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Clerk of the  
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
Assigned on Briefs December 1, 2022

**IN RE ALYSSA A. ET AL.<sup>1</sup>**

**Appeal from the Circuit Court for Montgomery County**  
**No. CC-21-CV-342      Kathryn W. Olita, Judge**

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**No. M2022-00582-COA-R3-PT**

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This appeal concerns the termination of a father’s parental rights to his children. The trial court found that the petitioner, the children’s grandmother, established several grounds for terminating the father’s parental rights and that termination of his rights was in the best interests of the children. The father appeals, challenging each ground for termination as well as the trial court’s finding that termination of his parental rights was in the children’s best interests. We affirm the termination of the father’s parental rights.

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

FRANK G. CLEMENT JR., P.J., M.S., delivered the opinion of the Court, in which CARMA DENNIS MCGEE and KRISTI M. DAVIS, JJ., joined.

Jacob P. Mathis and Tiffany D. Leffler, Clarksville, Tennessee, for the appellant, Joshua A.

Christopher J. Pittman and Theresa Schimmels, Clarksville, Tennessee, for the appellee, Cynthia B.

Brittani B. Dial, Clarksville, Tennessee, as guardian ad litem for Alyssa A. and Kiana A.

**OPINION**

**FACTS AND PROCEDURAL HISTORY**

Alyssa A. and Kiana A. (“the Children”), twins, were born in July of 2018 in Bulloch County, Georgia, to Joshua A. (“Father”) and Danielle G. Because the Children were born several weeks early, they required medical treatment and remained in the

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<sup>1</sup> This court has a policy of protecting the identity of children by initializing the last names of the parents, children, and immediate relatives.

hospital for approximately seven weeks after birth. Not long after the Children's births, their mother was found unresponsive in her home. She died on September 19, 2018.

Both Children were released from the hospital in September 2018. Upon their release, the Children resided primarily with their maternal grandmother, Cynthia B. ("Grandmother"), in Rincon, Georgia, and occasionally with their paternal aunt, Tiffany A., in South Carolina. During this time, Grandmother cared for the Children and took the Children to weekly health appointments in Savannah, Georgia.

The Children required frequent, significant medical care in the months following their release from the hospital. Grandmother was making weekly trips to Savannah, Georgia, for appointments with eye specialists and neurologists. Both girls suffered from severe retinopathy, and Kiana had to see a neurologist for brain bleeds. Father did not reside with the Children during this time and did not regularly visit. While in her care, Grandmother provided for the Children's daily needs and provided them with specialized care to address developmental delays.

In January 2019, Father married Rachel A. ("Father's Wife"). Between January 2019 and April 2019, Father had been residing in a hotel room in Clarksville, Tennessee; however, in May 2019, Father was able to work as an iron worker and find more stable housing. As a result, in May 2019, when the Children were approximately ten months old, they began residing with Father in Clarksville, Tennessee. The Children resided with Father, Father's Wife, and her children from previous relationships from May 2019 until December 29, 2019. On December 29, 2019, Father called his sister, Tiffany A., to pick up the Children. At that point, Tiffany A. contacted the Children's maternal aunt, Stephanie J. ("Ms. J."), to assist her in picking up the Children. According to Ms. J., she and Father's sister, Tiffany A., were to meet Father in Atlanta, Georgia, to pick up the Children for an undetermined amount of time in order to help Father with a "situation." Both aunts went together and picked up the Children within hours of Father calling and were able to bring the Children to Ms. J.'s home in Georgia by 3:00 a.m. the following morning.

Upon arriving home, Ms. J. noticed that both Children were sick and that Kiana had bruising on her forehead, eye, cheeks, neck, and lower back. The next day, Ms. J. brought both Children to an urgent care clinic where she was directed to take them to an emergency room. Upon examination at the emergency room, police and the Georgia Department of Children's Services were contacted. The Children stayed with Ms. J. at her home until they were once again transported to Grandmother's home in South Carolina.

On January 3, 2020, Grandmother filed a Petition for Dependency and Neglect and a Request for Ex Parte Order for Temporary Placement in the Juvenile Court of Montgomery County, Tennessee. The juvenile court ordered the Children into Grandmother's temporary custody that same day and scheduled a hearing for January 13, 2020. At the hearing, Father's counsel filed a motion requesting the Children be returned

to Father's care, which the court denied. The juvenile court litigation experienced numerous and lengthy delays due to several circumstances, including the COVID-19 pandemic. Grandmother filed her petition to terminate Father's parental rights before a final ruling was entered.

On March 1, 2021, Grandmother filed her petition to terminate Father's parental rights to the Children in the Circuit Court for Montgomery County, Tennessee.<sup>2</sup> At this point, the Children had resided with Grandmother since December 2019, and Grandmother wished to adopt them.

The case went to trial on March 15, 2022, during which the court heard testimony from Grandmother, Ms. J., Father, and Father's Wife's ex-husband, Jeremy Smith. The court also admitted into evidence and considered several documents, including, inter alia, Father's Wife's divorce decree, Father's Wife's permanency plans in reference to her own children's involvement with Tennessee's Department of Children's Services, and text messages between Father and Ms. J. At the conclusion of the trial, the court announced it would be granting the petition to terminate Father's parental rights.

In its final written order filed on April 4, 2022, the trial court found that Grandmother established three grounds for termination: (1) abandonment by failure to support, (2) abandonment by failure to visit, and (3) failure to manifest an ability and willingness to assume custody of the Children. The court also found that termination of Father's rights was in the best interest of the Children for four reasons: (1) Father's home was unsafe due to potential physical abuse of the Children at the hands of Father's Wife, (2) Father's failure to regularly visit or contact the Children, (3) a total lack of meaningful relationship between the Children and Father, and (4) Father's failure to provide any monetary support to the Children.

This appeal followed.

### **ISSUES**

Father raises four issues on appeal, stated as follows:

- I. Did the trial court err in finding Father abandoned the children for willfully failing to support?
- II. Did the trial court err in finding Father abandoned the children for willfully failing to visit?
- III. Did the trial court err in finding Father failed to manifest an ability or willingness to assume responsibility for the children?

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<sup>2</sup> Grandmother had legal and physical custody of the children by order of the Juvenile Court of Montgomery County, Tennessee. She was a resident of Allendale, South Carolina, at the time of the filing of the petition.

- IV. Did the trial court err in conducting a best interest analysis when no statutory ground for termination was proven by clear and convincing evidence?

#### STANDARD OF REVIEW

“Parents have a fundamental constitutional interest in the care and custody of their children under both the United States and Tennessee constitutions.” *Keisling v. Keisling*, 92 S.W.3d 374, 378 (Tenn. 2002). “[T]his right is not absolute and parental rights may be terminated if there is clear and convincing evidence justifying such termination under the applicable statute.” *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)).

“To terminate parental rights, a court must determine that clear and convincing evidence proves not only that statutory grounds exist but also that termination is in the child’s best interest.” *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002) (citing Tenn. Code Ann. § 36-1-113(c)). “Clear and convincing evidence enables the fact-finder to form a firm belief or conviction regarding the truth of the facts, and eliminates any serious or substantial doubt about the correctness of these factual findings.” *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010) (internal citations omitted). “The clear-and-convincing-evidence standard ensures that the facts are established as highly probable, rather than as simply more probable than not.” *In re Carrington H.*, 483 S.W.3d 507, 522 (Tenn. 2016).

In an appeal, “this court is required ‘to review thoroughly the trial court’s findings as to each ground for termination and as to whether termination is in the child’s best interests.’” *In re Connor B.*, 603 S.W.3d 773, 779 (Tenn. Ct. App. 2020) (quoting *In re Carrington H.*, 483 S.W.3d at 525). In doing so, we must 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). Stated another way, we must make our own “determination as to whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, amount to clear and convincing evidence of the elements necessary to terminate parental rights.” *In re Carrington H.*, 483 S.W.3d at 524.

The trial court’s findings of fact are reviewed de novo upon the record, accompanied by a presumption of correctness unless the evidence preponderates against those findings. *See* Tenn. R. App. P. 13(d); *see also In re Carrington H.*, 483 S.W.3d at 523–24; *In re F.R.R., III*, 193 S.W.3d at 530. Questions of law, however, are reviewed de novo with no presumption of correctness. *See In re Carrington H.*, 483 S.W.3d at 524 (citing *In re Angela E.*, 303 S.W.3d 240, 246 (Tenn. 2010)). A trial court’s determinations regarding witness credibility are entitled to great weight on appeal and will not be disturbed “absent clear and convincing evidence to the contrary.” *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007).

## ANALYSIS

### I. GROUNDS FOR TERMINATION

In its final order, the trial court found that Grandmother established three grounds for terminating Father’s parental rights: (1) abandonment by failure to support, (2) abandonment by failure to visit, and (3) failure to manifest an ability and willingness to assume custody of the Children. We will discuss each ground in turn.

#### A. Abandonment—Failure to Support

Tennessee Code Annotated § 36-1-113(g)(1) establishes a ground for termination based on abandonment by failure to support as defined in Tennessee Code Annotated § 36-1-102. A failure to support occurs when a parent has failed, “for a period of four (4) consecutive months, to provide monetary support or [has failed] to provide more than token payments toward the support of the child.” Tenn. Code Ann. § 36-1-102(1)(D). “Token support” is defined as “support [that], under the circumstances of the individual case, is insignificant given the parent’s means.” Tenn. Code Ann. § 36-1-102(1)(B). The fact that “the parent had only the means or ability to make small payments is not a defense to failure to support if no payments were made during the relevant four-month period.” *Id.* § 36-1-102(1)(D).

In *In re Kolton C.*, this court noted:

Prior to 2018, the statutory definition of abandonment placed the burden of proof on the petitioner to show that a parent’s failure to visit or failure to support was “willful.” In 2018, the General Assembly amended the statute to shift the burden of proof to the parent to show the failure to support or visit was not willful.

No. E2019-00736-COA-R3-PT, 2019 WL 6341042, at \*5 (Tenn. Ct. App. Nov. 26, 2019).

For cases filed on or after July 1, 2018, the relevant statute now provides:

For purposes of this subdivision (1), it shall be a defense to abandonment for failure to visit or failure to support that a parent or guardian’s failure to visit or support was not willful. The parent or guardian shall bear the burden of proof that the failure to visit or support was not willful. Such defense must be established by a preponderance of evidence. The absence of willfulness is an affirmative defense pursuant to Rule 8.03 of the Tennessee Rules of Civil Procedure.

Tenn. Code Ann. § 36-1-102(1)(I).

Grandmother filed her petition on March 1, 2021. Thus, Father has the burden to show that his failure to visit and failure to support the Children was not willful. Moreover, to raise the defense of willfulness, Father was required to assert the absence of willfulness as an affirmative defense pursuant to Rule 8.03 of the Tennessee Rules of Civil Procedure. Significantly, as the trial court correctly noted in its final order, “[Father’s] answer to the Petition does not contain any affirmative defenses, nor does it reference a lack of willfulness on [his] part.” Accordingly, willfulness is not an issue.

Father does not dispute that he did not provide any financial support for the Children during the relevant period. Further, Father admits that he was gainfully employed throughout the entirety of the Children’s lives earning \$26 - \$27 per hour up to seven days a week.

We acknowledge Father’s argument that the social security benefits the Children received as a result of their mother’s death constitutes sufficient support. However, we find his argument misplaced because, as the trial court noted:

Every parent who is eighteen (18) years of age or older is presumed to have knowledge of a parent’s legal obligation to support such parent’s child or children.” T.C.A. § 36-1-102(H). Further, the contribution of one parent does not alleviate the responsibility of the other parent to support his child. Children have a right to support from both parents who are equally charged with their care, nurture, welfare, education and support. *Kirkpatrick v. O’Neal*, 197. S.W. 674, 679 (Tenn. 2006). Moreover, there is no requirement that a child’s custodian ask for support, nor that there be a court order setting support. *Bryant v. Bryant*, 1999 WL 43282, \*4 (Tn. Ct. App. 1999); *State Dep’t of Hum. Servs. v. Manier*, 1997 WL 675209, \*5 (Tn. Ct. App. 1997).

The record clearly and convincingly establishes that Father did not support the Children during the relevant period from October 28, 2020, to February 28, 2021. Accordingly, we affirm the trial court’s finding that Grandmother proved the ground of abandonment by failure to support by clear and convincing evidence.

#### B. Abandonment—Failure to Visit

Tennessee Code Annotated § 36-1-102(1)(A)(i) provides that a parent will be deemed to have abandoned a child if, “for a period of four (4) consecutive months immediately preceding the filing of the petition . . . to terminate the parental rights, the parent . . . failed to visit . . . the child.

A failure to visit occurs when a parent, “for a period of four (4) consecutive months, [fails] to visit or engage in more than token visitation.” Tenn. Code Ann. § 36-1-102(1)(E).

“Token visitation” is defined as “visitation [that], under the circumstances of the individual case, constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child.” Tenn. Code Ann. § 36-1-102(1)(C). Because the petition to terminate Father’s rights was filed on March 1, 2021, the relevant four-month period is from October 28, 2020 to February 28, 2021.

Based on the same authority as noted above, Father was required to assert the absence of willfulness to visit as an affirmative defense pursuant to Rule 8.03 of the Tennessee Rules of Civil Procedure. Yet, he failed to do so as the trial court correctly noted. Accordingly, willfulness is not an issue.

Concerning the issue of visitation and contact with the Children, the trial court made the following findings of fact:

From October 28, 2020 until February 28, 2021, [Father] had one brief visit with his children. It is not in dispute that the Juvenile Court of Montgomery County entered an Ex Parte Temporary Placement Order granting [Grandmother] physical and legal custody of the girls on January 3, 2020. (Exhibit 6). [Father] moved the Court to grant him visitation, and on January 13, 2020, the Court denied that motion. However, the testimony of the parties was that there was no order prohibiting contact between [Father] and the children. In fact, the parties discussed visitation on a number of occasions, primarily by text message. [Father]’s recollection was that he saw the girls on Thanksgiving Day 2020, which would have fallen during the relevant period. The visit took place at [Father]’s grandmother’s home and was for a period of about 2 - 3 hours. [Father] had driven into town on Thanksgiving Day and left the very next day. He did not see the girls for Christmas that year as he “only had Christmas Day off” from work. Notably, though, he testified that he can take off work “when [he] need[s] to.”

[Father] testified that [Grandmother] denied him visitation on at least one occasion. He wanted to meet [Grandmother] for visitation in Georgia around Easter time. When [Grandmother] responded to his texts asking for details about date, time and location, [Father] did not timely provide such information and ultimately, [Grandmother] went ahead with other Easter plans for the girls. The Court does not find this to be a denial of visitation and further finds that even if it were, Easter did not fall during the relevant period in this case.

Calls and inquiries about the girls have also been minimal. [Grandmother] testified that [Father] only asks about the girls every 6 months or so. [Grandmother]’s recollection was that there had been one phone call and one

video call. [Father] testified that he had called the girls many times on video chat, but did not testify to any specific dates within the relevant period. [Father] acknowledged that he has not had enough contact with the girls to have a meaningful relationship with them.

The trial court went on to acknowledge Father's argument that his visitation had been thwarted by Grandmother's dependency and neglect action, specifically the ex parte restraining order issued in that action. However, that order merely restrained Father and Father's Wife "from interfering with [Grandmother's] care, control, and custody" of the Children pending further orders of that court. Father also argued that the denial of his motion to establish specific parenting time proves his lack of willfulness. However, as noted above, Father was not restrained from exercising visits with the girls or from calling the girls or from sending gifts, cards or letters, which the trial court described as "things that would help him 'maintain the thread of the parent-child relationship and pave the way for the return of the child[ren] to [his] custody.'" See *In re Joshua S.*, No. E2010-01331-COA-R3-PT, 2011 WL 2464720, at \*16 (Tenn. Ct. App. June 16, 2011). Then the trial court reasoned:

To the extent Father has attempted to establish as an affirmative defense that his failure to visit was not willful, he has failed to do so. He knew where the girls were at all times; he maintained communication with [Grandmother] via text; [Grandmother] did not deny or resist his efforts to visit the girls. [Father] simply did not visit other than one token visit on Thanksgiving of 2020.

Based on these and other findings, the trial court found that Grandmother had clearly and convincingly proved that Father had abandoned the Children based upon failure to visit.

We have determined that the evidence does not preponderate against the findings of fact as made by the trial court and that the evidence clearly and convincingly established the ground of abandonment by failure to visit the Children. Accordingly, we affirm the trial court on this ground.

### C. Failure to Manifest an Ability and Willingness to Assume Custody

A court may terminate a parent's rights if (1) the parent "failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility of the child;" and (2) "placing the child in the [parent]'s legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child." Tenn. Code Ann. § 36-1-113(g)(14).



“In construing this statute, the Tennessee Supreme Court [] has held that the first prong requires clear and convincing proof that the parent ‘has failed to manifest either ability or willingness’ to assume custody of or responsibility for the child.” *In re Manning H.*, No. M2020-00663-COA-R3-PT, 2021 WL 2935047, at \*6 (Tenn. Ct. App. July 13, 2021) (quoting *In re Neveah M.*, 614 S.W.3d 659, 677 (Tenn. 2020)). In order to satisfy the second prong, the petitioner must show “clear and convincing proof that placing the child in the parent’s physical custody would likely cause substantial harm.” *In re Manning H.*, 2021 WL 2935047, at \*6. Though the statute does not specifically define “substantial harm,” this court has construed it to require showing “a real hazard or danger that is not minor, trivial, or insignificant.” *Ray v. Ray*, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001).

The trial court made specific findings of fact concerning whether Father had manifested either an ability or willingness to assume custody of or responsibility for the Children, which included:

Father has not had parenting time with the children on any regular basis since December of 2019. The girls were 18 months old at the time he left them with their aunts. There was no immediate plan for their return to him. Now, the girls are almost four (4) years old. He has not provided monetary support of any kind for the children. He’s not provided any necessities of their daily living. He is of the opinion that the social security benefits the girls receive as a result of the death of their mother is enough to support their every financial need. This is all despite the fact that at all relevant times, he was earning \$26 - \$27 per hour, sometimes working more than eight hours a day, seven days a week.

While [Father] has participated in the private dependency and neglect action in the Juvenile Court of Montgomery County, he has not made reasonable efforts to visit with the girls. As set forth above, although the Juvenile Court declined to set specific visitation, [Grandmother] never denied [Father] visitation with the girls and communication between the parties was open such that he could have arranged for visits if he had wanted. [Father] was never completely restrained from visiting the with [sic] girls. The children have been apart from Father for nearly all their lives and don’t have an existing relationship with him. He failed to maintain even the most minimal of contacts with the girls such that there is no meaningful relationship existing between them.

Concerning whether placing the Children in Father’s physical custody would likely cause substantial harm, the trial court expressed concern with the presence of Father’s Wife in his home. The court was also mindful of the fact that Father’s Wife did not appear at the

trial. Notably, Grandmother, Ms. J., and the ex-husband of Father's Wife,<sup>3</sup> all expressed significant concerns regarding Father's Wife presence and her impact on the Children's welfare. The final order included the following findings that are germane to this issue:

21. [Father's] Wife, Rachel A., was previously married to Jeremy Smith, who appeared to testify in this matter. Rachel and Jeremy had three (3) children born of their marriage, Aiden, Abel and Madelyn. They were divorced by final decree of the Circuit Court of Montgomery County, Tennessee dated September 7, 2016. (Exhibit 4). Mr. Smith was awarded primary custody of the parties' children, with Rachel having 80 days of parenting time. Included in the divorce court's ruling was a finding that [Father's Wife's] is bi-polar and attempted suicide resulting in a hospitalization. In addition, the Court referenced "a disturbing note found in [Father's Wife's] bedroom to 'kill Abel', the parties' middle child which convinced the Court that Father was the appropriate and stable primary parent. That note was made an exhibit at the trial of this matter and it is indeed disturbing. (Exhibit 3).

22. In an incredibly tragic turn of events, Abel Smith, age 9, did in fact pass away on October 12, 2019 while in the care of Rachel A. and Father. His cause of death was ruled to be natural causes. Currently, Rachel A. has only supervised visits with Aiden and Madelyn pursuant to an injunction entered by the Circuit Court in a pending modification action filed by Jeremy Smith.

23. In late 2019, things were stressful in [Father's] home. According to his recounting, they had six (6) children in the house, then Abel passed away, then Rachel broke her back falling down the stairs while holding one of the twins. Rachel was in a back brace and on pain meds and [Father's] testimony was that he "needed some help."

24. [Father's] son Karsten primarily lives with his mother, Shelley Brantley. Ms. Brantley's deposition was taken on July 8, 2020 and was admitted into evidence without objection. (Exhibit 9). Father and Ms. Brantley share parenting time with Karsten and in 2019, Father had custody of Karsten beginning the week before Christmas. Sometime during Karsten's visit, an incident occurred wherein Karsten allegedly pushed Kiana out of a small child's chair face forward onto the hardwood floor. Father testified that it was a quick incident and that Kiana cried briefly, but then was fine. At trial, Father testified that he saw the incident happen. Father asserts that this is where Kiana's facial bruising came from.

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<sup>3</sup> Father's Wife's ex-husband testified that Father's Wife only had visitation with their children for 80 days a year due in part to concerns for their children.

25. According to the testimony of Shelley Brantley, when Father was telling her about the circumstances of Kiana getting hurt, he told her he didn't know what happened because "he wasn't in there." (Deposition of Shelley Brantley, p. 10, I. 1 - 13). During the conversation, he was crying and he specifically said he did not know how Kiana had gotten the bruises. He shared that there was a big boom and he ran in there and saw Kiana and Karsten. When Ms. Brantley asked if Rachel was in there with the children, he wouldn't answer.

26. Respectfully, the Court does not find that the bruising on Kiana's face appears to be consistent with this version of events. Specifically, Kiana had a significant black eye with deep purple bruising on her eyelid and undereye. (Exhibit 1). She also has bruising on her cheeks that appears to be small and circular in nature — like fingerprint shapes. She also had bruising on her forehead. The story about Karsten pushing Kiana also does not explain the bruising on Kiana's neck or lower back. Father said that he never saw such bruising and was not able to explain the source of that bruising.

27. Father also testified regarding the events leading up to his call to his sister to get the children on December 29. He confirmed that he had been in an argument with Rachel. Karsten had torn a tent that belonged to Rachel's son Abel, who had just passed away two months earlier. Father tried to hide the damaged tent so Rachel would not find it. He knew she'd be upset. She did, in fact, find the tent and became angry. Father testified she was angry that he had hidden it from her. During the argument, divorce was discussed and Father said he made the decision to immediately leave with the kids.

The trial court also made the following specific findings of fact concerning the Children's bonding with Grandmother:

[T]he girls are significantly bonded to [Grandmother]. She has provided for their every need for nearly all their lives. Upon their release from the hospital, she ensured the girls received all the necessary medical care required as a result of their pre-maturity. She has provided for their daily needs. She applied for and obtained social security benefits for the girls as a result of the death of their mother. She has utilized those funds for their care, but has also opened a savings account for their future benefit. The girls are bonded with [Grandmother] such that placing the children in [Father]'s legal and physical custody would pose a risk of substantial harm to the physical and psychological welfare of the children.

Based on these and other findings, the trial court found that Grandmother had carried her burden of proof and established both prongs of Tenn. Code Ann. § 36-1-

113(g)(14). We have determined that the evidence does not preponderate against the trial court's findings and that the evidence clearly and convincingly proves that Father has failed to manifest either an ability or willingness to assume custody of or responsibility for the Children. We likewise find that placing the Children in Father's physical custody would likely cause substantial harm. Accordingly, we affirm the trial court's decision on this ground.

## II. BEST INTEREST ANALYSIS

Tennessee Code Annotated § 36-1-113(i) identifies factors to be considered when analyzing whether termination of parental rights is in a child's best interest. However, these "factors are illustrative, not exclusive," and the parties are free to offer proof of any other relevant factor to the analysis.<sup>4</sup> *In re Gabriella D.*, 531 S.W.3d 662, 681 (Tenn. 2017). In *In re Gabriella D.*, the Tennessee Supreme Court summarized the law pertaining to this analysis:

Facts considered in the best interests analysis must be proven by "a preponderance of the evidence, not by clear and convincing evidence." "After making the underlying factual findings, the trial court should then consider the combined weight of those facts to determine whether they amount to clear and convincing evidence that termination is in the child's best interest[s]." When considering these statutory factors, courts must remember that "[t]he child's best interests [are] viewed from the child's, rather than the parent's, perspective." Indeed, "[a] focus on the perspective of the child is the common theme" evident in all of the statutory factors. "[W]hen the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child..."

Ascertaining a child's best interests involves more than a "rote examination" of the statutory factors. And the best interests analysis consists of more than tallying the number of statutory factors weighing in favor of or against termination. Rather, the facts and circumstances of each unique case dictate how weighty and relevant each statutory factor is in the context of the case. Simply put, the best interests analysis is and must remain a factually intensive undertaking, so as to ensure that every parent receives individualized consideration before fundamental parental rights are terminated. "[D]epending upon the circumstances of a particular child and a particular

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<sup>4</sup> The petition at issue was filed prior to April 22, 2021, at which time Tennessee Code Annotated § 36-1-113(i) identified nine factors for consideration. The statute was subsequently amended, and it now includes additional factors that should be considered, if relevant. *See* 2021 Pub. Acts, c. 190, § 1, eff. Apr. 22, 2021. Because the amended statute applies only to petitions for termination filed on or after April 22, 2021, the new factors do not apply to the present case.

parent, the consideration of one factor may very well dictate the outcome of the analysis.” But this does not mean that a court is relieved of the obligation of considering all the factors and all the proof. Even if the circumstances of a particular case ultimately result in the court ascribing more weight—even outcome determinative weight—to a particular statutory factor, the court must consider all of the statutory factors, as well as any other relevant proof any party offers.

531 S.W.3d at 681-82 (citations omitted).

“The child’s best interests must be viewed from the child’s, rather than the parent’s, perspective.” *In re Audrey S.*, 182 S.W.3d 838, 878 (Tenn. Ct. App. 2005) (citations omitted). “When the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child[.]” Tenn. Code Ann. § 36-1-101(d). The trial court set forth findings of fact regarding the factors it deemed applicable, and we review those findings below.

#### 1. Adjustment of Circumstance

The first factor to be considered in determining whether termination is in a child’s best interest is “[w]hether the parent . . . 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.” Tenn. Code Ann. § 36-1-113(i)(1).

The trial court was principally concerned with the presence of Father’s Wife in the home. As noted above, Grandmother, Ms. J., and the ex-husband of Father’s Wife each expressed concerns that placing the Children in Father’s physical custody would likely cause substantial harm due, in part, to Father’s Wife’s presence and the potential threat for physical harm that she may pose the Children. Father’s Wife did not appear at trial.

The trial court made the following findings regarding this best interest factor:

Father and Rachel A. are still married. Father was adamant throughout his testimony that everything that has ever been said about his wife is a lie, to include the findings of the divorce court from Rachel’s divorce from Jeremy Smith. Father would not acknowledge or agree that Rachel suffers from bipolar disorder as was found in her divorce action. Instead, he maintains that every person who testified against Rachel was lying.

Based on the foregoing, the trial court found that “there had not been an adjustment of circumstance in Father’s home that would make it safe and in the children’s best interest to be in the home of [Father].” We have determined that the evidence does not preponderate against this finding.

## 2. Lasting Adjustment

The second factor is “[w]hether the parent . . . 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.” Tenn. Code Ann. §36-1-113(i)(2).

The trial court determined that this factor was not applicable; thus, it did not weigh in favor or against termination.

## 3. Regular Visitation or Contact

The third factor to be considered is “[w]hether the parent . . . has maintained regular visitation or other contact with the child.” Tenn. Code Ann. § 36-1-113(i)(3).

The trial court made the finding that “[a]s discussed above, Father has not maintained regular visitation or other contact with the children for many years. He has not maintained contact by calls, cards or letters.” We have determined that the evidence does not preponderate against this finding.

## 4. Meaningful Relationship

The fourth factor is “[w]hether a meaningful relationship has otherwise been established between the parent . . . and the child.” Tenn. Code Ann. § 36-1-113(i)(4).

Father acknowledged that he had not maintained a relationship with the Children, and the trial court found that “there is no meaningful relationship existing between Father and the children at this time. They were eighteen months old at the time he left them with their aunts in December of 2019.” They were almost four years old when the case was tried. Accordingly, the evidence does not preponderate against the finding that Father failed to maintain a meaningful relationship with the children.

## 5. Change of Caretakers and Physical Environment

The fifth factor to be considered is “[t]he effect a change of caretakers and physical environment is likely to have on the child’s emotional, psychological and medical condition.” Tenn. Code Ann. § 36-1-113(i)(5).

The trial court made the following specific findings:

The girls are thriving in their current environment. They are bonded to Petitioner who has provided for their daily needs for nearly all their lives. They have lived in a safe, stable environment for more than two years now. Their medical needs have been met primarily by the Petitioner and they are now hitting and exceeding all developmental milestones. A change of their

caretaker and physical environment would have a negative impact on their emotional and psychological development.

Based on these findings, the court concluded that “a change in their physical environment would not be in the children’s best interests.” We agree.

#### 6. Abusive Behavior

The sixth factor to be considered is “[w]hether the parent . . . , or other person residing with the parent . . . , has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household.” Tenn. Code Ann. § 36-1-113(i)(5).

The trial court expressed its ruling on this factor as follows: “As set forth above, the witnesses and the Court do have concern about [Father’s Wife], but there was not proof by a preponderance of the evidence of brutality, physical, sexual, emotional or psychological abuse, or neglect toward the children. Therefore, this factor is not as weighty or relevant to the Court’s inquiry.” Applying a strict construction to the meaning of the operative terms, we do not disagree.

#### 7. Physical Environment of Parent’s Home

The seventh factor is “[w]hether the physical environment of the parent’s . . . home is healthy and safe, whether there is criminal activity in the home, or whether there is use of alcohol, controlled substances or controlled substance analogues as may render the parent or guardian consistently unable to care for the child in a safe and stable manner.” Tenn. Code Ann. § 36-1-113(i)(7).

The trial court determined that this factor was not applicable because it “did not hear much evidence about the physical environment of [Father’s] home, other than that he remains married and committed to Rachel A.” We agree.

#### 8. Mental and Emotional State

The eighth factor to be considered is “[w]hether 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.” Tenn. Code Ann. § 36-1-113(i)(8).

The trial court stated that it “did not hear evidence regarding [Father’s] mental or emotional status in order to make findings on this factor.” Thus, it does not weigh in favor or against termination.

#### 9. Child Support

The ninth factor is “[w]hether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.” Tenn. Code Ann. § 36-1-113(i)(9).

The trial court found that “Father has not ever paid support for children.” The evidence fully supports this finding.

After having considered the nine statutory factors set forth in Tennessee Code Annotated § 36-1-113(i), the trial court concluded that termination of Father’s parental rights was in the Children’s best interest.

Following a thorough review of the trial court’s findings of fact concerning the relevant best interest factors, we have determined that the facts as found by the trial court are supported by a preponderance of the evidence. We also agree with the trial court that the combined weight of those facts established by clear and convincing evidence that termination of Father’s parental rights is in the best interests of the Children. *See In re Kaliyah S.*, 455 S.W.3d 533, 555 (Tenn. 2015) (“After making the underlying factual findings, the trial court should then consider the combined weight of those facts to determine whether they amount to clear and convincing evidence that termination is in the child’s best interest.”).

#### IN CONCLUSION

Having affirmed the trial court’s findings that grounds exist for terminating the parental rights of Father and that termination of his parental rights is in the best interest of the Children, we affirm the termination of the parental rights of Father. Costs of appeal are assessed against the appellant, Joshua A.

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FRANK G. CLEMENT JR., P.J., M.S.