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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs February 1, 2023

IN RE DISNIE P.

Appeal from the Chancery Court for Hamblen County
No. 2021-CV-18 Douglas T. Jenkins, Chancellor

No. E2022-00662-COA-R3-PT

This is an appeal involving the termination of parental rights. The trial court entered an order terminating the parental rights of both the parents on the ground of abandonment by failure to support pursuant to Tennessee Code Annotated sections 36-1-113(g)(1) and 36-1-102(1)(A)(i). However, the court found that the petitioners failed to establish the following grounds for termination: (1) failure to manifest an ability and willingness to parent; (2) abandonment by incarcerated parent for wanton disregard pursuant to section 36-1-102(1)(A)(iv); (3) substantial noncompliance with a permanency plan; and (4) persistent conditions. Additionally, the court found that termination was in the best interests of the child. Both parents appeal, and the petitioners also challenge the trial court's findings that two of the grounds were not established. We conclude as follows: (1) we reverse the court's finding that the ground of abandonment by failure to support was established as to both of the parents; (2) we reverse the court's finding that the ground of persistent conditions was not established as to the mother but affirm as modified as to the father; (3) we vacate the ground of failure to manifest an ability and willingness as to both of the parents but remand only as to the father; and (4) we reverse the court's finding that termination of both of the parents' parental rights was in the best interests of the child and remand to the trial court for findings on the new best interest factors. Accordingly, we vacate in part, reverse in part, affirm in part as modified, and remand for further proceedings consistent with this opinion.

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

CARMA DENNIS MCGEE, J., delivered the opinion of the court, in which JOHN W. MCCLARTY and W. NEAL MCBRAYER, JJ., joined.

Ryan T. Logue, Morristown, Tennessee, for the appellant, Michael D.

Greg S. Easterling, Church Hill, Tennessee, for the appellant, Tiffney P.

Aaron J. Chapman, Morristown, Tennessee, for the appellees, Deborah C. and Clarence C.

OPINION

I. FACTS & PROCEDURAL HISTORY

The petitioners in this matter are Deborah C. and Clarence C. (collectively, “Petitioners”), who filed a petition for adoption and for termination of parental rights as prospective adoptive parents. The respondents are Michael D. (“Father”) and Tiffney P. (“Mother”), who are the biological parents of Disnie (“the Child”).¹ Prior to the Child’s birth, Mother submitted to prenatal drug screens and was positive for opana, morphine, and codeine in June 2019 and for buprenorphine in September 2019. The Child was then born drug exposed in October 2019. Upon Mother’s admission to the hospital, she submitted to a urine drug screen and tested positive for buprenorphine and oxycodone. Furthermore, the Child’s umbilical cord test was positive for oxymorphone, oxycodone, and norbuprenorphine. Due to the Child’s drug exposure, the Tennessee Department of Children Services (“DCS”) began an investigation.

In January 2020, DCS received a report of possible harm to the Child alleging that she was the victim of drug exposure perpetrated by Mother after law enforcement had responded to the family home for a welfare check. The referral alleged that Mother was suffering from hallucinations stating “people were locked in the bedrooms” and “were making her dance.” The DCS case manager at the time, Ms. Trudy Hammer, received text messages from Father advising her that Mother was displaying erratic behavior, had threatened to “scalp” him, and had been awake for days. Several hours later, she received a call from Father notifying her that Mother had been arrested. According to an affidavit, officers had responded to the family home in reference to a potential burglar inside the home. Upon arrival, they made contact with Father, who explained that he had left work because Mother called stating that someone was in the home. They found Mother and the Child sitting on the sofa, but Mother appeared to be under the influence. Mother informed the officers that she had not slept for two days and that “the people in the home were telling her to do things like dance while she was holding her baby.” The officers were able to remove the Child from the situation and hand her over to Father. Mother then became aggressive and was placed under arrest.

After Mother’s arrest, Ms. Hammer spoke with Father, who submitted to a urine

¹ Both Father and Mother each had a son from previous relationships. According to Father, his son resided with the maternal great-grandmother, but he still maintained contact with him. Mother’s son was in the custody of his aunt, and Mother was restricted to supervised visitation with him.

drug screen and was negative for all substances. Father reported that the Child cried continuously and that Mother would not comfort the Child and would threaten him when he attempted to console the Child. Ms. Hammer also spoke with Deborah, who was Father's cousin and the Child's babysitter at the time. She reported that Father and Mother had a "volatile relationship," and she expressed concerns about the Child's safety while in Mother's care. Ms. Hammer then spoke with one of the officers who responded to the family home on the night of Mother's arrest. He stated that Mother was arrested and charged with child endangerment and disorderly conduct, but she was subsequently charged with introducing contraband into a penal facility. He explained that a syringe and what appeared to be methamphetamine was found on Mother's person when booking and processing her. Ms. Hammer attempted to make contact with Mother at the Hamblen County Jail where she was advised by officers that Mother was in no mental condition for visitors. She was told that Mother was urinating and defecating on herself, was suffering from hallucinations, and was in four-point restraints. Mother later admitted that she was arrested for her erratic behavior, but she testified that it was the result of a mental health issue. She explained that she was transported to a mental health facility for an evaluation after she was arrested and taken to jail. She further explained that her mental health was very poor after the Child was born and that she struggled with depression during that time.

In February 2020, DCS held a child and family team meeting after Father left the Child at Deborah's home advising her that he could no longer care for the Child. At the meeting, Father confirmed that he was unable to care for the Child, and Deborah agreed to be a placement option for the Child. Father and Deborah completed an Immediate Protection Agreement allowing her and her husband to care for the Child. Thereafter, DCS filed a petition for dependency and neglect in the Hamblen County Juvenile Court, asking the court to award temporary legal custody of the Child to Petitioners. The court entered an order finding the Child dependent and neglected as to Father based on his stipulation. The court noted that Mother was hospitalized at the time, and it extended the time period for her adjudication due to her hospitalization. The court ultimately entered an order as to Mother in May 2020 finding the Child dependent and neglected based on her stipulation. The court awarded temporary legal custody to Petitioners and ordered Father and Mother to each pay temporary child support in the amount of \$10.00 per month.²

In January 2021, Petitioners filed a petition for adoption in the Hamblen County Chancery Court requesting that the parental rights of Father and Mother be terminated. They noted that Father joined in the petition for the purpose of giving his consent to the adoption and the termination of his parental rights. As such, they only made allegations concerning Mother. However, the petition failed to identify what grounds were being alleged or cite to any relevant statutory provisions regarding termination. Father then filed

² In October 2020, Father filed a motion for return of custody requesting that the juvenile court return custody of the Child to his care. However, he later testified that the hearing on his motion never took place because it was postponed due to COVID.

a motion to set aside his consent to the adoption of the Child because he no longer wished for his parental rights to be terminated. He later testified that he was “confused” when he joined in the petition consenting to the adoption and the termination of his parental rights. In August 2021, Petitioners filed an amended petition for termination of parental rights and for adoption, which alleged five grounds for termination: (1) failure to manifest an ability and willingness to parent; (2) abandonment by incarcerated parent for wanton disregard; (3) substantial noncompliance with a permanency plan; (4) persistent conditions; and (5) severe child abuse. Additionally, they alleged that termination was in the best interests of the Child. However, in their amended petition, Petitioners referred to Father, Mother, and the Child by the wrong names at times, which appeared to be the names of a father, mother, and child from an unrelated termination case. Father filed an answer to the amended petition.

In January 2022, the trial court entered an order granting Mother’s motion to continue due to improper service and granting Petitioners’ motion to amend their amended petition for typographical, grammatical, and factual errors. Petitioners filed a second amended petition for termination of parental rights and for adoption. In their second amended petition, they no longer alleged the ground of severe child abuse. Instead, they alleged just four grounds against Father and Mother: (1) failure to manifest an ability and willingness to parent; (2) abandonment by incarcerated parent for wanton disregard; (3) substantial noncompliance with a permanency plan; and (4) persistent conditions. They again alleged that termination was in the best interests of the Child. Both Father and Mother filed answers to the second amended petition.

The trial court ultimately held trial in April 2022. After the paternal grandmother’s testimony, the court and counsel for the parties had a discussion regarding what grounds were being pled. Counsel for Petitioners confirmed that the ground of severe child abuse was no longer being pursued. With respect to the discussion as to the ground of abandonment, it appears there may have been some confusion about what particular definition of abandonment was being alleged. Counsel for Petitioners stated that they were alleging not just the ground of abandonment by incarcerated parent for wanton disregard but also for failure to support and for failure to visit. However, it was not specified which definition of abandonment they were relying on in Tennessee Code Annotated section 36-1-102(1)(A) for failure to support and for failure to visit, i.e., subsection (i) or subsection (iv). In any case, counsel for Petitioners specified that the ground of abandonment by incarcerated parent for wanton disregard only applied to Mother. Following this discussion, Deborah and her daughter provided their testimony. At the close of Petitioners’ proof, counsel for Father moved the court to dismiss arguing that Petitioners had not met their burden of proof as to the grounds for termination. Counsel for Mother joined in the motion. The guardian ad litem also joined in the motion as it pertained to the grounds of substantial noncompliance with a permanency plan, persistent conditions, and abandonment. After hearing argument from counsel for Petitioners, the court granted the motion with respect to the ground of substantial noncompliance with a permanency plan.

However, the court overruled the motion with respect to the grounds of abandonment, failure to manifest an ability and willingness, and persistent conditions. Both Father and Mother then provided their testimony.

After trial, the trial court orally announced its findings of fact and conclusions of law, which was then reduced to writing. The court directed counsel for Petitioners to draft the appropriate order terminating the parental rights of Father and Mother. Counsel for Petitioners asked if he could attach the court's oral ruling to the order. The trial court stated that this Court has questioned that practice. The court then clarified, "I think if you do attach my findings to this judgment that you prepare, you should make it abundantly clear that they are restated within the body of the final judgment." In May 2022, the court entered its order terminating the parental rights of both Father and Mother. The court found that Petitioners failed to establish the following grounds for termination: (1) failure to manifest an ability and willingness; (2) abandonment by wanton disregard pursuant to Tennessee Code Annotated section 36-1-102(1)(A)(iv); (3) substantial noncompliance with a permanency plan; and (4) persistent conditions.³ However, the court found that Petitioners had established the ground of abandonment by failure to support pursuant to Tennessee Code Annotated section 36-1-102(1)(A)(i). Additionally, the court found that termination was in the best interests of the Child. The court reserved the adoption matter until the appeal process was completed if Father and Mother decided to appeal. The court's oral ruling was not incorporated or attached to this order. Both Father and Mother timely filed their appeals.⁴

II. ISSUES PRESENTED

Father and Mother present the following issues for review on appeal, which we have slightly restated:

³ The court also "looked at abandonment by no visitation," but it did not expressly make a finding in its order as to whether this ground of abandonment was established by Petitioners. However, its statements regarding visitation by Father and Mother implied that this particular ground of abandonment was not established. Additionally, in its oral ruling, the court found "that both parents visited as best they could during the relevant four[-]month period."

⁴ Both Father and Mother submitted appellate briefs in this appeal. However, we must point out that their briefs are nearly identical. In Father's brief, there are statements made about him with appropriate references to the transcript. In Mother's brief, the same statement is made using Mother's name, but the same reference is made to the portion of the transcript which concerns Father and not Mother. For example, Mother's brief states that "[t]he record shows that [Mother] had a deep desire to visit with her daughter; however, [Deborah] inhibited his [sic] ability to do so by . . . ignoring her repeated requests or by requiring that the visits occur via Facetime even two years after the Covid-19 pandemic in 2022." The references following this statement are to Deborah's testimony regarding her communications with Father and to the exhibits of communications between Deborah and Father. As such, we caution against the practice of replicating briefs in this manner and emphasize that lawyers are obligated to act as zealous advocates on behalf of their client. *See generally* Tenn. Sup. Ct. R. 8, RPC 8(3) (providing that lawyers are obligated to act as a zealous advocate on behalf of his or her client).

1. Whether the trial court erred by finding clear and convincing evidence that both Father and Mother willfully and voluntarily abandoned the Child by failing to pay child support; and
2. Whether the trial court erred by finding clear and convincing evidence that it was in the best interests of the Child to terminate the parental rights of Father and Mother.

Petitioners present the following additional issues for review on appeal, which we have slightly restated:

1. Whether the trial court erred in finding that the ground of persistent conditions had not been established by clear and convincing evidence; and
2. Whether the trial court erred in finding that the ground of failure to manifest an ability and willingness to parent had not been established by clear and convincing evidence.

For the following reasons, we reverse in part, affirm in part as modified, vacate in part, and remand for further proceedings consistent with this opinion.

III. STANDARD APPLICABLE TO TERMINATIONS CASES

Among the most serious decisions courts make is the termination of a parent's rights to his or her child. *In re Gabriel B.*, No. W2017-02514-COA-R3-PT, 2018 WL 3532078, at *3 (Tenn. Ct. App. July 23, 2018). “No civil action carries with it graver consequences than a petition to sever family ties irretrievably and forever.” *In re Kaliyah S.*, 455 S.W.3d 533, 556 (Tenn. 2015) (citing Tenn. Code Ann. § 36-1-113(l)). It is well established that “[a] parent’s right to the care and custody of [his or] her child is among the oldest of the judicially recognized fundamental liberty interests protected by the Due Process Clauses of the federal and state constitutions.” *In re Neveah M.*, 614 S.W.3d 659, 674 (Tenn. 2020) (quoting *In re Carrington H.*, 483 S.W.3d 507, 521 (Tenn. 2016)). “Parental rights have been described as ‘far more precious than any property right.’” *Id.* (quoting *In re Carrington H.*, 483 S.W.3d at 522). Despite being fundamental and constitutionally protected, however, parental rights are not absolute. *In re Carrington H.*, 483 S.W.3d at 522 (citing *In re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010)).

Tennessee Code Annotated section 36-1-113 “sets forth the grounds and procedures for terminating the parental rights of a biological parent.” *In re Kaliyah S.*, 455 S.W.3d at 546. Pursuant to this statute, the petitioner seeking termination of parental rights must prove two elements. *Id.* at 552. First, the petitioner must prove the existence of at least one of the statutory grounds for termination set forth in Tennessee Code Annotated section 36-1-113(g). *Id.* Second, the petitioner must prove that termination of parental rights is in the best interests of the child under the factors set forth in Tennessee Code Annotated section 36-1-113(i). *Id.* Due to the constitutional dimension of the rights at stake, the

petitioner seeking termination must prove both elements by clear and convincing evidence. *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010); see Tenn. Code Ann. § 36-1-113(c). “Clear and convincing evidence enables the fact-finder to form a firm belief or conviction regarding the truth of the facts, *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005), and eliminates any serious or substantial doubt about the correctness of these factual findings.” *Id.* (citing *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002); *State, Dep’t of Children’s Servs. v. Mims (In re N.B.)*, 285 S.W.3d 435, 447 (Tenn. Ct. App. 2008)).

Because of the heightened burden of proof applicable in parental termination cases, we adapt our customary standard of review on appeal. *In re Audrey S.*, 182 S.W.3d at 861. We review a court’s factual findings de novo in accordance with Rule 13(d) of the Tennessee Rules of Appellate Procedure, presuming each factual finding to be correct unless the evidence preponderates otherwise. *In re Carrington H.*, 483 S.W.3d at 524. We then make our own determination regarding “whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, amount to clear and convincing evidence of the elements necessary to terminate parental rights.” *Id.* (citing *In re Bernard T.*, 319 S.W.3d at 596-97). As for conclusions of law, “[t]he trial court’s ruling that the evidence sufficiently supports termination of parental rights is a conclusion of law, which appellate courts review de novo with no presumption of correctness.” *Id.* (citing *In re M.L.P.*, 281 S.W.3d 387, 393 (Tenn. 2009)).

IV. DISCUSSION

As an initial matter, we have determined that we must apply the statutes in effect at the time the second amended petition was filed in January 2022. See *In re Piper N.*, No. W2021-01185-COA-R3-PT, 2023 WL 334656, at *1 (Tenn. Ct. App. Jan. 20, 2023) (applying the statutes in effect at the time the amended petition was filed because the original adoption petition contained no grounds for termination of the parents’ rights). Petitioners filed their initial petition in January 2021. Father joined in the initial petition for the purpose of giving his consent to the adoption of the Child by Petitioners and was willingly surrendering his parental rights. Furthermore, while allegations were made against Mother, the initial petition failed to identify what grounds were being alleged or cite to any relevant statutory provisions regarding termination. Petitioners filed their amended petition in August 2021, which alleged five grounds for termination. Yet, they referred to Father, Mother, and the Child by the wrong names at times, which appeared to be the names of a father, mother, and child from an unrelated termination case. The style of the amended petition referred to the correct names of Father, Mother, and the Child. However, the correct names of Father, Mother, and the Child were used only once in the substance of the amended petition. Petitioners then filed their second amended petition in January 2022, which corrected these errors and alleged only four grounds for termination against both Father and Mother. Therefore, as in *In re Piper*, we determine that we must apply the statutes in effect at the time the second amended petition was filed in January 2022.

Having addressed this matter, we now proceed with our analysis of the issues presented on appeal. Both Father and Mother challenge the trial court's finding as to the ground of abandonment by failure to support, which was the sole ground for termination found against them. They also challenged the trial court's finding that it was in the best interests of the Child to terminate their parental rights. Petitioners present additional issues for review, which concern the grounds of persistent conditions and failure to manifest an ability and willingness to parent. As previously discussed, the trial court found that Petitioners failed to establish these two grounds by clear and convincing evidence.

In accordance with *In re Carrington H.*, we “must review the trial court’s findings as to each ground for termination and as to whether termination is in the child’s best interests, regardless of whether the parent challenges these findings on appeal.” 483 S.W.3d at 525-26 (citing *In re Angela E.*, 303 S.W.3d at 251 n.14) (footnote omitted). However, we have not interpreted that “to mean that this Court must also review grounds that the trial court found were not sufficiently proven when the party who sought termination does not challenge that ruling on appeal.” *In re C.S.*, No. E2019-01657-COA-R3-PT, 2020 WL 2066247, at *3 (Tenn. Ct. App. Apr. 29, 2020) (quoting *In re Colton B.*, No. M2018-01053-COA-R3-PT, 2018 WL 5415921, at *5 (Tenn. Ct. App. Oct. 29, 2018) *perm. app. denied* (Tenn. Jan. 22, 2019)); *see, e.g., In re Gabriel B.*, 2018 WL 3532078, at *4 n.6 (limiting review on appeal to “each ground for termination that the trial court found the Department established by clear and convincing evidence” but omitting analysis of another ground that the trial court found was not proven where DCS did not challenge that ruling on appeal); *In re Zayne P.*, No. W2017-01590-COA-R3-PT, 2018 WL 2041573, at *6 (Tenn. Ct. App. Apr. 30, 2018) (concluding that “the mandate from *In re Carrington H.* to review all grounds on which termination of parental rights is based does not apply” and this Court “need not consider the grounds that were not proven” when the trial court declines to terminate parental rights); *In re Addalyne S.*, 556 S.W.3d 774, 784 n.6 (Tenn. Ct. App. 2018) *perm. app. denied* (Tenn. July 30, 2018) (“The rule adopted in *Carrington* has never been construed to require this Court to also consider the grounds not sustained by the trial court’ and not challenged on appeal by the [petitioner].”) (quoting *In re Sydney B.*, 537 S.W.3d 452, 456 n.8 (Tenn. Ct. App. 2017) *perm. app. denied* (Tenn. Aug. 1, 2017)). As such, we have held that it is not necessary to review grounds for termination that the trial court deemed inapplicable unless the petitioner challenges those rulings. *Id.* Here, Petitioners challenge the trial court’s findings that the grounds of persistent conditions and failure to manifest an ability and willingness were not established. However, they do not challenge the court’s findings that the grounds of substantial noncompliance and abandonment by an incarcerated parent were not proven.

A. Grounds for Termination

A petition for termination of parental rights may be based upon any of the statutory grounds listed in the termination statute. Tenn. Code Ann. § 36-1-113(g). The “grounds

are cumulative and nonexclusive, so that listing conditions, acts or omissions in one ground does not prevent them from coming within another ground.” *Id.* Generally, however, “[a] parent’s rights cannot be terminated pursuant to statutory grounds not alleged in the petition.” *In re Tiffany B.*, No. E2020-00854-COA-R3-PT, 2021 WL 514299, at *8 (Tenn. Ct. App. Feb. 11, 2021). This Court has emphasized the importance of properly alleging the grounds for termination:

Parental rights can only be terminated on grounds that were alleged in the termination petition. *See In re M.J.B.*, 140 S.W.3d 643, 655-56 (Tenn. Ct. App. 2004). Notice is “a fundamental component of due process.” *In re W.B.*, IV, M2004-00999-COA-R3-PT, 2005 WL 1021618, at *13 (Tenn. Ct. App. Apr. 29, 2005); *see also Keisling v. Keisling*, 92 S.W.3d 374, 377 (Tenn. 2002) (“Basic due process requires ‘notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” (citation omitted)). Pleadings should give the opposing party enough notice of the issues to prepare a defense. *Keisling*, 92 S.W.3d at 377. In the context of parental termination, due process requires that the parent be notified of the alleged grounds for termination. *In re Jeremiah N.*, No. E2016-00371-COA-R3-PT, 2017 WL 1655612, at *8 (Tenn. Ct. App. May 2, 2017).

In re Lauren F., No. W2020-01732-COA-R3-PT, 2021 WL 5234712, at *5-6 (Tenn. Ct. App. Nov. 10, 2021) (quoting *In re Ashlynn H.*, No. M2020-00469-COA-R3-PT, 2021 WL 2181655, at *3 (Tenn. Ct. App. May 28, 2021)).

1. Abandonment

i. Abandonment Generally

Abandonment is the first ground for termination listed in the termination statute and is the ground most frequently relied on. *In re Audrey S.*, 182 S.W.3d at 862 (citing Tenn. Code Ann. § 36-1-113(g)(1)). This ground exists based on a parent’s abandonment of his or her child, as defined in Tennessee Code Annotated section 36-1-102(1)(A). Tenn. Code Ann. § 36-1-113(g)(1). In section 36-1-102(1)(A), there are “five alternative definitions for abandonment as a ground for the termination of parental rights.” *In re Audrey S.*, 182 S.W.3d at 863 (citing Tenn. Code Ann. § 36-1-102(1)(A)(i)-(v)). In the case at bar, there are two relevant definitions of abandonment:

(i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding, pleading, petition, or any amended petition to terminate the parental rights of the parent or parents . . . of the child who is the subject of the petition for termination of parental rights or adoption, that the parent or parents . . . either have failed to visit or have failed to support

or have failed to make reasonable payments toward the support of the child;
[or]

...

(iv) A parent . . . is incarcerated at the time of the filing of a proceeding, pleading, petition, or amended petition to terminate the parental rights of the parent . . . of the child who is the subject of the petition for termination of parental rights or adoption, or a parent . . . has been incarcerated during all or part of the four (4) consecutive months immediately preceding the filing of the action and has:

(a) Failed to visit, has failed to support, or has failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding the parent's . . . incarceration;

(b) Failed to visit, has failed to support, or has failed to make reasonable payments toward the support of the child during an aggregation of the first one hundred twenty (120) days of nonincarceration immediately preceding the filing of the action; or

(c) 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)(i) and (iv) (emphasis added). As shown above, section 36-1-102(1)(A) provides two forms of abandonment for failure to visit and failure to support. *In re London B.*, No. M2019-00714-COA-R3-PT, 2020 WL 1867364, at *7 (Tenn. Ct. App. Apr. 14, 2020).

There are two substantive differences between the definition of abandonment in subsection (i) and the definition of abandonment in subsection (iv). *In re Colton R.*, No. E2016-00807-COA-R3-PT, 2017 WL 499439, at *9 (Tenn. Ct. App. Feb. 7, 2017). One of those differences is that the consideration of the parent's incarceration applies only to subsection (iv).⁵ *Id.* We have explained that, in order for subsection (iv) to even apply, "the parent must be incarcerated at the time of the filing of the termination petition or in the four months preceding the filing of the termination . . . petition." *In re Colton R.*, 2017 WL 499439, at *9.

⁵ The other difference is that abandonment by failure to visit or by failure to support under subsection (iv) "requires the court to consider the four months preceding incarceration, rather than the four months preceding the filing of the termination petition that would be applicable under subsection (i) if the condition precedent was not met." *In re Colton R.*, 2017 WL 499439, at *9. "Thus, the two alternative definitions concern different time periods." *Id.*

If the condition precedent of incarceration is satisfied, subsection (iv) “contains multiple ways of abandonment for termination of parental rights.” *In re Nevada N.*, 498 S.W.3d 579, 598 (Tenn. Ct. App. 2016) (quoting *In re Kierra B.*, No. E2012-02539-COA-R3-PT, 2014 WL 118504, at *8 (Tenn. Ct. App. Jan. 14, 2014)). First, it may be alleged that the incarcerated parent has “failed to visit, has failed to support, or has failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding. . . incarceration[.]” Tenn. Code Ann. § 36-1-102(1)(A)(iv)(a). Second, it may be alleged that the incarcerated parent has “failed to visit, has failed to support, or has failed to make reasonable payments toward the support of the child during an aggregation of the first one hundred twenty (120) days of non-incarceration immediately preceding the filing of the action[.]” *Id.* § 36-1-102(1)(A)(iv)(b). Third, it may be alleged that the incarcerated parent “[h]as 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)(c). As such, “[a]bandonment by wanton disregard is a distinct ground for termination of parental rights.” *In re Evella S.*, No. M2019-02075-COA-R3-PT, 2021 WL 2588395, at *6 (Tenn. Ct. App. June 24, 2021) (quoting *In re Johnny K.F.*, No. E2012-02700-COA-R3-PT, 2013 WL 4679269, at *7 (Tenn. Ct. App. Aug. 27, 2013)).

ii. Whether Abandonment by Failure to Support was Pled

We now analyze the manner in which the ground of abandonment was pled. In Petitioners’ initial petition, they sought to terminate the parental rights of both Father and Mother. Yet, they only made allegations concerning Mother because Father was willingly surrendering his parental rights to the Child at the time. As previously noted, the petition failed to identify what grounds for termination were being alleged or cite to any relevant statutory provisions regarding termination. Petitioners then amended their petition and alleged “Abandonment-wanton disregard,” citing to the specific definition of abandonment in subsection (iv) of section 36-1-102(1)(A). Due to errors in their amended petition, they filed a second amended petition and again specifically titled the section as “Abandonment-wanton disregard,” citing to the specific definition of abandonment in subsection (iv) of section 36-1-102(1)(A). They made the following allegations for this ground:

- A. Grounds exist pursuant to Tenn. Code Ann. § 36-1-113(g)(1) to terminate respondents[’] parental rights to the minor child, because in abandonment by the parent or guardian, as defined in § 36-1-102[(1)(A)](iv), has occurred;
- B. Respondent, Mother has been incarcerated the majority of the child’s life. Respondent, Father, has failed to make any effort to maintain meaningful contact with the child. Father in fact only has made effort to see the child through face time contact. Respondents have engaged in conduct that exhibits a wanton disregard for the welfare of the child; And
- C. Respondent, Mother was charged with child endangerment regarding this child. Warrant and judgment are attached to the original Petition. Said

criminal activity is in accord with prior and repeated criminal activity by Respondents. Father has now been charged with Fraudulent use of a credit/debit card eight times, theft, and forgery.

From our review of the second amended petition, it is clear that for the ground of abandonment, Petitioners only pled the ground of abandonment pursuant to the definition in section 36-1-102(1)(A)(iv). The second amended petition demonstrates that Petitioners alleged abandonment by incarcerated parent for wanton disregard against both Father and Mother pursuant to section 36-1-102(1)(A)(iv)(c). It is also clear that Petitioners made no allegations for the ground of abandonment concerning Father's or Mother's failure to support the Child, which is the only ground that the trial court ultimately found was established.

At trial, counsel for Petitioners and the court had the following exchange regarding the ground of abandonment:

THE COURT: What's the second one?

MR. EVANS: Abandonment, wanton disregard.

THE COURT: No visitation—or is it wanton disregard only, or is no visitation, no money paid? What are we dealing with here?

MR. EVANS: Yes. No money paid, no meaningful visitation.

THE COURT: Okay. So, no money, no visits. Then, the third prong of that, if a defendant is incarcerated is wanton disregard . . .

MR. EVANS: Correct, Your Honor.

THE COURT: Would that apply to the mother only?

MR. EVANS: Mother only, yes.

The court and counsel for the parties then had a lengthy discussion regarding the four-month periods relevant to Father and Mother. From this exchange, we ascertain that Petitioners were alleging the grounds of abandonment *by incarcerated parent* for failure to support, abandonment *by incarcerated parent* for failure to visit, and abandonment *by incarcerated parent* for wanton disregard. See Tenn. Code Ann. § 36-1-102(1)(A)(iv)(a)-(c). The court referred to wanton disregard as “the third prong” after it was stated that Petitioners were alleging failure to support and failure to visit, and counsel for Petitioners agreed by stating “Correct, Your Honor.” The court’s “third prong” comment insinuated that it was referring to the multiple ways of abandonment found in section 36-1-102(1)(A)(iv). Therefore, in addition to abandonment by incarcerated parent for wanton disregard, we gather that it was Petitioners intent at the time to allege abandonment by incarcerated parent for failure to support and abandonment by incarcerated parent for failure to visit pursuant to section 36-1-102(1)(A)(iv)(a) or (b), which requires incarceration as a condition precedent. It was not Petitioners intent to allege abandonment by failure to support or failure to visit pursuant to section 36-1-102(1)(A)(i).

In its oral ruling after trial, the trial court found that the ground of abandonment by incarcerated parent for wanton disregard was not proven so the ground failed. Additionally, the court found “that both parents visited as best they could during the relevant four[-]month period.” The court then stated that “abandonment by failure to support, that ground is sustained with respect to both parents” In the court’s order, it cited to the first and fourth definitions for the ground of abandonment, found in section 36-1-102(1)(A)(i) and (iv), but it only cited to the provision for wanton disregard for the fourth definition. Again, the court found that Petitioners failed to establish the ground of abandonment by wanton disregard pursuant to section 36-1-102(1)(A)(iv).⁶ The court also “looked at abandonment by no visitation,” but it did not expressly make a finding in its order as to whether this ground of abandonment was established by Petitioners. However, its statements regarding visitation by Father and Mother implied that this particular ground of abandonment was not established. Ultimately, the court found that Petitioners established the ground of abandonment against both Father and Mother, basing its decision on abandonment by failure to support pursuant to section 36-1-102(1)(A)(i).

Our review of the second amended petition confirms that the ground of abandonment by failure to support was not pled. Neither Father nor Mother were put on sufficient notice that their parental rights could be terminated on the ground of abandonment by failure to support under either definition of abandonment. The word “support” does not appear in the section concerning the ground of abandonment in Petitioners’ second amended petition; it only appears in the section concerning the ground of failure to manifest an ability and willingness and in the section concerning the best interests of the Child. Moreover, Petitioners cited to the definition of abandonment in section 36-1-102(1)(A)(iv) and not section 36-1-102(1)(A)(i). Therefore, neither Father nor Mother were put on sufficient notice that their parental rights could be terminated under the definition of abandonment in section 36-1-102(1)(A)(i).

iii. Whether Abandonment by Failure to Support was Tried by Consent

Our analysis does not conclude here because “a ground for termination not included in the petition can be properly found if [it] was tried by implied consent.” *In re Lauren F.*, 2021 WL 5234712, at *11 (quoting *In re Alleyanna C.*, No. E2014-02343-COA-R3-PT, 2015 WL 4773313, at *6 (Tenn. Ct. App. Aug. 10, 2015)). This Court has discussed the procedural requirements in termination cases:

[Courts must] “strictly apply the procedural requirements in cases involving the termination of parental rights.” *Weidman v. Chambers*, No. M2007-02106-COA-R3-PT, 2008 WL 2331037, at *6 (Tenn. Ct. App. June 3, 2008) (citing *In re W.B. IV*, No. M2004-00999-COA-R3-PT, 2005 WL 1021618 at

⁶ Petitioners did not present an additional issue regarding the trial court’s finding that the ground of abandonment by incarcerated parent for wanton disregard was not established.

*10 (Tenn. Ct. App. Apr. 29, 2005) and *In re M.J.B.*, 140 S.W.3d 643, 651 (Tenn. Ct. App. 2004)). And a fundamental component of due process is proper notice of the issues to be tried in the court. *In re W.B. IV*, 2005 WL 1021618, at *13. So unless a ground for termination is tried by implied consent, see *In re Alysia S.*, 460 S.W.3d 536, 564 (Tenn. Ct. App. 2014), parental rights may be terminated “only upon the statutory ground(s) alleged in the petition because otherwise the parent would be ‘disadvantage[d] in preparing a defense.’” *In re Anthony R.*, No. M2012-01412-COA-R3-PT, 2013 WL 500829, at *4 (Tenn. Ct. App. Feb. 8, 2013) (quoting *In re W.B. IV*, 2005 WL 1021618, at *10).

Id. at *11 (quoting *In re Boston G.*, No. M2019-00393-COA-R3-PT, 2020 WL 2070399, at *3 (Tenn. Ct. App. Apr. 29, 2020)). Petitioners appear to recognize the deficiency in their second amended petition and argue that this ground was tried by express or implied consent.⁷ In order to support a finding that this particular ground was tried by consent, “it must be clear from the record that any ‘evidence presented that is relevant to the unpled ground had no relevance to any other issue being presented to the Trial Court.’” *Id.* (quoting *In re Johnny K.F.*, 2013 WL 4679269, at *8). It is clear that whether Father and Mother failed to support the Child *was* relevant to the ground of failure to manifest an ability and willingness and the analysis of the best interest factors. See *id.* at *12 (finding that the father’s “conduct prior to his incarceration was relevant to the court’s best interest analysis, not only to the unpled ground of wanton disregard”).

As previously noted, at the beginning of trial, counsel for Petitioners and the court had a discussion regarding the ground of abandonment, and counsel for Petitioners stated that they were attempting to prove abandonment by failure to support as to Father and Mother, but apparently in relation to subsection (iv). We are not convinced that the ground of abandonment under the definition in section 36-1-102(1)(A)(i) was tried by consent. Particularly, Petitioners invited confusion concerning this ground by pleading only the definition of abandonment found in section 36-1-102(1)(A)(iv) and not specifying that they were also attempting to prove failure to support in addition to wanton disregard. Furthermore, when Petitioners stated at trial that they were attempting to establish failure to support, they did not specify whether they were attempting to establish failure to support under the definition in subsection (i) or subsection (iv).

Accordingly, we find that the ground of abandonment by failure to support, pursuant to Tennessee Code Annotated section 36-1-102(1)(A)(i), was not properly raised in the second amended petition and was not tried by consent of the parties. “[T]he trial court cannot simply substitute one definition of abandonment for another when making its ruling.” *In re Samuel R.*, No. W2017-01359-COA-R3-PT, 2018 WL 2203226, at *13 (Tenn. Ct. App. May 14, 2018). We reverse the trial court’s holding that Petitioners

⁷ We note here that counsel for Petitioners on appeal was not counsel in the trial court.

established the ground of abandonment by failure to support pursuant to section 36-1-102(1)(A)(i).

2. Persistent Conditions

The next ground for termination at issue on appeal is commonly referred to “persistent conditions” or “persistence of conditions.” This ground applies when:

(3)(A) The child has been removed from the home or the physical or legal custody of a parent . . . 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 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 . . . ;

(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 . . . in the near future; and

(iii) The continuation of the parent . . . 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[.]

Tenn. Code Ann. § 36-1-113(g)(3). Each element must be proven by clear and convincing evidence. *In re Valentine*, 79 S.W.3d at 550. This Court has explained that this ground applies “when, by court order, a ‘child has been removed from the home or the physical or legal custody of a parent . . . for a period of six (6) months’ as a result of a dependency and neglect petition.” *In re Boston G.*, 2020 WL 2070399, at *6; *see also In re D.V.*, No. E2018-01438-COA-R3-PT, 2019 WL 1058264, at *5 (Tenn. Ct. App. Mar. 6, 2019) (“The child must have been removed from the home or the physical or legal custody of a parent/guardian for a period of six (6) months by a court order entered following a petition alleging that the child is a dependent and neglected child.”). “The necessary order of removal is ‘the threshold consideration’ for this ground.” *In re Lucas S.*, No. M2019-01969-COA-R3-PT, 2021 WL 710841, at *4 (Tenn. Ct. App. Feb. 24, 2021) (quoting *In re Alleyanna C.*, 2015 WL 4773313, at *14).

Prior to the filing of DCS's petition for dependency and neglect in the juvenile court, the Child was not in the home or physical custody of Father or Mother because the Child was in the care of Petitioners. Father had left the Child with Deborah advising her that he could no longer care for the Child. Father and Deborah then completed an Immediate Protection Agreement allowing Petitioners to care for the Child. *See In re Elijah R.*, No. E2020-01520-COA-R3-PT, 2021 WL 2530644, at *11-12 (Tenn. Ct. App. June 21, 2021) (concluding that the child had not been removed from the father's home or physical custody because the child was residing with the aunt and uncle for about a month when the petition was filed). Therefore, in order for this ground to apply to either Father or Mother, the Child must have been removed from their *legal custody* for a period of six months by a court order entered at any stage of proceedings in which a petition had been filed in the juvenile court alleging that the Child was dependent and neglected. Tenn. Code Ann. § 36-1-113(g)(3)(A).

DCS filed a petition to transfer temporary legal custody and for an ex parte order in the juvenile court in February 2020, alleging that the Child was dependent and neglected. The court entered an order as to Father in February 2020, placing legal custody of the Child with Petitioners. However, it did not state whether Father actually had legal custody of the Child. We determine that it is unclear from the record whether Father had legal custody of the Child to begin with. This Court has explained that legal custody of a child is with the mother when the child is born to unmarried parents. *In re Elijah R.*, 2021 WL 2530644, at *12 (quoting *In re Audrey S.*, 182 S.W.3d at 872). The Child in this case was born to unmarried parents. According to Father's testimony, Mother was "still married" to someone else at the time of trial, and DCS required Father to complete a paternity test verifying that he was actually the Child's father. "Absent an order of custody to the contrary, custody of a child born out of wedlock is with the mother." Tenn. Code Ann. § 36-2-303. There was no such order in the record. As such, we conclude that the ground of persistent conditions is inapplicable to Father, and we therefore affirm the court's finding that this ground was not proven as to him. *See In re Allie-Mae K.*, No. M2020-00215-COA-R3-PT, 2020 WL 6887870, at *12 (Tenn. Ct. App. Nov. 24, 2020) (reversing the ground of persistent conditions because, based on the limited record, we were simply unable to determine by clear and convincing evidence whether the children were removed from the mother's home or custody by the requisite order). The court later entered an order as to Mother in May 2020, which placed legal custody of the Child with Petitioners and thereby removed legal custody from Mother. Petitioners filed their initial petition for adoption in January 2021, which sought to terminate the parental rights of Father and Mother. However, they did not sufficiently allege the ground of persistent conditions until amending their initial petition. Regardless, the Child was removed from the legal custody of Mother by a court order for a period of six months as a result of a dependency and neglect petition. Tenn. Code Ann. § 36-1-113(g)(3)(A). Additionally, six months accrued before the termination petition was set to be heard in April 2022. *Id.* § 36-1-113(g)(3)(B).

In regard to Mother, the trial court found in its oral ruling that it was "arguable" that

the conditions still persisted and that it was “possible” there was little likelihood that the conditions would be remedied at an early date due to her pending charges. The court also found that the continuation of the parent-child relationship greatly diminished the Child’s chances of early integration into a safe, stable, and permanent home. However, the court ultimately found that Petitioners did not meet their burden of proof. The court’s final order reflected its oral ruling and stated that Petitioners failed to meet their burden of proof of clear and convincing evidence regarding this ground.

Although it was not stated as such, we have reasoned that the chief conditions leading to the Child’s removal were Father’s and Mother’s ability to parent the Child and to provide an environment free of inappropriate behavior, namely Mother’s behavior resulting in her repeated arrests and incarcerations. The proof demonstrates that it was more than “arguable” that the conditions still persisted as to Mother. We find the proof to be clear and convincing. Mother had quite the criminal history, and she acknowledged that it had “ramped up” since the Child was born in October 2019 because she was “just angry.” She admitted that she had a couple of misdemeanor charges, such as public intoxication, prior to the Child being born. She was also charged with introduction of contraband into a penal facility that occurred in July 2019. In November 2019, she was arrested and incarcerated overnight just weeks after the Child was born. In January 2020, she was arrested, incarcerated, and charged with disorderly conduct and child neglect. She was released from incarceration in March 2020, but she was arrested and incarcerated again several days later for domestic assaults that occurred on March 25 and March 28. In June 2020, she was arrested and incarcerated for aggravated assault after putting Father in a headlock and then choking and punching him in the head and face. Another domestic assault occurred in August 2020 where she burned Father with a lit cigarette. In December 2020, she was arrested and incarcerated again on two separate occasions. On the first occasion, she attacked Father leaving a mark and a bloody scratch on his neck. After officers arrived, she refused to be handcuffed and then screamed and cursed at the officers after being handcuffed. On the second occasion, she struck Father in the head with her fist. After this incident, Father communicated with Deborah on Facebook messenger and sent a picture of himself showing where Mother hit him. He also sent a message telling Deborah not to let Mother around the Child because she was “being aggressive.” Mother admitted to recently being arrested and charged for an offense in North Carolina, which appears to have occurred in September 2021. Additionally, she admitted at trial that she had pending charges for possession of methamphetamine and possession of Xanax, though it is unclear when she committed those offenses.

The paternal grandmother had concerns about Mother and described her as “violent,” “dangerous,” and “not capable of nurturing a child.” Deborah also testified that Mother had a “violent tendency.” Mother’s “erratic behavior” resulted in her arrest and incarceration in January 2020, which then led to the Child’s removal in this case. As set forth in the paragraph above, Mother has continued to engage in behavior resulting in multiple arrests and incarcerations since the Child was removed from her custody. She has

shown an inability to refrain from incurring additional charges and to contain her behavior which has caused many of those charges. Mother testified that her behavior was due to a mental health issue, but she only participated in therapy for three or four months in 2020. She still felt as if she had the current need for mental health services, but she was not currently receiving any while she was incarcerated. At the time of trial, Mother was incarcerated for five failure-to-appear charges and a violation of probation, and she was not set to be released from incarceration until July 2022.

Based upon this proof, we find that there was clear and convincing evidence in favor of terminating Mother's parental rights in regard to the ground of persistent conditions. The conditions that led to the Child's removal still persisted as to Mother. Tenn. Code Ann. § 36-1-113(g)(3)(A)(i). Due to Mother's incessant behavior resulting in arrests and her incarceration at the time of trial, we also find that 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 in the near future and that the continuation of the parent-child relationship greatly diminishes the Child's chances of early integration into a safe, stable, and permanent home. *Id.* § 36-1-113(g)(3)(A)(ii) and (iii). Accordingly, we reverse the trial court's finding that Petitioners failed to establish the ground of persistent conditions as to Mother.

3. Failure to Manifest an Ability and Willingness to Parent

The final ground at issue on appeal exists when “[a] parent . . . 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 legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child[.]” Tenn. Code Ann. § 36-1-113(g)(14). Under this ground, there are two elements necessary to prove. *In re Neveah M.*, 614 S.W.3d at 674. The first element “places a conjunctive obligation on a parent . . . to manifest both an ability and willingness to personally assume legal and physical custody or financial responsibility for the child.” *Id.* at 677. Accordingly, “clear and convincing proof that a parent . . . has failed to manifest either ability or willingness” satisfies the first element of this ground. *Id.* (adopting *In re Amynn K.*, No. E2017-01866-COA-R3-PT, 2018 WL 3058280, at *13 (Tenn. Ct. App. June 20, 2018)). The second element requires the petitioner to establish that “placing the child in the [parent's] legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child[.]” Tenn. Code Ann. § 36-1-113(g)(14); *see In re Neveah M.*, 614 S.W.3d at 677.

In its oral ruling, the trial court held that it could not sustain this ground. It stated as follows:

The parents have done some things that . . . DCS wanted them to do. They've both done some classes. The father is working, got a place, got a room for the child. I don't believe the father's testimony that the petitioner's [sic] have

prevented or thwarted him in any way from making progress or visiting the child. The mother didn't make any such allegations. She's having a hard time staying out of jail, but when she and the father are not into it with each other, and she appeared to be pretty docile here on the witness stand today. She's not addicted to any drugs that I can tell. From the proof, and as her counsel pointed out, she's passed a whole bunch of drug tests. Both of these people, if they could get their lives straightened out, could probably parent these children down the road somewhere, but this ground requires clear and convincing proof, and the court just can't find that it's sustained under that burden, particularly with posing a significant—a risk of substantial harm to the physical or psychological welfare of the child.

In its order, however, the court incorrectly, and perhaps inadvertently, applied the elements for the ground of persistent conditions, instead of the elements relevant to the ground of failure to manifest an ability and willingness. It stated that the Child had been removed from the home or custody of both Father and Mother for a period of six months. It further stated, "Petitioners failed to prove that the conditions that led to the child's removal still persist" The court's order is the order from which this appeal arises, and it did not incorporate or attach the oral ruling quoted at length above.

We note that the trial court directed counsel for Petitioners to prepare this order, but the court ultimately signed it and approved it for entry. As a result of applying the incorrect elements for this ground, the court's order lacks the appropriate findings of fact and conclusions of law. "[T]he trial court must make 'specific findings of fact and conclusions of law' when entering an order in a termination of parental rights proceedings." *In re Zoey L.*, No. E2019-01702-COA-R3-PT, 2020 WL 2950549, at *1 (Tenn. Ct. App. June 3, 2020); *see* Tenn. Code Ann. § 36-1-113(k) ("The court shall enter an order that makes specific findings of fact and conclusions of law[.]"); *see also* Tenn. R. Civ. P. 52.01 ("In all actions tried upon the facts without a jury, the court shall find the facts specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment."). "[I]n termination cases, the 'trial court's failure to comply with [Tennessee Code Annotated section] 36-1-113(k) affects more than the standard of appellate review. It affects the viability of the appeal.'" *Id.* at *2 (quoting *In re G.N.S.*, No. W2006-01437-COA-R3-PT, 2006 WL 3626322, at *6 (Tenn. Ct. App. Dec. 13, 2006)). Because this is a termination case, "we may not 'soldier on' to make our own findings of fact relative to this ground." *In re Alexis S.*, No. E2018-01989-COA-R3-PT, 2019 WL 5586820, at *9 (Tenn. Ct. App. Oct. 29, 2019); *see In re Nevada N.*, 498 S.W.3d at 594; *see also In re S.M.*, 149 S.W.3d 632, 639 (Tenn. Ct. App. 2004) (stating that the absence of specific findings fatally undermines the validity of a termination order). Appellate courts "may not conduct a de novo review of the termination decision in the absence of such findings." *In re Charles B.*, No. W2020-01718-COA-R3-PT, 2021 WL 5292087, at *9 (Tenn. Ct. App. Nov. 15, 2021) (quoting *In re Carrington H.*, 483 S.W.3d at 523).

As such, we vacate the court's order in regard to the ground of failure to manifest an ability and willingness to parent as to both Father and Mother. See *In re Leann K.*, No. M2021-00053-COA-R3-PT, 2021 WL 3485915, at *7 (Tenn. Ct. App. Aug. 9, 2021) (vacating the trial court's order as it pertained to the ground of failure to manifest an ability and willingness to parent). We conclude that it is unnecessary to remand this ground as to Mother because we have already determined that the ground of persistent conditions was established as to her. See *In re Kamyiah H.*, No. M2021-00834-COA-R3-PT, 2022 WL 16634404, at *7 (Tenn. Ct. App. Nov. 2, 2022) (vacating the ground of failure to manifest an ability and willingness to parent due to a lack of sufficient findings but concluding it was not necessary to remand the case for additional findings because other grounds existed to support termination of the mother's parental rights); *In re Ralph M.*, No. E2021-01460-COA-R3-PT, 2022 WL 3971633, at *16-17 (Tenn. Ct. App. Sept. 1, 2022) (vacating the persistence of conditions ground due to insufficient findings of fact but declining to remand for additional findings because "other grounds exist[ed]"). However, we have found that no grounds have been established as to Father. Therefore, we remand this ground to the trial court only as to Father, with instructions to make "specific findings of fact and conclusions of law," as Tennessee Code Annotated section 36-1-113(k) requires. *In re Alexis S.*, 2019 WL 5586820, at *9; see *In re Mickeal Z.*, No. E2018-01069-COA-R3-PT, 2019 WL 337038, at *13 n.8 (Tenn. Ct. App. Jan. 25, 2019) ("Although this Court has sometimes found a remand to be unnecessary in cases of insufficient findings when another ground for termination has been established, we have concluded that there are no grounds established against Father in this case at the present time.").

B. Best Interests of the Child

We now briefly address the issue of whether termination of parental rights was in the best interests of the Child. In its oral ruling, the trial court concluded that the "old" best interest factors applied because the initial petition was filed in January 2021. The court then entered its order finding that it was in the best interests of the Child to terminate the parental rights of Father and Mother. As previously discussed, however, we are applying the statutes in effect at the time the second amended petition was filed in January 2022.

Therefore, rather than considering the statutory best interest factors as they existed at the time of the filing of the initial petition, the trial court should have considered the new statutory best interest factors, which went into effect on April 22, 2021. See 2021 Tenn. Pub. Acts, Ch. 190 § 1 (S.B. 205); see *In re Jackson R.*, No. M2021-01545-COA-R3-PT, 2023 WL 353420, at *9 n.8 (Tenn. Ct. App. Jan. 23, 2023) (noting that the amended statute applies to a petition for termination filed on or after April 22, 2021). In a similar case, we explained that "the statute as amended adds a number of 'additional factors that should be considered, if relevant.'" *In re Alessa H.*, No. M2021-01403-COA-R3-PT, 2022 WL 3332653, at *14 (Tenn. Ct. App. Aug. 12, 2022) (quoting *In re Riley S.*, No. M2020-01602-COA-R3-PT, 2022 WL 128482, at *14 n.10 (Tenn. Ct. App. Jan. 14, 2022)); see also Dawn

Coppock, *Happier Childhoods and Better Best Interest Factors*, 57 Tenn. B.J. 24, 26 (July/Aug. 2021) (stating that courts are not “required to make findings for each enumerated factor, but are directed to identify the factors relevant to the case at bar, including any other ‘child-centered factors’ and to make specific findings of fact regarding only the factors considered”). As such, in *In re Alessa H.*, we reversed the trial court’s finding that termination of the mother’s parental rights was in the best interests of the child based upon the previous version of the statute and remanded for findings on the new best interest factors. *Id.* We do the same here.

Accordingly, we reverse the trial court’s finding that termination of Father’s and Mother’s parental rights was in the best interests of the Child and remand to the trial court for findings on the new best interest factors.⁸ Furthermore, this Court recognizes that “time has marched on during this litigation.” *Id.* Therefore, the trial court may exercise its discretion to consider additional evidence on remand.

V. CONCLUSION

For the aforementioned reasons, we conclude as follows: (1) we reverse the court’s finding that the ground of abandonment by failure to support was established as to both Father and Mother; (2) we reverse the court’s finding that the ground of persistent conditions was not established as to Mother but affirm as modified as to Father; (3) we vacate the ground of failure to manifest an ability and willingness to parent as to both Father and Mother but remand only as to Father; and (4) we reverse the court’s finding that termination of Father’s and Mother’s parental rights was in the best interests of the Child and remand to the trial court for findings on the new best interest factors. Costs of this appeal are taxed equally between the parties, for which execution may issue if necessary.

CARMA DENNIS MCGEE, JUDGE

⁸ On remand, the trial court must make findings on the new best interest factors as to Mother. However, the court should only make findings on the new best interest factors as to Father if it determines that the ground of failure to manifest an ability and willingness to parent was established as to him. *See In re Miceal Z.*, 2019 WL 337038, at *16 (noting that the trial court should only conduct the best interest analysis as to the father if on remand the court found sufficient grounds to support the termination of his parental rights).