

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

February 14, 2023 Session

IN RE AUSTIN S., ET AL.

Juvenile Court for Sevier County
Nos. 22-000037, 22-000038, 22-000039

No. E2022-01277-COA-R3-PT

JUDGMENT

This appeal came on to be heard upon the record from the Juvenile Court for Sevier County, briefs filed on behalf of the respective parties, and arguments of counsel. Upon consideration thereof, this court is of the opinion that there is no reversible error in the trial court's judgment.

It is, therefore, **ORDERED** and **ADJUDGED** by this court that the judgment of the trial court is affirmed. This case is remanded to the trial court for such further proceedings as may be necessary. Costs of this appeal are assessed to the appellant, Brenda B.

PER CURIAM

FILED

09/14/2023

Clerk of the
Appellate Courts

Appendix A

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

FILED

12/08/2023

Clerk of the
Appellate Courts

IN RE AUSTIN S. ET AL.

Juvenile Court for Sevier County
No. 22-000037, 22-000038, 22-000039

No. E2022-01277-SC-R11-PT

ORDER

Upon consideration of the application for permission to appeal of mother, Brenda B., and the record before us, the application is DENIED. Mother's motion to proceed *in forma pauperis* is denied as unnecessary because she was found indigent by the lower courts.

PER CURIAM

Appendix B

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

February 14, 2023 Session

IN RE AUSTIN S., ET AL.

Appeal from the Juvenile Court for Sevier County
Nos. 22-000037, 22-000038, 22-000039 Jeffrey D. Rader, Judge

No. E2022-01277-COA-R3-PT

Mother appeals the termination of her parental rights to her children. Upon our review, we conclude that the record contains clear and convincing evidence to support the grounds for termination and that termination was in the best interest of the children.

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

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which THOMAS R. FRIERSON, II, and KRISTI M. DAVIS, JJ., joined.

Gregory E. Bennett, Seymour, Tennessee, for the appellant, Brenda B.

Jordan Keith Crews, Assistant Attorney General, Nashville, Tennessee, for the appellee, Tennessee Department of Children's Services.

Dianna M. Russell, Sevierville, Tennessee, guardian ad litem.

OPINION

I. BACKGROUND

The record shows that the involvement of the Department of Children's Services ("DCS") with the appellant, Brenda B. ("Mother"), and her children began in October of 2018. Three of the children—Austin S., Brayden S., and Remi B.—are at issue in the current matter. The father of both Austin and Brayden previously surrendered his parental rights on November 6, 2019; no father has been named for Remi.

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09/14/2023

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Appellate Courts

On October 24, 2018, DCS obtained custody of twins Austin and Brayden, along with their half-siblings Christian B. and Joshua J., through a petition and ex parte order alleging severe child abuse against Mother and Joshua J., Sr. (Joshua's father).¹ DCS filings asserted that Joshua J., Sr. abused the children and that Mother failed to protect them. During the earlier investigation, Christian informed a forensic investigator that Mother's paramour "was hitting me and my brothers." He related that Joshua J., Sr. "would punch us, smack us, whoop us, kick us, and punch us in stomach and back." Christian further noted that sometimes Mother "would see when Josh hit us" According to Christian, Joshua J., Sr. "would use a wooden paddle or his belt. The paddle has a handle and oval shape. He would use his black leather belt [that] . . . had two metal prongs that hold it together." Christian, sobbing, reported: "It hurt, I felt like my bones were going to be broken." Eventually, Brayden and Austin reported similar beatings. Austin told investigators that he had been afraid to report the abuse because Joshua J., Sr. "threate[ned] to hurt them and their mother if they told."

On September 6, 2019, after an adjudication hearing, the trial court ruled that the children were dependent and neglected. Moreover, the court adjudicated that both Joshua J., Sr. and Mother severely abused the children. As for Mother specifically, the court found that:

[M]other failed to protect the children because she admitted having a suspicion [that] Mr. [J.] was abusing them[,] & he was also abusing her. The children reported [that] she was present for some of this abuse & even provided them with ice packs for some of their bruises [M]other either knew or had reckless disregard— [Mr. J.] was out of the house[,] & then [Mother] allowed him back into the home & left him alone with the children. The children could have died.

Remi was born shortly after the hearing. The order, as to the boys, became final after it was not appealed. After an initial placement with a maternal aunt, the children, with the exception of Christian, were put in DCS custody. Remi, it appears, remained with Mother after her birth.

On October 4, 2019, a permanency plan was initiated to return Joshua, Austin, and Brayden back to Mother. On April 20, 2020, a therapist with Helen Ross McNabb Center of Sevier County opined that he "[did] not believe [Mother] to be a danger to herself or others." On September 23, 2020, the court awarded Mother full custody of all the children pursuant to Tennessee Code Annotated section 37-1-130(c), upon a finding that "the children will be provided a safe home free from the brutality [and] abuse that was the basis for the severe abuse finding." Joshua J., Sr. was ordered to have no contact with the children. The trial court's notes indicate: "Court explained this in detail."

¹ Christian B., now 14 years old, Mother's oldest child, was placed with his father in 2019.

As soon as Mother regained custody, the record suggests that she sent all of the children to live with her mother, purportedly so the school aged boys could enroll at another school. Per the testimony of the maternal grandmother, the children remained with her until July 2021. According to the grandmother, Mother “never gave [her] a reason for sending the kids to live” at her home, but she “believe[d] Josh [Sr.] was there [Mother’s home] and that’s why she didn’t take the kids there. Because she wasn’t allowed to have the kids around Josh [Sr.]”

Six months later, on January 1, 2022, the current matter arose when Joshua—who was three-and-a-half-years-old at the time—became unresponsive at Mother’s home. When Emergency Medical Services (“EMS”) arrived, Mother was performing CPR on Joshua. The child was taken to LeConte Medical Center with no pulse or spontaneous respirations. After Joshua was stabilized, he was transferred to East Tennessee Children’s Hospital (“ETCH”). There he was evaluated by Dr. Marymer Patricia Perales, who later testified at trial as an expert in child abuse pediatrics. Dr. Perales related that when Joshua first arrived at ETCH, he was in “very critical” condition, unconscious, required “life-sustaining medication,” and had injuries throughout his body. Dr. Perales noted that virtually every part of Joshua’s body showed signs of injury. On his head, there was bruising on his right eyelid and the left and right side of his head; an abrasion over his left eye; diffused bruising on his forehead, which reflected “a significant event that occurred there to his head”; different areas of missing hair with bruising underneath that were caused by at least “two episodes” of hair pulling by an adult; “quite significant bruising” and swelling in his left ear as well as bruising on the tip and back of the ear, indicating an “impact to that ear,” and a “scratch mark across his head at that same area”; and “very bloody” secretions coming out of a nasal tube that was pumping out blood from his stomach. She testified that on his torso, Joshua had a “healing abrasion . . . on the lower part of his chest,” linear bruising along his lower ribs, and “some discoloration . . . to the mid back.” “[H]is abdomen was distended . . . , particularly closer to the groin area,” and “there were concerns that he had bowel wall,” either from ischemia (inadequate blood flow) or direct trauma to the bowel. Joshua had several abrasions and some bruising in his hip area, and there was a “lip-like lesion” on his right hip that Dr. Perales believed was caused by an impact injury. He had bruising on his penis and scrotum, and there was so much swelling to his lower abdomen, groin, and testicular area that Dr. Perales “[could not] even palpate his testicles.” There also was discoloration on his buttocks and “darkening of his anal area” that could have been bruising to the anal area itself or “dependent bruising from the scrotal injury going down into the anal area.” On Joshua’s extremities, Dr. Perales described extensive bruising on his arms, as well as “bruising[] with abrasion type marks” on his left thumb and “similar lesions on other fingers.” There was circumferential bruising around his elbows, which Dr. Perales explained is not normal for accidental injuries to three-year-old children. His thighs were bruised, and his feet were swollen and discolored. Dr. Perales explained that Joshua “was so critical and had such poor [per]fusion” (blood flow) at the time that when evaluating his lower extremities, “it was hard for [her] to assess” whether the discoloration in the lower extremities was due to

trauma to that area, perfusion, or both. Dr. Perales took more pictures of Joshua two days later, on January 3, 2022, at which time she determined that the discoloration on Joshua's scrotum was bruising and that some of the discoloration on his legs was "most likely bruis[ing]." Dr. Perales further noted that Joshua was "very malnourished." She explained that a CT scan of Joshua revealed subdural hematomas—i.e., bleeding between the brain and the skull.

According to Mother's version of the events of January 1, 2022, she had asked her sons, Austin and Brayden, to take Joshua to the bathroom (because Joshua was still potty training). Shortly thereafter, while she was in another room, Joshua fell. Brayden called out to her that "Joshua was not getting up" after he had fallen. Mother claimed that after walking into the bathroom and seeing that Joshua was unresponsive, she called 911.

As for the other injuries found on the child's body, Mother contended that, overall, Joshua was fine, but he had not been himself since December 22, 2021, at which time he had fallen off a porch or ramp outside.² According to Mother, he fell approximately four feet onto concrete/gravel. Mother further asserted that the bruises on Joshua's body could be explained by the rough way Austin and Brayden physically treated Joshua. Mother claimed that her other sons would punch and push Joshua when he took their toys. Moreover, Mother explained the bruising on Joshua's genital area by alleging that Austin and Brayden would "nut check" Joshua. However, Mother only reported the "nut check" explanation to the police; she informed DCS that she never saw Austin nor Brayden hit Joshua. Lastly, Mother opined that the patches of missing hair on Joshua's head might have been caused by an undiagnosed condition.

At a later forensic interview with DCS Investigator Bree McGrane, Brayden reported that on January 1, Mother had knocked Joshua into the bathtub, after which time the child could no longer get up. Brayden demonstrated to the investigator how Joshua was gasping for air during the incident. During the interview, Brayden also disclosed additional times when Mother had abused Joshua. Brayden stated that Mother would hit Joshua's private parts, make Joshua eat his own feces, require Brayden and Austin to hit Joshua, and pull Joshua's hair. Mother denied all these disclosures, asserting that her sons "lie[] about everything."³

Joshua, unfortunately, never regained consciousness and, on January 11, 2022, he succumbed after being removed from life support. At trial, Dr. Perales opined within a reasonable degree of medical certainty that Joshua was a victim of non-accidental trauma. The autopsy revealed that Joshua suffered blunt force injuries to the head, and the manner of death was classified as a homicide. The autopsy found subdural and subarachnoid hemorrhages, which are brain bleeds between Joshua's skull and scalp. These hemorrhages

² Dr. Perales stated that "she was well versed with th[e] ramp explanation as it [] [was] the same explanation [Mother] gave for the other children's injuries" during the prior dependency-and-neglect case.

³ There is proof in the record that Mother has unaddressed mental health issues.

caused a deprivation of oxygen, blood flow, and swelling in the brain.

On January 19, 2022, DCS filed a petition to terminate Mother's parental rights. The petition noted that Joshua "had head injuries, bruising to much of his face and eyes, patches of hair pulled out of his head, bite marks on his fingers, bruising and wounds to his penis, testicles and anus, and circulation to his legs had somehow been cut off to the point that the child was likely to lose some of his toes had he survived." The petition alleged three grounds: 1) Mother had already been found by previous court order to have committed severe abuse against a child 2) Mother had committed severe abuse against Joshua J. in the present action; and 3) Mother had failed to manifest the ability and willingness to parent the children. As to ground one in the petition, DCS provided: "Reports indicate that the mother was at times duct-taping the child Joshua's mouth, hands, and feet when he was crying too much, that the mother and other adults at the home were setting off bottle rockets from the buttocks of the children, and that the father of Joshua was shooting at the feet of the children with a gun in the yard at times. The mother's niece reports that the child Joshua has said before that the mother would hit him and bite his fingers." As to ground two, DCS related that Mother "portrayed herself as a victim of domestic abuse and indicated she would not allow Joshua's father⁴ around the children again." Upon regaining custody, however, Mother "did not maintain her stability for very long [I]n ... June or July 2021, ... it appears that the abuse and torture by both the mother and Joshua's father resumed.... The mother ... lost her job and did not have the children enrolled in school until DCS became involved in September 2021" Mother was arrested on March 9, 2022, and was incarcerated at the time of trial. Mother was indicted for, *inter alia*, first-degree murder, felony first-degree murder, aggravated child abuse, and two counts of child neglect.

At trial, Kendra Mina, a foster care counselor at Youth Villages, related that Brayden told her his mother instructed him to hit his brother. He reported to her that Joshua was locked in the bathroom for misbehavior, that all the children were left outside when it was really hot, and that "they were punched and spanked and things." Brayden informed her that Mother sent him a message via his tablet telling him "that he wasn't supposed to talk to anybody or else—he said that she said she would kill him." According to Ms. Mina, Brayden felt a sense of responsibility as an older brother for what had occurred in their home. She testified that Austin was "way more reserved," but acknowledged "a time where he and his brother were being hit" by "his mom" and "Big Josh."

Brayden's former foster mother testified as follows about Brayden's recollections:

⁴ In the prior investigation, Mother had admitted to fear of Joshua J., Sr. "because he had threatened to hurt them or get someone to come hurt them, showing them his tattoos that were gang affiliated." Mother stated her belief that "she couldn't keep his son Joshua Jr. away from him because he was the father and on the birth certificate." She told investigators: "I felt like he was always watching me or in my head, I was scared for my children."

A. That mom was very abusive, especially to baby brother, Joshua. How she would hold—put duct tape over his eyes and push his eyes down. He thought that Josh was blind. Did not feed him and pulled his hair.

We were in the car one day driving down the road and he starts crying.... He said that he could not be in the vehicle any longer because all he could see was my headrest and mom throwing baby brother's head at the headrest....

* * * *

He did make a statement that he had to help beat baby brother with two by fours. And he told his mother that he could not do it anymore. And she said, "If you stop before I tell you to, I will murder you."

* * * *

We had like a little breakfast date And he told me everything. How he would have to babysit and they would have to sit on the couch while Brayden was in charge. Mom wouldn't let them get off the couch or they were going to get beat.

He said that that was the only time that Joshua really even got to eat. Because Brayden would make him peanut butter and jelly sandwiches. Sometimes he would even have to make mom peanut butter and jelly sandwiches.

* * * *

A. He did have an iPad and And he said—he had shown me like where mom had lived on the address or something like that.

And I was like, "Oh, okay. We don't need to look at that." But apparently she had wrote him a message on the tablet or something that said, "If you ever say anything I will haunt you and I will murder you." And he got scared.

* * * *

A. Issues, nighttime, he just went to bed often and he cried. So that he had ... nightmares saying that mom, like he could see mom holding a knife in one hand and a gun in the other chasing him, saying, "I'm gonna kill you. I'm gonna find you. Kill you, hurt you."

Q. This was his nightmare you said, his dream?

A. Yes. And those happened every night. Every night

At trial, Ms. McGrane, the DCS investigator, recalled that Brayden said Josh pretty

much lived in the bathroom, eating only peanut butter and jelly. Christie Carroll, the DCS foster care worker, related Brayden was “afraid because [Mother] told him that she was going to hunt him down and kill him if he told anybody what happened”

At the close of the evidence, the guardian ad litem gave a statement:

I’ve been the Guardian for these kids since 2018. And one of those kids doesn’t have a voice today. But I can be his voice. And he deserved better and he deserved to be protected.

These children are in a pre-adoptive home. And they are flourishing. I was there this past week and they are doing very well. And to say that this is not in their best interest is a disservice to these children.

Because they deserve better. They deserve to be loved. They deserve to be protected and to be safe. And their best interest is for this mother’s rights to be terminated today....

On July 28, 2022, the court terminated Mother’s parental rights, finding prior and current severe abuse, failure to manifest the ability and willingness to assume legal and physical custody of the children, and that termination was in the best interest of the children. The trial court’s order provided, in part, as follows:

The Court finds by clear and convincing evidence that the State has sustained its burden. The Court previously found on September 5, 2019, that the mother severely abused the children Austin, Brayden, and their older sibling C.B. That order is a final order.

In regards to the child Joshua Jr., clearly, these same types of activities were on-going back in 2018 and 2019 as described earlier. And it culminated in this child’s death. And this Court believes Joshua Jr’s death was at the hand of this mother.

The Court is going to read from the autopsy report because it sums a lot of this whole case up. The autopsy documented evidence of blunt force injuries of the head...including contusions of the scalp, face, and left ear, associated with multifocal deep scalp hemorrhages, organizing subdural hemorrhages, and a bunch of subarachnoid hemorrhages. Subdural and subarachnoid hemorrhages were predominantly on the right side. And these injuries resulted in diffuse hypoxic ischemic injury of the brain and cerebral edema. Additional blunt force injuries included contusions of the torso, the external genitalia, and the extremities were marked with edema and hemorrhage of the lower legs and feet.... The manner of death in the autopsy is classified as homicide.

The trial court expressed the belief that “torture [was] involved” and observed “there is no doubt, based on the proof in this record that the State has sustained its burden by clear and convincing evidence.” The Order of Termination of Parental Rights and Decree of Full Guardianship was entered on August 15, 2022. Mother filed a timely notice of appeal.

II. ISSUES PRESENTED

We consolidate the issues raised by Mother for review as follows:

- A. Did the trial court err in finding that grounds existed to terminate Mother’s parental rights?
- B. Did the trial court err in finding that termination of Mother’s parental rights was in the best interest of the children as defined by Tennessee Code Annotated section 36-1-113(i)?

III. STANDARD OF REVIEW

As our Supreme Court recently provided in *In re Markus E.*, 671 S.W.3d 437 (Tenn. 2023):

Parents have a fundamental right to the care, custody, and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988). This right “is among the oldest of the judicially recognized liberty interests protected by the Due Process Clauses of the federal and state constitutions.” *In re M.J.B.*, 140 S.W.3d 643, 652-53 (Tenn. Ct. App. 2004). “Termination of a person’s rights as a parent is a grave and final decision, irrevocably altering the lives of the parent and child involved and ‘severing forever all legal rights and obligations’ of the parent.” *Means v. Ashby*, 130 S.W.3d 48, 54 (Tenn. Ct. App. 2003) (quoting Tenn. Code Ann. § 36-1-113(I)(1)). “[F]ew consequences of judicial action are so grave as the severance of natural family ties.” *M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996) (quoting *Santosky v. Kramer*, 455 U.S. 745, 787 (1982)).

Although parental rights are superior to the claims of other persons and the government, they are not absolute and may be terminated upon appropriate statutory grounds. See *In Re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010); *Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002). Due

process requires clear and convincing evidence of the existence of the grounds for termination. *In re Drinnon*, 776 S.W.2d at 97. A parent's rights may be terminated only upon

- (1) [a] finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and
- (2) [t]hat termination of the parent's or guardian's rights is in the best interest[] of the child.

Tenn. Code Ann. § 36-1-113(c). “[A] court must determine that clear and convincing evidence proves not only that statutory grounds exist [for the termination] but also that termination is in the child's best interest.” *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). The existence of at least one statutory basis for termination of parental rights will support the trial court's decision to terminate those rights. *In re C.W.W.*, 37 S.W.3d 467, 473 (Tenn. Ct. App. 2000), abrogated on other grounds by *In re Audrey S.*, 182 S.W.3d 838 (Tenn. Ct. App. 2005).

The heightened burden of proof in parental termination cases minimizes the risk of erroneous decisions. *In re C.W.W.*, 37 S.W.3d at 474; *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). “Evidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *In re Audrey S.*, 182 S.W.3d at 861 (citations omitted). It produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established. *In re A.D.A.*, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002); *Ray v. Ray*, 83 S.W.3d 726, 733 (Tenn. Ct. App. 2001); *In re C.W.W.*, 37 S.W.3d at 474.

In 2012, a panel of this court described the clear and convincing evidence standard as a two-step process and provided as follows:

Under the clear and convincing evidence standard, it is important to distinguish between the specific facts found by the trial court and the combined weight of those facts. Each specific underlying fact need only be established by a preponderance of the evidence. Such specific underlying facts include whether a particular injury suffered by the child was the result of nonaccidental trauma, and whether the caregiver's conduct with respect to the injury was knowing. Once these specific underlying facts are established by a preponderance of the evidence, the court must step back to look at the combined weight

of all of those facts, to see if they clearly and convincingly show severe child abuse.

In re S.J., 387 S.W.3d 576, 591–92 (Tenn. Ct. App. 2012) (internal citations and quotation marks omitted). “After making the underlying factual findings, the trial court should then consider the combined weight of those facts to determine whether they amount to clear and convincing evidence that termination is in the child’s best interest.” *In re Kaliyah S.*, 455 S.W.3d 533, 555 (Tenn. 2015) (citations omitted).

In 2023, the Tennessee Supreme Court provided the following further guidance to this court in reviewing cases involving the termination of parental rights:

To review trial court decisions, appellate courts use a similar two-step process, to accommodate both Rule 13(d) of the Tennessee Rules of Appellate Procedure and the statutory clear and convincing standard. First, appellate courts review each of the trial court’s specific factual findings de novo under Rule 13(d), presuming each finding to be correct unless the evidence preponderates against it. When a trial court’s factual finding is based on its assessment of a witness’s credibility, appellate courts afford great weight to that determination and will not reverse it absent clear evidence to the contrary.

Second, appellate courts determine whether the combination of all of the individual underlying facts, in the aggregate, constitutes clear and convincing evidence. Whether the aggregate of the individual facts, either as found by the trial court or supported by a preponderance of the evidence, amounts to clear and convincing evidence is a question of law, subject to de novo review with no presumption of correctness. As usual, the appellate court reviews all other conclusions of law de novo with no presumption of correctness.

In re Markus E., 671 S.W.3d 437, 455–57 (Tenn. 2023) (internal citations omitted).

Lastly, in the event that the “resolution of an issue in a case depends upon the truthfulness of witnesses, the trial judge, who has had the opportunity to observe the witnesses and their manner and demeanor while testifying, is in a far better position than this Court to decide those issues.” *In re Nevada N.*, 498 S.W.3d 579, 591 (Tenn. Ct. App. 2016) (citing *McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn. 1995); *Whitaker v. Whitaker*, 957 S.W.2d 834, 837 (Tenn. Ct. App. 1997)). “Thus, this court gives great weight to the credibility accorded to a particular witness by the trial court.” *In re Christopher J.*, No. W2016-02149-COA-R3-PT,

2017 WL 5992359, at *3 (Tenn. Ct. App. Dec. 4, 2017) (citing *Whitaker*, 957 S.W.2d at 837).

IV. DISCUSSION

A. 1.

As to the first ground, Tennessee Code Annotated section 36-1-113(g)(4) provides that:

The parent or guardian has been found to have committed severe child abuse, as defined in §37-1-102, under any prior order of a court or is found by the court hearing the petition to terminate parental rights or the petition for adoption to have committed severe child abuse against any child;

Tenn. Code Ann. § 36-1-113(g)(4). The plain language of section 36-1-113(g)(4) “does not require that the prior order have any specific temporal proximity or nexus to the current child at issue or the proceedings currently being adjudicated.” *In re I.E.A.*, 511 S.W.3d 507, 516 (Tenn. Ct. App. 2016).

At a hearing on September 6, 2019, Mother stipulated to a finding of severe abuse by clear and convincing evidence, admitting that she failed to protect the children from Joshua J., Sr. despite witnessing some of the abuse and providing care to the children following the abuse.

As we observed in *In re Heaven L.F.*, 311 S.W.3d 435, 439 (Tenn. Ct. App. 2010):

The doctrine of *res judicata* applies when “an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.” *Galbreath v. Harris*, 811 S.W.2d 88, 90 (Tenn. Ct. App. 1990). This court previously applied the doctrine of *res judicata* to prevent a parent from re-litigating whether she committed severe child abuse in a later termination of parental rights proceeding, when such a finding had been made in a previous dependency and neglect action. *See State v. Tate*, No. 01-A-01-9409-CV-00444, 1995 WL 138858, at *5 (Tenn. Ct. App. Mar. 31, 1995).

Significantly,

[t]he most serious consequence of a finding that a parent has committed severe child abuse is that such a finding, in and of itself, constitutes a ground for termination of parental rights.... The ground itself is proved by a prior

court order finding severe child abuse, and the issue of whether abuse occurred is not re-litigated at the termination hearing.

In re S.S., No. E2021-00761-COA-R3-PT, 2022 WL 1151424, at *1, *6 (Tenn. Ct. App. Apr. 19, 2022) (quoting *In re Samaria S.*, 347 S.W.3d at 201 (quoting *DCS v. M.S.*, No. M2003-01670-COA-R3-CV, 2005 WL 549141, at *10 (Tenn. Ct. App. Mar. 8, 2005))).

Mother admits that she did previously stipulate to a clear and convincing finding of severe abuse and failure to protect her children, but she contests whether severe child abuse can be used as a ground for termination of parental rights after the severe abuse has been rectified and custody restored following both a DCS severe abuse review and court order.

Despite Mother regaining custody of Joshua, Austin, and Brayden on September 23, 2020, a prior final order finding that a parent committed severe child abuse *alone* is sufficient grounds for parental termination under section 36-1-113(g)(4). Mother and DCS were parties to the case. Mother did not appeal the prior final judgment. Therefore, clear and convincing evidence supports the trial court's ruling that a ground for termination exists pursuant to section 36-1-113(g)(4). See *In re Jaylan J.*, No. W2019-02025-COA-R3-PT, 2020 WL 7861378, at *1, *21 (Tenn. Ct. App. Dec. 22, 2020).

2.

As to the second ground, section 37-1-102 defines “severe child abuse” as:

The knowing exposure of a child to or the knowing failure to protect a child from abuse or neglect that is likely to cause serious bodily injury or death and the knowing use of force on a child that is likely to cause serious bodily injury or death[.]

Tenn. Code Ann. § 37-1-102(b)(27)(A)(i).” In *In re Markus E.*, 671 S.W.3d. at 461, the court observed that “knowing” has been described as follows:

We consider a person's conduct to be “knowing,” and a person to act or fail to act “knowingly,” when he or she has actual knowledge of the relevant facts and circumstances or when he or she is either in deliberate ignorance of or in reckless disregard of the information that has been presented to him or her.

Id. (quoting *In re S.J.*, 387 S.W.3d at 579, 592).

In *In re S.J.*, this court observed

[p]arents “may deny that the injury was purposefully inflicted, and ... there is often no witness to the injury other than the parent or caregiver. The “knowing” element can and often must be gleaned from circumstantial

evidence, including but not limited to, medical expert testimony on the likelihood that the injury occurred in the manner described by the parent or caregiver.”

387 S.W.3d at 592. After all of the evidence is presented, the court must examine the “combined weight of all the facts to see if they clearly and convincingly show severe child abuse.” *In re Devonta L.C.*, No. E2012–00678–COA–R3–PT, 2013 WL 395977, at *1, *4 (Tenn. Ct. App. Jan. 31, 2013) (noting “[D]ecisions from this Court have found severe child abuse based not on specific, proven acts of abuse, but on the ‘combined weight of the facts.’”).

Mother argues in the instant case that the trial court erred in ruling that DCS had proven that she committed severe child abuse by clear and convincing evidence. She bases this argument on DCS’ failure to establish the cause of the blunt force trauma, the perpetrator of the blunt force trauma, and the time frame in which the blunt force trauma occurred. Mother denied injuring Joshua and provided inconsistent or repeated explanations for Joshua’s injuries. The trial court discredited Mother’s testimony, finding “her explanations were woefully lacking” and that “her testimony...was nothing but self-serving.”

Expert medical testimony explained that the injuries Joshua received were not a normal accidental injury for a three-and-a-half-year-old. He had bruising on his forehead indicating a “significant event” and was found to have brain bleeds between his skull and scalp. Joshua had missing hair with bruising underneath, the cause of which was consistent with an adult pulling his hair. Joshua had lesions throughout his body; significant swelling in his lower abdomen, groin, and testicular area; and discoloration on his buttocks. Dr. Perales opined within a reasonable degree of medical certainty that Joshua was a victim of non-accidental trauma at the hands of an adult. The autopsy found Joshua’s cause of death was “blunt force injuries of the head,” and the manner of death was a homicide.

According to Dr. Perales’ testimony, “if a child becomes symptomatic and dies of his injuries, ... the event that caused the most damaging injury most likely occurred close to the time the child became symptomatic.” Joshua became symptomatic on January 1, 2022. Mother acknowledged that she was the sole caretaker of all the children at the time and the only one around the children from Christmas 2021 until Joshua’s hospitalization. It is significant that Mother was the only person around the children within the approximate time range that Dr. Perales opined Joshua might have been injured. Her son Brayden reported to authorities that Mother abused Joshua and her other children. The weight of all the facts combined demonstrates by clear and convincing evidence that Mother knowingly exposed Joshua to and knowingly failed to protect Joshua from serious bodily harm. In our view, the record supports the trial court’s determination that Mother committed severe child abuse as defined under Tennessee Code Annotated § 37-1-102(b)(27)(A). *See In re Devonta*, 2013 WL 295977, at *4.

3.

Parental rights may be terminated 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). Both elements of this code provision must be established in order to determine that a parent is unfit to continue with parental care of a child.

The first part of this statute “places a conjunctive obligation on a parent or guardian to manifest both an ability and willingness to personally assume legal and physical custody or financial responsibility for the child.” To establish the first prong, the party seeking to terminate parental rights need only prove that a parent failed to manifest either ability or willingness. *In re Neveah M.*, 614 S.W.3d 659, 677 (Tenn. 2020).

To demonstrate the “ability” element of the statute, a parent must have the true ability to care for the child. “Ability focuses on the parent’s lifestyle and circumstances.” *In re Serenity W.*, No. E2018-00460-COA-R3-PT, 2019 WL 511387, at *6 (Tenn. Ct. App. Feb. 8, 2019). A parent who is not present, for example, is not one that has the “ability” to care for a child; thus, the ability element is not met in that case. *In re Neveah M.*, 614 S.W.3d at 677. For the “willingness” element to be met, a parent must “attempt[] to overcome the obstacles that prevent [him or her] from assuming custody or financial responsibility for the child.” *In re Cynthia P.*, No. E2018-01937-COA-R3-PT, 2019 WL 1313237, at *8 (Tenn. Ct. App. Mar. 22, 2019). Simple desire and words are insufficient to prove this. *In re Jonathan M.*, No. E2018-00484-COA-R3-PT, 2018 WL 5310750, at *5 (Tenn. Ct. App. Oct. 26, 2018).

If the first elements are met, parents can lose custody based on a separate analysis of whether a child will endure “substantial harm” to said child’s physical or psychological welfare. There is no concrete test for this because the range of possibilities are vast as well as the complexities of human discourse. The court in *Ray v. Ray*, 83 S.W.3d at 732, explained the definition of “substantial harm” as:

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

As to the statutory requirement to show that placing the child in the legal and physical custody of the parent would pose a risk of substantial harm to the physical or psychological welfare of the child, the trial court observed as follows:

I find that there have been various attempts by [DCS] in the past to try to assist the mother and that was to no avail. And it resulted in the child's death.

The Court notes that the mother's attempts to civility did not last very long. I find that the attempts to explain why the children were not taken to the doctor, the children were allowed to discontinue their meds, the supervision, the home life, all of that the Court finds to be woefully lacking based on this record.

And I believe that when the children were returned, initially, to the mother in June of 2021, that the abuse and actions of the mother just simply resumed.

The Court believes that there is no way that these children could be placed back in the mother's custody. That there would be a substantial risk of harm, both physically and psychologically, to attempt to return them to her.

I believe that the children have witnessed unimaginable things either at the hands of the mother or Joshua, Senior. And I believe that they are going to require extensive therapy in the future to somehow return them to a semblance of normalcy.

We note that Mother has clearly failed to establish the ability to assume legal and physical custody of the children because she was incarcerated at the time of the trial and would not have the ability to assume custody of her children. She has also failed to show willingness to assume custody of the children by denying responsibility and placing the blame of Joshua's death on her other children. Willingness can be measured by the ability to admit to fault for one's mistakes. Mother has failed to take responsibility for her actions, thus, failing the willingness test. *In re Katrina S.*, No. E2019-02015-COA-R3-PT, 2020 WL 5269236, at *9-10 (Tenn. Ct. App. Sept. 3, 2020).

As noted by the court, placing the children in Mother's legal and physical custody would pose a risk of substantial harm to their physical and psychological welfare. After Brayden was removed from Mother's custody, he had vivid nightmares about Mother chasing him with a knife and gun, stating that she was going to kill him. He also suffered nightmares involving Joshua's dad throwing Joshua's ashes at him. Early in foster care, DCS received reports regarding the children's aggressive behavior, requiring therapy and regular emergency interventions.⁵ As for the current circumstances for the children, Ms.

⁵ These reports pertained to the boys. Remi was two years old at the time of Joshua's death. All the children receive therapy.

Carroll, the DCS foster care worker, indicated that Austin is “very outgoing,” “courageous,” “protective of Remi,” and “doing amazing.” She related that Remi is “doing great,” is being potty trained, and was being evaluated for speech services. Despite her gait being “a little off,” she is “walking a little bit better.” Brayden has been described as “so sweet,” “loving,” “absolutely amazing,” “cheeky,” and “funny.”

Accordingly, for the reasons stated above, we affirm the trial court’s decision. The trial court did not err in finding clear and convincing evidence of this statutory ground.

B.

In order to terminate a parent’s rights, a court must find “that the grounds for termination of parental or guardianship rights have been established; and [t]hat termination of the parent’s or guardian’s rights is in the best interests of the child.” Tenn. Code Ann. § 36-1-113(c). Because grounds for termination have been found, whether termination of Mother’s parental rights is in the best interest of the children must be considered.

In considering the best interest of a child, the current version of section 36-1-113(i)(1) provides the following factors for consideration:

- (A) 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;
- (B) The effect a change of caretakers and physical environment is likely to have on the child’s emotional, psychological, and medical condition;
- (C) Whether the parent has demonstrated continuity and stability in meeting the child’s basic material, educational, housing, and safety needs;
- (D) Whether the parent and child have a secure and healthy parental attachment, and if not, whether there is a reasonable expectation that the parent can create such attachment;
- (E) Whether the parent has maintained regular visitation or other contact with the child and used the visitation or other contact to cultivate a positive relationship with the child;
- (F) Whether the child is fearful of living in the parent’s home;
- (G) Whether the parent, parent’s home, or others in the parent’s household trigger or exacerbate the child’s experience of trauma or post-traumatic symptoms;
- (H) Whether the child has created a healthy parental attachment with another person or persons in the absence of the parent;
- (I) Whether the child has emotionally significant relationships with persons other than parents and caregivers, including biological or foster siblings, and the likely impact of various available outcomes on these relationships and the child’s access to information about the child’s heritage;

(J) Whether the parent has demonstrated such a lasting adjustment of circumstances, conduct, or conditions to make it safe and beneficial for the child to be in the home of the parent, including consideration of whether there is criminal activity in the home or by the parent, or the use of alcohol, controlled substances, or controlled substance analogues which may render the parent unable to consistently care for the child in a safe and stable manner;

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

(L) Whether the department has made reasonable efforts to assist the parent in making a lasting adjustment in cases where the child is in the custody of the department;

(M) Whether the parent has demonstrated a sense of urgency in establishing paternity of the child, seeking custody of the child, or addressing the circumstance, conduct, or conditions that made an award of custody unsafe and not in the child's best interest;

(N) Whether the parent, or other person residing with or frequenting the home of the parent, has shown brutality or physical, sexual, emotional, or psychological abuse or neglect toward the child or any other child or adult;

(O) Whether the parent has ever provided safe and stable care for the child or any other child;

(P) Whether the parent has demonstrated an understanding of the basic and specific needs required for the child to thrive;

(Q) Whether the parent has demonstrated the ability and commitment to creating and maintaining a home that meets the child's basic and specific needs and in which the child can thrive;

(R) Whether the physical environment of the parent's home is healthy and safe for the child;

(S) Whether the parent has consistently provided more than token financial support for the child; and

(T) Whether the mental or emotional fitness of the parent would be detrimental to the child or prevent the parent from consistently and effectively providing safe and stable care and supervision of the child.

In the instant action, the trial court found that there is a pre-adoptive foster home and the children are beginning to do much better; termination of parental rights will have a positive effect on the children's need for stability and continuity, and placing these children in another home would certainly be in their best interest; and a change of caretakers or the physical environment at this point would have a negative effect on the children, both emotionally and psychologically.

The court also determined there is no demonstration in the record that continuity

and stability would result from placing the children back with Mother. The court did not believe Mother had the ability to meet the material, educational, housing or safety needs of the children. The trial court observed that there is no showing by Mother of a secure and healthy parental attachment with the children. To the contrary, the children would be fearful of living in Mother's home, and placement with her would trigger or exacerbate the experience of trauma and post-traumatic syndromes for the children. Brayden has expressed relief upon discovering that Mother had been incarcerated. The children are beginning to create healthy parental attachment with others in the absence of Mother. They are developing emotionally significant relationships with the pre-adoptive parents.

The trial court found that Mother has not demonstrated a lasting adjustment of circumstances or conduct so as to make it safe and beneficial for the children to be in her care. The court specifically found that Mother's actions make her home unsafe. Further, Mother has not taken advantage of any available resources or programs. The trial court noted that DCS made reasonable efforts to assist Mother although, in retrospect, the children should not have been returned. There is no proof in this record that Mother has ever provided a safe and stable environment for the children.

The court concluded that Mother has demonstrated no understanding of the basic or specific needs required for children to thrive and the environment required for them to thrive. She has not made a commitment to creating and maintaining a home for them. Significantly, the emotional health of Mother would be detrimental to safe and stable care for the children.

The trial court properly found, by clear and convincing evidence, that termination of the parental rights of Mother is in the children's best interest. Having also determined that statutory grounds for termination were established, we affirm the trial court's termination of Mother's parental rights to the children.

V. CONCLUSION

The judgment of the trial court is affirmed in its entirety. This case is remanded to the trial court, pursuant to applicable law, for enforcement of the trial court's judgment. Costs on appeal are taxed to the appellant, Brenda B.

JOHN W. MCCLARTY, JUDGE