

FILED

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Clerk of the  
Appellate Courts

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

**IN RE KOREY L.**

**Appeal from the Juvenile Court for Davidson County  
No. 250217 Sheila Calloway, Judge**

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**No. M2022-00487-COA-R3-PT**

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Appellant/Father appeals the trial court's termination of his parental rights to the minor child on the grounds of: (1) failure to establish a suitable home; (2) abandonment by wanton disregard; (3) persistence of the conditions that led to the child's removal; (4) incarceration for a 10-year sentence; and (5) failure to manifest an ability and willingness to assume legal and physical custody of the child. The trial court failed to make sufficient findings to support the grounds of: (1) failure to establish a suitable home; (2) abandonment by wanton disregard; and (3) failure to manifest an ability and willingness to assume legal and physical custody of the child. Tenn. Code Ann. § 36-1-113(k). Accordingly, we reverse the termination of Father's parental rights on those grounds. We affirm the trial court's termination of Father's parental rights on the remaining grounds and on its finding that termination of Father's parental rights is in the child's best interest.

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

KENNY ARMSTRONG, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and THOMAS R. FRIERSON, II., J., joined.

Kelli Barr Summers, Brentwood, Tennessee, for the appellant, William L.<sup>1</sup>

Jonathan Skrmetti, Attorney General and Reporter, and Mara L. Cunningham, Assistant Attorney General, for the appellee, Tennessee Department of Children's Services.

Thomas H. Miller, Franklin, Tennessee, Guardian ad Litem.

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<sup>1</sup> In cases involving a minor child, it is the policy of this Court to redact the parties' names to protect their identities.

## OPINION

### I. Background

Appellant William L. (“Father”) and K.D.C. (“Mother”) are the parents of the child at issue in this case, Korey L. (the “Child”), who was born in March 2016. Mother surrendered her parental rights to the Child on January 24, 2020, and she is not a party to this appeal. As such, we discuss Mother’s involvement only as necessary to the recitation of a full factual and procedural history.

Mother and Father also have a daughter, who is not the subject of this appeal. Appellee Tennessee Department of Children’s Services (“DCS”) first became involved with this family in relation to the daughter. A review of DCS’ records reveals that, in 2013, Father was charged with aggravated child neglect of his daughter, who was removed from the parents’ custody and placed with the maternal grandmother.<sup>2</sup> According to Father’s statements to DCS, he and Mother were incarcerated for thirteen months for the neglect of their daughter. In relation to the removal of his daughter, DCS provided Father with parenting classes and assessments, in-home services, and mental health services. In a mental health report from 2014, it was noted that Father was unable to parent a child. Due to the ongoing mental health issues and based on evaluations, following their release from prison, the parents were allowed only supervised visits with their daughter.

Giving rise to the instant appeal, on February 27, 2017, DCS received a referral, alleging lack of supervision and environmental neglect regarding the then eleven-month-old Child. Father called law enforcement after Mother left Father home alone with the Child. Father claimed that Mother abandoned the Child and that it was “not solely his responsibility to care for [the Child].” Father reported that the family had been evicted and that they were without clothing and diapers for the Child. Father was concerned about the Child’s wheezing and coughing while they were walking around in the rain, so he called an ambulance. Although the Child appeared to be clean and well kept, the attending medics reported that the Child’s car seat was filthy, and the bottle Father gave them had mold growing on the top.

DCS’ initial attempts to interview Father and Mother were thwarted by the fact that they had been evicted from their housing. Although DCS attempted to interview the parents, Father became “verbally aggressive and denied the allegations” giving rise to the referral. Specifically, Father claimed that DCS was harassing them, and he became loud and rude, making statements about the Ku Klux Klan, Obama’s Affordable Care Act, and racism. DCS stopped the interview. On March 3, 2017, CPSA Toryn McKelvey conducted separate interviews with Mother and Father at DCS’ offices. During her interview, Mother

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<sup>2</sup> The maternal grandmother was not a possible placement for Korey L. due to an investigation into potential violations of the supervision of the daughter.

claimed that she left Father with the Child to “cool down” after an argument with Father, and by the time she returned, Father and the Child were gone. Mother reported that the Child suffered from respiratory problems, and she did not know why Father would take the Child to the hospital. Mother denied that there was mold on the bottle, that they were homeless, and that the child needed clothing and diapers. She believed Father made the DCS referral because he did not want Mother to “live her life.” Father expressed his belief that someone was looking in their windows and that his neighbors, “who smoked crack,” were responsible for the police coming to the home. Later in the interview, Father remembered calling the police himself. Father denied that the Child’s diaper rash was from not changing the diaper, that there was mold on the bottle, that they were homeless, and that he argued with Mother.

DCS interviewed Denisha Jackson, with Mental Health Co-Op, where Father was being treated. Ms. Jackson stated that Father had been diagnosed with schizoaffective disorder and PTSD. Although Ms. Jackson indicated that Father was “in compliance with [his] mental health services,” she stated that he had not yet started the recommended therapy. Furthermore, Father allegedly stopped taking his medication in March of 2017. DCS recommended that Father undergo a Well-Functioning Parenting Assessment. On April 21, 2017, DCS and Father completed a non-custodial parenting plan that required Father to submit to this assessment and comply with any recommendations thereof.

On April 27, 2017, DCS received a second referral, alleging that the Child was being physically abused. Specifically, the referral alleged that Mother and Father were fighting every day and leaving the Child unattended. On April 28, 2017, DCS met with Mother and Father. Father stated that there was no physical abuse in the home. He denied that the Child was crying for long periods of time and stated that the Child “was going to cry because he was a baby.” Father explained that Mother had left him, and he was caring for the Child alone.

Father submitted to a psychological evaluation, which revealed concerns about his ability to parent a young child. During the evaluation, the examiner had to direct Father to attend to the Child, who was playing with a laptop cord plugged into the wall and a space heater. Father stated that he allowed the Child to play with such devices, including an air conditioning unit, in the home. After the exam, Father attempted to leave the Child in the office unattended. The report noted concerns regarding Father’s judgment and lack of knowledge regarding child safety. Based on the evaluation, it was recommended that Father complete parenting classes focusing on child safety and have in-home services to help him identify potential dangers in the home.

Based on the history of Father’s inability to parent, mental health concerns, domestic violence in the home, and child-safety concerns, an immediate protection agreement (“IPA”) was deemed necessary. After the IPA was entered, DCS attempted to schedule a meeting with the parents at the rooming house where they were living at that

time. Hostilities with Mother made scheduling this meeting difficult and required a police escort. While waiting for a police escort, DCS observed the parents on the porch without the Child for more than one hour. The parents then left with the Child before the police arrived.

On May 10, 2017, DCS returned and observed that the door to the parents' room was open. Another resident of the rooming house let the DCS caseworker in, but Father was not home. Mother became upset discussing the IPA and stated that neither she nor Father had any family to care for the Child. When informed of the importance of finding placement, Mother claimed not to care, handed the Child over to DCS, and said "take him." The caseworker observed that the room had pillows strewn on the floor, and there were dirty bottles by the door. When asked for the Child's things, Mother stated that he had none and refused to hand over the car seat, which had been provided by DCS based on the condition of the Child's original car seat. The May 10, 2017 removal was based on mental health issues, the parents' instability and inability to parent, domestic violence issues, homelessness, and substance abuse. The subsequent emergency protective custody order found that there was no less drastic alternative to removal to prevent "severe and irreparable harm" to the Child. The Child has remained in foster care continuously since that date.

On May 11, 2017 DCS filed a dependency and neglect petition, seeking emergency removal of the Child. As to Father, DCS alleged dependency and neglect due to ongoing mental health issues that directly affected his parenting, lack of supervision, and domestic violence in the home. Father agreed to a finding of dependency and neglect. Accordingly, the Juvenile Court of Davidson County ("trial court") found that the Child was dependent and neglected pursuant to Tennessee Code Annotated sections 37-1-102(b)(13)(F) and (G) due to mental health issues, homelessness, and the inability to properly parent.<sup>3</sup>

On June 4, 2017, less than a month after the Child's removal, Father was arrested for attempted first-degree murder after stabbing a man during an argument. Father pleaded to the lesser charge of attempted second-degree murder and received a fourteen-year sentence as a Range II Multiple Offender. Father's release eligibility date was the standard thirty percent. Due to Father being off his medication at the time of the "incident," the criminal court determined that his mental health issues were not mitigating factors that would warrant treatment in the community rather than incarceration. Following his incarceration, Father began taking his medication again. Father remained incarcerated continuously from June 4, 2017, through trial in January 2022. While incarcerated, Father allegedly received his GED, participated in parenting assessments and behavioral classes for reintegration for parole. There is no indication in the record that Father has been paroled.

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<sup>3</sup> The Child was also found to be dependent and neglected based on drug use in the home. At the hearing on the petition to terminate Father's parental rights, DCS conceded that the drug use primarily involved Mother, whereas mental health issues were the primary concern with Father.

The Child was placed in the foster home of Katrina S. (“Foster Mother”) on May 16, 2017, when he was approximately fourteen months old. The Child has been with Foster Mother continuously since that time. Foster Mother initiated therapy for the Child after observing that he had nightmares and trouble sleeping. The Child also showed aggression—throwing things, hitting people, and having tantrums. These issues have improved with consistent therapy.

On June 21, 2019, DCS petitioned to terminate Father’s parental rights. The trial court held a trial on January 21, 2022. By order of March 18, 2022, the trial court terminated Father’s parental rights on the grounds of: (1) failure to establish a suitable home; (2) abandonment by wanton disregard; (3) persistence of the conditions that led to the Child’s removal; (4) incarceration for a 10-year sentence; and (5) failure to manifest an ability and willingness to assume legal and physical custody of the child. The trial court also found that termination of Father’s parental rights was in the Child’s best interest. Father appeals.

## II. Issues

There are two dispositive issues, which we state as follows:

1. Whether there is clear and convincing evidence to support at least one of the grounds relied upon by the trial court to terminate Father’s parental rights.
2. If so, whether there is clear and convincing evidence to support the trial court’s finding that termination of Father’s parental rights is in the Child’s best interest.

## III. Standard of Review

The Tennessee Supreme Court has explained that:

A parent’s right to the care and custody of 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. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L.Ed.2d 49 (2000); *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L.Ed.2d 551 (1972); *In re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010); *In re Adoption of Female Child*, 896 S.W.2d 546, 547-48 (Tenn. 1995); *Hawk v. Hawk*, 855 S.W.2d 573, 578-79 (Tenn. 1993). But parental rights, although fundamental and constitutionally protected, are not absolute. *In re Angela E.*, 303 S.W.3d at 250. “[T]he [S]tate as *parens patriae* has a special duty to protect minors. . . .’ Tennessee law, thus, upholds the [S]tate’s authority as *parens patriae* when interference with parenting is necessary to prevent serious harm to a child.” *Hawk*, 855

S.W.2d at 580 (quoting *In re Hamilton*, 657 S.W.2d 425, 429 (Tenn. Ct. App. 1983)); see also *Santosky v. Kramer*, 455 U.S. 745, 747, 102 S. Ct. 1388, 71 L.Ed.2d 599 (1982); *In re Angela E.*, 303 S.W.3d at 250.

*In re Carrington H.*, 483 S.W.3d at 522-23. Tennessee Code Annotated section 36-1-113 provides the various grounds for termination of parental rights. *In re Jacobe M.J.*, 434 S.W.3d 565, 568 (Tenn. Ct. App. 2013); see also Tenn. Code Ann. § 36-1-113(g). “A party seeking to terminate parental rights must prove both the existence of one of the statutory grounds for termination and that termination is in the child’s best interest.” *Id.* (citing Tenn. Code Ann. § 36-1-113(c)).

Because of the substantial interests at stake in termination of parental rights proceedings, the heightened standard of clear and convincing evidence applies. *In re Carrington H.*, 483 S.W.3d at 522 (citing *Santosky*, 455 U.S. at 769). This heightened burden “minimizes the risk of erroneous governmental interference with fundamental parental rights[,]” and “enables the fact-finder to form a firm belief or conviction regarding the truth of the facts[.]” *Id.* (citing *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010)). “The clear-and-convincing-evidence standard ensures that the facts are established as highly probable, rather than as simply more probable than not.” *Id.* (citing *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005)). Accordingly, the standard of review in termination of parental rights cases is as follows:

An appellate court reviews a trial court’s findings of fact in termination proceedings using the standard of review in Tenn. R. App. P. 13(d). *In re Bernard T.*, 319 S.W.3d at 596; *In re Angela E.*, 303 S.W.3d at 246. Under Rule 13(d), appellate courts review factual findings de novo on the record and accord these findings a presumption of correctness unless the evidence preponderates otherwise. *In re Bernard T.*, 319 S.W.3d at 596; *In re M.L.P.*, 281 S.W.3d 387, 393 (Tenn. 2009); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007). 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. The trial court’s ruling that the evidence sufficiently supports termination of parental rights is a conclusion of law, which appellate courts review *de novo* with no presumption of correctness. *In re M.L.P.*, 281 S.W.3d at 393 (quoting *In re Adoption of A.M.H.*, 215 S.W.3d at 810). Additionally, all other questions of law in parental termination appeals, as in other appeals, are reviewed *de novo* with no presumption of correctness. *In re Angela E.*, 303 S.W.3d at 246.

*In re Carrington H.*, 483 S.W.3d at 523-24.

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

The trial court terminated Father's parental rights on the grounds of: (1) failure to establish a suitable home; (2) abandonment by an incarcerated parent by wanton disregard; (3) persistence of conditions; (4) incarcerated for a 10-year sentence; and (5) failure to manifest an ability and willingness to assume legal and physical custody of the child. However, in their respective appellate briefs, both DCS and the Guardian ad Litem concede that the trial court failed to make the requisite and necessary findings of fact on the grounds of: (1) failure to establish a suitable home; (2) abandonment by an incarcerated parent by wanton disregard; and (3) failure to manifest an ability and willingness to assume legal and physical custody of the child. Tenn. Code Ann. § 36-1-113(k) ("The court shall enter an order that makes specific findings of fact and conclusions of law . . ."). From our review of the trial court's order, we agree that the findings on the foregoing grounds are insufficient to facilitate our review. The requirement for specific findings in termination orders is a highly significant one and "reflects the Tennessee General Assembly's recognition of the necessity of individualized decisions in these cases." *In re C.R.B.*, No. M2003-00345-COA-R3-JV, 2003 WL 22680911, at \*3 (Tenn. Ct. App. Nov. 13, 2003). The requirement for specific findings "reflects the legislature's understanding that findings of fact and conclusions of law facilitate appellate review and promote the just and speedy resolution of appeals." *Id.* As such, "[m]eticulous compliance" with the mandates of Tennessee Code Annotated section 36-1-113(k) is required, *In re Maria B.S.*, No. E2011-01784-COA-R3-PT, 2012 WL 1431244, at \*3 (Tenn. Ct. App. Apr. 25, 2012), and "[w]hen a trial court fails to enter an order containing adequate findings of fact and conclusions of law with regard to all alleged grounds for termination, the Tennessee Supreme Court has instructed the appellate courts to remand the case to the trial court for the preparation of appropriate written findings of fact and conclusions of law." *In re C.R.B.*, 2003 WL 22680911, at \*4. Here, however, remand is not necessary. As noted above, only one ground for termination of parental rights must be found by clear and convincing proof. Here, the trial court made sufficient findings on the grounds of persistence of conditions, and incarcerated for a ten-year sentence. So, while we reverse the trial court's termination of Father's parental rights on the grounds of: (1) failure to establish a suitable home; (2) abandonment by an incarcerated parent by wanton disregard; and (3) failure to manifest an ability and willingness to assume legal and physical custody of the child, we proceed to review the question of whether clear and convincing evidence supports the trial court's termination of Father's parental rights on the remaining grounds of: (1) persistence of conditions; and (2) incarcerated for a ten-year sentence.

##### A. Persistence of Conditions

Under Tennessee Code Annotated section 36-1-113(g)(3), courts may terminate a parent's rights when:

(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;

In its order terminating Father's parental rights, the trial court made the following findings concerning this ground:

The conditions that led to the removal of the [C]hild from [Father's] legal and physical custody were mental health issues . . . homelessness, and the inability to properly parent. The [C]hild was removed from the custody of Father for more than six (6) months. These issues still exist for [Father] currently, specifically he is still incarcerated and unable to parent [the Child].

The evidence establishes by clear and convincing evidence that the issues that resulted in the removal of the [C]hild from the legal and physical custody of [Father] persist and in all probability would cause the [C]hild to be subject[ed] to further abuse and/or neglect, making it unlikely that the [C]hild could return to him in the near future; and there is little likelihood that these conditions will be remedied at an early date so that the [C]hild can be returned in the near future and the continuation of the parent/child relationship diminishes the chance of an early integration into a stable and permanent home. The [C]hild is already well integrated into a safe and stable pre-adoptive home.

The purpose of the persistence of conditions ground "is to prevent the child's lingering in the uncertain status of foster child if a parent cannot within a reasonable time demonstrate an ability to provide a safe and caring environment for the child." *In re Nevada N.*, 498 S.W.3d 579, 605 (Tenn. Ct. App. 2016). Consequently, "[t]he failure to remedy the conditions which led to the removal need not be willful." *Id.* (citing *In re T.S. and M.S.*, No. M1999-01286-COA-R3-CV, 2000 WL 964775, at \*6 (Tenn. Ct. App. July 13, 2000)). This ground for termination applies "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." *In re Audrey S.*, 182 S.W.3d at 874; *see also In re Veronica T.*, No. M2017-00726-COA-R3-PT, 2018 WL 1410909, at \*4 (Tenn. Ct. App. Mar. 21, 2018) ("An essential prerequisite to establishing persistence of conditions is evidence of a 'prior court order removing the child from the parent's home . . . based on a judicial finding of dependency, neglect or abuse.'" (quoting *In re Aiden R.*, No. E2015-01799-COA-R3-PT, 2016 WL 3564313, at \*9 (Tenn. Ct. App. June 23, 2016))). We have also held that "the pertinent question in a termination proceeding based upon the statutory ground of persistence of conditions is whether [the parent] has continued to neglect the [c]hild" after the child has been removed from the parent's custody. *In re Emilie A.M.*, No. E2011-02416-COA-R3-PT, 2012 WL 4053040, at \*6 (Tenn. Ct. App. Sept. 17, 2012) (citing *State v. C.H.K.*, 154 S.W.3d 586, 593 (Tenn. Ct. App. 2004)); *see also In re Audrey S.*, 182 S.W.3d at 873 (explaining that the purpose behind the persistence of conditions ground is to prevent children from languishing in foster care when a parent makes minimal efforts towards reunification).

Turning to Father's testimony, we note that it is largely incoherent. Father was first asked to state his name for the record. Although he initially stated William J. L., he went on to explain that, "I don't go by that. That's a slave name. My name is Ras Malenya Bazrothe. . . . It's just a John Doe name. Ras, dot, M-w-e-n-y-a, and then Bazro, B-a-z-r-o. . . . That's Swahili."

Father also denied any mental health issues, stating:

Q. Okay. Do you have any psychological diagnoses?

A. No, ma'am.

Q. You don't.

A. All I have is behavioral health.

Q. Okay. So if there is an order from the Criminal court that says you've been diagnosed with schizophrenia and posttraumatic stress disorder, is that incorrect?

A. That's incorrect. . . . The Criminal Court, they got mood disorder, which is not mental health, none of that. A mood disorder is an emotional disorder, which it can be mood swings, female hormones, male hormones.

When asked about his criminal charges, Father stated:

Q. When you engaged in your criminal activity that resulted in your incarceration--

A. I never engaged in nothing.

Q. -- you knew Korey was --

A. Ma'am, do I look like the Burger King guy?

Q. I'm not sure what that means.

A. That's what was in court documents, that the Burger King guy shot and stabbed somebody. Now, how did I shoot when she just said I stabbed somebody?

Concerning whether Father had remedied any of the conditions that led to the Child's removal, Latrecia Morris-Clay, the DCS team leader assigned to this case, testified, in relevant part, as follows:

Q [to Ms. Morris-Clay]: Okay. And we'll move into persistence of conditions in regards to that. You said that Korey came into foster care due to the instability of the parents, mental health issues, . . . substance abuse, and homelessness; is that right?

A. Yes.

Q. Have any of those conditions, to your knowledge, been remedied?

A. Not to my knowledge.

Q. Okay. Based on [Father's] testimony today, would you have concerns about his mental health stability?

A. Yes.

Q. Does he have appropriate housing?

A. No.

Q. Have you been provided documentation of the services he claims to have worked?

A. No.

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Q. Okay. Would you have concerns about Korey's safety and well-being if he were ever placed in [Father's] care?

A. Yes.

Q. Tell me why you have those concerns.

A. [Father's] mental capacity. It would be—as far as the safety concerns, Korey needs someone that can be able to provide housing, stable housing, mental stability for a child. And [Father] at this point has not shown that he's able to do those things.

We agree with Ms. Morris-Clay's assessment. Father was arrested and charged with attempted first-degree murder when the Child was just fifteen-months old. When the Child was two years old, Father pleaded guilty to attempted second-degree murder, and was sentenced to fourteen-years. Father has remained incarcerated since that time. However, more troubling than Father's incarceration is the fact that his significant mental issues persist. This fact was demonstrated by Father's own testimony at trial. Father denied the severity of his diagnoses of schizoaffective disorder and PTSD, stating that he suffered from a "mood swing disorder." However, Father's testimony, some of which is reproduced above, raises serious questions regarding the status of his mental health. Other than taking

his medication, there is no indication that Father has addressed his mental health issues. Based on Father's current incarceration, there is little likelihood that Father's mental health issues, parenting issues, or housing issues will be remedied at any early date; as such, the continuation of the parent-child relationship greatly diminishes the Child's chances of early integration into a safe, stable and permanent home. From the totality of the circumstances, there is clear and convincing evidence to support the trial court's termination of Father's parental rights on the ground of persistence of the conditions that led to the Child's removal.

### **B. Incarceration for a Ten-Year Sentence**

Turning to the second ground for termination, Tennessee Code Annotated section 36-1-113(g)(6) provides that grounds for termination exist when "[t]he parent has been confined in a correctional or detention facility of any type, by order of the court as a result of a criminal act, under a sentence of ten (10) or more years, and the child is under eight (8) years of age at the time the sentence is entered by the court[.]" Only two findings are necessary to support this statutory ground: (1) that the parent has been confined to a correction or detention facility of any type, by order of the court as a result of a criminal act, under a sentence of ten or more years, and (2) that the child at issue was under eight years of age at the time the sentence was entered by the court. *In re Jamazin H.*, No. W2013-01986-COA-R3-PT, 2014 WL 2442548, at \*4 (Tenn. Ct. App. May 28, 2014) (citing *In re E.M.P.*, No. E2006-00446-COA-R3-PT, 2006 WL 2191250, at \*6 (Tenn. Ct. App. Aug. 3, 2006)). Establishing this ground for termination is not a "difficult task because the parent either is or is not serving a prison sentence of at least ten years, and the child either was or was not eight years old when the sentence was imposed." *Id.* (quoting *In re T.M.G.*, 283 S.W.3d 318, 325 n.4 (Tenn. Ct. App. 2008)). In this sense, "the legislature has established a 'bright line' ground for termination of parental rights" in enacting section 36-1-113(g)(6). *In re Adoption of K.B.H.*, 206 S.W.3d 80, 85 (Tenn. Ct. App. 2006). Here, it is undisputed that Father was sentenced to fourteen years. At the time of Father's sentencing, the Child was two years old. As such, the criteria for this ground are clearly met. However, Father asserts that his eligibility for parole after serving thirty percent of his sentence should negate this ground. We disagree. This Court has consistently held that a parent's eligibility for parole does not affect whether the 36-1-113(g)(6) criteria are met. *See In re Jamazin H.*, 2014 WL 2442548, at \*11 n.6 ("This ground for termination applies regardless of the possibility of early parole[.]"); *In re Adoption of K.B.H.*, 206 S.W.3d at 85 ("At the time [section 36-1-113(g)(6)] was enacted, the legislature was certainly aware of parole and other means by which a prisoner could end up released from his or her incarceration prior to expiration of the full sentence, and did not include such circumstances in the language of the statute."). As such, Father's parole argument is not persuasive. The criteria for this ground are met by clear and convincing evidence, and we affirm the trial court's termination of Father's parental rights based on his sentence of more than ten years when the Child was younger than eight years old.

## V. Best Interest

Having determined that grounds exist for the termination of Father's parental rights, we next address the best interest analysis. The version of Tennessee Code Annotated section 36-1-113(i) that was in effect when the termination petition was filed provides a set of non-exclusive factors courts are to consider in determining whether termination of parental rights is in a Child's best interest, to-wit:

(i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol, 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.

Tenn. Code Ann. § 36-1-113(i). The Legislature amended the best interest factors effective April 2021. However, it is the version in effect at the time of the filing of the petition to terminate parental rights that governs. *See, e.g., In re Riley S.*, No. M2020-01602-COA-

R3-PT, 2022 WL 128482, at \*13 n.10 (Tenn. Ct. App. Jan. 14, 2022), *perm. app. denied* (Tenn. Mar. 17, 2022) (holding that the newly-enacted best interest factors apply “only to petitions for termination filed on or after April 22, 2021”). In this case, DCS filed its petition to terminate Father’s parental rights on June 21, 2019; therefore, the foregoing version of the statute applied. Here, however, the trial court applied the newly-enacted best interest factors. We note that neither party raises an issue concerning the trial court’s use of the amended best interest factors.<sup>4</sup> Regardless, this Court has held that the previous version of the best interest factors is included within the newly-enacted factors. *In re Da’Moni J.*, No. E2021-00477-COA-R3-PT, 2022 WL 214712, at \*23 (Tenn. Ct. App. Jan. 25, 2022), *perm. app. denied* (Tenn. Apr. 1, 2022) (“[T]he best interest factors relevant to this case are included in the new version of factors that went into effect in April 2021.”). As such, the *Da’Moni J.* Court found that a trial court’s error of analyzing the new version of the best interest factors when the previous version was applicable was not reversible error. *Id.* Therefore, we exercise our discretion to proceed with our review of the trial court’s best interest analysis.

Before turning to the trial court’s specific findings, we note that the Tennessee Supreme Court has instructed:

When conducting the best interest[] 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 interest[] 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 interest[] analysis must be proven by “a preponderance of the evidence, not by clear and convincing evidence.” *In re Kaliyah S.*, 455 S.W.3d [533,]at 555 [(Tenn. 2015)] (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 interest[] involves more than a “rote examination” of the statutory factors. *In re Audrey S.*, 182 S.W.3d at 878.

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<sup>4</sup> The Guardian ad Litem’s brief lists the correct version of the best interest factors.

And the best interest[] 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 interest[] 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).

In its order terminating Father’s parental rights, the trial court made the following findings concerning the Child’s best interest:

The Court has considered the relevant and child-centered, non-exclusive factors found at T.C.A. §36-1-113(i) and makes the following findings:

(1) The effect a termination of parental rights will have on the child’s critical need for stability and continuity of placement throughout the child’s minority:

In this case, the [C]hild has been in the same foster home since shortly after he was placed in custody. He has bonded with the foster parent and has stability. It is in his best interest to maintain the continuity of this placement.

(2) The effect a change of caretakers and physical environment is likely to have on the child’s emotional, psychological and medical condition:

A change of caretaker and physical environment is likely to have a negative effect on the [C]hild's emotional, psychological and/or medical condition. At this point, the foster parent is the only family that Korey really knows. Although he regularly talks with his father and sees pictures of him, his foster parent is his parent. Korey is excelling in every respect in his foster parents

care.

(3) Whether the child has created a healthy parental attachment with another person or persons in the absence of the parent:

The [C]hild has created a healthy parental attachment with his foster parent. She clearly loves him and has taken care of all his needs. He is a part of her family and is bonded with his foster parent, and the entire extended family.

(4) 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:

[Father] has not made an adjustment of circumstances, conduct, or conditions so as to make it safe and in the [C]hild's best interest to be in the home of the respondent. [Father] is still incarcerated and will not be eligible for parole until 2023.

(5) Whether the parent has taken advantage of available programs, services, or community resources to assist in making a lasting adjustment of circumstances, conduct of conditions:

Although [Father] testified as to the programs he participated in while in prison, there was no proof as to information on the specifics of the programs. While [Father] has attempted to make changes in his life, he is still incarcerated.

(6) Whether the parents 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:

The mental and/or emotional status of [Father] would be detrimental to the [C]hild's health.

(7) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

[Father] has not paid child support consistent with the child support guidelines promulgated by the Department.

The record supports the trial court's findings. The Child has not lived with Father since he was fifteen-months old. Father was incarcerated when the Child was just two

years old. As such, the Child has not developed a bond with Father. Although Father testified that he has participated in various programs while incarcerated, no evidence was introduced to support Father's statements. Regardless, Father's testimony (as set out in part above) raises serious concerns regarding his current mental health. Unless and until Father acknowledges his mental health diagnoses and seriously addresses those issues, it would not be safe for the Child to live with Father.

While Father has been incarcerated, the Child has bonded with his Foster Mother and is thriving in her care. Foster Mother testified that the Child was in kindergarten at the time of trial and was working at average and above-average levels. Foster Mother was paying for a private school, and she worked with the Child nightly on his studies. DCS reported that Foster Mother and the Child had a mother-son relationship, with the Child calling Foster Mother, "Mom." Foster Mother has sought therapy for the Child and has worked with him through that process, providing stability and love. At the time of the termination hearing, the Child was five years old. Foster Mother testified that she loves the Child as her own and wishes to adopt him. The Child has bonded not only with his Foster Mother, but with her extended family. Foster Mother stated that the Child is an "integral part of [the] family." From our review, there is sufficient evidence to support the trial court's finding that termination of Father's parental rights is in the Child's best interest.

## **VI. Conclusion**

For the foregoing reasons, we reverse the trial court's termination of Father's parental rights on the grounds of: (1) failure to establish a suitable home; (2) abandonment by an incarcerated parent by wanton disregard; and (3) failure to manifest an ability and willingness to assume legal and physical custody of the child. We affirm the trial court's termination of Father's parental rights on the grounds of: (1) persistence of conditions; and (2) incarcerated for a ten-year sentence, and on its finding that termination of Father's parental rights is in the Child's best interest. The case is remanded for such further proceedings as may be necessary and are consistent with this opinion. Costs of the appeal are assessed to the Appellant, William L. Because William L. is proceeding *in forma pauperis* in this appeal, execution for costs may issue if necessary.

s/ Kenny Armstrong  
KENNY ARMSTRONG, JUDGE