

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
Assigned on Briefs August 1, 2018

IN RE STEVEN W. ET AL.<sup>1</sup>

Appeal from the Juvenile Court for Davidson County  
No. 227124 Alan Edward Calhoun, Special Judge

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No. M2018-00154-COA-R3-PT

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This is a termination of parental rights case, focusing on Steven W., Jr. (“Steven”); Joseph W.; Jorrie W.; Lyric W.; and Timothy W., the minor children (“the Children”) of Tabbitha S. (“Mother”) and Steven W. (“Father”). The Children were taken into protective custody by the Tennessee Department of Children’s Services (“DCS”) on August 14, 2015, upon investigation into allegations of inadequate supervision, lack of stable housing, child abuse, substance abuse, and domestic violence concerns. The Davidson County Juvenile Court (“trial court”) subsequently adjudicated the Children dependent and neglected as to both parents in an order entered May 16, 2016. On March 3, 2017, DCS filed a petition to terminate the parental rights of Mother and Father to the Children. Following a bench trial, the trial court granted the petition as to both parents in an order entered on December 28, 2017.<sup>2</sup> As pertinent to this appeal, the trial court found that statutory grounds existed to terminate Mother’s parental rights upon its finding by clear and convincing evidence that (1) Mother had abandoned the Children by willfully failing to financially support them, (2) Mother had abandoned the Children by exhibiting behavior prior to her incarceration that demonstrated wanton disregard for the Children’s welfare, (3) Mother had failed to substantially comply with the reasonable responsibilities and requirements of the permanency plans, (4) the conditions leading to the Children’s removal from Mother’s home persisted, and (5) Mother had failed to manifest an ability and willingness to personally assume custody or financial responsibility for the Children. The trial court further found by clear and convincing evidence that termination of Mother’s parental rights was in the Children’s best interest. Mother has appealed. Having determined that DCS failed to present clear and convincing evidence that

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<sup>1</sup> We note that several appellate filings list the spelling of the eldest child’s name in the style of the case as “Stephen.” However, the termination petition and order, pleadings filed in the trial court, and the applicable birth certificate reflect that the eldest child’s name is actually spelled, “Steven.” We have therefore corrected the spelling in the style of this opinion.

<sup>2</sup> Father has not appealed the termination of his parental rights to the Children. We will therefore confine our analysis to those facts relevant to Mother’s appeal.

Mother's failure to financially support the Children was willful, we reverse the trial court's finding on that ground. We affirm the trial court's judgment terminating Mother's parental rights to the Children in all other respects.

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

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which ANDY D. BENNETT, J., and J. STEVEN STAFFORD, P.J., W.S., joined.

Beth Matter, Nashville, Tennessee, for the appellant, Tabbitha S.

Herbert H. Slatery, III, Attorney General and Reporter, and Jordan K. Crews, Assistant Attorney General, for the appellee, Tennessee Department of Children's Services.

**OPINION**

I. Factual and Procedural Background

The Children were removed from Mother's home on August 14, 2015, and placed into protective custody by order of the trial court entered on August 18, 2015. At the time, Steven was six years of age, Joseph was four, Jorrie was three, Lyric was two, and Timothy was one. DCS had received an anonymous referral on August 9, 2015, alleging lack of supervision and physical abuse against Mother in regard to Steven and Jorrie. At the time of the August 2015 referral, DCS had received previous referrals concerning the Children in July 2015 and was investigating allegations of sexual abuse as to Steven, Joseph, and Jorrie, as well as an allegation of lack of supervision of all the Children. According to the petition for protective custody order, admitted as an exhibit during the termination proceeding, Mother contacted DCS as the investigation was ongoing and requested that the Children be taken into protective custody because Mother was about to be evicted from her current living situation. Although Father did not reside with Mother at the time of the Children's removal, his name was listed as the father on each of the Children's birth certificates, and no other putative fathers have been identified for any of the Children.<sup>3</sup>

Following a hearing conducted on April 20, 2016, and the announcement of an agreement reached by the parties, the trial court, with Magistrate Melinda Rigsby presiding, adjudicated the Children to be dependent and neglected as to both parents in an order entered May 16, 2016. In this order, presented by DCS as an exhibit during the

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<sup>3</sup> During the termination trial, DCS presented copies of birth certificates for all of the Children and reports from the putative father registry for all of the Children except Lyric.

termination trial, the court specifically found in pertinent part that the Children were dependent and neglected “due to [Mother] being unable to provide stable housing, domestic violence issues, use of illegal drugs, and lack of supervision which led to Jorrie being placed at substantial risk of harm; and [Father] due to domestic violence issues, failure to provide stable housing, and lack of supervision.” The court noted that an investigation had been triggered when Jorrie was injured on August 8, 2015, requiring medical treatment, after a sibling pushed him “over a second story loft wall” inside Mother’s apartment. Mother acknowledges that during this time period in August 2015, DCS also investigated the family when Timothy was found wandering alone two blocks away from Mother’s residence with no shoes. The trial court specified in the adjudicatory order its finding that DCS had “made, and continue[d] to make, reasonable efforts to assist the parents in remedying the conditions that led to removal, or to identify alternate options for placement that will provide permanency for the children.”

Although the trial court maintained legal custody of the Children with DCS in the May 2016 adjudicatory order, the court subsequently noted in the termination order that Steven, Lyric, and Timothy “briefly exited to former foster parents between May 26, 2016 and August 2, 2016, at which time they were returned to the custody of [DCS] and have remained in foster care continuously since that date.” Joseph and Jorrie remained in DCS custody continuously from the date of the Children’s removal from Mother’s home through the termination trial. Joseph and Jorrie were placed with foster parents, L.T. and M.T., on September 29, 2015. According to M.T., who testified during the termination trial, she and L.T. subsequently relocated in order to make it possible for all five of the Children to be placed with them. Following their placement with former foster parents, Steven, Lyric, and Timothy joined Joseph and Jorrie in M.T.’s home in August 2016.

Due to behavior and safety concerns for the other children, DCS removed Steven from M.T.’s home in April 2017. The other four children remained with M.T. at the time of trial. According to M.T., she and L.T. had separated but continued to cooperate as parents, with L.T. providing some daily child care and transportation to each of the four children in their custody. M.T. indicated that she and L.T. were committed to providing long-term care for the Children and were willing to provide a permanent placement for them. M.T. expressed openness to Steven’s returning to her home if safety issues surrounding his behavior could be resolved.

Following Steven’s removal from M.T.’s home in April 2017, he was placed with another foster mother, I.B., who also testified during the termination trial. According to I.B., when Steven first came to her home, it was for a “respite,” and then DCS asked if I.B. could continue to foster Steven and could work with his behavioral issues. I.B. indicated that she felt prepared to work with Steven in part because she was teaching in a juvenile residential treatment facility, working with children ages five to nineteen. She said that she had worked with Steven on redirecting and verbally de-escalating his

behavior, as well as coping and communication skills. I.B. indicated that Steven's behavior had markedly improved and that she was willing to become a permanent placement for Steven if his reunification with the other Children did not later become possible. M.T. and I.B. each respectively testified that they were open to working with each other to maintain Steven's relationship with his siblings.

Curtis McAfee, Jr., who had served as the DCS family services worker for the family since August 2016, testified during the termination trial that Mother had been incarcerated three times while the Children were in protective custody. In the first instance, Mother was incarcerated for TennCare fraud in Marshall County but was subsequently found not guilty of that charge in June 2016. In the second instance, Mother was incarcerated from mid-October 2016 through December 4, 2016, on a charge of violation of probation. According to Mr. McAfee, Mother had tested positive for marijuana and oxycodone after undergoing a drug test administered by her probation officer. Mr. McAfee reported that Mother did eventually complete that probationary period but was then arrested for the third time in June of 2017 on a charge of armed robbery.

As to Mother's previous criminal history, DCS presented during the termination trial a certified copy of Mother's criminal history from Marshall County, which included January 2010 Marshall County Circuit Court judgments reflecting that Mother had pled guilty to multiple counts of forgery up to \$1,000, a class E felony, and had been sentenced to an effective four years of supervised probation and ordered to pay restitution. The criminal history further reflected that Mother was arrested for violation of this probation in February 2010 due to a positive drug screen for marijuana and failure to make a restitution payment. According to this history, Mother was then arrested in April 2011 in Davidson County and pled guilty to one count of forgery under \$500, also a class E felony, in May 2011, for which the Davidson County Criminal Court sentenced her to one year of incarceration, to be served concurrently with her Marshall County sentence. Mother was subsequently released from the Marshall County Jail on December 28, 2011, and placed on two years of supervised probation.

DCS also presented an uncertified copy of a June 22, 2016 judgment reflecting that Mother was found not guilty, following a jury trial, of TennCare Fraud. We note that although no further documentation of Mother's criminal history is in the record on appeal, Mother has not disputed the testimony describing her periods of incarceration while the Children were in protective custody.

Mark Schwartz, the in-home service coordinator for this case with Camelot, a family counseling provider, testified during the termination trial regarding Mother's supervised visits with the Children. Mr. Schwartz stated that by agreement of the therapists working on the case, none of the Children visited with Mother while she was

incarcerated. When she was not incarcerated, Mother was scheduled to participate in supervised visits with the Children twice monthly. Testimony demonstrated that although Mother did participate in visitation, she was often late to visits or had to reschedule. Mother's last visit with the Children occurred on February 20, 2017, after which her visitation was suspended.

Prior to filing the petition for termination of parental rights, DCS developed two permanency plans for the Children and the parents. Both plans were presented as exhibits during the termination proceedings. The first permanency plan was established on September 14, 2015, and ratified by the trial court, with Magistrate Rigsby presiding, on October 27, 2015. The court's order ratifying the plan indicates that Mother and her counsel were present for the permanency plan hearing and that the court reviewed with Mother the statutory termination grounds and statutory definition of abandonment.<sup>4</sup> The trial court found in its order ratifying the initial plan that the placements of the Children were "appropriate and in the children's best interest in that placements meet children's needs; all placed with at least one sibling; doing sibling visitation." The court also found that the stated goal of the plan to "Return to Parent" was appropriate and in the Children's best interest at that time.

Under the initial permanency plan, Mother's relevant responsibilities and requirements were to (1) undergo a mental health assessment and follow all resultant recommendations, (2) undergo a drug and alcohol assessment and follow all resultant recommendations, (3) undergo a parenting assessment and follow all resultant recommendations, (4) obtain and maintain stable housing with documentation of six months' residence, (5) undergo random drug screens, (6) complete domestic violence classes/counseling, and (7) obtain and maintain stable income with documentation of employment. The court specifically found that "[t]he services and goals of the plan are reasonably related to the goal in that [they] address reasons for custody and other identified needs of family." The court also found that DCS was "making reasonable efforts toward reunification or toward making a permanent and appropriate placement for the child[ren] and toward preventing the child[ren] from continuing in custody unnecessarily and achieving the goals set forth in the permanency plan and setting forth responsibilities for treatment for the children." As to child support, the court referred the case "for assessment for payment by the mother and father for child support."

A revised permanency plan was established on September 16, 2016, and ratified by the trial court on September 20, 2016, following a hearing with Magistrate Rigsby presiding. Mother and her counsel were again present during the hearing, and Mother

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<sup>4</sup> Mother and her counsel were also listed as participants in the child and family team meeting during which the initial permanency plan was developed, although the last few pages of the plan, where participants would typically sign the document, are missing from the exhibit presented at trial. On appeal, Mother does not dispute that she was aware of the initial plan requirements.

indicated through her signature on the permanency plan that she had participated in the plan's development. Mother's requirements and responsibilities under this revised plan remained essentially as under the initial plan with the added action step, as relevant to this appeal, that Mother would follow the rules of her probation. In addition, the requirements from the initial plan for Mother to complete a parenting assessment and domestic violence classes and counseling were delineated in action steps in the revised plan for Mother to "actively participate in non-offender classes with a component of parenting education" and "actively participate in counseling sessions to include addressing the areas related to victimization, healing, and safety."

In its order ratifying the revised plan, the trial court directed that "the goal of Adoption be added as being in the children's best interest . . . due to [the] length of time [the] children have been [in] custody." The court again found that the services provided and requirements for the parents were reasonably related to the goals of the permanency plan. The court also found that DCS had been making reasonable efforts toward "reunification or toward making a permanent and appropriate placement" for the Children. However, the court determined that Mother was not in substantial compliance with the initial plan because she did not "have housing; [had] pending criminal matters; [and] ha[d] not complied with services." The court retained the Children in foster care and noted in its order that DCS intended to file a termination petition as to both parents.

On March 3, 2017, DCS filed a petition to terminate the parental rights of Mother and Father, alleging, as to both parents, statutory grounds of abandonment by failure to financially support the Children, substantial noncompliance with the permanency plans, and failure to personally assume custody or financial responsibility for the Children. Specifically as to Mother only, DCS further alleged statutory grounds of abandonment by failure to establish a suitable home, abandonment by conduct exhibiting wanton disregard for the Children's welfare prior to Mother's incarceration, and persistence of the conditions leading to removal of the Children from Mother's home. Specifically as to Father only, DCS also alleged the statutory ground of severe child abuse against Lyric. The trial court subsequently appointed counsel to represent each parent and attorney Kelli Barr Summers as guardian *ad litem*.

The trial court conducted a bench trial over the course of two days on November 8 and 9, 2017, announcing its ruling during a separate hearing on November 20, 2017, with Magistrate Alan Edward Calhoun presiding as a special judge.<sup>5</sup> DCS presented testimony from Mr. McAfee of DCS; Mr. Schwartz of Camelot; the foster mothers, M.T. and I.B.; four therapists from the Nashville Children's Alliance, each of whom had worked individually with one of the four younger children; and a therapist from Camelot who had

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<sup>5</sup> Davidson County Juvenile Court Judge Sheila D.J. Calloway entered an order on November 3, 2017, appointing Magistrate Calhoun as a "substitute judge" to hear this matter pursuant to Tennessee Code Annotated § 17-2-118 (2009).

worked individually with Steven. Father did not appear for trial, and upon motion, his counsel was allowed to withdraw prior to the presentation of proof.

Mother appeared with her counsel at the beginning of trial. However, following the mid-day recess on the first day, Mother sent word to the court through her counsel that she was “very upset” and felt unable to return to court that day. Mother’s counsel further reported that Mother had indicated a wish to surrender her parental rights although not at that time. The trial court proceeded with the trial, and Mother’s counsel continued to represent her and cross-examine witnesses. On the second day of trial, Mother sent word through her counsel that she had been unable to secure transportation to court but that she had decided to continue “fight[ing]” the termination of her parental rights. The court proceeded with trial through the close of proof that day. Although Mother failed to appear in court after the first half-day of trial and did not testify, she was represented by counsel at all times.

In an order entered December 28, 2017, the trial court determined that grounds existed to terminate the parental rights of both parents. The court found by clear and convincing evidence that both parents had willfully abandoned the Children by failing to provide financial support during the respective applicable periods, failed to substantially comply with the reasonable responsibilities and requirements of the permanency plans, and failed to manifest an ability and willingness to personally assume physical and legal custody or financial responsibility for the Children. Specifically as to Mother, the court also found that the conditions leading to removal of the Children from Mother’s home persisted, that Mother had abandoned the Children by failing to establish a suitable home, and that Mother had exhibited conduct prior to her incarceration demonstrating wanton disregard for the Children’s welfare. In addition, as to Father, the court found that Lyric had been the victim of severe child abuse constituting aggravated sexual battery. The court further found by clear and convincing evidence that termination of Mother’s and Father’s parental rights was in the best interest of the Children. Mother timely appealed.

## II. Issues Presented

On appeal, Mother presents seven issues, which we have restated slightly as follows:

1. Whether the trial court erred by finding that DCS made reasonable efforts to assist Mother in an attempt to reunify Mother with the Children or place the Children in a relative’s home.<sup>6</sup>

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<sup>6</sup> As explained more fully in subsequent sections of this opinion, we will analyze Mother’s issue regarding whether DCS made reasonable efforts to assist her within our analyses of whether Mother abandoned the Children by failing to establish a suitable home, *see* Tenn. Code Ann. § 36-1-102(1)(A)(ii) (2017), and the Children’s best interest, *see* Tenn. Code Ann. § 36-1-113(i)(2) (2017). *See also In re*

2. Whether the trial court erred in finding by clear and convincing evidence that Mother abandoned the Children by willfully failing to financially support them.
3. Whether the trial court erred in finding by clear and convincing evidence that Mother abandoned the Children by failing to establish a suitable home for them.
4. Whether the trial court erred in finding by clear and convincing evidence that Mother, prior to her incarceration, abandoned the Children by exhibiting wanton disregard for the Children's welfare.
5. Whether the trial court erred in finding by clear and convincing evidence that Mother was substantially noncompliant with her permanency plans.
6. Whether the trial court erred in finding by clear and convincing evidence that the conditions leading to the Children's removal from Mother's custody persisted.
7. Whether the trial court erred in finding by clear and convincing evidence that termination of Mother's parental rights to the Children was in the Children's best interest.

### III. Standard of Review

In a termination of parental rights case, this Court has a duty 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 evidence preponderates against those findings. *See* Tenn. R. App. P. 13(d); *see also In re Carrington H.*, 483 S.W.3d 507, 523-24 (Tenn. 2016); *In re F.R.R., III*, 193 S.W.3d at 530. Questions of law,

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*Kaliyah S.*, 455 S.W.3d 533, 555 (Tenn. 2015). As to Mother’s argument that DCS was required to demonstrate in the termination proceeding that it had made reasonable efforts to place the Children with a relative, we agree with DCS that the Children’s placements in foster care were part of the dependency and neglect proceeding adjudicated in May 2016, during which Mother did not object to the Children’s non-relative placements. *See* Tenn. Code Ann. § 37-2-403 (2014). None of the statutory grounds for termination of parental rights at issue here are impacted by whether DCS made reasonable efforts to place the Children with a relative. We determine this portion of Mother’s issue concerning reasonable efforts to be pretermitted as moot.

however, are reviewed *de novo* with no presumption of correctness. See *In re Carrington H.*, 483 S.W.3d at 524 (citing *In re M.L.P.*, 281 S.W.3d 387, 393 (Tenn. 2009)). The trial court’s determinations regarding witness credibility are entitled to great weight on appeal and shall not be disturbed absent clear and convincing evidence to the contrary. See *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002).

“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). It is well established, however, that “this 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)). As our Supreme Court has explained:

The parental rights at stake are “far more precious than any property right.” *Santosky [v. Kramer]*, 455 U.S. [745,] 758-59 [(1982)]. Termination of parental rights has the legal effect of reducing the parent to the role of a complete stranger and of “[severing forever all legal rights and obligations of the parent or guardian of the child.” Tenn. Code Ann. § 36-1-113(1)(1); see also *Santosky*, 455 U.S. at 759 (recognizing that a decision terminating parental rights is “final and irrevocable”). In light of the interests and consequences at stake, parents are constitutionally entitled to “fundamentally fair procedures” in termination proceedings. *Santosky*, 455 U.S. at 754; see also *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty, N.C.*, 452 U.S. 18, 27 (1981) (discussing the due process right of parents to fundamentally fair procedures).

Among the constitutionally mandated “fundamentally fair procedures” is a heightened standard of proof—clear and convincing evidence. *Santosky*, 455 U.S. at 769. This standard minimizes the risk of unnecessary or erroneous governmental interference with fundamental parental rights. *Id.*; *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010). “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 at 596 (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 Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005); *In re M.A.R.*, 183 S.W.3d 652, 660 (Tenn. Ct. App. 2005).

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In light of the heightened burden of proof in termination proceedings, however, the reviewing court must make its 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 Bernard T.*, 319 S.W.3d at 596-97.

*In re Carrington H.*, 483 S.W.3d at 522-24. “[P]ersons seeking to terminate [parental] rights must prove all the elements of their case by clear and convincing evidence,” including statutory grounds and the best interest of the child. *See In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010).

When interpreting statutes, we adhere to the following longstanding principles:

When dealing with statutory interpretation, well-defined precepts apply. Our primary objective is to carry out legislative intent without broadening or restricting the statute beyond its intended scope. *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002). In construing legislative enactments, we presume that every word in a statute has meaning and purpose and should be given full effect if the obvious intention of the General Assembly is not violated by so doing. *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn. 2005). When a statute is clear, we apply the plain meaning without complicating the task. *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004). Our obligation is simply to enforce the written language. *Abels ex rel. Hunt v. Genie Indus., Inc.*, 202 S.W.3d 99, 102 (Tenn. 2006). It is only when a statute is ambiguous that we may reference the broader statutory scheme, the history of the legislation, or other sources. *Parks v. Tenn. Mun. League Risk Mgmt. Pool*, 974 S.W.2d 677, 679 (Tenn. 1998). Further, the language of a statute cannot be considered in a vacuum, but “should be construed, if practicable, so that its component parts are consistent and reasonable.” *Marsh v. Henderson*, 221 Tenn. 42, 424 S.W.2d 193, 196 (1968). Any interpretation of the statute that “would render one section of the act repugnant to another” should be avoided. *Tenn. Elec. Power Co. v. City of Chattanooga*, 172 Tenn. 505, 114 S.W.2d 441, 444 (1937). We also must presume that the General Assembly was aware of any prior enactments at the time the legislation passed. *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995).

*In re Estate of Tanner*, 295 S.W.3d 610, 613-14 (Tenn. 2009).

#### IV. Grounds for Termination of Mother's Parental Rights

Tennessee Code Annotated § 36-1-113 (2017) lists the statutory requirements for termination of parental rights, providing in relevant part:

- (a) The chancery and circuit courts shall have concurrent jurisdiction with the juvenile court to terminate parental or guardianship rights to a child in a separate proceeding, or as a part of the adoption proceeding by utilizing any grounds for termination of parental or guardianship rights permitted in this part or in title 37, chapter 1, part 1 and title 37, chapter 2, part 4.

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- (c) Termination of parental or guardianship rights must be based 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) That termination of the parent's or guardian's rights is in the best interests of the child.

The trial court determined that the evidence clearly and convincingly supported a finding of six statutory grounds to terminate Mother's parental rights: (1) abandonment through willful failure to financially support the Children, (2) abandonment through failure to provide a suitable home for the Children, (3) abandonment through conduct exhibiting wanton disregard for the Children's welfare prior to Mother's incarceration, (4) substantial noncompliance with the reasonable requirements of the permanency plans, (5) persistence of the conditions leading to the Children's removal from Mother's custody, and (6) failure to manifest an ability and willingness to assume custody or financial responsibility for the Children. We will address each statutory ground in turn.

##### A. Statutory Abandonment

Three of the statutory grounds found by the trial court involve statutory abandonment: (1) willful failure to financially support, (2) failure to establish a suitable home, and (3) conduct prior to incarceration exhibiting wanton disregard for the Children's welfare. *See* Tenn. Code Ann. § 36-1-102 (2017). Tennessee Code Annotated § 36-1-113(g)(1) (2017) provides, as relevant to this action:

(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 nonexclusive, 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; . . .

#### 1. Willful Failure to Support

As to the statutory ground of abandonment through willful failure to support, the version of Tennessee Code Annotated § 36-1-102(1)(A) (2017) in effect at the time of the petition’s filing in this action defined abandonment, in pertinent part, as:<sup>7</sup>

(i) 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; . . .

\* \* \*

(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

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<sup>7</sup> Effective July 1, 2018, the General Assembly has amended Tennessee Code Annotated § 36-1-102(A) to substitute the phrase, “proceeding, pleading, petition, or any amended petition,” in place of “proceeding or pleading.” See 2018 Tenn. Pub. Acts, Ch. 875, § 1 (H.B. 1856). Pursuant to the same amendment, the words, “willful” and “willfully,” have been deleted wherever they previously appeared in subsection -102(1), and a new subsection, -102(1)(I), has been added, providing that the “absence of willfulness” shall be an affirmative defense to abandonment for failure to visit or support, for which “[t]he parent or guardian shall bear the burden of proof.” See *id.* at § 2. Inasmuch as the instant action was filed in March 2017, we will confine our analysis in this Opinion to the version of Tennessee Code Annotated § 36-1-102 in effect at that time.

months immediately preceding such parent's or guardian's incarceration . . . .

Mother contends that the trial court erred by finding that she willfully failed to financially support the Children or make reasonable payments toward their support during the statutorily determinative period. Mother specifically argues that the trial court erred in finding that (1) Mother was required to pay monetary support when she had not been court-ordered to do so, (2) it was not relevant to set the dates of the statutorily determinative period for this ground, (3) Mother had paid no support when she had provided some meals and clothes for the Children during visits, and (4) Mother had the ability to pay support. Upon careful review, we conclude that DCS failed to present clear and convincing evidence of Mother's periods of incarceration to facilitate determination of the relevant four-month period and that the trial court erred in finding such a determination attempt to be "largely irrelevant" in this case. We further conclude that the evidence presented by DCS concerning Mother's ability to pay support at all times relevant to possible determinative periods, and thereby her willfulness in failing to do so, did not rise to the level of clear and convincing proof.

At the outset, we note that it is well settled in Tennessee that every parent is presumed to have knowledge of a parent's duty to support his or her minor children regardless of whether a court order to that effect is in place. *See* Tenn. Code Ann. § 36-1-102(1)(H) (2017) ("Every parent who is eighteen (18) years of age or older is presumed to have knowledge of a parent's legal obligation to support such parent's child or children[.]"); *Kirkpatrick v. O'Neal*, 197 S.W.3d 674, 680 (Tenn. 2006) (holding "that a parent is liable for the support of his or her child throughout minority, with or without the existence of a court order, and that parents are liable for support retroactively from the date custody is granted to another person."). We therefore find Mother's argument that her failure to pay support was not willful due to the absence of a court order concerning support to be unavailing.

Likewise, Mother's corresponding assertion that her failure to pay support was not willful because DCS personnel had not "discussed" the need for monetary support with her is unavailing. In addition to the legal presumption that Mother knew her Children required support, the trial court documented in each of its permanency plan orders that Mother had signed a copy of the criteria and procedures for termination of parental rights and that the law related to abandonment had been explained to Mother by the court.

In its final order, the trial court made the following specific findings of fact, in pertinent part, in determining that Mother had willfully failed to financially support the Children:

The Court finds that [Mother] had a job for the majority of the time the children were in care. In those times she was without employment, she quickly obtained employment. [Mother] often indicated she had to arrive late to visits or leave visits early due to employment commitments. [Mother] never indicated she had any disability that inhibited her ability to work. The Court therefore believes [Mother] was able bodied and capable of working and earning an income.

While [Mother] was in and out of jail for various issues, in various counties, throughout the case, a specific calculation of which four month period to look at for the ground of Abandonment for Failure to Support by an Incarcerated Parent as to [Mother] is largely irrelevant because she never paid any support for the children. The Court acknowledges [Mother] did provide some necessities at some visits.

The trial court thereby found that the dates of the statutorily determinative period for this ground were irrelevant as to Mother because she had failed to pay support during the entire time that the Children were in protective custody from August 14, 2015, through the termination petition's filing on March 3, 2017. In so finding, the trial court also found that Mother had the ability to pay support at all times during this nearly seventeen-month period despite her intermittent periods of incarceration. *See In re R.L.F.*, 278 S.W.3d 305, 320 (Tenn. Ct. App. 2008), *overruled on other grounds by In re Kaliyah S.*, 455 S.W.3d 533 (Tenn. 2015) (“A parent who fails to support a child because he or she is financially unable to do so is not willfully failing to support the child.” (quoting *In re M.J.M., Jr.*, No. M2004-02377-COA-R3-PT, 2005 WL 873302, at \*8 n.17 (Tenn. Ct. App. Apr. 14, 2005))).

As this Court has previously explained:

[T]he element of willfulness is essential and central to the 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). Willfulness in the context of termination proceedings does not require the same standard of culpability as is required by the penal code, nor does it require that the parent acted with malice or ill will. *In re Audrey S.*, 182 S.W.3d at 863; *see also In re S.M.*, 149 S.W.3d 632, 642 (Tenn. Ct. App. 2004). Rather, a parent's conduct must have been willful in the sense that it consisted of intentional or voluntary acts, or failures to act, rather than accidental or inadvertent acts. *In re Audrey S.*, 182 S.W.3d at 863. “A parent cannot be said to have abandoned a child when his failure to visit or support is due to circumstances outside his control.” *In re Adoption of Angela E.*, 402 S.W.3d [636,] 640 [(Tenn.

2013)] (citing *In re Adoption of A.M.H.*, 215 S.W.3d at 810 (holding that the evidence did not support a finding that the parents “intentionally abandoned” their child)).

*In re Alysia S.*, 460 S.W.3d 536, 565-66 (Tenn. Ct. App. 2014), *perm. app. denied* (Tenn. Mar. 16, 2015). Although the General Assembly has since amended Tennessee Code Annotated § 36-1-102(1)(A) to render the absence of willfulness to be solely an affirmative defense for cases filed as of the amendment’s effective date of July 1, 2018, *see* 2018 Tenn. Pub. Acts, Ch. 875, § 2 (H.B. 1856), the amendment does not apply to the instant action commenced in March 2017.

We are unable to agree with the trial court that the statutorily determinative period was “largely irrelevant” in this case. We find this deficiency to be especially problematic because it is necessary to view the evidence of Mother’s ability to pay support in light of the determinative period. On appeal, DCS asserts that the determinative period for this ground spanned “mid-June to mid-October 2016,” based on Mr. McAfee’s testimony that Mother was incarcerated in “mid-October” of 2016 and released on December 4, 2016, three months before the March 3, 2017 filing of the termination petition. Inasmuch as Mother’s December 2016 release date was less than four months prior to the filing of the termination petition, DCS is correct that if Mother had not been incarcerated for four consecutive months prior to mid-October 2016, the determinative period would have consisted of the four months immediately preceding her October 2016 incarceration. *See* Tenn. Code Ann. § 36-1-102(1)(A)(iv).

During closing argument at trial, DCS’s counsel pointed out an October 13, 2016 start date for Mother’s incarceration that was included in the termination petition. Mother’s counsel did not object to the reference of this exact date. This Court previously has determined that, pursuant to Tennessee Code Annotated § 36-1-102(1)(A)(iv), the four-month period “immediately preceding” the parent’s incarceration ends on the day before the actual date of incarceration. *See, e.g., In Re Jayden B.T.*, No. E2014-00715-COA-R3-PT, 2015 WL 3876573, at \*4 (Tenn. Ct. App. June 23, 2015), *perm. app. denied* (Tenn. Sept. 25, 2015); *In re D.H.B.*, No. E2014-00063-COA-R3-PT, 2015 WL 1870303, at \*8 (Tenn. Ct. App. Apr. 23, 2015). Therefore, if Mother had not been incarcerated for four months prior to her October 13, 2016 arrest, the statutorily determinative period prior to Mother’s incarceration in this case would have spanned from June 13, 2016, through October 12, 2016.

However, evidence in the record reflects that Mother was incarcerated for a brief period of time in July 2016 and possibly in June 2016 as well, indicating that the determinative period claimed by DCS may not have been a consecutive four-month period of nonincarceration. As applicable to situations such as this one, the General Assembly amended Tennessee Code Annotated § 36-1-102(1)(A)(iv) in 2016, *see* 2016

Tenn. Pub. Acts, Ch. 919, § 1 (S.B. 1393), to “provide a different method of calculating the four-month period for purposes of determining willful failure to visit or support for an incarcerated parent.” See *In re Travis H.*, No. E2016-02250-COA-R3-PT, 2017 WL 1843211, at \*9 (Tenn. Ct. App. May 5, 2017), *perm. app. denied* (Tenn. July 31, 2017).

This added language provides:

If the four-month period immediately preceding the institution of the action or the four-month period immediately preceding such parent’s incarceration is interrupted by a period or periods of incarceration, and there are not four (4) consecutive months without incarceration immediately preceding either event, a four-month period shall be created by aggregating the shorter periods of nonincarceration beginning with the most recent period of nonincarceration prior to commencement of the action and moving back in time. Periods of incarceration of less than seven (7) days duration shall be counted as periods of nonincarceration. Periods of incarceration not discovered by the petitioner and concealed, denied, or forgotten by the parent shall also be counted as periods of nonincarceration. A finding that the parent has abandoned the child for a defined period in excess of four (4) months that would necessarily include the four (4) months of nonincarceration immediately prior to the institution of the action, but which does not precisely define the relevant four-month period, shall be sufficient to establish abandonment[.]

Tenn. Code Ann. § 36-1-102(1)(A)(iv) (2017). In applying this statutory language, this Court has determined that in a situation such as the one at bar when there are not four consecutive months without incarceration immediately preceding either the filing of the termination petition or the parent’s most recent incarceration prior to the petition’s filing, “the trial court [is] required to determine the four-month period by piecing together [the parent’s] periods of non-incarceration prior to the filing of the termination petition.” *In re Travis H.*, 2017 WL 1843211, at \*9; see, e.g., *In re Addalyne S.*, 556 S.W.3d 774, 790 (Tenn. Ct. App. Apr. 26, 2018), *perm. app. denied* (Tenn. July 30, 2018) (determining the relevant four-month period for abandonment through willful failure to support to be the week between the father’s release from incarceration and the filing of the termination petition aggregated with a period of three months and three weeks preceding his incarceration).

Regarding Mother’s periods of incarceration in the months preceding her October 2016 incarceration, DCS presented notes from the former case worker, Brittany Coughlin, authenticated during Mr. Schwartz’s testimony, in which Ms. Coughlin stated that Mother was arrested on July 22, 2016, in Maury County on a probation violation with a court date set for August 8, 2016. In her notes, Ms. Coughlin stated: “Next

parent/child visit will not take place until [Mother's] release from jail." Mr. Schwartz's notes delineating Mother's "Visit Attempts," presented during trial, also reflect that Mother cancelled her scheduled July 22, 2016 visit with the Children due to an arrest for probation violation, although Mr. Schwartz stated in his notes that Mother was being held in Marshall County. In his record of visit attempts, Mr. Schwartz also recorded Mother's attempts to complete parenting sessions. He listed a scheduled parenting session on August 3, 2016, which Mother cancelled due to "car trouble." This indicates that Mother was not incarcerated on August 3, 2016, but we are unable to discern from the record exactly how long Mother remained incarcerated between her arrest on July 22, 2016, and the attempted parenting session on August 3, 2016. If this incarceration spanned at least seven days, it would prevent the four-month period from June 12, 2016, to October 13, 2016, from counting as a consecutive period of nonincarceration. *See* Tenn. Code Ann. § 36-1-102(1)(A)(iv) ("Periods of incarceration of less than seven (7) days duration shall be counted as periods of nonincarceration.").

DCS also presented a Marshall County judgment reflecting that on June 22, 2016, Mother was found not guilty by a jury on a charge of TennCare fraud with an offense date listed as May 25, 2015. It is not clear from the record whether Mother was incarcerated for any period of time surrounding her June 2016 trial. Although Mr. McAfee testified that Mother's arrest for TennCare fraud began one of her three periods of incarceration during the time that the Children were in protective custody, the record offers no indication of exactly when Mother was arrested on the TennCare fraud charge or how long she was incarcerated. We glean from Mr. Schwartz's record of visit attempts and Ms. Coughlin's notes that Mother participated in visits with the Children on May 26, 2016; June 3, 2016; and June 10, 2016, with a shortened visit on May 26 due to the maternal grandmother's hospitalization and a shortened visit on June 3 due to Mother's "work schedule." We can thereby surmise that Mother was not incarcerated on May 26, 2016, and on June 10, 2016, prior to the June 22, 2016 judgment. However, we are unable to discern from the record whether Mother was incarcerated on any of the days between these dates. Again, if this incarceration spanned at least seven days, it would also prevent the four-month period from June 13, 2016, to October 12, 2016, from standing as a consecutive period of nonincarceration. *See id.*

In the event that the trial court had been able to find one or both of the incarceration events occurring in June to July 2016 to be longer than seven days in duration, the trial court should have created a four-month determinative period "by aggregating the shorter periods of nonincarceration beginning with the most recent period of nonincarceration prior to commencement of the action and moving back in time." *See* Tenn. Code Ann. § 36-1-102(1)(A)(iv). Such an aggregate period would have consisted of the three months between Mother's release from jail on December 4, 2016, and the termination petition's filing on March 3, 2017, plus one month prior to Mother's most recent incarceration on October 13, 2016. This would have yielded an aggregate

determinative period of September 14, 2016, to October 13, 2016, plus December 4, 2016, to March 3, 2017.

Instead, the trial court essentially found the entire seventeen months that the Children were in protective custody to be the statutorily determinative period because Mother had not made payments of financial support during this time and had been sporadically employed. DCS asserts that an “alternative” finding regarding the four-month period for purposes of abandonment through failure to visit or support is provided for in the last sentence of the language added by the 2016 amendment: “A finding that the parent has abandoned the child for a defined period in excess of four (4) months that would necessarily include the four (4) months of nonincarceration immediately prior to the institution of the action, but which does not precisely define the relevant four-month period, shall be sufficient to establish abandonment[.]” We determine that to interpret the last sentence of subsection -102(1)(A)(iv) as relieving the trial court of the duty to set a relevant time period would be to negate the effect of the preceding sentences in the statute that explain how staggered periods of nonincarceration should be calculated. *See In re Estate of Tanner*, 295 S.W.3d at 614 (“Any interpretation of the statute that ‘would render one section of the act repugnant to another’ should be avoided.” (quoting *Tenn. Elec. Power Co. v. City of Chattanooga*, 114 S.W.2d 441, 444 (1937))). Nonetheless, the trial court’s determination of the entire time the Children were in protective custody as the relevant time period could be considered harmless error if proof of abandonment through the parent’s willful failure to visit or support were clear and convincing for the entire time period, “encompass[ing] the correct determinative period.” *See In re Savanna C.*, No. E2016-01703-COA-R3-PT, 2017 WL 3833710, at \*9 (Tenn. Ct. App. Apr. 18, 2017).

However, the trial court’s finding in this regard is particularly problematic in this case because evidence presented of Mother’s income was sparse during the two possible determinative periods and indeed throughout the seventeen months the Children were in protective custody. The trial court found that Mother “had a job for the majority of the time” that the Children were in custody and that she “quickly obtained employment” when she was between jobs. Reviewing Ms. Coughlin’s notes from when the Children first came into custody, Mr. McAfee testified that in September 2015, Mother had reported working at Standard Candy and then subsequently at Newk’s and Panera Bread. When questioned regarding where Mother had reported working since Mr. McAfee had taken over the case in August 2016, Mr. McAfee stated that Mother had reported working variously at “Charlie Bob’s, Newk’s, Panera Bread, Dunkin’ Donuts,” with the latest employment at Dunkin’ Donuts beginning in March 2017, the month of the termination petition’s filing. Other than offering dates of September 2015 and March 2017 for specific employment, Mr. McAfee was unclear concerning when Mother had held her various jobs. He acknowledged that Mother had never provided him with pay stubs or other documentation of employment.

Ms. Coughlin's notes presented as an exhibit, which span entries dated August 18, 2015, through July 25, 2016, mention Mother's employment at Newk's in September 2015 and at Panera Bread in September, October, and November 2015. However, Ms. Coughlin's notes for these months reflect no record of pay stubs or other employment documentation. According to Ms. Coughlin's notes, a supervisor at Panera Bread told her that Mother had been "fired" in early February 2016. The next mention of Mother's employment in Ms. Coughlin's notes is in an entry dated May 16, 2016, in which Ms. Coughlin wrote that Mother "currently works at Little Choo Choo BBQ" and had cancelled a visit due to her work schedule. Ms. Coughlin reported requesting proof of employment from Mother on June 8, 2016, to which Mother purportedly replied that she would seek some sort of documentation but that she was "paid in cash."

In Mr. Schwartz's record of Mother's "Visit Attempts," the earliest indication of a conflict between Mother's work schedule and a visit with the Children occurred on June 3, 2016. Mr. Schwartz also noted that Mother was "working late" on August 8, 2016, and that her visits were shortened due to her work schedule on December 18, 2016; January 23, 2017; and February 20, 2017. No documentation of Mother's income or monthly living expenses was presented at trial.

Mother does not dispute that she made no monetary payments toward the Children's support while they were in protective custody. As the trial court found, however, Mother did provide "some necessities at some visits," including meals for the Children, diapers for the younger children, and some clothing for Jorrie. M.T. also testified that Mother had provided some Christmas gifts for the Children. These items may well have amounted to merely token support, but it is difficult to substantiate such a conclusion without some evidence of the amount of Mother's income and expenses. *See* Tenn. Code Ann. § 36-1-102 (1)(B) (2017) (defining "token support" to mean that "the support, under the circumstances of the individual case, is insignificant given the parent's means") (emphasis added).

Under the version of the statute in effect at the time of this action's commencement, DCS had the burden of proving by clear and convincing evidence that Mother had the ability to provide financial support during the relevant statutory period. *See In re Seth Mc.*, No. M2017-02562-COA-R3-PT, 2018 WL 3060366, at \*5 (Tenn. Ct. App. June 20, 2018) ("Without evidence to establish that Mother had the ability to pay support for her children during the relevant time period, we conclude that DCS failed to show by clear and convincing evidence that Mother failed to support or make reasonable payments toward the support of her children to prove the ground of abandonment set forth in Tenn. Code Ann. § 36-1-102(1)(A)(iv)."). Having determined that DCS failed to clearly demonstrate Mother's relevant periods of incarceration to facilitate a determination of the statutorily determinative period, that the trial court erred in declining

to attempt such a determination, and that DCS's proof regarding Mother's ability to pay during all possibly relevant periods failed to rise to the level of clear and convincing, we further determine that the trial court's finding that Mother abandoned the Children by willfully failing to financially support them should be reversed.

## 2. Failure to Establish a Suitable Home

The trial court also found by clear and convincing evidence that Mother had abandoned the Children by failing to establish a suitable home during the applicable statutory period despite DCS's reasonable efforts to assist her. Mother argues that the trial court erred in finding clear and convincing evidence of this ground because DCS did not make reasonable efforts to assist her during the determinative period and because she obtained stable housing for a period of time. Upon careful review, we agree with the trial court.

Regarding the definition of abandonment applicable to this ground, the version of Tennessee Code Annotated § 36-1-102(1)(A)(ii) (2017) in effect when the instant action commenced provided:<sup>8</sup>

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<sup>8</sup> Effective July 1, 2018, Tennessee Code Annotated § 36-1-102(1)(A)(ii) has been amended to substitute the following language in place of the former version:

- (a) The child has been removed from the home or the physical or legal custody of a parent or parents or guardian or guardians by a court order at any stage of proceedings in which a petition has been filed in the juvenile court alleging that a child is a dependent and neglected child, and the child was placed in the custody of the department or a licensed child-placing agency;
- (b) 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
- (c) For a period of four (4) months following the physical removal, the department or agency made reasonable efforts to assist the parent or parents or the guardian or guardians to establish a suitable home for the child, but that the parent or parents or the guardian or guardians have not made reciprocal 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. The efforts of the department or agency to assist a parent or guardian in establishing a suitable home for the child shall be found to be reasonable if such efforts equal or exceed the efforts of the parent or guardian toward the same goal, when the parent or guardian is aware that the child is in the custody of the department[.]

The child has been removed from the home of the parent or parents or the guardian or guardians 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 or parents or the guardian or guardians to establish a suitable home for the child, but that the parent or parents or the guardian or guardians 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. The efforts of the department or agency to assist a parent or guardian in establishing a suitable home for the child may be found to be reasonable if such efforts exceed the efforts of the parent or guardian toward the same goal, when the parent or guardian is aware that the child is in the custody of the department[.]

For the statutory ground of abandonment by failure to provide a suitable home to be applicable, DCS must first prove that the Children had been removed from Mother's home and that the Children had been found by the court to be dependent and neglected. Under the applicable version of the statute, termination of parental rights based upon this ground requires proof that the child was removed from the home of the parent whose rights are being terminated. *See* Tenn. Code Ann. § 36-1-102(1)(A)(ii); *In re K.M.K.*, No. E2014-00471-COA-R3-PT, 2015 WL 866730, at \*5 (Tenn. Ct. App. Feb. 27, 2015). We note that pursuant to the statutory amendment effective to termination actions filed on or after July 1, 2018, this statutory ground will also be applicable when a child has been removed from the "physical or legal custody" of a parent or guardian. *See* Tenn. Code Ann. § 36-1-102(1)(A)(ii)(a) (Supp. 2018); 2018 Tenn. Pub. Acts, Ch. 875, § 3 (H.B. 1856).

The record reflects that DCS removed the Children from Mother's home on August 14, 2015. Upon DCS's petition, the trial court entered an "Emergency Protective Custody Order" on August 18, 2015, placing the Children in the custody of DCS. The trial court subsequently found on May 16, 2016, by clear and convincing evidence that the Children were dependent and neglected while in Mother's care. Therefore, the record supports the trial court's finding that the Children were removed from Mother's home

and placed into foster care as the result of proceedings in the trial court wherein the Children were found to be dependent and neglected. The four-month determinative period for purposes of determining abandonment through failure to provide a suitable home, pursuant to Tennessee Code Annotated § 36-1-102(1)(A)(ii), began with the Children's removal into protective custody on August 14, 2015, and concluded on December 14, 2015. *See, e.g., In re Gabriel B.*, No. E2013-01581-COA-R3-PT, 2014 WL 1272201, at \*6 (Tenn. Ct. App. Mar. 28, 2014).

To satisfy this ground for termination, DCS was required to make reasonable efforts to assist Mother in establishing a suitable home for the Children during the statutorily determinative period. *See* Tenn. Code Ann. § 36-1-102(1)(A)(ii). In its final judgment, the trial court expressly found that DCS had “made reasonable efforts to assist [Mother] throughout the case, despite [Mother’s] repeated periods of incarceration.” The court further found that “for the four (4) months following removal [DCS] made reasonable efforts to assist [Mother] in establishing a suitable home for the children, but [Mother] made no reasonable effort to provide a suitable home and has demonstrated a lack of concern for the children to such a degree that it appears unlikely that she will be able to provide a suitable home at an early date[.]” Specifically, the court found that the assistance offered or provided to Mother “included, but was not limited to, the following: rides for [Mother] to obtain services or address needs, transportation for children to and from visits, arranging visits to work around [Mother’s] schedule and needs, drug screens, and assistance in setting up classes to comply with the permanency plan.”

According to the petition for emergency protective custody, Mother telephoned DCS on August 14, 2015, and requested that the Children be removed from her custody because she was going to be evicted and had no place to stay. At the time, Mother and the family were already involved in a DCS investigation due to multiple referrals. Mr. McAfee testified that when the Children first came into custody, Mother did not have housing and admitted to being homeless at that point. Reviewing Ms. Coughlin’s notes, Mr. McAfee testified that on October 21, 2015, Mother had paid a deposit on a subsidized three-bedroom, unfurnished townhome. Mother eventually obtained rental furniture for the townhome, but Ms. Coughlin’s notes indicated that Mother was subsequently unable to make the payments and returned the furniture to Rent-a-Center. It is undisputed that on March 15, 2016, a fire in the townhome forced Mother to leave that housing, and her eligibility for subsidized housing was then reduced to a one-bedroom apartment. Mother reported to Ms. Coughlin that she believed her cousin had broken into the townhome and started the fire.

In support of her argument that she had made strides toward providing a suitable home, Mother relies in part on housing she obtained subsequent to the determinative period and on her assertion that DCS was “passive” in assisting her during that time. We note that pursuant to Tennessee Code Annotated § 36-1-102(1)(A)(ii), the relevant time

period as to this statutory ground ended on December 14, 2015, at which time Mother was in the townhome but did not have it fully furnished for the Children and had not made other needed progress to ensure that the Children would be safe in her home.

As to the housing that Mother subsequently acquired, Mr. McAfee testified that when he took over the case from Ms. Coughlin in August 2016, Mother had recently been released from jail. Mr. McAfee stated that in September 2016, he met Mother where she was then working at Charlie Bob's to provide her with information regarding subsidized housing on Neil Avenue in Nashville. Mother contacted Cedar Hill Apartments ("Cedar Hill") in Nashville instead and reported to Mr. McAfee that Cedar Hill had vacancies. According to Mr. McAfee, he then contacted Cedar Hill regarding subsidized housing for Mother and was told that Cedar Hill would need Mother's Social Security card and copies of the Children's birth certificates. Mr. McAfee reported that when he attempted to contact Mother to obtain those documents, she did not respond. Mr. McAfee stated that Mother, who had been living with a boyfriend at a location unknown to Mr. McAfee, was then arrested and incarcerated again in October 2016.

At the time of trial, Mr. McAfee reported that the most recent residence he had listed in his notes for Mother was a home on Pitts Avenue in Nashville ("Pitts Avenue Residence"), which he had visited in March 2017. Mr. McAfee stated that Mother and her boyfriend had obtained the Pitts Avenue Residence through the boyfriend's employer and were "fixing it up." Mother, however, did not provide any documentation of a written lease for the Pitts Avenue Residence or any other proof that her name was on the lease. Given that Mother did not appear to testify at trial, she provided no evidence to show that her housing situation at the time of trial was suitable for the Children.

Moreover, establishing a suitable home for a child entails more than merely providing an appropriate physical location to reside. *See In re Nevada N.*, 498 S.W.3d 579, 596 (Tenn. Ct. App. 2016); *In re A.D.A.*, 84 S.W.3d 592, 599 (Tenn. Ct. App. 2002). A suitable home for a child requires a safe and stable environment in which the child may reside with a proper caregiver who can provide the appropriate care and attention necessary to meet the child's needs. *See In re James V.*, No. M2016-01575-COA-R3-PT, 2017 WL 2365010, at \*5 (Tenn. Ct. App. May 31, 2017). Additionally, this Court has determined that "a parent's compliance with counseling requirements is 'directly related to the establishment and maintenance of a suitable home.'" *In re Matthew T.*, No. M2015-00486-COA-R3-PT, 2016 WL 1621076, at \*7 (Tenn. Ct. App. Apr. 20, 2016) (quoting *In re M.F.O.*, No. M2008-01322-COA-R3-PT, 2009 WL 1456319, at \*5 (Tenn. Ct. App. May 21, 2009)).

As the trial court found in its final order, Mother "never attended counseling to address her own history as a [domestic violence] victim," despite DCS referrals to such counseling through Camelot. Although Mother reported to her DCS worker that she had

completed what she termed a “substitute” domestic violence class while incarcerated, Mother only provided documentation of a one-week parenting class, entitled, “Motivation to Change,” which she completed in September 2017 during her most recent incarceration. Mr. Schwartz’s testimony and notes, as well as Ms. Coughlin’s notes, demonstrated that Mother repeatedly cancelled or shortened the parenting sessions that Mr. Schwartz had arranged to take place prior to visits with the Children. Mr. Schwartz further testified that Mother’s initial progress in managing the Children and redirecting their energy during visits was stalled by her inconsistent attendance at parenting sessions and visits with the Children. Additionally, Mother’s subsequent violation of probation due to substance abuse further called into question Mother’s ability to provide a safe, stable home free from criminal activity.

Upon a thorough review of the record, we conclude that the evidence preponderates in favor of the trial court’s findings by clear and convincing evidence that DCS made reasonable efforts to assist Mother during the statutorily determinative period and that Mother nevertheless abandoned the Children by failing to provide a suitable home during this period. We therefore affirm this statutory ground for termination of Mother’s parental rights.

### 3. Wanton Disregard for the Children’s Welfare Prior to Incarceration

Mother also contends that the trial court erred by finding that DCS had proven by clear and convincing evidence that she had abandoned the Children through her actions prior to incarceration that allegedly constituted wanton disregard for the Children’s welfare. *See* Tenn. Code Ann. § 36-1-102(1)(A)(iv). Upon a thorough review of the record, we disagree.

The applicable definition of abandonment for this statutory ground provides in pertinent part that for purposes of instituting an action to terminate parental rights:

A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and . . . the parent or guardian has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child.

Tenn. Code Ann. § 36-1-102(1)(A)(iv) (emphasis added).

A parent’s actions constituting wanton disregard for the welfare of a child are not restricted to solely the four-month period prior to incarceration. *See In re Audrey S.*, 182 S.W.3d at 871. This Court has consistently held that “probation violations, repeated

incarceration, criminal behavior, substance abuse, and the failure to provide adequate support for a child can, alone or in combination, constitute conduct that exhibits a wanton disregard for the welfare of a child.” *In re Audrey S.*, 182 S.W.3d at 867-68; *see also In re K.F.R.T.*, 493 S.W.3d 55, 59-60 (Tenn. Ct. App. Mar. 10, 2016), *perm. app. denied* (Tenn. June 6, 2016) (citing *In re Audrey S.* with approval and noting that “wanton disregard can be based upon bad conduct that occurs at any time prior to incarceration”). “Simply stated, a parent’s ‘poor judgment and bad acts that affect the children constitute a wanton disregard for the welfare of the children.’” *In re T.L.G.*, No. E2014-01752-COA-R3-PT, 2015 WL 3380896, at \*3 (Tenn. Ct. App. May 26, 2015) (quoting *State, Dep’t of Children’s Servs. v. Hood*, 338 S.W.3d 917, 926 (Tenn. Ct. App. 2009)).

Concerning this statutory ground, the trial court specifically found in relevant part:

Regarding the ground of abandonment by an incarcerated parent, the Court finds [DCS] has proven by clear and convincing evidence that [Mother] had a wanton disregard for the welfare of her children. She was incarcerated multiple times throughout the case. The circumstances were not fully known and proof was closed at that point, but it appeared that on November 20th when the Court issued this ruling, [Mother] was again incarcerated. [Mother] clearly knew and understood the conditions of her probation, but tested positive for drugs and was again incarcerated in the four months prior [to] the filing of the petition due to that being a probation violation.

We agree with the trial court that Mother’s conduct leading to repeated periods of incarceration during the approximately seventeen months that the Children were in protective custody prior to trial, as well as before this period, supports a finding of Mother’s wanton disregard for the Children’s welfare prior to incarceration. Setting aside Mother’s incarceration related to the June 2016 not-guilty verdict, the record nevertheless demonstrates that Mother was incarcerated from mid-October 2016 through December 4, 2016, on a charge of violation of probation after testing positive for illegal substances. Following Mother’s eventual completion of that probationary period and the filing of the termination petition, Mother was arrested in June of 2017 on a charge of armed robbery, the resolution of which was unknown at the time of trial.

In addition, Mother’s criminal history from Marshall County demonstrates that prior to the Children’s removal into protective custody, Mother began developing a history of conduct leading to incarceration. Mother had pled guilty to multiple counts of forgery in January 2010, at a time when Steven was approximately fourteen months old. Mother had again pled guilty to a forgery charge in May 2011, by which time Joseph had been born and Mother would have been expecting Jorrie in four months’ time. *See In re Kyle F.*, No. E2017-01821-COA-R3-PT, 2018 WL 1953210, at \*4 (Tenn. Ct. App. Apr.

25, 2018) (“We note that a parent’s conduct prior to the Child’s birth can constitute wanton disregard for the Child’s welfare so long as that parent was aware of the Child’s existence *in utero*.” (citing *In re Anthony R.*, No. M2014-01753-COA-R3-PT, 2015 WL 3611244, at \*3 (Tenn. Ct. App. June 9, 2015))).

In regard to this ground, Mother primarily takes issue with a general statement the trial court made in its final order that the parents “seemed to understand there was a clock ticking in this case and there was a limit to how long their children could remain in care and work toward a goal of reunification” and yet “the proof throughout the trial was that the parents would leisurely go about their days.” The trial court found that Mother “clearly knew what she needed to do to comply with the permanency plan and regain custody, but then would do the exact opposite.” The court then stated that it was “unsure what other actions could be taken by a parent to demonstrate wanton disregard than knowing what actions are required and doing the opposite.” We agree with Mother that characterizing her actions as “leisurely” may have been an inexact account of the evidence given Mother’s attempts to maintain employment, obtain housing, and participate in visits with the Children. However, the evidence preponderates in favor of the trial court’s findings that Mother repeatedly engaged in conduct that resulted in her incarceration and negatively affected the Children.

We note also that although we have determined that DCS failed to demonstrate Mother’s ability to financially support the Children sufficiently to prove willfulness in her failure to support, it is undisputed that Mother provided no monetary support for the Children beyond occasional meals, clothing, and presents. The failure to provide adequate financial support for a child is another type of conduct that can exhibit wanton disregard for the welfare of a child. *See In re Audrey S.*, 182 S.W.3d at 867-68.

We conclude that the evidence regarding Mother’s behavior prior to her incarceration, including her criminal activity and failure to make any monetary payments toward the financial support of the Children, supports the trial court’s finding that the statutory ground of abandonment through wanton disregard was proven by clear and convincing evidence.

#### B. Substantial Noncompliance with Permanency Plans

The trial court also found by clear and convincing evidence that Mother failed to substantially comply with the reasonable responsibilities set out in the permanency plans. Tennessee Code Annotated § 36-1-113(g)(2) provides as an additional ground for termination of parental rights:

- (2) There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan pursuant to the provisions of title 37, chapter 2, part 4[.]

In its final judgment, the trial court stated specific findings of fact regarding this statutory ground as follows:

[DCS] devised two (2) separate permanency plans on behalf of the family. The first one was drafted on September 14, 2015 and ratified by this Court on October 27, 2015. The Court found that the requirements were reasonably related to the reason the children were in foster care and in their best interest. The annual permanency plan dated September 16, 2016 was ratified by the Court on September 20, 2016. The Court once again found that the requirements were reasonably related to the reason . . . the children were in foster care and in their best interest.

Pursuant to the initial permanency plan, [Mother] was to complete an alcohol and drug assessment and comply with recommendations; complete a mental health assessment and comply with recommendations; sign a release of information so that assessment records could be obtained; participate in domestic violence classes; provide DCS with documentation of stable housing; communicate positively in regards to the children, provide for them, and establish a support system; complete a parenting assessment and follow recommendations; and ensure that the children have proper supervision. The annual [revised] plan required [Mother] to follow through with random drug screens; follow rules of probation; actively participate in non-offender classes with a component of parenting education; actively participate in counseling to address victimization, healing and safety; undergo an alcohol and drug assessment and follow recommendations; provide documentation regarding prescriptions; provide a leasing agreement that covers at least six months in a residence; provide documentation of a legal source of income; and ensure children have appropriate supervision at all times.

While [Mother] complied with portions of the plans at times, she ultimately was not in compliance at the time of the hearing with the majority of the requirements. Despite initially complying with some of the alcohol and drug requirements, she later tested positive and that act became a violation of probation. [Mother] indicated she had done domestic violence services, but never provided any proof. [DCS] made attempts to centralize services by having Mr. Schwartz provide parenting classes at the same time as visits, but [Mother] would not attend timely for those classes

to occur. [Mother] never attended counseling to address her own history as a victim. While she had indicated to Mr. McAfee that she had housing for approximately the last year of the case, she never provided a lease to demonstrate legal rights to the property, or that the children could reside there.

\* \* \*

The ground[] of . . . substantial non-compliance with the permanency plans ha[s] . . . been proven by clear and convincing evidence as to [Mother]. [DCS] made reasonable efforts to assist [Mother] throughout the case, despite [Mother's] repeated periods of incarceration. The requirements on both plans were reasonably related to the reasons that brought the children into foster care, yet [Mother] has failed to substantially comply with the requirements of the plans. For the assessments she did complete, she failed to follow the recommendations of the assessments.

Upon thorough review, we determine that a preponderance of the evidence supports the trial court's findings that Mother failed to substantially comply with the reasonable responsibilities of her permanency plans.

In support of her position on this ground, Mother asserts that the trial court erred in part by finding that DCS had exerted reasonable efforts to assist her in substantially complying with the permanency plans. However, as this Court has previously explained: "The termination statute regarding the ground of substantial noncompliance with the requirements of a permanency plan contains no requirement that DCS expend reasonable efforts to assist a parent in complying with the permanency plan requirements." *In re Skylar P.*, No. E2016-02023-COA-R3-PT, 2017 WL 2684608, at \*7 (Tenn. Ct. App. June 21, 2017) (citing Tenn. Code Ann. § 36-1-113(g)(2)). Moreover, our Supreme Court has held that "the extent of DCS's efforts to reunify the family is weighed in the court's best-interest analysis, but proof of reasonable efforts is not a precondition to termination of the parental rights of the respondent parent." *In re Kaliyah S.*, 455 S.W.3d 533, 555 (Tenn. 2015). We will therefore consider the trial court's findings as to DCS's reasonable efforts to assist Mother within the best interest analysis.

Mother argues that the trial court failed to give sufficient weight to her compliance with and success in passing random drug screens administered by DCS, completion of a mental health intake and "substitute" domestic violence class, and attempts to maintain stable housing and employment. In contrast, the trial court's judgment reveals that the court did consider such positive efforts made by Mother, noting that although Mother "complied with portions of the plans at times, she ultimately was not in compliance at the time of the hearing with the majority of the requirements."

Mr. McAfee testified that Mother complied with the random drug screens administered by DCS and had a negative result on the most recent one, administered on May 18, 2017. As Mother notes, Mr. McAfee reported that an earlier screen administered on May 1, 2017, had shown a positive result for OxyContin, for which Mr. McAfee testified that Mother had subsequently provided a prescription. However, it is undisputed that Mother had previously been arrested and incarcerated in October 2016 for violation of probation due to a drug screen administered by Mother's probation officer, showing positive results for illegal substances. Additionally, Mr. McAfee testified that although Mother completed an alcohol and drug assessment on November 4, 2015, as required by the permanency plan, she did not follow through on the assessment recommendation for outpatient treatment, as further required by the permanency plan.

As to the domestic violence education and counseling requirement, Mother reported to her DCS worker that she had completed what she termed a "substitute" domestic violence class while incarcerated. However, the documentation Mother provided at trial was for a one-week parenting class, entitled, "Motivation to Change," which she completed in September 2017 during her most recent incarceration. Mr. McAfee testified that he was aware that during Mother's incarceration, she had also completed a victim impact class, consisting of a weekly group session. However, Mother did not complete individual domestic violence counseling as required by the permanency plan.

Regarding employment, Mother asserts on appeal that she "had stable income from employment, even though it was from several different workplaces," and that she "could obtain and maintain employment easily." Setting aside that this argument calls into question Mother's previous assertion that she did not have the ability to pay child support, the record reflects that Mother simply provided no proof of employment through pay stubs, work schedules, or any other documentation, as required by the permanency plans. We note that Mr. McAfee testified that he had advised Mother to provide pay stubs or other employment documentation and that Mother had told him she "would try to work on getting something."

Having previously determined that the evidence does not preponderate against the trial court's finding that Mother failed to provide a suitable home for the Children, we further determine Mother's argument regarding her efforts to obtain and maintain housing to be unavailing as to this statutory ground. Considering the totality of the evidence, we determine that the trial court did not err in terminating Mother's parental rights upon clear and convincing evidence of the statutory ground of failure to substantially comply with the permanency plans.

### C. Persistence of Conditions Leading to the Children's Removal

The trial court further found clear and convincing evidence of the statutory ground of persistence of conditions leading to removal of the Children from Mother's home. Regarding this statutory ground, the version of Tennessee Code Annotated § 36-1-113(g)(3) (2017) in effect at the time this action was commenced provided:<sup>9</sup>

- (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 or parents or the guardian or guardians, still persist;

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<sup>9</sup> Effective July 1, 2018, subsequent to the commencement of the instant action, the General Assembly has amended Tennessee Code Annotated § 36-1-113(g)(3), replacing the former language in its entirety with the following:

- (3)(A) The child has been removed from the home or the physical or legal custody of a parent or guardian for a period of six (6) months by a court order entered at any stage of proceedings in which a petition has been filed in the juvenile court alleging that a child is a dependent and neglected child, and:
  - (i) The conditions that led to the child's removal still persist, preventing the child's safe return to the care of the parent or guardian, or other conditions exist that, in all reasonable probability, would cause the child to be subjected to further abuse or neglect, preventing the child's safe return to the care of the parent or guardian;
  - (ii) 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 or guardian in the near future; and
  - (iii) 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.
- (B) The six (6) months must accrue on or before the first date the termination of parental rights petition is set to be heard.

- (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 or parents or the guardian or guardians 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; . . .

In its final judgment, the trial court stated the following specific findings regarding this statutory ground:

The Court finds there are grounds based on persistence of conditions in this matter. To meet its burden on this ground, [DCS] must prove that the children have been removed from [Mother's] custody for more than six (6) months. In fact, it has been more than two (2) years. Next, it must prove that the conditions which led to their removal from her home still exist and/or other conditions exist which in all probability would cause them to be subject to further abuse and/or neglect, making it unlikely that the children could be returned to her in the near future. This has already been addressed by the Court in previous grounds, but there is no proof [Mother] currently has suitable housing, nor will she for a significant period of time. She was incarcerated up until the week before the trial, and it appeared on the date of the ruling that she was back in jail. She chose not to be present for the trial to explain to this Court how any of the conditions present at the time of removal and/or adjudication had been remedied, much less the multiple issues that present additional conditions that would cause the children to be further neglected. She has not addressed the domestic violence issues that occurred in her relationship with [Father], either through a general domestic violence class to understand how the issue occurs and often reoccurs, nor has she engaged in therapy to understand and address her own trauma. Substance abuse was part of the original adjudication and she has been incarcerated during so much of the time the children were in custody there has been no real opportunity to determine if she can maintain sobriety when not in jail. There were subsequent findings that Lyric was sexually abused, with some indication in the children's statements that [Mother] may have had knowledge, yet she has not complied with non-offending parenting services to address this issue. The Court finds that there is little likelihood that these conditions will be remedied at an early date and the continuation of the parent/child

relationship is interfering with the children being able to integrate into a stable and permanent home.

Upon careful review, we further determine that a preponderance of the evidence supports the trial court's findings as to this statutory ground.

Under the version of the statute applicable in this case, a prior court order adjudicating the child to be dependent, neglected, or abused is an essential requirement of a court's termination of parental rights upon the ground of persistence of conditions. *See In re Audrey S.*, 182 S.W.3d at 874. As this Court explained, the statutory ground of persistence of conditions applied "as a ground for termination of parental rights only where the prior court order removing the child from the parent's home was based on a judicial finding of dependency, neglect, or abuse." *Id.*

In the case at bar, the Children were removed from Mother's custody in August 2015. The trial court subsequently entered an order in May 2016, finding the Children to be dependent and neglected due to Mother's "being unable to provide stable housing, domestic violence issues, use of illegal drugs, and lack of supervision which led to Jorrie being placed at substantial risk of harm[.]" Regarding the statutory ground of persistence of conditions, the trial court based its determination on Mother's failure to provide proof of suitable housing, including her incarceration ending the week before the termination trial; failure to address domestic violence issues; and failure to demonstrate that she could abstain from illegal substances when not incarcerated. The court also found that because Mother failed to personally appear after the first morning of the two-day trial, she presented no testimony to explain how she would prevent further neglect of the Children, which would include the lack of supervision that led to Jorrie's accident, Timothy's wandering by himself two blocks from home when he was only a toddler, and the sexual abuse found to have been inflicted upon Lyric by Father.

In support of her position on this ground, Mother again asserts that the trial court erred in part by finding that DCS had exerted reasonable efforts to assist her in remedying the conditions that led to the Children's removal. However, as with the ground of substantial noncompliance with the permanency plans, the termination statute regarding persistence of the conditions leading to the Children's removal also contains no requirement that DCS expend reasonable efforts to assist a parent in remedying such conditions. *See* Tenn. Code Ann. § 36-1-113(g)(3). We emphasize that "the extent of DCS's efforts to reunify the family is weighed in the court's best-interest analysis, but proof of reasonable efforts is not a precondition to termination of the parental rights of the respondent parent." *In re Kaliyah S.*, 455 S.W.3d at 555. Again, we will therefore consider the trial court's findings as to DCS's reasonable efforts to assist Mother within the best interest analysis.

Mother primarily asserts that this ground should be reversed because she had established stable housing at the time she acquired the townhome that was subsequently lost to fire in March 2016 and in the year prior to trial when she resided with a boyfriend in the Pitts Avenue Home. Mother relies on her argument regarding housing based upon her assertion that the sole reason the Children were removed from her custody was her lack of housing. As Mother notes, DCS's August 2015 petition for emergency removal of the Children reflects that Mother did place a telephone call to DCS on August 14, 2015, stating that DCS "needed to come and pick up her kids because she was being threatened" with eviction by the people with whom she and the Children were staying. DCS removed the Children on the day of the telephone call.

However, the petition and subsequent removal and adjudicatory orders further demonstrate that at the time of removal, Mother and her family were the subject of several referrals and an investigation focusing on allegations of inadequate supervision, lack of stable housing, child abuse, substance abuse, and domestic violence concerns. Mother's lack of stable housing cannot be considered the sole reason for the Children's removal from her custody. Moreover, we have determined in an earlier section of this opinion that Mother failed to present proof of suitable, stable housing throughout the pendency of this action.

We further determine that the evidence demonstrated that continuation of the parent-child relationship between Mother and the Children would greatly diminish the Children's chances of integration into a safe, stable, and permanent home. We conclude that the trial court properly terminated Mother's parental rights based on clear and convincing evidence of this statutory ground as well.

#### D. Failure to Manifest an Ability and Willingness to Assume Custody or Financial Responsibility of the Child

Although not raised as an issue by Mother on appeal, the trial court also found clear and convincing evidence to support termination of Mother's parental rights pursuant to Tennessee Code Annotated § 36-1-113(g)(14) (2017). The applicable version of this subsection, which was added to the statutory framework effective July 1, 2016, *see* 2016 Tenn. Pub. Acts, Ch. 919 § 20 (S.B. 1393), provided as an additional ground for termination.<sup>10</sup>

A legal parent or guardian has 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 placing the child in the person's

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<sup>10</sup> Effective July 1, 2018, Tennessee Code Annotated § 36-1-113(g)(14) has been amended to substitute the phrase, "A parent," in place of "A legal parent." *See* 2018 Tenn. Pub. Acts, Ch. 875, § 12 (H.B. 1856).

legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child.

DCS also does not specifically raise this statutory ground as an issue on appeal, although DCS does argue in favor of affirming the ground within an overarching issue of “[w]hether the trial court properly determined that grounds existed to terminate Mother’s parental rights.” See Tenn. R. App. P. 13(b) (“Review generally will extend only to those issues presented for review.”); *Owen v. Long Tire, LLC*, No. W2011-01227-COA-R3-CV, 2011 WL 6777014, at \*4 (Tenn. Ct. App. Dec. 22, 2011) (“The requirement of a statement of the issues raised on appeal is no mere technicality.”). Nonetheless, due to the fundamental constitutional interest involved, we will address this statutory ground. See *In re Carrington H.*, 483 S.W.3d at 525; see also *In re Angela E.*, 303 S.W.3d 240, 251 n.14 (Tenn. 2010).

This Court has recently explained the following with regard to this ground for termination of parental rights:

Essentially, this ground requires DCS to prove two elements by clear and convincing evidence. First, DCS must prove that [the parent] failed to manifest “an ability and willingness to personally assume legal and physical custody or financial responsibility of the child[ren].” Tenn. Code Ann. § 36-1-113(g)(14). DCS must then prove that placing the children in [the parent’s] “legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child[ren].” *Id.*

\* \* \*

We have made the following observations about what constitutes “substantial harm”:

The courts have not undertaken to define the circumstances that pose a risk of substantial harm to a child. These circumstances are not amenable to precise definition because of the variability of human conduct. However, the use of the modifier “substantial” indicates two things. First, it connotes a real hazard or danger that is not minor, trivial, or insignificant. Second, it indicates that the harm must be more than a theoretical possibility. While the harm need not be inevitable, it must be sufficiently probable to prompt a reasonable person to believe that the harm will occur more likely than not.

*Ray v. Ray*, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001) (footnotes omitted).

*In re Maya R.*, No. E2017-01634-COA-R3-PT, 2018 WL 1629930, at \*7-8 (Tenn. Ct. App. Apr. 4, 2018) (additional internal citations omitted). This Court has held that the first prong of Tennessee Code Annotated § 36-1-113(g)(14) requires that the petitioner prove that a parent has failed to meet the requirement of manifesting both a willingness and an ability to assume legal and physical custody of the child or has failed to meet the requirement of manifesting both a willingness and an ability to assume financial responsibility of the child. *In re Amynn K.*, No. E2017-01866-COA-R3-PT, 2018 WL 3058280, at \*14 (Tenn. Ct. App. June 20, 2018); *but see In re Ayden S.*, No. M2017-01185-COA-R3-PT, 2018 WL 2447044, at \*7 (Tenn. Ct. App. May 31, 2018) (reversing this ground for termination when parents were unable but had demonstrated willingness to assume custody and financial responsibility of their children).

The trial court in its final order found that Mother had “failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility of the child[ren], and placing the children in her legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the children[.]” The court further found “no other fact better suited to demonstrate the lack of an ability or willingness to care for the children than the fact [that] neither parent was present for the trial. There is no way to manifest an ability to parent if you are not present.” The court was referencing Mother’s failure to appear after hearing the four younger children’s therapists’ testimonies during the first morning of trial. The therapists, each assigned to a different child, respectively testified, *inter alia*, to each child’s expressed wish to stop participating in visits with Mother.

Mother’s difficulty in returning to court, either that afternoon or the next day, is certainly understandable, but as the trial court noted, her inability to continue personally participating in the proceedings, whether due to illness for which she did not provide documentation, transportation problems for which she did not provide documentation, emotional distress, or some other cause, was indicative of Mother’s failure to manifest, throughout the time the Children were in protective custody, an ability and willingness to meet the necessary requirements to assume legal and physical custody or financial responsibility for the Children. We emphasize that the trial court did not find clear and convincing evidence of this ground based solely on Mother’s failure to personally appear for the majority of trial, and neither do we. Rather, the trial court found that Mother’s inability or unwillingness to appear in court exemplified a pattern of problems Mother had experienced meeting requirements throughout the time that the Children were in protective custody. We agree.

For instance, Mr. Schwartz’s uncontested record of Mother’s visit attempts demonstrated that out of Mother’s seventeen scheduled visits with the Children from May

2016 through February 2017, five were full visits; seven were shortened due to Mother's work schedule or, in one instance, the maternal grandmother's hospitalization; and five were cancelled due to Mother's work schedule, car trouble, the maternal grandmother's hospitalization, or, in one instance, Mother's arrest in Marshall County. Of the thirteen attempted parenting sessions scheduled during this time, four were full, three were shortened, and the rest cancelled.

Mother has asserted that the trial court neglected to take note of her valid reasons for cancelling or shortening visits. Certainly some cancellations, such as the one for the maternal grandmother's hospitalization, were likely unavoidable. However, we note that Mother provided no pay stubs, work schedules, or other documentation of her employment to verify the conflicts with scheduled visits and parenting sessions. Moreover, the general pattern was one in which Mother failed to manifest an ability and willingness to prioritize doing what was necessary to regain custody of the Children.

Given the totality of the evidence presented by DCS and previously analyzed in this opinion—including Mother's failure to provide a suitable home for the Children; her conduct, including substance abuse, leading to multiple incarceration episodes; her failure to follow through on outpatient substance abuse treatment, parenting classes, and domestic violence counseling; her partial participation in a visitation schedule; and her failure to document employment—the trial court found that Mother had failed to manifest an ability and willingness to assume custody of or financial responsibility for the Children. For those same reasons, the trial court also determined that placing the Children in Mother's custody would pose a risk of substantial harm to the physical and psychological welfare of the Children. We note that the stability of Mother's home is relevant to the substantial harm analysis inasmuch as it demonstrates whether the Children would be at risk of substantial harm if placed in that environment. *See Blair v. Badenhope*, 77 S.W.3d 137, 157 (Tenn. 2002), *superseded by statute on other grounds*.

We conclude that the evidence does not preponderate against the trial court's findings by clear and convincing evidence that Mother failed to manifest an ability and willingness to personally assume legal and physical custody or financial responsibility of the Children and that placing the Children in Mother's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the Children. Accordingly, and considering our affirmance of four other statutory grounds at issue, we affirm the trial court's findings regarding the existence of statutory grounds for termination of parental rights.

## II. Best Interest of the Children

Mother contends that DCS did not present sufficient evidence to support the trial court's finding by clear and convincing evidence that termination of her parental rights

was in the best interest of the Children. We disagree. When a parent has been found to be unfit by establishment of at least one statutory ground for termination of parental rights, as here, the interests of parent and child diverge, and the focus shifts to what is in the child's best interest. *In re Audrey S.*, 182 S.W.3d at 877; *see also In re Carrington H.*, 483 S.W.3d at 523 (“The best interests analysis is separate from and subsequent to the determination that there is clear and convincing evidence of grounds for termination.” (quoting *In re Angela E.*, 303 S.W.3d at 254)). Tennessee Code Annotated § 36-1-113(i) (2017) provides a list of factors the trial court is to consider when determining if termination of parental rights is in a child's best interest. This list is not exhaustive, and the statute does not require the court to find the existence of every factor before concluding that termination is in a child's best interest. *See In re Carrington H.*, 483 S.W.3d at 523; *In re Audrey S.*, 182 S.W.3d at 878 (“The relevancy and weight to be given each factor depends on the unique facts of each case.”). Furthermore, the best interest of a child must be determined from the child's perspective and not the parent's. *White v. Moody*, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004).

Tennessee Code Annotated § 36-1-113(i) (2017) lists the following factors for consideration:

- (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, controlled substances or controlled substance analogues as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

As our Supreme Court recently explained regarding the best interest analysis:

“The best interests analysis is separate from and subsequent to the determination that there is clear and convincing evidence of grounds for termination.” In re Angela E., 303 S.W.3d at 254.

When conducting the best interests analysis, courts must consider nine statutory factors listed in Tennessee Code Annotated section 36-1-113(i). These statutory factors are illustrative, not exclusive, and any party to the termination proceeding is free to offer proof of any other factor relevant to the best interests analysis. In re Carrington H., 483 S.W.3d at 523 (citing In re Audrey S., 182 S.W.3d 838, 878 (Tenn. Ct. App. 2005)). Facts considered in the best interests analysis must be proven by “a preponderance of the evidence, not by clear and convincing evidence.” In re Kaliyah S., 455 S.W.3d at 555 (citing In re Audrey S., 182 S.W.3d at 861). “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].” Id. 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.” In re Audrey S., 182 S.W.3d at 878. Indeed, “[a] focus on the perspective of the child is the common theme” evident in all of the statutory factors. Id. “[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 . . . .” Tenn. Code Ann. § 36-1-101(d) (2017).

Ascertaining a child’s best interests involves more than a “rote examination” of the statutory factors. In re Audrey S., 182 S.W.3d at 878. And the best interests analysis consists of more than tallying the number of statutory factors weighing in favor of or against termination. White v. Moody, 171 S.W.3d 187, 193-94 (Tenn. Ct. App. 2004). Rather, the facts and circumstances of each unique case dictate how weighty and relevant each statutory factor is in the context of the case. See In re Audrey S., 182 S.W.3d at 878. 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. In re Carrington H., 483 S.W.3d at 523. “[D]epending upon the circumstances of a particular child and a particular parent, the consideration of one factor may very well dictate the outcome of the analysis.” In re Audrey S., 182 S.W.3d at 878 (citing White v. Moody, 171 S.W.3d at 194). 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.

*In re Gabriella D.*, 531 S.W.3d 662, 681-82 (Tenn. 2017). We note that as with other factual findings made in connection with the best interest analysis, whether DCS exerted reasonable efforts to assist Mother must be proven by a preponderance of the evidence, rather than by clear and convincing evidence. *In re Audrey S.*, 182 S.W.3d at 861.

In this case, the trial court concluded that the statutory factors weighed against maintaining Mother’s parental rights to the Children. In its final judgment, the trial court specifically found regarding these factors:

Having found that [DCS] has met its burden in proving grounds for termination, the Court must move to the best interest prong and examine the factors set out in T.C.A. § 36-1-113(i) to determine if termination . . . is in the children’s best interest. In this case, the Court finds as follows:

There has not been an adjustment of the circumstances by [Mother] . . . or [Father] that would make it safe for them to parent their children or for the children to be returned to [Mother’s] home. At the moment, it does not

appear [Mother] has a home for the children, and [Father] has never made his home available for inspection to determine if it is suitable.

[Mother] and [Father] have failed to effect a lasting adjustment, after reasonable efforts by available social agencies, for such duration of time that lasting adjustment does not reasonably appear possible. In making this finding, the Court considered the length of time the children have been in foster care, the lack of compliance overall with permanency plan requirements by both parents, and the ongoing attempts by [DCS] to assist the parents in remedying the conditions that prevented return.

No meaningful relationship continues to exist between the parents and the children. The testimony of each of the children's therapists was especially illuminating as to this issue. From very early in their custodial episode the children had been referring to their parents [by their given names]. It does not appear the foster parents or service providers dissuaded the children from referring to their biological parents by any common parental terms, but that the children made this switch themselves due to the lack of bond between the children and their parents. While the Court acknowledges there can be difficulties in maintain[ing] a close relationship while children are in State custody, it was clear there is currently no bond between the children and their parents. For whatever reasons it has happened, the children now view both parents as outsiders.

The Court believes that a change in caretaker and physical environment would likely have a negative effect on the children's psychological well-being. Again, the testimony of the children's therapists was detailed as to the emotions the children have regarding their parents, ranging from fear to indifference.

According to the adjudication in the underlying dependent-neglect proceedings, [Mother] and [Father] caused the children to be dependent/neglected while the children were in [Mother's] care and custody.

[Mother] and [Father] have provided no proof of a permanent home that would provide a healthy and safe environment for the children.

There has been no consistent child support (either financial or in kind) provided on the children's behalf by [Father] or [Mother].

[Mother] continues to make lifestyle choices that prevent her from being able to parent and provide a home for the children.

[Father] has committed severe abuse of Lyric by sexually abusing her.

[M.T.], foster parent for Timothy, Lyric, Jorrie and Joseph, testified at length about her desire to adopt the children and the Court finds that it would be detrimental for them to be removed from the [foster parents] at this time. The Court specifically finds this despite the testimony regarding the current separation of [M.T.] and her husband, and their attempts to move toward reconciliation.

While [M.T.] testified she would still want to adopt Steven in an effort to keep the children together, that may ultimately prove to be impossible. In that event, his current foster mother, [I.B.], has expressed an openness to adopting Steven herself and is committed to maintaining a relationship between Steven and his siblings, as deemed appropriate by the children's therapists.

The trial court also considered a recommendation from the guardian *ad litem* that it would be in the Children's best interest to terminate Mother's parental rights.

The trial court expressly found that the following factors weighed against maintaining Mother's parental rights to the Children: factor one (whether Mother has made an adjustment of circumstance, conduct, or conditions), factor two (whether Mother has effected a lasting adjustment after reasonable efforts made by DCS), factor four (whether a meaningful relationship existed between Mother and the Children), factor five (the effect a change of caretakers and physical environment would have on the Children), factor six (whether Mother has shown neglect toward the Children), factor seven (whether the physical environment of Mother's home is healthy and safe), and factor nine (whether Mother has paid child support). *See* Tenn. Code Ann. § 36-1-113(i).

Additionally, we determine that in finding that a meaningful relationship no longer existed between Mother and the Children, the trial court implicated Mother's inability to maintain regular visitation (factor three). *See id.* Furthermore, we note that Mother's failure to participate in domestic violence counseling and follow through with outpatient substance abuse treatment may impact her mental and emotional status and ability to provide safe and stable supervision for the Children (factor eight). *See id.*

In support of her argument that the trial court erred in finding that it was in the Children's best interest to terminate her parental rights, Mother asserts that the court

failed to properly consider testimony regarding her positive interactions with the Children during visits, negative drug screens, and the efforts she made toward securing stable housing and employment. Mother also argues that the trial court failed to properly consider testimony that the younger children may have been influenced in their perception of Mother by Joseph (the second oldest child) or by M.T. We disagree.

Mr. McAfee did testify that Mother attempted during the early months of visitation to improve her skills in managing the Children and that Mother enjoyed some positive interactions with the four younger children in particular. Mr. Schwartz and Christine Croon, Joseph's therapist, testified that Joseph had physically resisted exiting a vehicle for two visits with Mother, and Ms. Croon opined that Joseph, seven years old at the time of trial, was the "leader" among the siblings in the absence of Steven. In asserting that Joseph may have been influencing the younger children, Mother references Mr. Schwartz's testimony that in interviewing each of the Children, he was careful to do so individually, particularly because Jorrie's language about Mother would sometimes mimic Joseph's language. For her part, M.T. categorically denied accusations that she had attempted to influence the Children to say they did not want to visit with Mother.

On appeal, Mother notes that "[n]o proof was entered as to the effect on the children of never seeing [Mother] again." This is because Mother presented no proof and did not testify. Mother's argument in this regard is unavailing.

We will now address Mother's previous argument that the trial court erred by finding that DCS had exerted reasonable efforts to assist her in regaining custody of the Children. This argument is relevant as part of factor two in the best interest analysis. *See* Tenn. Code Ann. § 36-1-113(i)(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[.]"); *In re Kaliyah S.*, 455 S.W.3d at 555. The trial court expressly found that DCS had exerted reasonable efforts throughout the case to assist Mother. We agree. As the trial court specifically found in its final order:

The testimony of [Mr.] McAfee, which included reference to case notes from the original [family services worker], Brittany Coughlin, make clear that [DCS] made reasonable efforts to assist [Mother] in regaining custody from the time the children entered foster care. The assistance [DCS] offered and/or provided included, but was not limited to, the following: rides for [Mother] to obtain services or address needs, transportation for children to and from visits, arranging visits to work around [Mother's] schedule and needs, drug screens, and assistance in setting up classes to comply with the permanency plan.

We determine that the evidence preponderates in favor of the trial court's findings concerning reasonable efforts.

Based on our thorough review of the evidence in light of the statutory factors, we conclude that the evidence presented does not preponderate against the trial court's determination by clear and convincing evidence that termination of Mother's parental rights was in the best interest of the Children. Having also determined that statutory grounds for termination were established, we affirm the trial court's termination of Mother's parental rights.

## VI. Conclusion

For the foregoing reasons, we reverse the trial court's finding as to Mother regarding the statutory ground of abandonment through willful failure to financially support the Children. We affirm the trial court's judgment in all other respects, including the termination of Mother's parental rights to the Children. This case is remanded to the trial court, pursuant to applicable law, for enforcement of the trial court's judgment terminating Mother's parental rights and collection of costs assessed below. Costs on appeal are assessed to the appellant, Tabbitha S.

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THOMAS R. FRIERSON, II, JUDGE