. While [Mother] attended some counseling sessions, she failed to utilize any information she may have acquired in that she remained in a domestically violent relationship with [Father].

Further, [Mother] never obtained a consistent and stable source of income to support herself, much less to support six children. [Father] refused to complete any type of counseling, continued to test positive for illegal substances, and continued to be involved in a domestically violent relationship with [Mother].

The evidence does not preponderate against the trial court's findings. The proof at the hearing showed that neither Father nor Mother ever achieved the objective of providing the Children with "a stable and permanent home with a structured environment." In order to achieve this goal, the plan charged both parents with obtaining stable employment and stable housing. Father's suggestion that he and the Children could again share his mother's home did not appear to be a feasible option as the paternal grandmother was considered by DCS to have assisted Father in passing his drug screens at one point and was alleged to have drug users other than Father living in her home. Moreover, Father admittedly failed to obtain stable employment that could have helped him to obtain other, more appropriate housing.

For her part, Mother was able to maintain the apartment she lived in throughout the pendency of the case. According to Mother, she first lived in a subsidized, four-bedroom apartment, but had to downsize to a two-bedroom unit after Father went to jail. For a time, Mother shared the smaller apartment with a roommate. Her rent had varied from \$1 to \$97 a month, depending on her employment; at the time of the hearing she was unemployed and paying no rent. While she managed to keep her apartment, Mother repeatedly was unable to pay the electric bill and needed assistance to do so. After DCS paid one month's bill, they declined her request to pay another. Despite receiving further assistance from local charities, Mother was unable to pay the electric bills. At the end of 2008, her apartment had had no electric service for several months and she, together with Father, had been staying with her father. The evidence clearly and convincingly showed that Father and Mother failed to provide a suitable home – that is, a stable, structured place for the Children to live – and there was no indication that either Father or Mother could do so in the foreseeable future.

VI.

Next, the juvenile court found that both parents failed to comply substantially with their responsibilities set forth in the permanency plans. Both parents attended the meeting with DCS staff at which the initial plan was developed on June 29, 2006, and agreed to the plan's objectives and requirements. Moreover, DCS case managers testified that they repeatedly reviewed the plan's requirements during their status meetings with the parents and the parents expressed no uncertainty regarding their individual responsibilities.

As to Father, the plan basically required him to obtain stable employment and housing for himself and the Children; remain free from further criminal activity – expressly including no further incidents of domestic violence with Mother; undergo marital counseling, individual therapy, and therapeutic visitation with the Children so as to be able to parent effectively; and become drug free. As to Mother, the plan similarly required that she obtain stable housing and employment; learn to effectively parent the Children by obtaining marital counseling, individual therapy, and therapeutic visitation; and be drug-free.

The juvenile court expressly found that the requirements of the plan were “all reasonably related to remedying the conditions that necessitated foster care” and that both Father and Mother failed to comply with their stated responsibilities. The court found, in relevant part, as follows:

[Father] failed to remain free of criminal charges as he was convicted of disorderly conduct violating his probation which resulted in his incarceration for approximately six (6) months. He further admitted at trial that he had incurred recent drug related criminal charges. Both [Father and Mother] were arrested for felony drug offenses on or about January 21, 2009 while this proceeding was pending.

Though [Father] participated in a domestic violence prevention class, he engaged in further domestic altercation with [Mother] subsequent to his participation. [Mother] attended individual therapy at Family Life Services, yet she failed to continue ongoing treatment as recommended and she continually remained in a domestically violent relationship with [Father].

While [Father] completed an alcohol and drug assessment, he failed to complete counseling and failed to remain drug free. [Father] continually tested positive for cocaine and marijuana while the [C]hildren have been in foster care and throughout the trial of this matter, as he tested positive for marijuana on August 20, 2008, November 7, 2008 and February 11, 2008. He also tested positive for opiates and benzodiazepines and amphetamines on the later two trial dates, which the expert . . . [testified] indicates use of oxycodone, valium, loretan, oxycontin, and/or hydrocodone. [Father] had previously completed an alcohol and drug assessment, yet he obviously

failed to comply with the recommendations by his continued usage of illegal substances.

Further, neither parent has demonstrated an ability to care for themselves; thus, they are not capable of providing for the financial care of the six minor [C]hildren.

Finally, [Father] never participated in marital counseling or parenting classes; and though [Mother] attended parenting classes, she has failed to demonstrate that she could utilize any skills she may have acquired. During each visitation, the case manager had to continually remind [Mother] to change the diapers for the infants or to supervise the older siblings. Though [Mother] received hands-on parenting assistance during visitation, she never processed the instructions or initiated the appropriate parenting techniques during visits without prompting from the supervisors. During a particular visitation at McDonald's the [C]hildren were running out of control and she was not correcting or attempting to manag[e] the [C]hildren's behaviors, yet [Mother] was attempting to advise another unrelated mother how to care for her own children. During most visitations, neither parent has properly supervised the [C]hildren and both parents required prompting/direction to take care of the [C]hildren's basic needs during a two hour visit. Further, [Father] failed to interact with all of the [C]hildren, only focusing on River at times, and he failed to reinforce any parenting techniques being taught to [Mother].

Again, the evidence strongly preponderates in favor of the juvenile court's findings that neither parent achieved the key objectives outlined in the permanency plans. We noted earlier in this opinion Father's failure to obtain steady employment and suitable housing. In addition, Father did not complete domestic violence classes and never become drug free, as evidenced by his continued positive drug screens even on the termination hearing dates. He continued to engage in criminal behavior that led to his incarceration for five months in 2007 on a probation violation, and to new criminal charges in 2009. Finally, Father never underwent marital counseling, intended primarily, according to the case manager, to educate him and Mother how to effectively co-parent their Children regardless of whether they remained married or not.

Mother asserts that she achieved all of her stated responsibilities and cannot, therefore, be found in noncompliance with the permanency plan. She points to a March 19, 2008, letter to “whom it may concern,” in which her case manager wrote that Mother had “completed the required sessions concerning domestic violence and parenting issues.” In addition, the letter stated, “At this point she has completed her goals of the Permanency Plan as written but needs to apply the skills she has developed through counseling.” At the hearing, the case manager testified that she wrote the letter, at Mother’s request, for Mother to provide to her father. Mother explained that she had asked her father for money to pay for a divorce from Father, and he wanted some evidence of her progress before he would make the loan. Certainly, as the letter attests, Mother made an effort to achieve her responsibilities stated in the plan and succeeded to a degree. The proof at the hearing showed, however, that she failed to grasp little, if anything, she was taught at the many counseling sessions and as a result of the courses she completed. Regarding her parenting skills, the case manager essentially testified that Mother could not manage the Children during a two-hour visit and she found it highly doubtful that Mother would be able to parent them “24/7” by herself. Moreover, despite completing domestic violence classes, Mother continued her relationship with Father throughout the lower court proceedings – she reported living with Father again in January 2009 when both were arrested on drug-related criminal charges. Like Father, Mother’s failures in the areas of parenting were in addition to her inability to maintain steady employment or a suitable home environment for the Children.

In its termination order, the juvenile court noted that the hearing was held over a seven-month span, in part because of the court’s own illness. The court expressed particular disappointment that despite the additional time this afforded them, neither Father nor Mother took advantage of the delay to remedy any of their deficiencies under the plan. We must agree. Despite the fact that the Children had not been under their direct control since 2004, and had been in foster care for over two years, Father and Mother were in no better position to parent the Children at the time of the hearing than when the Children were removed from their custody in 2006. Clear and convincing evidence established that “[t]here has been substantial noncompliance by the parent[s] . . . with the statement of responsibilities in a permanency plan or a plan of care. . . .” Tenn. Code Ann. § 36-1-113(g)(2).

VII.

Father and Mother dispute the juvenile court’s finding that the conditions which caused the Children to be removed from their custody still persisted at the time of the termination hearing. Both argue that, to the contrary, they fully or partially resolved many of the conditions that led to the Children’s removal to state custody.

As to Father, the trial court expressly cited his continuing criminal behavior, his continuing drug use, a recent drug-related arrest, the parents' ongoing relationship with each other involving incidents of domestic violence, and Father's failure to obtain suitable housing or consistent employment. Finally, the court found that Father and Mother were unable to care for themselves and therefore could not properly parent the Children.

The Children were initially removed from the parents' custody because of domestic violence that led to an unstable and unsafe environment in which the Children were neglected. As set out in the initial permanency plan, there were other issues that Father also needed to resolve before the Children could be returned to his custody. In summary, Father needed to end his drug abuse and criminal activity, obtain stable housing and employment, and follow the recommendations of his parenting assessment by undergoing marital and individual counseling. Father notes that he had not been convicted of the most recent charges at the time of the hearing, and therefore they should not be "counted" against him. He fails, however, to address the earlier convictions and resulting incarcerations and probation violations in which he engaged after the Children were already in DCS custody. As to his admitted continued drug use, Father unconvincingly contends that "no evidence was entered that the drug use inhibited his ability to parent." Next, Father acknowledges that he failed to complete the required domestic violence classes, allegedly because he and Mother were divorcing, but nonetheless notes he was not involved in any further violent incidents with Mother in the past two years.

The proof did show that the physical altercations between Father and Mother had subsided by the time of the hearing. However, even after the Children were removed as a result of Father's assault on Mother, Mother reported incidents of Father hitting her more than once during the following year, and they continued to see each other and at times lived together during the pendency of this case, even while the order of protection was in force. Other conditions were not resolved at all. While it was testified that Father had at times worked hard and was able to secure a variety of short-term jobs, he was again unemployed at the time of the hearing. Regarding housing, it appears that the only option he considered during the entire time the Children were in DCS custody was a return to his mother's house. As his case manager had advised Father, that option was not considered suitable even for Father and he was repeatedly advised of the need to look for other housing for himself and the Children. In short, Father's assertions that the conditions that led to the Children's removal were, for the most part, resolved at the time of the hearing are not substantiated in this record.

Mother likewise contends that she "completed" her requirements under the plan and therefore, no persistent conditions remained at the time of the hearing. Again, the evidence belies Mother's assertion. As to Mother, the juvenile court found that the risks of injury to

the Children posed by her continuing relationship with Father persisted. The court noted that while Mother reported that she was afraid of Father, wanted the protective order in place, and was preparing to divorce him, she continued a relationship with him knowing that he had not completed domestic violence classes and that their tumultuous relationship was a major barrier to achieving reunification with the Children. Further, Mother had not shown that the environmental conditions in her home had become safe and stable for the Children. During a March 2008 parenting assessment, the assessor from Family Solutions noted that the home was “very unclean” and that Mother reported having been off of her medications since October 2007 and was unable to focus as a result. At the time of the termination hearing, Mother reported that she had resumed taking her medications, but had quit working because of stress related to the Children’s situation. Mother acknowledged she had trouble paying the electric bill for her apartment, but denied that she had been living at her father’s house with Father, as he had testified.

The evidence does not preponderate against the trial court’s ultimate conclusion that Father and Mother “are in the same position as when the [C]hildren were removed in that they are incapable of meeting the needs of these minor [C]hildren.” The evidence does not preponderate against the juvenile court’s finding of persistent conditions by clear and convincing evidence.

VIII.

With respect to Father, the juvenile court found that he had also abandoned the Children as further defined in Section 36-1-102. That section provides:

(iv) A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and either has willfully failed to visit or has willfully failed to support or has willfully failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent’s or guardian’s incarceration, or the parent or guardian has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child.

Tenn. Code Ann. § 36-1-102(1)(A)(iv). Under the statute, “ ‘willfully failed to support’ or ‘willfully failed to make reasonable payments toward such child’s support’ 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(E).

This court has explained that abandonment under Section 36-1-102(1)(A)(iv) may be established in two ways:

The first test asks whether the incarcerated parent “willfully failed to visit[,] . . . support[,] or . . . make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such . . . incarceration.” *Id.* The second test asks whether the parent “engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child.” *Id.*

M.D.E. v. J.J.C., No. E2006-00942-COA-R3-PT, 2007 WL 1958643, *2 (Tenn. Ct. App. E.S. filed July 6, 2007); *In re Audrey S.*, 182 S.W.3d 838, 865 (Tenn. Ct. App. 2005). In the present case, the juvenile court found that both tests were met.

First, the court found that Father intentionally failed to support the Children in the first consecutive four-month period preceding his incarceration(s) – that is, from December 10, 2006 through April 10, 2007. During this time, the Children had been in DCS custody for some seven months. The trial court found as follows:

[Father] did not contribute to the support of the minor [C]hildren and he was aware of his duty to support the [C]hildren as he was ordered by this Honorable Court to pay support for [the Children] in the amount of \$93.75 per month each, to which he failed to render payment.

[Father] was able bodied and capable of working and supporting the [C]hildren prior to and since his release from incarceration, yet he has made no attempt to support and has provided no justifiable excuse for failing to support the [C]hildren. He testified that he had employment at different locations making approximately \$7.00 to \$9.00 per hour; however, he was either laid off or lost his job when incarcerated. [Father] continually tested positive on drugs screens for illegal substances . . . which the Court finds contributed to [Father’s] lack of stable employment, not an inability to work, as he is clearly capable of working if he remained drug free. Most notably, the Court finds

that since [Father] could afford to purchase illegal drugs; he had the ability to pay support for his [C]hildren, yet he chose his drug usage once again as a priority over his [C]hildren's financial needs.

In December 2006, Father was ordered to pay child support beginning on January 10, 2007. He made no payments during the applicable four-month period and in fact never did so until December 2007, after DCS sought termination of his parental rights. Father testified that in the late 1990s and early 2000s, he had held some steady jobs. He stated that before his incarceration, he had found temporary jobs, but worked only about two days a week. As the trial court found, however, Father managed to buy drugs and had admitted that his drug use had contributed to his inability to maintain steady employment. The evidence fully supports the juvenile court's finding that Father abandoned the Children through his wilful failure to support them.

The trial court further found that second test of abandonment under Section 36-1-102(1)(A)(iv) – conduct evincing Father's wanton disregard for the Children's welfare – was also satisfied. As we noted earlier, the Children were taken into DCS custody in May 2006 following Father's assault on Mother. Father spent one month in jail for this offense before being released on two years' probation. While the Children remained in foster care and he remained under supervised release, Father was returned to custody from April 10 - April 21, 2007, on charges of resisting arrest, public intoxication, and disorderly conduct. As a result of a further felony probation violation, Father spent the next six months in jail, from May 1 - October 27, 2007, rather than being available to work on his responsibilities under the permanency plan. When he was not in jail, Father admittedly continued to use drugs while the Children were in custody. As the juvenile court observed, Father engaged in such conduct even after receiving notice of the criteria for terminating his parental rights in February 2007. "Probation violations, repeated incarceration, criminal behavior, substance abuse and failure to provide adequate support or supervision for a child may alone or in combination, constitute conduct that exhibits a wanton disregard for the welfare of a child." *M.D.E. v. J.J.C.*, No. E2006-00942-COA-R3-PT, 2007 WL 1958643 at *3. (citing *In re Audrey S.*, 182 S.W.3d at 866; *In re C.T.S.*, 156 S.W.3d 18, 25 (Tenn. Ct. App. 2004)). Without question, Father's conduct in this case showed a wanton disregard for the Children's welfare.

IX.

Father acknowledges that among the reasons the Children remained separated from him were his assault on Mother and his resulting incarceration, his illegal drug use, his lack of housing and stable employment, and his parenting abilities. He contends that DCS made

no reasonable efforts to assist him with any of these issues except to provide him “some encouragement” to stop his drug abuse.

DCS is charged with making “reasonable efforts” that would potentially allow a child to safely return home. *See* Tenn. Code Ann. §§ 37-1-166(a)(2),-166(g)(2)(B) (2005). Under the statute, “‘reasonable efforts’ means the exercise of reasonable care and diligence by the department to provide services related to meeting the needs of the child and the family.” Tenn. Code Ann. § 37-1-166(g)(1). Further, “in making such reasonable efforts, the child’s health and safety shall be the paramount concern.” *See id.*

Within its order, the trial court found that DCS had made reasonable efforts toward the goal of reunifying the parents and the Children in this case. The trial court observed:

[DCS] first began working with [Father and Mother] in 2002 in assisting with marital and domestic violence counseling, individual therapy, parenting and alcohol and drug assessments; however, [Father and Mother] failed to utilize any of these services to remedy the conditions from which the [C]hildren were removed. Despite the extensive efforts of [DCS], [Father and Mother] continued to obtain criminal charges and use illegal drugs, continued to maintain a domestically violent relationship, and continued to maintain a lifestyle without safe and stable housing.

The evidence does not preponderate against the juvenile court’s findings. As we noted earlier, the court also found that each parents’ responsibilities and the objectives of the plan were reasonably related to addressing the issues that had caused the Children to be removed from the parents’ custody and prevented their safe return. When the Children entered DCS custody in 2006, DCS tried to build on the extensive assistance it had provided the family to that point. With respect to Father, he had recently undergone a psychological evaluation and a parenting assessment, and had completed a detoxification program at Vanderbilt Hospital for his drug abuse. Accordingly, the case manager referred Father to pursue follow-up, individual counseling offered at Lentz Public Health Center at no cost to him and recommended he continue the Twelve-Step program and attend Alcoholics/Narcotics Anonymous meetings. In addition, DCS administered random drug screens. Following the recommendations of the parenting assessment, Father was also tasked with undergoing marital counseling and DCS made a referral to Foundations and then to Centerstone for that purpose. DCS counseled Father on his need to obtain employment from the time the initial permanency plan was established. According to the case manager, Father reported that he was working through his probation office to find employment and also taking additional drug

screens there. At one point, Father provided documentation that he was employed, but his employment was not long-lasting.

At the August 9, 2006, team meeting, the case manager reviewed all the requirements with Father again and noted that “basically, he needed to do everything because he hadn’t done anything.” The case manager arranged for domestic violence classes that Father did not attend. Upon repeatedly emphasizing that Father needed to find employment, the case manager referred Father several times to a temporary service agency. She noted that Father never managed to secure full-time work after a temporary stint ended. Although Father had held steady jobs in the past and the proof showed he was capable of working at various types of jobs, he worked no more than about two days a week after the Children came into DCS custody. As to housing, the case manager repeatedly advised Father that he needed to find housing other than at his mother’s home, but the proof is devoid of any efforts he made in this regard.

Based on the foregoing, we think it is clear that DCS made reasonable efforts to assist Father in all of the areas that he was required to address, but particularly regarding his domestic violence and drug issues. In the petition to terminate Father’s parental rights, DCS averred that the “requirements for [Father] to be free of domestic violence and free of drug usage are particularly important in reducing the risk of harm to the [C]hildren so that the [C]hildren could be safely returned to the parent’s care.” The proof showed that Father had made some progress in that there were no further reports of domestic violence with Mother after early 2007. However, he refused to begin domestic violence classes until after the termination petition was filed leaving it in doubt whether he had the necessary tools to prevent further violent incidents – even in his March 2008 parenting assessment, Father minimized his role in the assault against Mother and blamed her for his actions. Perhaps most significantly, despite the efforts of DCS to assist him through initiating further assessments, programs, counseling, and monitoring, Father’s drug abuse continued. By May 2008, Father became a “no-show” for any further drug screens.

With regard to his inability to maintain a job or to find suitable housing, the proof shows that Father understood the requirements, but took little initiative to achieve stability in these areas. This Court has observed that it is not up to DCS alone to achieve the goal of reuniting parents with the Children removed from their custody:

Although the Department bears the responsibility to make reasonable efforts toward reunification, the road to reunification is a “two-way street.” *State Dep’t of Children’s Servs. v. S.M.D.*, 200 S.W.3d 184, 198 (Tenn. Ct. App. 2006)). A parent desiring to be reunited with his child has a corresponding duty

to “make reasonable and appropriate efforts to rehabilitate themselves and to remedy the conditions that required the Department to remove” their child from custody. *In re A.R.*, No. W2008-00558-COA-R3-PT, 2008 WL 4613576, at *16 (Tenn. Ct. App. Dec. 13, 2007) (quoting *In re Giorgianna H.*, 205 S.W.3d at 519). Accordingly, although the Department bears a responsibility to facilitate reunification, it does not bear the entire responsibility. *Id.* (citing *State Dep't. of Children's Servs v. S.M.D.*, 200 S.W.3d at 198).

In re B.L.C., No. M2009-01187-COA-R3-PT, 2009 WL 3672786, * 5 (Tenn. Ct. App. M.S., filed Nov. 4, 2009).

In our view, the proof supports the trial court’s finding that Father repeatedly chose drugs over becoming a parent to the Children. In summary, the evidences establishes, as provided in Tenn. Code Ann. § 36-1-113(i)(2), that Father “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.”

X.

Having concluded that there was clear and convincing evidence supporting each of the statutory grounds relied upon to terminate Father’s and Mother’s parental rights, we consider whether clear and convincing evidence also supports the trial court’s conclusion that termination was in the best interests of the Children. To this end, Tenn. Code Ann. § 36-1-113(i) provides a non-exclusive list of applicable factors as follows:

(i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, 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;

(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 § 36-5-101.

This court has observed that the determination of best interest should be considered from the perspective of the child and not the parent. *In re Giorgianna H.*, 205 S.W.3d 508, 523 (Tenn. Ct. App. 2006) (citations omitted).

In the present case, the trial court concluded that termination of both parents' rights was in the Children's best interest. The court found that "[Father and Mother] have not made

such an adjustment of circumstance, conduct, or conditions as to make it safe and in the [C]hildren's best interest to be in the home of [Father and Mother] due to the criminal lifestyle, drug usage, domestic violence, lack of stable and safe home environment and abandonment by [Father and Mother]." In its extensive findings, the court essentially found that all of the relevant statutory factors weighed in favor of terminating both parents' rights, with the exception that both Father and Mother had consistently exercised visitation with the Children. In particular, the court found that Father and Mother had demonstrated an inability to care and provide for themselves, "much less for the basic needs of these six minor [C]hildren;" that they had a bond, but not a meaningful relationship with the Children because they had failed to take parental responsibility for them; that the foster parents had provided the "safety and stability that the [C]hildren need;" and that a change of care gives would likely have a negative impact on the Children's well-being. The evidence does not preponderate against the juvenile court's findings.

As we have noted, at the time of the hearing, the Children had been raised by their foster parents for over two years and out of the parental home for nearly five years. The twins had known no other parental figures in their young lives besides their foster parents. Three of the older Children were shown to have special needs and behavioral issues that necessitated counseling, individualized education plans, and medication. During their time in foster care, the foster parents and school officials had reported that the older Children's problematic behavior and outbursts had declined and they were progressing nicely academically. For their part, the foster parents were ready and willing to adopt all six Children so that they could remain together. On our review of the record, we conclude that clear and convincing evidence demonstrates that the termination of Father's and Mother's parental rights is in the best interest of the Children.

XI.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellants, Joseph K., and Brandy B.-K. and their sureties, if any, for which execution may issue if necessary. This case is remanded to the juvenile court, pursuant to applicable law, for enforcement of the court's judgment and for the collection of costs assessed below.

CHARLES D. SUSANO, JR., JUDGE