IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 22, 2017 Session

IN RE: SOPHIA P.

Direct Appeal from the Circuit Court for Montgomery County
No. MC-CC-CV-SA-14-2261 Ross H. Hicks, Judge

No. M2016-01400-COA-R3-PT

This case involves a petition to terminate parental rights and to adopt filed by the child's grandparents. The trial court found that no ground for termination was proven by clear and convincing evidence and therefore denied the petition. The grandparents appeal. We affirm and remand for further proceedings.

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

BRANDON O. GIBSON, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and W. NEAL MCBRAYER, J., joined.

Gregory D. Smith, Clarksville, Tennessee, for the appellants, Trina P. and Charles P.

Christopher J. Pittman and Zachary Louis Talbot, Clarksville, Tennessee, for the appellee, Cody C.

OPINION

I. FACTS & PROCEDURAL HISTORY

Sophia P. was born in April 2014. Her parents ("Mother" and "Father") were unmarried and in their early 20s. No father was listed on Sophia's birth certificate. Upon their release from the hospital, Mother and Sophia resided with Mother's mother and stepfather ("Grandmother" and "Grandfather," or collectively, "Grandparents") in Clarksville. Father resided in Nashville. When Sophia was one month old, a dispute arose between Mother and Grandparents when Mother left with Sophia to attend a party and did not return until the following evening. During their verbal altercation, Mother became angry and left Grandparents' home with Sophia to stay in a motel. The Tennessee Department of Children's Services ("DCS") investigated the situation but

found no basis for intervention. On May 21, 2014, Mother sent a text message to Grandmother informing her that she could come and get Sophia because Mother had to return to work. Grandparents picked up Sophia at the motel that day, and Sophia remained in their care thereafter.

In June 2014, Grandparents filed a petition for custody of Sophia in juvenile court. Father was not made a party to the proceeding. On July 2, 2014, the juvenile court entered an "Order for Custody" that stated:

> Based upon the Petition for Custody and the testimony presented, the Court finds as follows:
> 1. [Mother] waives her right to a preliminary hearing and agrees for custody to remain with the Petitioners.
> 2. It will be up to [Mother] to petition the Court to have custody placed back with her.
> 3. Petitioners are fit and proper, and it is in the child's best interest that custody remain with the Petitioners.

Father also attended the hearing and agreed with Sophia remaining in Grandparents' custody.

In the months that followed the July 2 Order of Custody, Grandparents permitted Mother and Father to visit with Sophia in their home at specified times under their supervision and in accordance with certain conditions. However, Mother and Father were not permitted to be alone with Sophia or leave Grandparents' home with her. Father moved to Colorado in September 2014 to reside with his parents. On November 5, 2014, four months and three days after the Order of Custody was entered, Grandparents filed a petition in circuit court seeking to terminate the parental rights of Mother and Father and to adopt six-month-old Sophia. They alleged that grounds for termination existed pursuant to Tennessee Code Annotated section 36-1-113(g)(1) due to abandonment by willful failure to visit and willful failure to support.

Days later, Father filed a petition in juvenile court seeking to establish paternity and obtain custody of Sophia. He then filed a motion in the termination proceeding asking the court to establish his paternity and grant him either immediate custody or visitation pending the final hearing. Mother filed an answer and sought visitation as well. Both Mother and Father began having overnight visitation with Sophia while the case was pending.

Trial was held on July 15, 2015, before Judge John Gasaway. Sophia was fifteen months old by that time. The trial court heard testimony from the DCS investigator,

Grandmother, Grandfather, Mother, Father, Father's mother, and Sophia's maternal great-grandmother. At the conclusion of the testimony, the trial judge announced his ruling from the bench. The trial judge found that Grandparents had not proven by clear and convincing evidence that either parent *willfully* failed to visit or support Sophia during the four-month period prior to the filing of the termination petition. As such, the trial judge announced that the petition to terminate parental rights and to adopt would be denied. The trial judge also announced that he would terminate or dissolve the juvenile court's custody order and award joint custody to Mother and Father. Grandparents were directed to relinquish custody of Sophia the following day so that Father could take Sophia with him on his return flight to Colorado. Mother and Father had assured the trial judge during the termination trial that they could mutually agree on a parenting plan if they were awarded custody, and the trial judge directed them to either agree on a parenting plan or return to court in two months (in September) for the court to fashion a parenting schedule alternating between Colorado and Tennessee. However, Mother's attorney subsequently withdrew from representing her, and no parenting plan was entered as contemplated by the trial judge.

The trial court entered its written order from the termination trial on September 16, 2015. The trial court declared Father to be Sophia's natural and legal father for all purposes. It denied Grandparents' petition for termination and adoption, dissolved the juvenile court's Order of Custody, and awarded joint custody to Mother and Father. However, the order provided that the hearing on the parenting plan would be reset by agreement of Father and Mother. The trial court entered another order on September 18, 2015, ordering Mother and Father to attend mediation in an attempt to reach an agreement on a parenting plan. On September 22, 2015, Grandparents filed a motion for grandparent visitation.

Before these matters were resolved, however, Grandparents filed a notice of appeal to this Court on September 30, 2015, attempting to appeal the trial court's September 16 order from the termination trial. The circuit court entered an agreed order on December 14, 2015. According to the order, the parties had attended mediation and resolved issues between them. Specifically, the agreed order stated that Grandparents would have visitation with Sophia on the second full weekend of each month except during the month of June each year due to Father's parenting time. The order provided that Grandparents would continue to have visitation one weekend per month once Sophia reached school age. It also provided that Grandparents would have visitation each year on specified dates around Christmas. Grandparents were required to be responsible for transportation for all of their visitation periods. The agreed order stated:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that that this Agreed Order resolves the Petitioners' Petition for Grandparent Visitation,

> however, the appeal of the Order denying Petitioner's adoption Petition in this matter shall remain pending.

On May 23, 2016, this Court issued an opinion dismissing Grandparents' appeal for lack of subject matter jurisdiction due to the lack of a final judgment. *In re Sophia P.*, No. M2015-01978-COA-R3-PT, 2016 WL 3090788, at *1 (Tenn. Ct. App. May 23, 2016). We recognized that Grandparents were attempting to appeal the trial court's refusal to grant their termination petition. *Id.* However, we noted that the trial court contemplated either the entry of an agreed parenting plan or an additional hearing for the court to fashion a parenting plan for the parties. Because neither of those had taken place, we explained that a final, appealable judgment did not exist. *Id.* at *2.

The subsequent proceedings on remand were held before Judge Ross Hicks. On June 8, 2016, Judge Hicks entered an agreed order that stated:

> Based upon the agreement of the parties, IT IS ORDERED that the order previously entered by Judge John Gasaway on September 16, 2015 is a final judgment as to the dismissal of the adoption petition filed by [Grandparents] pursuant to T.R.C.P. Rule 54.02, the Court finding that there is no just reason for delay, and the Court specifically directs the entry of this Final Order on the adoption petition.

On July 6, 2016, Grandparents filed a second notice of appeal, which stated that they intended to appeal the agreed order entered on June 8.

On July 14, 2016, the trial court entered a "Final Judgment" and parenting plan setting forth a parenting schedule that allocated time for Sophia with Mother in Tennessee and Father in Colorado. Aside from the style of the case, neither the Final Judgment nor the attached parenting plan mentioned Grandparents or the December 14, 2015 agreed order that resolved Grandparents' petition for grandparent visitation.

II. ISSUES PRESENTED

Grandparents present the following issues, as slightly reworded, for review on appeal:

> 1. Whether the trial court erred in finding that neither parent abandoned Sophia by willfully failing to visit and/or pay child support during the four months leading up to the termination petition;
>
> 2. Whether grandparent visitation should be ordered pursuant to

Tennessee Code Annotated section 36-6-306.

For the following reasons, we affirm and remand for further proceedings.

III. DISCUSSION

A. Grandparent Visitation

At the outset, we address Grandparents' attempt to raise issues on appeal regarding grandparent visitation. As noted above, in Grandparents' first appeal, they sought to challenge the trial court's refusal to grant their termination petition, and we held that a final appealable order did not exist due to the outstanding issue regarding the entry of a parenting plan. *In re Sophia P.*, 2016 WL 3090788, at *2. On remand, Judge Hicks entered an agreed order on June 8, 2016, stating that Judge Gasaway's September 16, 2015 order was designated as "a final judgment as to the dismissal of the adoption petition filed by [Grandparents] pursuant to T.R.C.P. Rule 54.02, the Court finding that there is no just reason for delay, and the Court specifically directs the entry of this Final Order on the adoption petition." Grandparents then filed a second notice of appeal within thirty days, on July 6, 2016, specifically indicating that they intended to appeal the June 8, 2016 agreed order. *Thereafter*, the trial court entered its final order and parenting plan addressing parenting time for Mother and Father but failing to mention Grandparents or the issue of grandparent visitation. On appeal, Grandparents interpret the final order and parenting plan as implicitly denying their petition for grandparent visitation, despite the entry of the December 14, 2015 agreed order resolving their petition for grandparent visitation. They now ask this Court to award grandparent visitation on appeal. We conclude, however, that the issue of grandparent visitation is not properly before this Court.

For an appeal as of right, the notice of appeal must be filed "within 30 days after the date of entry of the judgment appealed from[.]" Tenn. R. App. P. 4(a). Ordinarily, "[t]he date of entry of a final judgment in a civil case triggers the commencement of the thirty-day period in which a party aggrieved by the final judgment must file either a post-trial motion or a notice of an appeal." *Ball v. McDowell*, 288 S.W.3d 833, 836 (Tenn. 2009) (citing Tenn. R. Civ. P. 59.02; Tenn. R. App. P. 4(a)-(b)). However, Tennessee Rule of Civil Procedure 54.02 permits a trial court "to certify an order as final and appealable, even if parts of the overall litigation remain pending in the trial court." *Johnson v. Nunis*, 383 S.W.3d 122, 130 (Tenn. Ct. App. 2012). In other words, Rule 54.02 allows a trial court "to convert an interlocutory ruling into an appealable order." *Mann v. Alpha Tau Omega Fraternity*, 380 S.W.3d 42, 49 (Tenn. 2012). Certifying an interlocutory judgment as final under Rule 54.02 "thereby requir[es] a litigant to file an

appeal while the remainder of the litigation is ongoing." *Harris v. Chern*, 33 S.W.3d 741, 745 n.3 (Tenn. 2000).

The June 8, 2016 agreed order invoking Rule 54.02 was a final appealable order in its own right, and Grandparents timely filed a notice of appeal of that order on July 6, 2016. The appeal was docketed in this Court on July 11, 2016. Grandparents' notice of appeal allows us to review the trial court's order as to the dismissal of their petition for termination and adoption, as the trial court directed the entry of a final judgment as to that claim. However, Grandparents cannot extend the scope of their notice of appeal to also encompass the final order and parenting plan ultimately entered by the trial court on July 14, 2016.

We faced the same situation, procedurally speaking, in *Grigsby v. University of Tennessee Medical Center*, No. E2005-01099-COA-R3CV, 2006 WL 408053 (Tenn. Ct. App. Feb. 22, 2006). In that case, the plaintiff sued a hospital and two doctors for medical malpractice. *Id.* at *1. On April 12, 2005, the trial court entered an order granting the hospital's motion to dismiss and certifying its order as final pursuant to Rule 54.02. *Id.* The plaintiff filed a notice of appeal within thirty days, on May 6, 2005. *Id.* Thereafter, on June 28, 2005, the trial court entered an order granting summary judgment to the defendant-doctors. *Id.* The plaintiff did not file another notice of appeal following the subsequent order, but he attempted to argue on appeal that the trial court erred in granting summary judgment in favor of the doctors. *Id.* Because the plaintiff failed to file a notice of appeal of the trial court's latter order, we concluded that the latter order became final and that this Court lacked jurisdiction to consider the issues regarding the defendant-doctors. *Id.* at *2-3.

We likewise conclude that Grandparents are unable to raise issues on appeal regarding the trial court's final order and parenting plan because they did not file a notice of appeal of the latter order. We can only consider the issues they raise regarding the trial court's denial of their petition to terminate parental rights.

B. Termination of Parental Rights

In Tennessee, proceedings to terminate parental rights are governed by statute. *In re Kaliyah S.*, 455 S.W.3d 533, 541 (Tenn. 2015). Tennessee Code Annotated section 36-1-113 "sets forth the grounds and procedures for terminating the parental rights of a biological parent." *Id.* at 546. Pursuant to the statute, parties who have standing to seek termination of a biological parent's parental rights must prove two elements. *Id.* at 552.

First, they must prove the existence of at least one of the statutory grounds for termination listed in Tennessee Code Annotated section 36-1-113(g). *Id.* Second, the petitioner must prove that terminating parental rights is in the child's best interest, considering, among other things, the factors listed in Tennessee Code Annotated section 36-1-113(i). *Id.*

Because of the constitutional dimension of the rights at stake in a termination proceeding, persons seeking to terminate parental rights must prove both of these elements by clear and convincing evidence. *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010) (citing Tenn. Code Ann. § 36-1-113(c); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 808-09 (Tenn. 2007); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002)). "The purpose of this heightened burden of proof is to minimize the possibility of erroneous decisions that result in an unwarranted termination of or interference with these rights." *Id.* (citing *In re Tiffany B.*, 228 S.W.3d 148, 155 (Tenn. Ct. App. 2007); *In re M.A.R.*, 183 S.W.3d 652, 660 (Tenn. Ct. App. 2005)). "Clear and convincing evidence" has been defined as "'evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.'" *In re Adoption of Angela E.*, 402 S.W.3d 636, 640 (Tenn. 2013) (quoting *In re Valentine*, 79 S.W.3d at 546). It produces a firm belief or conviction in the fact-finder's mind regarding the truth of the facts sought to be established. *In re Bernard T.*, 319 S.W.3d at 596.

Due to the heightened burden of proof in parental termination cases, on appeal we adapt our customary standard of review set forth in Tennessee Rule of Appellate Procedure 13(d). *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005). First, we review each of the trial court's factual findings de novo in accordance with Rule 13(d), presuming the finding to be correct unless the evidence preponderates against it. *In re Adoption of Angela E.*, 402 S.W.3d at 639. Then, we must make our own determination regarding "whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, amount to clear and convincing evidence of the elements necessary to terminate parental rights." *In re Carrington H.*, 483 S.W.3d 507, 524 (Tenn. 2016) (citing *In re Bernard T.*, 319 S.W.3d at 596-97). "The trial court's ruling that the evidence sufficiently supports termination of parental rights is a conclusion of law, which appellate courts review de novo with no presumption of correctness." *Id.* (citing *In re M.L.P.*, 281 S.W.3d 387, 393 (Tenn. 2009)).

1. Grounds for Termination

The first ground for termination listed in the termination statute is abandonment. *See* Tenn. Code Ann. § 36-1-113(g)(1). For purposes of terminating parental rights, there

are five alternative definitions of abandonment. *See* Tenn. Code Ann. § 36-1-102(1)(A)(i)-(v). According to the first definition, which is allegedly applicable in this case, "abandonment" means:

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

Tenn. Code Ann. § 36-1-102(1)(A)(i). "Abandonment can be established by showing that a parent *either* willfully failed to visit *or* willfully failed to support the child during the relevant" four-month period. *In re Christopher M.*, No. W2010-01410-COA-R3-PT, 2010 WL 4273822, at *10 (Tenn. Ct. App. Nov. 1, 2010) (citing *In re Adoption of McCrone*, No. W2001-02795-COA-R3-CV, 2003 WL 21729434, at *10 (Tenn. Ct. App. July 21, 2003)).

The element of willfulness is essential and central to a determination of abandonment. *In re M.L.D.*, 182 S.W.3d 890, 896 (Tenn. Ct. App. 2005); *In re C.M.C.*, No. E2005-00328-COA-R3-PT, 2005 WL 1827855, at *6 (Tenn. Ct. App. Aug. 3, 2005). It "is both a statutory and a constitutional requirement." *In re Adoption of Kleshinski*, No. M2004-00986-COA-R3-CV, 2005 WL 1046796, at *18 (Tenn. Ct. App. May 4, 2005). A parent's conduct must have been willful in the sense that it consisted of intentional or voluntary conduct. *In re Audrey S.*, 182 S.W.3d at 863. "To prove the ground of abandonment, a petitioner must establish by clear and convincing evidence that a parent who failed to visit or support had the capacity to do so, made no attempt to do so, and had no justifiable excuse for not doing so." *In re Adoption of Angela E.*, 402 S.W.3d at 640 (citing *In re Audrey S.*, 182 S.W.3d at 864). Because testimony may be critical to the determination of whether a parent's conduct was willful, trial courts are best situated to make a determination of willfulness. *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003). Whether the parent failed to visit or support the child is a question of fact, but the issue of whether the failure to visit or support constitutes willful abandonment is a question of law. *In re Adoption of Angela E.*, 402 S.W.3d at 640 (citing *In re Adoption of A.M.H.*, 215 S.W.3d at 810).

a. Willful Failure to Visit

The trial court found that Grandparents failed to prove by clear and convincing evidence that Mother and Father willfully failed to visit Sophia because Grandparents "constructively denied access" to the child.

Because the termination petition was filed on November 5, 2014, we look to the four-month period immediately preceding that date, spanning from July 5 to November 4, 2014, in order to determine whether Mother and Father willfully failed to visit Sophia during that timeframe. *See In re Jacob C. H.*, No. E2013-00587-COA-R3-PT, 2014 WL 689085, at *6 (Tenn. Ct. App. Feb. 20, 2014) (explaining the calculation of the four-month period). As noted above, Sophia was born in April 2014. Mother and Sophia resided with Grandparents in Clarksville for about a month until they had a disagreement, and Mother went to a motel. After their disagreement, Grandparents informed Mother that she could no longer reside with them. Father resided in Nashville when Sophia was born, but at some point he obtained an apartment with Mother. Grandparents were awarded custody of Sophia on July 2, 2014. Mother testified that she could not afford an attorney to represent her in the custody proceeding. Four months and three days after the custody order was entered, when Sophia was six months old, Grandparents filed the petition to terminate parental rights.

During the four month period between the Order of Custody and the filing of the termination petition, both Mother and Father visited Sophia at Grandparents' house on a number of occasions. However, the precise number of visits was not articulated or even estimated at trial. Grandmother described the situation as follows:

> Q. Let's talk about the four months preceding the filing of this petition for adoption. During the four months, beginning with the mother, did she have any visitation with the child?
>
> A. She had some.
>
> Q. Okay. You say some. How much?
>
> A. I would say between July and November, it's a little more difficult, because at one point she was homeless and in a shelter, and so she spent a little bit more time at our house because she had nowhere else to go. But most of the time, it was 15 minutes here, 30 minutes there. She had just a couple of hours total of time for the first two months easy. Once she was homeless, I would say maybe ten hours with her total time.

Q. So in a four-month period, looking at about 10 or 12 hours of visitation?

A. Yeah. Yes. Absolutely, less than 15.

Thus, it is not clear from the record how many visits Mother had with Sophia over the course of four months to accumulate about fifteen hours of visitation. The same holds true for Father. Grandmother testified that Father visited with Sophia "probably a total of four hours or less" during the four months preceding the filing of the termination petition, but there was no testimony to suggest how many visits he attended. Grandmother only said that "most of the visits" were between fifteen and twenty minutes.[1]

Grandmother was asked whether she did anything to prevent visits from occurring during that period. She said that "in the very beginning" she and Grandfather required notice prior to visits. With the notice requirement, Grandmother said there were occasions when Mother would send a text message canceling a visit or fail to show up at all, so then, she and Grandfather "set a time frame" for the visits. Grandmother scheduled visits for Mother and Father at 9:00 a.m. on either Saturdays or Sundays, although she could not remember which day. According to Grandfather, he and Grandmother did not want to be at the "beck and call" of Mother and Father for "whenever they felt like they want[ed] to come over and visit." He said both parents were working, so Grandparents scheduled the time for visits on their mutual day off work. Grandmother acknowledged that the schedule she set for visits upset Mother and Father because it was early in the morning and they wanted to visit later in the afternoon. However, Grandmother said she explained to Mother and Father that early visits would permit Grandfather and her "to have the rest of [their] day." Grandfather said that he and Grandmother "held firm" to the visitation schedule they set despite resistance from Mother and Father. The record is not clear as to whether there was a set length or duration on the "time frame" for these once-a-week visits.[2]

Father testified that he was only permitted to visit Sophia when Grandparents had

[1]For example, if Father visited for only fifteen minutes each time, he would have attended sixteen visits over the four month period to accumulate four hours of visitation. If Mother visited for only fifteen minutes, she would have attended sixty visits over the course of four months to accumulate fifteen hours. Unfortunately, however, the parties did not estimate the number of visits or specify when they occurred during the four-month period.

[2]Although Grandmother at one point denied limiting Father in the amount of time he could spend with Sophia, she also acknowledged they "set a time frame" for visits. Grandfather also acknowledged that they set "specific times that must be complied with." Grandmother also indicated that she denied the parents' request to visit in the afternoon rather than the morning.

time or did not have other plans, and he said there were times they would not permit visitation if they had an event or something to attend. Mother also testified that there were times when Grandparents would not allow her to visit. She denied failing to show up for any visits but said she may have had to cancel because of her work schedule. She said she tried to see Sophia as much as she possibly could. Grandmother admitted that she would not allow Mother any overnight visitation with Sophia.

Father testified that he and Mother were very uncomfortable during the visits that did occur because they felt like they were "on a time frame" and being pushed out the door because Grandparents did not want them there. Grandmother denied being "overcontrolling" during visits but admitted that she and Grandfather would not leave Mother or Father in a room alone. Grandmother said they did this because "[t]here was no trust there," and they feared that Mother and Father would steal from them. Grandparents also wanted to ensure that Sophia was safe. Mother and Father were not allowed to take Sophia outside. At some point, Grandfather told Father that his relationship with Sophia was not contingent on his relationship with Mother and that he could still contact them to visit Sophia if he and Mother ended their relationship. However, Grandfather also admitted that on two occasions, he refused to let Father enter the house. Father's mother had a conversation with Grandparents and asked them to reconsider letting Father enter the house to see Sophia, which they did. Still, Grandmother admitted that the relationship between Father and Grandparents was "not the best relationship in the world." Grandfather confirmed that he did not like Father and agreed it was "obvious" they did not have a good relationship. Father's mother testified that she had attended a visit at Grandparents' house with Father and witnessed "the uncomfortableness" of the situation.

Father had no driver's license and relied on Mother to drive him. He moved to Colorado in early September 2014 (halfway through the relevant four-month time frame spanning from July to November) to reside with his parents. Father testified that he did not file a custody petition before leaving because he did not have the money for a lawyer. He testified that he moved in with his parents because he and Mother were having problems and he was only being allowed limited visitation with Sophia, so he felt that he needed to "get on [his] feet" and get the funds to hire a lawyer. After Father left, Mother was evicted from the apartment she had shared with Father. She became suicidal and was admitted to a mental hospital for four days. She subsequently resided in a homeless shelter.

The trial court made the following findings regarding this ground for termination:

> On the issue of failing to visit, the Court finds that [Grandparents] created such an atmosphere within which the parents were allowed to see the child, including supervision, the inability to go outside, the inability to go on a walk, and the inability to have any alone time at all with their child, that they have constructively denied access of the child to the parents. Thus, the Court finds that [Grandparents] have failed to carry their burden of proof that [Father and Mother] abandoned the minor child by failing to engage in meaningful visitation in the four (4) months preceding the filing of the adoption petition.

We agree with the trial court's conclusion that that evidence does not clearly and convincingly demonstrate that Mother or Father *willfully* failed to visit or engage in meaningful visitation with Sophia.

"A parent cannot be said to have abandoned a child when his failure to visit [ ] is due to circumstances outside his control." *In re Adoption of Angela E.*, 402 S.W.3d at 640. The Tennessee Supreme Court has recognized that "when a parent attempts to visit his child but is 'thwarted by the acts of others,' the failure to visit is not willful." *In re M.L.P.*, 281 S.W.3d at 392 (quoting *In re Adoption of A.M.H.*, 215 S.W.3d at 810). "A parent's failure to visit may be excused by the acts of another only if those acts actually prevent the parent from visiting the child or constitute a significant restraint or interference with the parent's attempts to visit the child." *Id.* at 393 (citing *In re Audrey S.*, 182 S.W.3d at 864). "[A] parent's failure to visit is deemed willful when it is the product of free will, rather than coercion." *Id.* at 392. Some examples of conduct amounting to a significant restraint or interference with a parent's efforts to develop a relationship with the child are "blocking access to the child" and "vigorously resisting a parent's efforts to visit the child." *In re S.M.*, 149 S.W.3d 632, 642 n.18 (Tenn. Ct. App. 2004).

Significantly, we cannot tell from the record how many visits Mother or Father had with Sophia during the four-month period at issue. We do know that Mother and Father visited Sophia numerous times despite the restrictions imposed by Grandparents. We also know that some other attempts to visit were thwarted by Grandparents. Mother and Father both testified that Grandparents would not permit them to see Sophia at times, and Grandfather admitted that he would not allow Father to enter the house on two occasions. Mother and Father were not allowed overnight visitation and were limited to a specific period at Grandparents' home one morning per week. Grandparents admittedly held firm to that schedule despite the parents' expressed desire to visit at other times. Significant animosity existed between Grandparents and Father. Regardless of whether

Grandparents were well-intentioned, their actions had the effect of significantly interfering with the parents' efforts to visit Sophia. Father had no driver's license and lived in Colorado for half of the four-month period, which further affected his ability to visit Sophia. Mother was admitted to a mental hospital and lived in a homeless shelter. Considering all the circumstances, the evidence demonstrates that Mother and Father faced significant restraints or barriers to their ability to maintain a relationship with Sophia during the relevant four month period. The evidence does not clearly and convincingly demonstrate that Father and Mother had the capacity to visit, made no attempt to do so, and had no justifiable excuse for not doing so. *See In re Adoption of Angela E.*, 402 S.W.3d at 640. We affirm the trial court's finding that Grandparents failed to prove by clear and convincing evidence a willful failure to visit.

b. Willful Failure to Support

We look to the same four-month period, spanning from July 5 to November 4, 2014, in order to determine whether Father or Mother willfully failed to support Sophia during that timeframe. Mother paid $20 to Grandparents during the relevant four-month period. Father paid no money directly to Grandparents, but Grandparents received several items in the mail for Sophia from Father's parents' Amazon account. A trial exhibit indicates that Grandparents received approximately five shipments during the relevant four-month period, containing cloth diapers, a Diaper Genie refill, toys, a bib, changing paid cover, spoons, a teether, bottles, clothing, socks, and other items. Father's mother testified that the items were mailed from her Amazon Prime account but that Father contributed to the cost of the items by giving her cash.

Again, however, the element of willfulness is central to our analysis. Defining abandonment as the mere non-payment of support, irrespective of intent, would be unconstitutional. *See In re D.L.B.*, 118 S.W.3d at 367. As such, "the financial ability[] or capacity[] of a parent to pay support must be considered in determining" the element of willfulness. *In re Envy J.*, No. W2015-01197-COA-R3-PT, 2016 WL 5266668, at *14 (Tenn. Ct. App. Sept. 22, 2016), *perm. app. denied* (Tenn. Dec. 16, 2016). The relevant statutes define the concept of willful failure to support or to make reasonable payments toward support as the willful failure to provide monetary support or "more than token payments toward the support of the child." Tenn. Code Ann. § 36-1-102(1)(D). Token support is support that "under the circumstances of the individual case, is insignificant given the parent's means." Tenn. Code Ann. § 36-1-102(1)(B). By its terms, the definition of token support requires consideration of the circumstances of the individual case. *In re K.C.*, No. M2005-00633-COA-R3-PT, 2005 WL 2453877, at *9 (Tenn. Ct. App. Oct. 4, 2005) (citing Tenn. Code Ann. § 36-1-102(1)(B)). A finding that support

was "insignificant" in light of the parent's "means" cannot be made without evidence regarding both a parent's actual financial support of the child and a parent's "means." *In re Z.J.S.*, No. M2002-02235-COA-R3-JV, 2003 WL 21266854, at *10 (Tenn. Ct. App. June 3, 2003); *see also In re Malaki E.*, No. M2014-01182-COA-R3-PT, 2015 WL 1384652, at *7 (Tenn. Ct. App. Mar. 23, 2015) (*no perm. app. filed*) ("The court must review a parent's means[.]"). "In the context of token support, the word 'means' connotes both income and available resources for the payment of debt." *In re Adoption of Angela E.*, 402 S.W.3d at 641 (citing *In re Z.J.S.*, 2003 WL 21266854, at *11 n.24; *Black's Law Dictionary* 1070 (9th ed. 2009)).

The Tennessee Supreme Court's decision in *In re Adoption of Angela E.*, 402 S.W.3d at 641, is instructive on the issue of willful failure to support. In that case, the Tennessee Supreme Court found that the petitioners failed to provide clear and convincing evidence of willful failure to support when there was no evidence presented concerning the defendant-father's monthly expenses, even though it was undisputed that he was a physician earning an annual income of $150,000 and owned lien-free property worth at least $300,000. *Id.* The Court found the evidence regarding the father's income and expenses "limited at best" and deemed the evidence insufficient. *Id.* The court reiterated that, in order to prove the ground of abandonment for failure to support, "[a] party seeking termination of parental rights must prove by clear and convincing evidence that the [parent who failed to support] had the capacity to pay support but made no attempt to do so and did not possess a justifiable excuse." *Id.* Thus, *In re Adoption of Angela E.* illustrates "the significance of evidence concerning a parent's income and expenses when the ground of abandonment by willful failure to support is alleged." *In re Navada N.*, 498 S.W.3d 579, 594 (Tenn. Ct. App. 2016).

The trial court's findings on this issue are not very helpful. The court only found that "[t]here is disputed testimony as to the support that has been paid in money or in kind by the parents" in the relevant four-month period, and "[g]iven the totality of the evidence, [Grandparents] failed to meet their burden of proof that the parents have abandon[ed] the child by failing to support the child." However, we agree with the court's ultimate conclusion that this ground for termination was not sufficiently proven.

At trial, Mother and Father were not asked about their income or expenses during the relevant four-month period between July and November 2014. The evidence reflects that Mother lived with Grandparents when Sophia was born in April 2014 because she had no place of her own. Father lived in Nashville and worked at a barbecue restaurant. After the disagreement between Mother and Grandparents in May 2014, Mother stayed in a motel because Grandparents would no longer permit her to reside in their home. The

four-month period began in July 2014. At some point, Mother and Father began renting a house or apartment. However, when Father moved to Colorado in September 2014, Mother was evicted and began staying at a homeless shelter.[3]

When discussing visitation during the four-month period, Grandfather casually mentioned that Mother and Father "were both at that time working at Convergys and both had the same day of the week off work." He also mentioned that Father's parents bought a car for Mother and Father around that time and that Mother had to drive it because Father had no license. Father testified that he was fired from Convergys at some point because he showed up late.

Father was employed at a gas station in Colorado at the time of trial and had been for six months, but that period does not correspond with the four-month period at issue. The fact that he was employed at the time of trial does not clearly and convincingly prove that he had the capacity to pay child support during the relevant four-month timeframe before the termination petition was filed. Father's mother mentioned that he had also worked at two fast food restaurants since moving to Colorado, but she did not say when that employment occurred. Father testified that he had been looking for jobs at prisons in Colorado and at a hotel.

Father testified that he did not file a petition for custody during the four-month period because he "had no money for a lawyer." Father was asked why he did not send money to Grandparents during the four-month period, and he responded, "They never asked for money." He also said that Sophia was in a safe place and that Grandparents were taking good care of her. The questioning continued as follows:

> Q. So you figured somebody else was taking good care of my daughter, there's no need for me to send any money; is that your testimony?
>
> A. Yes.
>
> Q. And you said they never asked you to send money?
>
> A. Right.
>
> Q. Does somebody have to ask you to send money to support your own child?

[3]Grandmother's mother testified at trial that Mother had resided with her for a period of time and that she loaned Mother money on several occasions, but she did not specify whether this occurred during the four-month period.

A. No.

Q. But you just testified that they never asked you. Is that what your -- were you waiting on them to ask you to send you -- for you to send them money?

A. No, I was waiting -- I sent her money on Valentine's Day.

Q. I'm talking about the four months preceding the adoption, July to November.

A. No.

Q. You were waiting for them to say, Hey, you know, we need some money here. That's what you were waiting on?

A. Yeah, or some child support, you know, order.

Grandparents rely on this exchange in support of their position that Father's failure to pay child support was willful. They point out that Father never mentioned an inability to pay support. We can conclude from Father's testimony that he believed there was no need for him to send money to Grandparents in the absence of a request or a child support order. However, to establish the ground of willful failure to support, we must also find, by clear and convincing evidence, that Father had the capacity and ability to pay child support. Father's testimony that he was "waiting" and the absence of any testimony about an inability to pay might lead us to speculate that he had the ability to pay. Considering the record as a whole, however, this testimony is not enough to establish his financial capacity to pay by clear and convincing evidence. "Speculation does not amount to clear and convincing evidence." *In re Malaki E.*, 2015 WL 1384652, at *7 (declining to speculate about a parent's capacity to support in the absence of evidence regarding her employment income, resources, or expense in the relevant four month period); *see also In re Aaron E.*, No. M2014-00125-COA-R3-PT, 2014 WL 3844784, at *7 (Tenn. Ct. App. Aug. 4, 2014) (declining to find willful failure to support when the trial court's finding was based only on speculation about the mother's job status).

The record contains no evidence regarding Father's income, work record, or expenses during the pivotal timeframe. This is a critical gap in the evidence that we cannot overlook. "Without such evidence, a finding of willfulness cannot be sustained." *In re Navada N.*, 498 S.W.3d at 600. "[A] court can only determine willfulness of a parent's failure to support where there is sufficient evidence regarding the parent's ability to pay." *In re Jamie G.*, No. M2014-01310-COA-R3-PT, 2015 WL 3456437, at *15 (Tenn. Ct. App. May 29, 2015), *perm. app. denied* (Tenn. Aug. 28, 2015). The burden to prove abandonment by willful failure to support rested squarely on Grandparents as the petitioners. We cannot fault a parent for the absence of evidence regarding his or her

financial situation. In a termination proceeding, the burden is not on a parent to demonstrate an inability to pay; the burden is on the petitioner to prove by clear and convincing evidence that the parent had the capacity to pay, made no attempt to do so, and had no justifiable excuse for not doing so. *In re Adoption of Angela E.*, 402 S.W.3d at 641. Without basic information regarding a parent's means, we are unable to determine, by clear and convincing evidence, whether the parent had the capacity to provide support or lacked a justifiable excuse for failing to do so. "Given the heavy burden necessary to interfere with a fundamental constitutional right," the evidence offered by Grandparents was simply insufficient to show that Father's failure to support Sophia was willful. *In re Envy J.*, 2016 WL 5266668, at *14. Consequently, we agree with the trial court's conclusion that Grandparents failed to prove willful failure to support by clear and convincing evidence and affirm the trial court's finding regarding Father and this ground for termination.

The evidence regarding Mother's means was just as sparse. She was working as a home health care giver at the time of trial and receiving food stamps, but her employment history during the four-month period is unclear. Grandfather and Mother both mentioned that Mother worked "at Convergys" during the four-month period, but Mother also said she was fired from Convergys at some point for missing work. Simply showing that Mother worked at some point during the four-month period does not, by itself, mean that she had the ability to pay child support. *See In re Alysia S.*, 460 S.W.3d 536, 570 (Tenn. Ct. App. 2014).

Mother had a revoked driver's license at some point. She spent time during the four-month period at a mental hospital and then lived at a homeless shelter after being evicted from her residence. At the time of trial, she was living with a couple who was trying to help her get her life back together. The limited evidence in the record does not demonstrate by clear and convincing evidence that Mother had the capacity to provide support during the relevant timeframe and lacked a justifiable excuse for failing to do so.

Finally, Grandparents argue that the trial court erred in separately analyzing the issue of "substantial harm." In addition to analyzing the ground of abandonment alleged by Grandparents, the trial court also found that Grandparents had failed to prove that substantial harm would come to the child in the care of Mother or Father. This finding was unnecessary in the context of this termination case. "This court has repeatedly recognized that the statutory grounds for termination of parental rights listed in Tenn. Code Ann. § 36-1-113(g) are all examples of parental conduct and situations that render a parent unfit or pose a risk of substantial harm to the welfare of a child." *In re Audrey S.,* 182 S.W.3d at 881. Establishing a statutory ground for termination of parental rights is

sufficient to establish substantial harm or parental unfitness and therefore support termination of parental rights. *In re Austin A.*, No. E2014-00910-COA-R3-PT, 2014 WL 6176544, at *7 (Tenn. Ct. App. Nov. 17, 2014); *see, e.g.*, *In re Adoption of A.M.H.*, 215 S.W.3d at 810 ("A parent who has abandoned a child by willfully failing to visit is unfit under constitutional standards.") (quotations omitted).

> Thus, as long as . . . at least one of the statutory grounds for termination of parental rights exists, the constitutional requirement of a showing of parental unfitness or a risk of substantial harm to the welfare of a child has been satisfied. In effect, the constitutional unfit parent/substantial harm analysis is subsumed within the analysis of whether the statutory grounds for termination have been properly established. A separate finding of parental unfitness or substantial harm, in addition to a finding of the existence of at least one of the statutory grounds, would be redundant.

In re Audrey S., 182 S.W.3d at 882. A separate and explicit finding of a substantial risk of harm is not required. *In re L.A.J., III*, No. W2007-00926-COA-R3-PT, 2007 WL 3379785, at *7 (Tenn. Ct. App. Nov. 15, 2007). Here, the trial court found that the alleged ground for termination had not been proven *and* that no substantial harm was demonstrated. The second finding was unnecessary but did not affect the outcome of this case.

V. CONCLUSION

For the aforementioned reasons, the decision of the circuit court is hereby affirmed and remanded for further proceedings. Costs of this appeal are taxed to the appellant-Grandparents, Trina and Charles P., for which execution may issue if necessary.

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BRANDON O. GIBSON, JUDGE