

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 6, 2025 Session

FILED

07/30/2026

Clerk of the
Appellate Courts

IN RE KNOX G.

**Appeal from the Circuit Court for Davidson County
No. 21A46 Stanley Kweiler, Judge**

No. M2024-01355-COA-R3-PT

Mother and Stepfather sought termination of Father's parental rights to a child who is subject to the Indian Child Welfare Act (ICWA). The trial court terminated Father's parental rights. Father appeals, alleging (1) various violations of the ICWA; (2) due process violations; (3) improper entry of default judgment; (4) a violation of his right to counsel; (5) improper application of the standard of proof required by the ICWA; (6) insufficient evidence to establish the termination grounds of abandonment by failure to visit, abandonment by failure to support, and failure to manifest a willingness and ability to assume custody, and (7) error as to the finding that termination is in the child's best interest. We conclude that the trial court erred in finding that the ground of failure to visit was established by clear and convincing evidence, but we affirm the judgment of termination. We deny Mother and Stepfather's request for attorney's fees.

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

JEFFREY USMAN, J., delivered the opinion of the court, in which ANDY D. BENNETT, J., and J. STEVEN STAFFORD, P.J., W.S., joined.

Nick Perenich, Nashville, Tennessee, for the appellant, Robert Cole G.

Sarah Richter Perky, Franklin, Tennessee, for the appellees, Emily G. and Randy F.

OPINION

I. Factual and Procedural History

In this parental termination proceeding, Robert Cole G. (Father) seeks to overturn the court's decision to terminate his rights to Knox G. The termination action was initiated

by Emily G. (Mother) and Randy F. (Stepfather).

Knox was born in May 2015 in Arkansas. Mother and Father were divorced in Michigan in October 2018, and the parties subsequently moved to Tennessee. The Michigan divorce decree was registered in Davidson County in April 2020.

On July 9, 2020, the circuit court temporarily suspended Father's parenting time, ordering him to submit to an alcohol and drug assessment. In reaching its decision, the circuit court noted that "Father is one of the worst witnesses^[1] from which the Court has ever had the opportunity to hear." The court found that Father had slandered his prior attorney and the court by alleging ex parte communications and had engaged in witness tampering by intimidating his ex-girlfriend, whom the court found to be credible on the subject of Father's consumption of alcohol around Knox. The alcohol use was particularly problematic as Father has struggled with alcohol abuse, and the Michigan court had previously entered an order requiring Father to use Soberlink, a device to demonstrate sobriety, before and during parenting time. The trial court also found Father had repeatedly perjured himself, and it stated it would refer the case to the District Attorney General. The order suspended Father's parenting time for 90 days, save weekly telephone calls.

Under the order, parenting time would remain suspended until Father filed a motion and completed an alcohol and drug assessment. The trial court ordered the alcohol and drug assessment to be completed with Dr. Stephen Montgomery or another appropriate professional. Attempting to reinstate parenting time, Father submitted a one-paragraph assessment from a counselor, but Mother, who was unpersuaded, moved for further testing. The trial court entered an order finding Father's proposed assessment was inadequate. The trial court noted that Father had stated Dr. Montgomery was not taking new patients, but this proved to be an inaccurate assertion, and Dr. Montgomery was in fact accepting new patients. The court ordered testing with Dr. Montgomery.

On November 13, 2020, the court held a hearing regarding Father's parenting time. The court considered a lengthy report completed by Dr. Montgomery, in which Dr. Montgomery diagnosed Father with an "[u]nspecified personality disorder with narcissistic and antisocial features," "[a]lcohol use disorder (provisional)," and tobacco use disorder. He concluded that Father's "problematic behaviors and symptoms have included lying, lack of empathy, problems with the legal system, verbal abuse, manipulation, entitlement, grandiosity, and substance use." According to Dr. Montgomery, persons with this diagnosis are "not very amenable to psychiatric and psychological treatments." Dr. Montgomery recommended refraining from alcohol and recommended using PEth tests² to

¹ The order initially stated "the worst witness," but it was modified by hand to read as recited above.

² "A PEth test detects alcohol biomarkers in the blood and can show whether the test-taker drank heavily in the past three weeks." *Welch v. Welch*, No. W2022-00227-COA-R3-CV, 2024 WL 3581304, at *1 (Tenn. Ct. App. July 30, 2024).

ensure abstinence from alcohol. He also recommended psychotherapy and substance abuse treatment but noted that success would depend on Father's investment. Dr. Montgomery also recommended supervised visitation until Father could demonstrate abstinence from alcohol, could refrain from further threatening or abusive language, and could show credibility and trustworthiness in his interactions with others.

In a November hearing, the trial court indicated that it was encouraging Father to create a treatment plan including a Rule 35 psychological evaluation but that the court would not order specific acts and that "the ball" was "in Father's court." The court noted that it had listened to a recording of Father speaking inappropriately with the child, blaming Mother for his limited parenting time, attempting to enlist the child in custody decision-making, and speaking negatively about Mother. The trial court, however, accepted Dr. Montgomery's recommendation for supervised parenting time, and it awarded time every other Saturday, noting Father was ordered to continue using Soberlink to demonstrate his sobriety prior to and during parenting time.

Mother's trial attorney shortly thereafter requested a restraining order and permanent injunction against Father. The motion stated that Father's supervised parenting time on November 21 was cancelled because he had a positive blood alcohol test. The motion alleged that Father, during the following week, threatened the supervisor, who removed herself from the case. The following visitation was cancelled because the child was required to quarantine for COVID exposure, and Father then threatened the new supervisor, who likewise removed herself. Father subsequently began emailing Mother's attorney, calling the attorney vulgar names, accusing her of various misdeeds, stating that he was reporting her to the Board of Professional Responsibility and the police, and asserting that she should stop representing Mother. Father also referenced counsel's own children and left a voicemail requesting Mother's attorney meet him alone.

The court issued an ex parte restraining order and subsequently held a hearing in which it found that Father had admitted to calling Mother's trial counsel a "litany of vile and vulgar names" and that he had accused her of stealing children, spreading COVID, and threatening to kill Father. The trial court observed that Father threatened to report Mother's attorney to the Board of Professional Responsibility, the news, and the police, and that he repeatedly referenced the attorney's children. The trial court determined that Father had attempted to get Mother's attorney to withdraw from the case. The court noted that Father asserted that Mother's attorney had sent a text message cursing at him but that he was unable to show the message and the court "did not believe a word that came from Father." Based on the hearing, the trial court found "Father has very serious mental health issues" and that he "presents a clear and present danger to the minor child." In the January order, the court awarded Father the superlative of "the worst behavior the Court has seen in his 12 years on the bench, and in 19 years of private practice." The order concluded it was in Knox's best interest to "suspend Father's contact with the child pending further orders of this Court." Father's attorney was permitted to withdraw.

Mother married Stepfather on December 31, 2020. Mother and Stepfather filed for termination and stepparent adoption on June 9, 2021, alleging abandonment by failure to visit, abandonment by failure to support, and failure to manifest an ability and willingness to assume custody. When no answer was filed, they sought and were granted a default judgment, and a final hearing date was set. On the same day that default was entered, Father, represented by counsel, moved to set the judgment aside, asserting that the Petitioners neglected to serve the Choctaw Nation despite the fact that termination of parental rights as to Knox fell within the ambit of the Indian Child Welfare Act (ICWA). *See* 25 U.S.C. § 1901 et seq. Father attached correspondence from a private adoption and guardianship specialist for the Choctaw Nation of Oklahoma, who provided the contact information for the Indian Child Welfare Director and the “address [where] documents should be sent.” Father also asserted that service on him had been improper because it was attempted through an improper process server. Pursuant to an agreed order, the first default was set aside and the Petitioners were permitted to amend the petition.

The amended petition was filed September 15, 2021, and it pled the same grounds for termination. The amended petition states that the Petitioners notified the tribe, and on September 30, 2021, the Petitioners filed a response from the Choctaw Nation listing the case number and indicating that the child was subject to the ICWA but that the Choctaw Nation did not intend to intervene, reserving the right to intervene in the future. The Choctaw Nation was served with this and future filings made by the Petitioners at the address in the September 2021 letter, although not all of Father’s filings were served on the Choctaw Nation. Father filed an answer asserting as affirmative defenses the failure to join the Choctaw Nation as a necessary party and “jurisdiction and venue as the minor child is a Native American and registered as a member of the Choctaw Nation in Oklahoma and the tribal court may be the appropriate venue pursuant to the Indian Child Welfare Act of 1978.” He reiterated this defense in an amended answer filed April 2023.

The proceedings were delayed by discovery disputes and by a delay in finding a suitable guardian ad litem. In April 2023, the court filed an order providing that “[i]f the parties are unable to agree on the specific dates for any depositions, the party desiring to take the deposition shall schedule the deposition by notice.” Mother’s counsel had stated she had not received several pleadings, some of which Father’s counsel had sent to her former address. Another provision of the order separately stated that the parties should exchange contact information, and that “[i]f notice becomes an issue, the Court will consider striking pleadings as a sanction.”

Father objected that the order, drafted by the Petitioners, conflated two issues from the hearing. According to Father, the court instructed the parties to send notices for depositions and then stated, “So if there is an issue with notice or something, if they haven’t filed anything asking for a protective order before May 22, and they don’t appear for a deposition, I may very well sanction them by striking pleadings.” Separately, the court’s proposed sanction for failing to serve filings on the opposing party was to require hand-

delivery of filings.

The court heard various motions in May 2023. The court's July 11, 2023 order noted that Father's counsel had informed the court at the hearing that Father was in an inpatient rehabilitation program "beginning from some point prior to May 19, 2023 until June 27, 2023 and was not able to participate in this litigation until after his anticipated discharge and release June 27, 2023." The court extended the deposition deadlines to August 31, 2023, and it granted the motion to correct the prior order to reflect that the consequence for not properly serving the opposing party would be the requirement of hand-delivery. The court ordered Petitioners to reveal their prospective witnesses to Father's counsel but instructed counsel not to reveal the information to Father and to ensure he would not have access to it if counsel withdrew. The court's July 11 order also provided that Father should provide any information or documents he wished to use in the final hearing and that he would not be able to testify about or rely on any information he did not disclose.

Father's counsel had filed a motion to withdraw in April 2023. Counsel continued her motion at the May hearing during which Father was in a rehabilitation program, but on June 9, 2023, she filed a notice setting the withdrawal motion for a hearing on June 23. The June notice included Father's email in the certificate of service. On July 11, 2023, the court entered an order permitting counsel to withdraw and requiring Father to provide his contact information to the parties. This notice was served on counsel but not on Father.

On August 22, 2023, the Petitioners filed a notice in which they sought to take Father's deposition on August 29, 2023, before the deadline set by the court. This notice was sent to Father by mail at two separate addresses. On August 30, 2023, the Petitioners moved for sanctions, alleging that counsel "made multiple attempts to reach an agreement with [Father] regarding the date his deposition was to be taken," that Father "refused to cooperate with choosing a date for his deposition," that they accordingly noticed the deposition, and that Father failed to appear and had not responded in any way. They further noted that Father had not disclosed the discovery material he intended to introduce at trial and that he accordingly should not be permitted to use any undisclosed information, per the trial court's July 11, 2023 order. The Petitioners asked for Father's pleadings to be stricken and for default judgment to be entered under Rule 37.02. Father was again served by mail at two addresses. The trial court held a hearing on the noticed hearing date. On September 28, 2023, the trial court entered an order finding that Father had failed to appear for the hearing or otherwise respond. The court found that Father failed to cooperate with discovery as outlined in the motion for sanctions, and it granted default judgment to the Petitioners and struck Father's pleadings. The order noted that Father would not be able to present evidence to support his claims or defenses but that he would be permitted to cross-examine witnesses. A subsequent filing from October 18, 2023, indicated that the default order was being mailed to Father at his current residence in the Williamson County jail.

Father sent correspondence to the Petitioners and the court denying he had notice of the September hearing or depositions. The court continued the trial, which was set in early November, but noted in its order that Father “has maintained a course of conduct wherein he has a history of only participating in this matter when he so chooses.”³ Father hired new counsel, who filed a motion to set aside the default in December 2023. Counsel requested that the default be set aside under Rule 55.02. The court declined to set aside the default. In so doing, the court found that Father “plays games with the Court” and that he failed to notify the court or parties of his arrest “until he thought he could use it to his advantage.” The court specifically found that Father was a sophisticated actor and “knows how to mail things and knows how to get in touch with the Court.”

The trial court elaborated on its findings regarding default and its credibility determinations relevant to default in the final termination order. The court noted the default was premised on both the failure to provide discovery documents and the failure to appear for the noticed deposition. The court found that both these acts were “contemptuous” and proper grounds for default. The court specifically made a credibility finding against Father, stating that the court did not credit Father’s claims that he did not know about the deposition or the default hearing. The court found that Father “continually failed to provide information he was ordered to provide and failed to properly participate in this litigation, and based on those failures and his disregard for this Court and the rules of procedure, the Court finds it was appropriate to enter the default judgment and sanctions against [Father].”

In March 2024, while represented by counsel, Father personally filed a series of handwritten motions. Father sought various forms of relief, including a transfer of the matter to tribal court and a dismissal of the petition. The filings included a pro se “Response to Amended Rule 29.01 Witness List and Exhibit List,” which consisted mainly of allegations that Father’s ex-wives and girlfriends were abusive and drunk and included an allegation that the Petitioners’ trial counsel “made rude and inappropriate sexual comments about the size of [Father’s] genitals.”

Father’s attorney moved to withdraw after Father began filing motions, less than two weeks before the scheduled trial on April 10, 2024, citing Rules of Professional Conduct 3.3, 1.16, and 1.6.⁴ She moved for a continuance and asked the court to consider appointing counsel. Father remained incarcerated at this point. Father filed a motion to terminate his attorney, but he opposed a continuance of trial on April 1. Father’s attorney was permitted to withdraw immediately before trial based on Father’s confirmation that he wished to terminate her representation.

³ The original trial judge passed away during the proceedings, and a new judge made these and subsequent credibility findings.

⁴ See Tenn. R. Sup. Ct. 8, RPC 3.3 (candor toward the tribunal); 1.6 (confidentiality of information); 1.16 (terminating representation).

The trial was held on two non-consecutive days. On the first day of trial, Father submitted an affidavit of indigency in which he stated his income was “\$250,000 on leave of absen[c]e 12 months” and that he owned a Porsche worth \$85,000. He listed debts on the automobile and to a country club but did not specify the amount of his debts. The trial court found that Father, who had hired three previous lawyers and had just terminated his last attorney, was “trying to prolong this matter” and that he was not indigent based on his representations. The trial court accordingly did not appoint counsel.

Randi Mann, a member of the Choctaw Nation and a field representative with the Oklahoma Department of Human Services and Child Welfare, testified as an expert in Indian Child Welfare matters. Father objected based on lack of notice regarding her expert testimony. The court overruled the objection, finding, “There was no request [f]or identification of expert witnesses in the written discovery propounded by any of your counsel.”

Ms. Mann had reviewed emails, attachments, court proceedings, pictures, videos, and criminal history, and she conducted research and background checks. She had met with Father’s attorney and with the Petitioners. She testified that Father was engaged in child-rearing practices that were not considered acceptable or safe in the tribal community. She stated the “biggest concern” was Father’s alcohol use, and she noted that Father’s emotional and physical abuse and dishonesty were also concerning. She believed beyond a reasonable doubt that Father’s continued custody was likely to result in serious emotional and physical damage to Knox. Ms. Mann also testified, in the context of the active efforts required by the ICWA,⁵ that Father was financially capable of obtaining services and completing recommendations and that his family had provided financial support as well as living space and had contributed to parenting time. Ms. Mann stated, “we have proof of workshop support, network from his family, who have provided financially for him, who have also provided a space for living for him on occasion, and also contributed to parenting time, when intact.” She noted that Father’s detox discharges recommended additional assistance outside the facilities involved, and she agreed that Father had been charged with over 20 criminal offenses. She testified that the circumstances of the case were “incredible” to her, that Father had plentiful support but had made no meaningful change, and that Knox was currently thriving. Father later moved to strike Ms. Mann’s testimony because the last 8 pages of the approximately 600 pages of Father’s medical records demonstrating alcohol abuse were not related to Father’s admission to a rehabilitative program, but to the admission of someone with a slightly similar name.

Mother testified that she worked as a manager for a sales team. She was married to Stepfather, and they were raising Knox, who was eight at the time of trial, along with

⁵ The ICWA requires a petitioner seeking termination to show “that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.” 25 U.S.C. § 1912(d).

Knox's two-year-old half-brother. She testified Knox was compassionate, truthful, and honest and that he knew Stepfather as his father. Knox was in the gifted program at school and participated in theater and sports. She testified about the strong bond Knox has with Stepfather, Stepfather's extended family, and Knox's little brother. Mother essentially testified that Knox was happy and thriving in his current environment. Mother testified that it would be detrimental and traumatic for his family unit to be disrupted. Mother indicated that Knox had begun to exhibit some anger and aggression after visits with Father around 2020. Furthermore, Knox was always crying whenever Mother picked him up from visits with Father. Knox's distress was partly due to Father discussing parenting time with him. Knox's behavior resolved after visitation was suspended.

Mother also testified regarding abandonment by failure to support. Between February and September 2021, Father paid no child support. Mother testified that Father was initially receiving payment in his own name from a technology company for contract work and that he then changed the payee to an LLC with his name, which has no employees, in an effort to circumvent child support. Mother introduced documents Father produced as "paystubs" in discovery, which showed he and his LLC received approximately \$50,000 between February and May 2021. Mother received two payments of child support in 2020 and six months of child support in 2023; all child support payments were received as a result of wage garnishment. She testified the payments in 2020 ceased when Father changed the payee to the LLC.

Regarding Father's visitation, Mother testified that between February and September 2021, Father took no action to reinstate his contact with Knox after it was suspended due to the trial court's concern about his mental health. Mother stated that, when Father was awarded supervised parenting time in November 2020, he tested positive for alcohol prior to his first visit, and it was canceled. Father then sent threatening and harassing messages to the supervisor, and the supervisor refused to supervise further visits. Father last had in-person contact with Knox in May 2020 and last had telephone contact in July 2020. Between February and September 2021, Father did not do anything to reinstate his contact with Knox. Mother did not prevent him from reinstating contact.

As relevant to Father's willingness and ability to assume custody, Mother testified that Father received treatment at Recovery Unplugged on three occasions in 2021 and that he had a positive blood alcohol screen on each admission. She testified he was admitted nine times for medical detox at the Williamson County Medical Center between 2021 and 2023. Father objected to this testimony, and counsel attempted to introduce medical records. She could not, however, locate the custodian's affidavit, and they were not introduced. Mother testified Father was also admitted to Brentwood Springs Detox for alcohol withdrawal on three occasions in May and June 2023. She confirmed that Father's attorney represented to the court that he was in a rehabilitation facility in May 2023 and that Father told Mother he would be in a rehabilitation facility in August 2023. Mother testified Father was incarcerated with 27 pending charges, including both felonies and

misdemeanors, and that he continued to accrue charges while incarcerated. During Mother's testimony, Father sought to admit Dr. Montgomery's report, confirming, after extensive discussion, "Yeah, I want the whole thing admitted, correct, yes." As noted above, the report concluded that Father had a personality disorder and substance abuse disorder. Mother testified Father did not comply with all of Dr. Montgomery's recommendations.

Mother testified as to active efforts made under the ICWA, noting that certain protective orders curtailed interactions between herself and Father. Mother testified that the Michigan court required Father to use Soberlink to demonstrate sobriety and that the Soberlink requirement was an effort to safely maintain contact between Father and Knox. She testified that Father's harassing and threatening texts caused the court to funnel communication through Our Family Wizard. Nevertheless, she asserted that she facilitated parenting time for years. She testified that numerous times, she and Knox would be in the car with a packed bag when Father would either fail the Soberlink test or represent that the Bluetooth connection required for the device to function was not working. Mother testified that she would simply tell Knox that they had to wait a little while. Mother also worked with the parenting time supervisors, filling out documents and coordinating times for the supervised visits. She facilitated telephone calls with Father and Father's extended family, and she relayed gifts from the family to Knox. Mother drove to Chicago and Memphis to allow Knox to spend time with Father and his extended family, and she sent pictures and facilitated Facetime and calls with Father's family. Mother set up child support payments when Father was in Michigan, Oklahoma, and Tennessee, so that Father would not be subject to the charge of failing to support the child. She filed pleadings in the courts for Father to receive assessment and treatment for substance abuse, mental health issues, and anger management.

Stepfather testified about the strong bond he shares with Knox, whom he first met in 2018. Knox was part of his proposal to Mother, and Stepfather also made a contemporaneous commitment to raise Knox. Knox is close to his brother and is a leader in school and extra-curricular activities such as baseball and theater. Knox calls Stepfather "Dad," and he brings his problems to Stepfather. Knox had never asked Stepfather about Father. Stepfather felt Knox would be "devastated" if his stable routine were destroyed. He testified that Father had lived at multiple addresses in Wisconsin, Arkansas, and at multiple locations in Nashville and Franklin. Father had been married twice since Stepfather came into Knox's life, although one of these marriages was annulled. Father had never provided for Knox's daily needs. Stepfather identified an order of protection spanning from February 2024 to 2025 obtained by one of Father's ex-wives against Father for abusing or threatening to abuse, sexually assaulting, and stalking her. Stepfather acknowledged that he had had no direct interaction with Father, save during one custody exchange when Father "did give me the middle finger."

Part way through the second day of trial, Father noted he had filed motions in the

case. The guardian ad litem (GAL) and Mother's counsel stated that they had not received copies of the motions. The judge responded that the motions, which had not been set, were not properly before the court. The court observed there was no date on the certificate of service and that the envelope was mailed April 18 in advance of the April 24 trial. The judge refused to consider the motions.

On May 3, 2024, prior to the written order, Father filed a pro se motion to reconsider, asserting various errors, including that the trial court erred in some findings of fact and that the default was entered without notice to him. Father moved for the trial judge's recusal on July 9, 2024. In addressing a motion to recuse filed by Father, which mainly took issue with the court's substantive rulings, the court found that Father had been properly served with the September 2023 motion for sanctions "at his address on file with the Court and at an additional address listed by Petitioner's counsel."

In the recusal order, the court also addressed Father's motion to transfer the matter to tribal court. The court noted that the motion to transfer was not set for a hearing and was filed pro se at a time that Father was represented by counsel. The court observed that counsel was permitted to withdraw and that Father did not request to be heard on the motion or orally request a transfer of jurisdiction. The court further found there was good cause to deny a transfer. The court also found that it did not err in refusing to appoint counsel when Father's affidavit and testimony established he was not indigent. Regarding timely disclosure of the experts on the ICWA, the court found that there was no objection raised by motion prior to trial and that Father's discovery requests did not seek expert disclosure. The denial of recusal was appealed, and this court affirmed the trial court's decision to decline to recuse.

On August 7, 2024, the trial court entered an order terminating Father's rights based on all three termination grounds alleged. The court credited Mother's testimony regarding Father's nine admissions to a Williamson County rehabilitation center between 2021 and 2023 and his three admissions to Brentwood Springs Detox for alcohol withdrawal in May and June 2023. The court noted that Father earned income during the statutory period but had not paid any child support. Father's prior child support payments were made as a result of wage garnishment, which was interrupted when he arranged to be paid as the LLC sharing his name. The court credited Mother's testimony that Father actively evaded paying support by altering his payee information, and it found Father willfully failed to pay child support. Regarding failure to visit, the court found that Father "engaged in a pattern of deception, emotional abuse, alcohol abuse, and a general disregard for the law in most instances" and that he "had many opportunities to repair and resume his relationship with the minor child, but he prioritized his lifestyle and his alcohol abuse over that relationship." The court credited Mother's testimony that the supervised visitation in December 2020 did not take place because Father failed to demonstrate sobriety and because the supervisors whom Father hired withdrew. According to the trial court, Father "sabotaged" supervised visitation by alienating the supervisors. The court found that Father had made no changes

to his behavior in order to regain parenting time, and in fact was now incarcerated. It stated that the court had given Father “a pathway back to his son,” which Father did not take.

According to the court, Father “continues to blame others for his situation, he continues to demonstrate impulsive behavior, and he continues to insist he does not have a problem with alcohol, or, alternatively, he argues that he successfully treated the problem.” The court found that, as noted by Dr. Montgomery, Father’s refusal to acknowledge the problem “makes it very unlikely he will ever be successful in treatment.” The court determined that this refusal was a “persistent threat to the minor child’s safety and psychological well-being if left in [Father’s] care.” According to the court, Father had no relationship with the child. The court also found Father had subjected the child to emotional abuse and trauma. The court found termination was in Knox’s best interest.

The court went on to make a finding under the ICWA that the Choctaw Nation was properly served with the petition. The court also credited Mother’s testimony that she attempted to facilitate visitation with Father directly and that, after orders of protection were in place, she attempted to preserve the relationship between Father and Knox by filing motions designed to assist him with his addiction and mental health. The court noted Ms. Mann’s testimony that Father did not meet certain ICWA requirements, in that he had the financial and family resources to address obstacles but had not used those resources. The trial court found beyond a reasonable doubt that active efforts were made by Mother, the extended family, and the courts. The court credited Ms. Mann’s testimony that Father’s child-rearing practices are “unsafe and unacceptable” in the tribal community and that Father’s custody would likely result in serious emotional and physical damage to Knox. The court found that Father’s initial motion to transfer was filed pro se, although he was represented by counsel, and that the motion was not docketed. Father’s second motion, filed when he was proceeding pro se, was filed on the second day of trial at 10:01 a.m. Concluding that the motions were not before the court, the court nevertheless held that there was good cause to deny the motions because of the extensive amount of time the proceeding was pending without a request to transfer, because of Father’s acts to delay resolution, including switching counsel three times, because the motions themselves were merely a tactic to delay, and because transfer would be unduly burdensome given the posture of the case and location of the parties.

Father appealed. On appeal, Father, who remained incarcerated, was determined to be indigent and appointed counsel. Father attempted to file a statement of the evidence, which the trial court determined was “fictionalized.”⁶ On appeal, Father asserts that (1) the ICWA was violated in various respects; (2) that his due process rights were violated; (3) that the default should have been set aside; (4) that he should have been found indigent

⁶ The court noted several assertions in the statement that were not supported by the proof at trial, including that Father owned a global company with 200 employees, and the court tangentially observed that if the statement were true, Father would have the means to pay for a transcript.

and appointed counsel at trial; (5) that the trial court erred in its application of the standard of proof; (6) that the evidence did not establish abandonment by failure to visit or support or a failure to manifest an ability and willingness to assume legal and physical custody, and (7) that termination was not in Knox's best interest.⁷ The Petitioners defend the trial court's ruling and seek attorney's fees.

II. Indian Child Welfare Act

Father alleges the court erred in failing to comply with the ICWA. The ICWA recognizes "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." 25 U.S.C. § 1901(3). The ICWA was enacted to address the fact that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901(4). Accordingly, the ICWA establishes "minimum Federal standards for the removal of Indian children from their families," 25 U.S.C. § 1902; among these are "a number of procedural protections for cases involving Indian children." *Thompson v. Fairfax Cnty. Dep't of Fam. Servs.*, 747 S.E.2d 838, 845 (Va. Ct. App. 2013).

Father alleges violations of the ICWA's requirements of (1) notice to the tribe, the parent, and the Regional Director; (2) notice, a hearing, and good cause in denying a

⁷ We have restated and reordered Father's appellate issues. The issues as stated by Father are:

I. Whether Father's constitutional right to due process of law was violated when notice was not provided as required?

II. Whether the default judgment against Father should have been set aside.

III. Whether Father should have been appointed counsel at the trial.

IV. Whether the Trial Court and/or Appellees complied with the Indian Child Welfare Act, 25 USC 1901 et seq.

V. Whether the Trial Court applied the correct standard of proof regarding grounds and best interest.

VI. Whether there were grounds under T.C.A. § 36-1-113(g)(1) and T.C.A. § 36-1-102(1)(A) that Father willfully failed to visit or failed to support the minor child for the four months prior to the filing of the petition to terminate parental rights.

VII. Whether there were grounds under T.C.A. 36-1-113(g)(14) that Father failed to manifest an ability or willingness to personally assume legal and physical custody or financial responsibility for the child and placing him in Father's custody would pose a risk of substantial harm to the welfare of the child.

VIII. Whether termination of parental rights was in the child's best interest.

transfer to tribal court; (3) a hearing regarding improper removal; (4) a failure to prove active efforts to provide services and an incorrect application of the standard of proof regarding active efforts; and (5) a violation of the ICWA's expert testimony requirement. Father also raises evidentiary issues which he asserts impact the ICWA analysis. We conclude that Father is not entitled to relief on the issues he has raised under the ICWA.

A. Notice

Father asserts that, contrary to the requirements of the ICWA, Mother did not properly notify the tribe, Father, or the Regional Director of the proceedings. Father acknowledges that under this court's opinion in *In re Kentavious M.*, the failure to notify the tribe may be harmless if the party can demonstrate that the tribe had actual notice. *See In re Kentavious M.*, No. W2010-00483-COA-R3-PT, 2010 WL 5140598, at *1, *7 (Tenn. Ct. App. Dec. 14, 2010). The Petitioners argue that the Choctaw Nation received actual notice and that Father's reading places form over substance.

As part of the procedural protections put in place to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families," 25 U.S.C. § 1902, the ICWA requires notice prior to termination:

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child *shall notify the parent or Indian custodian and the Indian child's tribe*, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. *If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner*, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

25 U.S.C. § 1912 (emphasis added). "Indian child" means "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). The parties do not dispute that Knox is an Indian child under the statute.

Notice is foundational to termination proceedings brought under the Act. Accordingly, "[a] judgment that terminates parental rights can be set aside [under the

ICWA] if notice was not given to a tribe or to the [Bureau of Indian Affairs (BIA)], and failure to include the required information can be grounds for a remand.” *N.J. Div. of Child Prot. & Permanency v. V.C.*, No. A-1683-23, 2024 WL 4579084, at *6 (N.J. Super. Ct. App. Div. Oct. 25, 2024), *cert. denied*, 335 A.3d 278 (N.J. 2025); *see* 25 U.S.C. § 1914 (providing that certain parties “may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title”). On the other hand, the “ICWA’s notice requirements are not jurisdictional and are subject to harmless error review.” *Matter of D.D.*, 482 P.3d 1176, 1180 (Mont. 2021) (quoting *In re S.B.*, 459 P.3d 214, 221 (Mont. 2019)).

Federal regulations further elucidate the notice guidelines.⁸ Under 25 C.F.R. § 23.11,

(a) In any involuntary proceeding in a State court where the court knows or has reason to know that an Indian child is involved, and where the identity and location of the child’s parent or Indian custodian or Tribe is known, the party seeking the foster-care placement of, or termination of parental rights to, an Indian child *must directly notify the parents, the Indian custodians, and the child’s Tribe* by registered or certified mail with return receipt requested, of the pending child-custody proceedings and their right of intervention. Notice must include the requisite information identified in § 23.111, consistent with the confidentiality requirement in § 23.111(d)(6)(ix). *Copies of these notices must be sent to the appropriate Regional Director* listed in paragraphs (b)(1) through (12) of this section by registered or certified mail with return receipt requested or by personal delivery and must include the information required by § 23.111.

25 C.F.R. § 23.11 (emphasis added).⁹ The regulation further provides that the notice should include “(vi) The right of the parent or Indian custodian and the Indian child’s Tribe to petition the court for transfer of the foster-care-placement or termination-of-parental-rights proceeding to Tribal court as provided by 25 U.S.C. 1911 and § 23.115.” 25 C.F.R. § 23.111(d)(6)(vi).

In analyzing notice, both parties cite to a prior decision by this court addressing

⁸ Prior to the 2016 enactment of the regulations, implementation and interpretation of the ICWA was inconsistent across, and even within, States. 81 Fed. Reg. 38,778 (June 14, 2016). “The regulations were adopted, in part, to address such ‘disparate applications of [the Act] based on where the Indian child resides’ and to make certain that the ‘uniform minimum Federal standards intended by Congress’ were applied in state courts.” *Geouge v. Traylor*, 808 S.E.2d 541, 552 (Va. Ct. App. 2017) (quoting 81 Fed. Reg. 38,778 (June 14, 2016)).

⁹ The regulation lists the address for the Regional Director for Tennessee in Nashville. 25 C.F.R. § 23.11(b)(1).

notice under the ICWA. In *In re Kentavious M.*, the mother challenged the termination of her parental rights based on a failure to send notice by registered mail to the tribe of which both she and the child were registered members. 2010 WL 5140598, at *1, *7. As in the present case, the petition there alleged that the tribe had been contacted and included as an attachment a communication from the tribe. This court concluded in *In re Kentavious M* that “DCS provided sufficient notice to the Osage Nation under the facts.” *Id.* at *8.

In the present case, the Petitioners demonstrated that the tribe had been contacted. They served court filings on the tribe, and they provided correspondence from the tribe. The tribe indicated that it did not intend to intervene. We agree with the Petitioners that the tribe in this case had actual notice and that under *Kentavious M.*, Father is not entitled to relief.¹⁰

Father also argues that the Petitioners failed to notify him of his rights regarding the right “for transfer of the foster-care-placement or termination-of-parental-rights proceeding to Tribal court as provided by 25 U.S.C. 1911 and § 23.115.” 25 C.F.R. § 23.111(d)(6)(vi). Father asserts that, “if Father had received notice, he could have exercised his right to request transfer immediately” to tribal court. Father’s pleadings, however, demonstrate that Father was aware of the right as to which he raises a purported notice deficiency. Indeed, he asserted jurisdiction and venue as affirmative defenses in both his initial and amended answers, stating that “the minor child is a Native American and registered as a member of the Choctaw Nation in Oklahoma and the tribal court may be the appropriate venue pursuant to the Indian Child Welfare Act of 1978.” In short, Father was aware that the matter could be tried in tribal court. Like the Choctaw Nation, Father had actual notice that the proceedings were being brought in state court but that tribal court might be an appropriate venue. Father even cited the relevant statute. He was aware that the ICWA applied to choice of venue. Actual notice is sufficient even though the strictures of the statute may not have been followed. *See In re Parental Rts. as to S.M.M.D.*, 272 P.3d 126, 134 (Nev. 2012) (both mother and tribe had actual notice); *see also, e.g., Matter of D.D.*, 482 P.3d at 1180 (indicating that an error can be harmless); *In re Kentavious M.*, 2010 WL 5140598, at *1, *7 (indicating that an error can be harmless). We conclude that Father is not entitled to relief on this basis.

Father also asserts that the Petitioners failed to notify the Regional Director. Father states that the regulations “do not explain why notice needs to be sent to the regional director,” but he argues that the statutory requirement must be met. Courts have concluded that “[t]he requisite notice to the tribe or the Bureau serves a two-fold purpose. It enables the tribe to investigate and determine whether the minor is an Indian child, and it advises

¹⁰ Various representatives of the tribe had provided Father and the Petitioners two different Durant, Oklahoma, addresses and three contact persons. Father notes that the “parties” sent documents to only one address, but he does not allege this was error. The Petitioners served filings on the last-provided contact; Father initially served the Choctaw Nation only some of his filings, but he also used this address.

them of the tribe’s right to exercise jurisdiction or intervene in the state proceedings.” *In re Guardianship of J.O.*, 743 A.2d 341, 347 (N.J. Super. Ct. App. Div. 2000); *see also In re K.S.*, 260 A.3d 387, 400 (Vt. 2021) (“Presumably because parents often lack information about tribal affiliation, the ICWA and the relevant BIA regulation require notice to be provided to the appropriate BIA Regional Director in addition to any identified tribes.”); *N.J. Div. of Child Prot. & Permanency*, 2024 WL 4579084, at *6 (“Once it receives an appropriate notice, the BIA must make reasonable efforts to locate and notify the appropriate tribe of the termination proceedings.” (quotation omitted)).

This understanding of the purpose is bolstered by the statutory language. For instance, subsection (c) of the statute requiring notice provides, “Upon receipt of the notice, the Secretary will make reasonable documented efforts to locate and notify the child’s Tribe and the child’s parent or Indian custodian.”¹¹ Furthermore, the subsection listing notice requirements states, “If the identity or location of the child’s parents, the child’s Indian custodian, or the Tribes in which the Indian child is a member or eligible for membership cannot be ascertained, but there is reason to know the child is an Indian child, notice of the child-custody proceeding must be sent to the appropriate Bureau of Indian Affairs Regional Director (see www.bia.gov).” 25 C.F.R. § 23.111(e).

Father does not articulate what prejudice he suffered from failure to serve the Regional Director; instead, he argues that the court “cannot assume that the failure to send this notice was harmless error.” This is not, however, the general approach courts have taken in considering this question. In *In re L.B.*, the notice was not sent to the Secretary or the Regional Director under 25 C.F.R. § 23.11(a). 3 Cal. Rptr. 3d 16, 20 (Cal. Ct. App. 2003). However, the court found any error harmless because notice was sent to the three tribes which might have claimed the child as a member. *Id.* Accordingly, in that case, “[t]he father . . . failed to demonstrate any prejudice flowed from the failure to send copies of the ICWA notices to the BIA.” *Id.*; *see also In re K.S.*, 260 A.3d at 401 (error in notice was harmless because subsequent events clarified that the act did not apply); *In re Antoinette S.*, 129 Cal. Rptr. 2d 15, 24 (Cal. Ct. App. 2002) (indicating that the error was harmless); *but see In re Suzanna L.*, 127 Cal. Rptr. 2d 860, 866 (Cal. Ct. App. 2002) (notice should have been provided to the BIA “[g]iven the uncertainty as to the tribe with which Edward’s grandparents were affiliated”).

In the case at bar, the argument for harmlessness is even stronger, because notice was sent to the child’s tribe, and the tribe confirmed that the ICWA applied to the child. The Regional Director could only have confirmed that the child was subject to the ICWA, which all parties agree applied to the child. Accordingly, we conclude any error was

¹¹ In a prior version of this statute, the notification was required to “be sent to the Secretary and the appropriate Regional Director,” rather than just the Regional Director. 25 C.F.R. § 23.11(a) (effective May 13, 2014, to Dec. 11, 2016). “Secretary means the Secretary of the Interior or the Secretary’s authorized representative acting under delegated authority.” 25 C.F.R. § 23.2.

harmless.

B. Transfer to Tribal Court

Father next alleges that notice to the tribe is required when a transfer request is made, and he alleges that the court failed to give the tribe notice, violating his due process rights. He further asserts that the court failed to hold a hearing and erred in its good cause analysis regarding denial of transfer. The Petitioners respond that this issue was not raised before the trial court and is waived. They further contend that Father did not make a proper motion for transfer because his pro se motions filed while represented by counsel were a nullity and because the motions were never docketed. They argue that without a proper transfer motion that the court did not err in failing to provide notice. The Petitioners argue alternatively that any lack of notice was harmless, as the tribe had notice of the proceedings, a representative testified that the tribe intentionally chose not to oppose termination, and Father provided copies of the removal notice to the tribe.

We conclude that there was good cause to deny transfer, that notice was provided, and that there was an opportunity for Father to put forth arguments on good cause. The ICWA provides as follows:

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

25 U.S.C. § 1911(b).

Under federal regulations, “[e]ither parent, the Indian custodian, or the Indian child’s Tribe may request, at any time, orally on the record or in writing, that the State court transfer a foster-care or termination-of-parental-rights proceeding to the jurisdiction of the child’s Tribe.” 25 C.F.R. § 23.115(a). This right “is available at any stage” of the proceeding. 25 C.F.R. § 23.115(b). Furthermore, “[u]pon receipt of a transfer petition, the State court must ensure that the Tribal court is promptly notified in writing of the transfer petition. This notification may request a timely response regarding whether the Tribal court wishes to decline the transfer.” 25 C.F.R. § 23.116. The regulatory requirements for transfer after a request are:

Upon receipt of a transfer petition from an Indian child’s parent, Indian custodian, or Tribe, the State court must transfer the child-custody proceeding unless the court determines that transfer is not appropriate

because one or more of the following criteria are met:

- (a) Either parent objects to such transfer;
- (b) The Tribal court declines the transfer; or
- (c) Good cause exists for denying the transfer.

25 C.F.R. § 23.117. The court should orally or in writing state its reasons to deny transfer. 25 C.F.R. § 23.118(d). In denying transfer, the court must not consider “[t]he Indian child’s cultural connections with the Tribe or its reservation.” 25 C.F.R. § 23.118(c)(4). Furthermore, “[a]ny party to the child-custody proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists.” 25 C.F.R. § 23.118(b).

Father points to the motions he filed while represented by counsel as a petition to transfer. However, a party generally cannot file pleadings pro se while represented by counsel. *See State v. Smith*, 492 S.W.3d 224, 242 (Tenn. 2016); *In re Easton G.*, No. E2025-01376-COA-R3-JV, 2025 WL 3269013, at *1 (Tenn. Ct. App. Nov. 24, 2025); *Jackson v. State*, No. W2019-00731-CCA-R3-PC, 2020 WL 5792961, at *5 (Tenn. Crim. App. Sept. 25, 2020). In any event, counsel did not docket these motions or otherwise seek to have the court rule on them, and an attorney’s conduct is generally attributable to and binding on the client. *Murray v. Miracle*, No. E2010-02425-COA-R3-CV, 2011 WL 13165396, at *6 (Tenn. Ct. App. Sept. 8, 2011) (citing *Hart v. First Nat’l Bank*, 690 S.W.2d 536, 539 (Tenn. Ct. App. 1985)).

Father also relies on a motion he filed on the second day of trial as his request to transfer. The four motions filed the second day of trial had not been received by either the Petitioners or the GAL as of the time Father asked the court to address the motions; however, the certificate of service indicated the motions were sent to the Choctaw Nation.¹² Father did not specify the subject of these motions orally; instead, he stated, “I filed a number of motions with this Court that I would like to have heard also.” The trial court responded that it, also, had not received the motions. The four motions, together with attachments, spanned around 80 pages. The motions were located, and the court noted an “emergency motion pursuant ICWA 25 USC 1911(b).”¹³ The court concluded that the motions were not properly before the court. Father did not orally request a transfer, and

¹² The motions were filed at 10:01 a.m., and Father asked for them to be heard at 11:28 a.m.

¹³ The motions were: “Emergency Motion Pursuant to I.C.W.A. 25 USC 1911(B)”; “Emergency Motion to Court of Competent Jurisdiction to Invalidate Testimony of Expert Witness & Violation Of 25 U.S.C. 1912 Per 25 U.S.C. 1914”; “Emergency Motion to Have All Communication With or About Expert Witness With This Court, Counsel of Record, and All Parties Involved to Be Part of the Record”; “Pursuant to Local Rules of the Court for the Middle District of Tennessee - Rule 60 Relief from Orders and I.C.W.A. 25 U.S.C. 1912 & 1914.” The “Emergency Motion Pursuant to I.C.W.A. 25 USC 1911(B)” requested transfer.

there is no indication that either the Petitioners or the GAL were aware that a transfer had been requested in writing.

The court subsequently made findings that there was, in fact, good cause to deny the transfer. Specifically, the court noted that the case had been pending for almost three years, that Father never requested transfer during that significant period of time, and that Father was the cause of much of the delay by withdrawing from participating in the case and switching attorneys multiple times. Most significantly, the trial court found that the request to transfer was not in fact a good faith request but merely another tactic to delay the proceedings. The trial court also found that transfer would be unduly burdensome, considering the length of the litigation and the fact that all parties reside in Tennessee and that none have ever resided on a reservation.

Father asserts error in the good cause determination, contending that there was no underlying basis to find good cause to deny the transfer. However, the trial court was confronted with circumstances wherein the termination had been pending almost three years, Father during those three years had engaged in tactics to delay resolution, Father had not previously requested transfer, the parties all lived in Tennessee, and Father's request was not in good faith but merely meant to delay. *See In Int. of J.W.*, 528 N.W.2d 657, 661 (Iowa Ct. App. 1995) (finding good cause existed when the request was untimely and transfer would result in geographic hardship to the parties).

Father asserts, however, that the trial court impermissibly considered “[t]he Indian child’s cultural connections with the Tribe or its reservation” when it found the child had never lived on the reservation. 25 C.F.R. § 23.118(c)(4). However, the order does not reflect that the trial court noted the child’s absence from the reservation in considering the child’s cultural connections; rather, the court’s observation was in connection with its finding that the burden for all parties involved in traveling to the Oklahoma reservation, where the child had never resided, supported the good cause determination. The record does not preponderate against the court’s factual determinations.¹⁴

Father also asserts there was error in failing to provide notice to the tribe of the transfer request. As the Petitioners point out, however, Father’s certificate of service in the motion for transfer included the Choctaw Nation. The trial court was entitled to rely on Father’s representation that he had sent a written copy of the motion to the Choctaw Nation. *See Burstiner v. Boyd*, No. M2025-01241-COA-R3-CV, 2026 WL 1675104, at *8 (Tenn. Ct. App. June 10, 2026) (A certificate of service “is prima facie evidence that a motion was served in the manner described in the certificate, and raises a rebuttable presumption that it was received by the person to whom it was sent.” (quoting *McBride v.*

¹⁴ Father acknowledges that, if he had received notice of his right to transfer, “perhaps his failure to request a transfer earlier would be his fault.” As noted above, however, Father asserted from the very earliest stages of litigation that tribal court was the appropriate venue under the ICWA.

Webb, No. M2006-01631-COA-R3-CV, 2007 WL 2790681, at *3 (Tenn. Ct. App. Sept. 25, 2007))).

Father also contends that the court erred because it “made a finding of good cause without a hearing.” However, the regulation does not actually require a formal hearing; it requires permitting the parties “the opportunity to provide the court with views regarding whether good cause to deny transfer exists.” 25 C.F.R. § 23.118(b). On appeal, while Father objects to the trial court’s failure to conduct a formal hearing, there is no indication that Father requested that the trial court conduct a formal hearing. There is no indication that Father objected to the trial court’s process. Father has not asserted on appeal that the trial court prevented him from providing his views to the court on whether good cause exists, nor did he raise such a contention before the trial court. Additionally, on the merits of the matter, even now, Father has provided no actual argument against the trial court’s good cause conclusion beyond his assertion that he would have requested a transfer sooner had he been notified. As noted above, Father had actual awareness of this ability to transfer from the outset of the proceedings. The trial court’s factual findings are well supported by the record. We conclude that Father is not entitled to relief based on the transfer petition.

C. Removal

Father next asserts that the court did not hold a hearing regarding improper removal under 25 C.F.R. § 23.114. That regulation provides:

(a) If, in the course of any child-custody proceeding, any party asserts or the court has reason to believe that the Indian child may have been improperly removed from the custody of his or her parent or Indian custodian, or that the Indian child has been improperly retained (such as after a visit or other temporary relinquishment of custody), the court must expeditiously determine whether there was improper removal or retention.

25 C.F.R. § 23.114.

Father asserts the court failed to hold a hearing as required under this provision. The statute does not, however, reference a hearing but requires an expeditious determination. In this case, the record reflects that Father initially filed motions requesting parenting time to be reinstated rather than a motion under section 23.114 asserting that the child was improperly removed. Father filed a motion for parenting time in October 2021, shortly after the termination petition. A few days before trial and while represented by counsel, Father filed a “Motion to Enforce a Foreign Decree, Comply with the Indian Child Welfare Act, and Dismiss the Petition for Adoption for Failure to Comply with the ICWA.” In this motion, Father detailed his connection to the tribe and the accomplishments of his extended family. He asserted that the court had not complied with 25 U.S.C. § 1911 to 1913, but he made no specific allegation regarding noncompliance. He asked, as relief, for

the pleadings to be stricken, for sanctions to be imposed on his own former attorneys and the Petitioners' attorney, and for the court to "order the Michigan parenting schedule into immediate effect for removing Knox from his Indian family without complying with the ICWA."

This motion does not appear to challenge removal under 25 C.F.R. § 23.114, and it was improperly filed pro se while Father was represented by counsel, but insofar as Father was asserting improper removal in his April 2024 motion, the court's orders establish that Father's parenting time was suspended due to the court's finding that he was abusing alcohol while Knox was in his care. Indeed, the court made a finding during the second day of trial, after the filing of Father's motion, that the July 2020 order "suspended your parenting time because you were a danger to the child." Accordingly, the court had actually expeditiously determined that there was no "reason to believe that the Indian child may have been improperly removed." Father is not entitled to relief.

D. Active Efforts

Father also asserts that Mother failed to prove active efforts under the ICWA, and he asserts active efforts have to be proven beyond a reasonable doubt. He contends the court did not permit him to cross-examine her regarding compliance with the ICWA, particularly regarding active efforts made after the termination petition was filed. The Petitioners respond that Mother made active efforts directly prior to the no contact orders, that she sought the court's assistance after the orders, and that the expert testified there were active efforts. They also assert the child was endangered by Father's substance abuse and emotional abuse.

The ICWA provides:

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

25 U.S.C. § 1912(d). This provision "applies to 'any party' who initiates an involuntary proceeding, thus sweeping in private individuals and agencies as well as government entities." *Haaland v. Brackeen*, 599 U.S. 255, 281 (2023). "Congress made no exception for stepparent adoptions or other types of non-dependency adoption proceedings, although the petitioning party in these proceedings will not have the resources of a social services department." *In re N.B.*, 199 P.3d 16, 23-24 (Colo. App. 2007). Regulations define "active efforts":

Active efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

- (1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
- (2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
- (3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;
- (4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;
- (5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;
- (6) Taking steps to keep siblings together whenever possible;
- (7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
- (8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;
- (9) Monitoring progress and participation in services;
- (10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;
- (11) Providing post-reunification services and monitoring.

25 C.F.R. § 23.2.

Initially, Father asserts that the “beyond a reasonable doubt” standard applies as the standard of proof for active efforts. We note that there is a split of authority on this question. *Compare State ex rel. Child., Youth & Fams. Dep’t v. Maisie Y.*, 489 P.3d 964, 971 (N.M. Ct. App. 2021) (“[W]e conclude that the beyond a reasonable doubt standard applies to a district court’s active efforts determination in cases in which the ICWA applies”); *People in Int. of E.M.*, 466 N.W.2d 168, 172 (S.D. 1991) (applying beyond a reasonable doubt standard); *with Yvonne L. v. Ariz. Dep’t of Econ. Sec.*, 258 P.3d 233, 239 (Ariz. Ct. App. 2011) (“[T]he necessary ICWA ‘active efforts’ finding must . . . be made under the clear and convincing evidence standard.”); *In re Annette P.*, 589 A.2d 924, 928 n.8 (Me. 1991) (requiring clear and convincing evidence); *In re E.P.F.L., Jr.*, 265 P.3d 764, 769 (Okla. Civ. App. 2011) (requiring clear and convincing evidence).

We also note that the statute, while providing that the requirements of subsection (f) must be proven beyond a reasonable doubt, does not provide a separate standard of proof for subsection (d) regarding active efforts. In general, a statutory text must be construed as a whole. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012). In this case, the statute specifies a heightened standard of review specifically in subsection (f); it includes no such heightened standard in subsection (d). Congress certainly could have included such a standard in subsection (d) or in section 1912 as a whole, yet it chose not to.

In *In re Vaughn R.*, a Wisconsin court relied on such textual analysis to conclude that the state standard of proof, rather than proof beyond a reasonable doubt, was the proper standard. 770 N.W.2d 795, 809 (Wis. Ct. App. 2009). The court observed, “Applying these principles [of statutory construction], we conclude that Congress’ specification of burdens of proof in § 1912(e) and (f) but not in subsec. (d) means that Congress did not intend to impose on the states a particular burden of proof for the showing required under subsec. (d).” *Id.* We find the reasoning in *Vaughn R.* persuasive. Furthermore, the Guidelines established by the Bureau of Indian Affairs note that no particular standard of proof is actually required by statute for active efforts. Guidelines for Implementing the Indian Child Welfare Act [hereinafter Guidelines] 44 (Dec. 2016), *available at* <https://www.bia.gov/sites/default/files/dup/assets/bia/ois/pdf/idc2-056831.pdf> (noting that the “ICWA does not establish a standard of evidence for review of whether active efforts have been provided”). We conclude that in Tennessee, consistent with the state standard of proof for termination, active efforts must be established by clear and convincing evidence.

“[C]ourts have recognized that ‘the term active efforts, by definition implies heightened responsibility compared to passive efforts.’” *In re N.R.*, 836 S.E.2d 799, 809 (W. Va. 2019) (quoting *In re A.N.*, 106 P.3d 556, 560 (Mont. 2005)). “[T]he types of

remedial and rehabilitative services to be required under subsection (d) depend on the facts of each case.” *Matter of Baby Boy Doe*, 902 P.2d 477, 484 (Idaho 1995). Parties seeking termination under the ICWA are not, however, required “to engage in futile, nonproductive efforts to reunify.” *In re Annette P.*, 589 A.2d at 929; *In re N.R.*, 836 S.E.2d at 809. “The active efforts standard does not require an agency to persist in futile efforts,” and “a court may consider a parent’s unwillingness to participate in treatment or engage with a resource as part of its active efforts inquiry.” *People in Int. of Q.A.L.*, No. 25CA1085, 2025 WL 3239693, at *2 (Colo. App. Nov. 20, 2025); *Elizabeth A. v. Dep’t of Fam. & Cmty. Servs., Off. of Child.’s Servs.*, No. S-18907, 2024 WL 4040502, at *5 (Alaska Sept. 4, 2024) (“A parent’s lack of willingness to cooperate with OCS can impact a court’s active efforts analysis in three ways: ‘(1) it can excuse *further* active efforts once it is clear those efforts would be futile; (2) it can excuse “minor failures by [OCS]”; and (3) it can influence what actions qualify as active efforts.’” (citations omitted)); *but see Matter of Dependency of G.J.A.*, 489 P.3d 631, 650 (Wash. 2021) (“A parent’s lack of engagement is relevant only insofar as the Department’s burden to prove its efforts were unsuccessful. It does not excuse the Department from providing active efforts in the first place.”); *In re J.L.*, 770 N.W.2d 853, 867 (Mich. 2009) (declining to adopt a futility test but observing that “[t]he ICWA obviously does not require the provision of *endless* active efforts”). “[A] parent’s demonstrated lack of willingness to participate in treatment may be considered in determining whether the state has taken active efforts.” *Sylvia L. v. State, Dep’t of Health & Soc. Servs., Off. of Child.’s Servs.*, 343 P.3d 425, 432 (Alaska 2015) (quoting *E.A. v. State, Div. of Fam. & Youth Servs.*, 46 P.3d 986, 991 (Alaska 2002)). Furthermore, “[f]ailed attempts to contact the parent or obtain information from her may qualify as active efforts if the parent’s evasive or combative conduct” made provision of services nearly impossible. *Id.* at 433.

Father cites to the Guidelines in arguing that the Petitioners should have extended their active efforts throughout the litigation and until the entry of the termination order.¹⁵

¹⁵ The Guidelines provide:

There are no specific time limits on active efforts, and what is required will depend on the facts of each case. State agencies should keep in mind that the State court must make a finding that active efforts were provided in order to make a foster-care placement or order TPR to an Indian child. Even if a finding was made that sufficient active efforts were made to support the foster-care placement, circumstances may have changed such that the court may require additional active efforts prior to ordering TPR. For example, if a parent initially refused alcohol treatment despite an agency’s active efforts to provide services, a court could find that these efforts satisfied the requirement for purposes of the foster-care placement. But, if the parent subsequently completes alcohol treatment and needs additional services to regain custody (such as parenting skills training), the court will need to consider whether active efforts were made to provide these services. The requirement to conduct active efforts necessarily ends at the TPR because, after that point, there is no service or program that would prevent the breakup of the Indian family. If a child-custody proceeding is ongoing, even after return of the child, then active efforts

See Guidelines 43. However, the Guidelines only state that, in the event active efforts were previously made, “the court may require additional active efforts prior to ordering TPR,” giving as an example a situation in which a parent successfully addresses alcohol abuse but needs further assistance, such as parenting training, to regain custody. Father here has not successfully addressed his alcohol abuse. Father also cites to a case designated “noncitable” by the California courts and to a case holding that “active efforts must be evaluated over time” in the context of the parent’s “too little, too late” argument on active efforts. See *Roland L. v. State, Off. of Child. ’s Servs.*, 206 P.3d 453, 456 (Alaska 2009). The authority Father relies on does not stand for the proposition that the party seeking termination must continue active efforts despite seeming futility and despite the parent’s resistance and combative opposition. See *People in Int. of S.R.*, 323 N.W.2d 885, 887 (S.D. 1982) (noting the court was justified in finding “further active efforts towards improvement would be fruitless” when the parent “spurned help and chose rather to deny her addiction”).

Here, Mother’s testimony established that she engaged in active efforts by: advocating for the use of Soberlink so that Father could exercise parenting time safely; facilitating parenting time on numerous occasions when Father was unable to pass the Soberlink test by waiting, ready to visit, with the child and his bag until Father could demonstrate sobriety; coordinating communications through Our Family Wizard; coordinating supervised visits by engaging with and completing paperwork for the supervisors; facilitating telephone calls with Father and Father’s extended family; relaying gifts from the family to Knox; driving to Chicago and Memphis to allow Knox to spend time with Father and his extended family; sending pictures; setting up child support garnishments; and asking the court to require Father to engage in treatment for addiction and mental health in order to make visitation safe. See *Philip J. v. State, Dep’t of Health & Soc. Servs., Off. of Child. ’s Servs.*, 314 P.3d 518, 526 (Alaska 2013) (holding that active efforts included substance abuse assessment and treatment, mental health assessment); *Martha S. v. State, Dep’t of Health & Soc. Servs., Off. of Child. ’s Servs.*, 268 P.3d 1066, 1082 (Alaska 2012) (listing as active efforts “parenting classes, parenting coaches, and mental health assessments”); *S.S. v. Stephanie H.*, 388 P.3d 569, 575 (Ariz. Ct. App. 2017) (concluding that active efforts in the context of abandonment include “keeping the parent informed of irregular but significant expenses, such as medical expenses, to which the parent would be expected to contribute”); *Matter of Baby Boy Doe*, 902 P.2d at 483 (concluding that “the state of Utah attempted to encourage the father to support his children by initiating a wage withholding for child support”).

Ms. Mann further testified that Father had the financial capacity to obtain treatment and that his family had provided financial support as well as living space and contributed to parenting time. Ms. Mann’s testimony factors into the reasonableness of the active

would be required before there may be a subsequent foster-care placement or TPR.

Guidelines 43.

efforts required, and Ms. Mann testified, “[W]e have proof of workshop support, network from his family, who have provided financially for him, who have also provided a space for living for him on occasion, and also contributed to parenting time, when intact.” Despite the help available to him from multiple sources, Father was unsuccessful in addressing his mental health and substance abuse issues.

While Father is correct that Mother’s efforts dropped off after the filing of the termination petition, active efforts “are to be tailored to the facts and circumstances of the case.” 25 C.F.R. § 23.2. Furthermore, in determining the sufficiency of active efforts, the court takes into account the futility of further efforts and a parent’s “verbally abusive and threatening behavior [which makes] it difficult . . . to provide services to the family.” *Martha S.*, 268 P.3d at 1082. The record is replete with instances of Father’s belligerent acts which created hurdles for securing assistance, including his abusive behavior to the Petitioners’ attorney and the parenting time supervisors. Furthermore, the record here demonstrates that Father was repeatedly admitted to detox programs after the filing of the petition but never successfully remained sober. Accordingly, it would have been futile to require efforts from the Petitioners seeking to admit him to a detox program, because he received rehabilitative services and participated in detox but was nevertheless unable to maintain sobriety. The Petitioners made numerous efforts to allow Father to parent Knox safely. The trial court in this instance found that the Petitioners made active efforts under the statute beyond a reasonable doubt. We agree that the proof in this case was sufficient to show active efforts as required under the ICWA was proven, and accordingly, Father is not entitled to relief.

E. Expert Testimony

Father next asserts that the ICWA’s requirement of expert witness testimony was violated. While he acknowledges that an expert testified, he argues the expert was not properly disclosed and her testimony should have been excluded. He also objects to the foundation of her testimony and to limits on his cross-examination. We view these arguments as challenges to the trial court’s decisions regarding evidence.

Trial courts have broad discretion regarding evidentiary decisions, and this court reviews such decisions for an abuse of discretion. *Caldwell v. Ruby Falls, LLC*, 674 S.W.3d 899, 908 (Tenn. Ct. App. 2023) (citing *Biscan v. Brown*, 160 S.W.3d 462, 468 (Tenn. 2005)). A trial court in general abuses its discretion when it applies “incorrect legal standards, reaches an illogical conclusion, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party.” *West v. Schofield*, 460 S.W.3d 113, 120 (Tenn. 2015) (citing *State v. Banks*, 271 S.W.3d 90, 116 (Tenn. 2008)).

The ICWA requires an expert in parental termination cases to aid in establishing harm to the child beyond a reasonable doubt:

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(f).

The Petitioners presented the testimony of Ms. Mann as an expert, and she testified that Father's continued custody of the child was likely to result in serious emotional or physical damage. Father initially objects that he did not have proper notice that the expert would testify. However, because Father cites no Rule or caselaw regarding the required notice, we conclude this issue is waived. *Sneed v. Bd. of Prof'l Resp. of Sup. Ct.*, 301 S.W.3d 603, 615 (Tenn. 2010) ("It is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her, and where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived."); *McGarity v. Jerrolds*, 429 S.W.3d 562, 566 n.1 (Tenn. Ct. App. 2013) ("The failure to cite authority to support an argument on appeal constitutes a waiver of the issue."). In any event, the trial court found that Father did not request the disclosure of expert witnesses in discovery. *See* Tenn. R. Civ. P. 26.02(4)(A)(i) ("A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial . . ."). Father notes that not all of the discovery is in the appellate record, insinuating that this finding was incorrect. Father may be correct that the appellate record does not contain all the discovery requests, but in the absence of a record showing error, we presume the trial court's factual findings are correct. *Linn v. Howard*, No. E2006-00024-COA-R3-CV, 2007 WL 208442, at *4 (Tenn. Ct. App. Jan. 26, 2007) (citing *Taylor v. Allstate Ins. Co.*, 158 S.W.3d 929, 931 (Tenn. Ct. App. 2004)).

Father also objects that there was an insufficient foundation for Ms. Mann's expert testimony because it was based on unreliable facts. The admissibility of expert testimony is a determination that rests within the sound discretion of the trial court. *Robinson v. LeCorps*, 83 S.W.3d 718, 725 (Tenn. 2002).

Tennessee Rule of Evidence 703 requires trial courts to exclude expert evidence if the underlying facts or data indicate a lack of trustworthiness:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts

or data need not be admissible in evidence. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

Tenn. R. Evid. 703.

Father insinuates that Ms. Mann relied on untrustworthy information. Ms. Mann testified that she reviewed the case file and pleadings, as well as emails and attachments, court proceedings, pictures, videos, criminal history, and background checks. She met with the Petitioners and with Father's attorney. She conducted her own research and background checks on the parties. She testified that continued custody by Father was likely to result in serious emotional or physical damage to Knox. *See People in Int. of O.S.*, 701 N.W.2d 421, 427-28 (S.D. 2005) (the mother's long-standing alcohol abuse problem, unsuccessful attempts at rehabilitation, and altercations with her child's father supported finding under 25 U.S.C. § 1912(f)). At trial, Father objected to Ms. Mann being qualified as an expert only on the basis that "[d]oing something as a side job does not make somebody an expert." Accordingly, it appears Father did not raise an objection to a reliance on untrustworthy facts below, and this issue is waived. *Powell v. Cmty. Health Sys., Inc.*, 312 S.W.3d 496, 511 (Tenn. 2010) ("It is axiomatic that parties will not be permitted to raise issues on appeal that they did not first raise in the trial court.").

In any event, Father does not point to any particular fact or datum upon which Ms. Mann relied that would require the exclusion of her expert opinion. At trial, Father's questioning was focused on some pages that were apparently inadvertently appended to his medical files by a healthcare provider regarding an individual with a similar name. Out of the approximately 600 pages of medical records, the last 8 were not pertinent to the proceedings. Insofar as Father is relying on these pages, there is nothing to indicate that Ms. Mann relied, in forming her opinion, on the 8 pages concerning the unrelated individual rather than the approximately 600 pages which detailed Father's struggles with addiction. We conclude the trial court did not abuse its discretion in admitting Ms. Mann's testimony.

Father states his cross-examination of witnesses regarding the ICWA was improperly limited. While Father classifies this as noncompliance with the ICWA, we conclude that this is a challenge to the trial court's decisions regarding the admission of evidence, and we review it under that standard. In particular, Father cites his attempt to question Mother regarding section 1912 and compliance with the statute. The trial court limited Father's questions on the basis that Mother was not an attorney or expert on the ICWA. The Petitioners respond that, without an offer of proof, Father has waived the issue.

Cross-examination is a tool to test the accuracy and completeness of testimony. *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 708 (Tenn. Ct. App. 1999). “However, despite its salutary purpose, cross-examination is subject to reasonable limitations to prevent obstruction of the orderly progress of a trial.” *Id.* Like other evidentiary determinations, limitations on cross-examination are left to the trial court’s sound discretion. *Id.*; *In re Estate of Darken*, No. M2016-00711-COA-R3-CV, 2016 WL 7378806, at *11 (Tenn. Ct. App. Dec. 20, 2016); *see Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 131 (Tenn. 2004).

Father asserts that he was unable to question Mother completely about what information she provided to Ms. Mann. Ms. Mann’s testimony established that she reviewed the case file and pleadings, as well as emails and attachments, court proceedings, pictures, videos, criminal history, and background checks. Father did not attempt to provide an offer of proof regarding what evidence cross-examination would have revealed that would have been helpful to him. He also does not present an argument regarding what he believes he would have discovered.

Under Tennessee Rule of Evidence 103, a court’s decision to admit or exclude evidence will not be a basis for relief unless (1) a substantial right of the party is affected, and (2) “[i]n case the ruling is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context.” Indeed, “where an appellant fails to make an offer of proof, this Court will not reverse a trial court’s evidentiary ruling.” *Dickey v. McCord*, 63 S.W.3d 714, 723 (Tenn. Ct. App. 2001) (concluding that there was no abuse of discretion in limiting cross-examination when the party failed to make an offer of proof); *cf. In re Cayson C.*, No. E2022-00448-COA-R3-PT, 2022 WL 17246337, at *14 (Tenn. Ct. App. Nov. 28, 2022) (mother’s challenge that she was not able to properly cross-examine was waived for failure to timely object, in particular because “it is difficult if not impossible to discern exactly which part of Kirk’s testimony Mother would have us deem inadmissible”). We agree with the Petitioners that Father’s failure to include an offer of proof as to the excluded testimony precludes appellate relief.¹⁶

¹⁶ This court has previously upheld termination in cases where cross-examination was limited. *In re Rhyder C.*, No. E2021-01051-COA-R3-PT, 2022 WL 2837923, at *8 (Tenn. Ct. App. July 21, 2022) (mother alleged her due process rights were violated when she was not permitted to confront witnesses through cross-examination, but this court concluded that mother’s rights were not violated by a grant of summary judgment based on admissions she made regarding undisputed facts); *In re Brady R.*, No. M2025-00691-COA-R3-PT, 2026 WL 937461, at *1 (Tenn. Ct. App. Apr. 7, 2026) (default judgment was upheld even though the parent did not participate in the termination trial); *cf. Orten v. Orten*, 185 S.W.3d 825, 828 (Tenn. Ct. App. 2005) (default judgment in a divorce was upheld when husband’s attorney was permitted to withdraw after husband did not appear and the case was decided on wife’s proof with no cross-examination).

III. Due Process

Father next argues that his due process rights were violated because he was not served with the order permitting his attorney to withdraw while he was in rehabilitation in the summer of 2023. Father does not cite to any legal authority that failure to serve him with this order was reversible error. Neither does Father articulate what prejudice resulted from any delay in the notification that his attorney was permitted to withdraw. The Petitioners argue that this issue was not raised below and is waived. They argue alternatively that Father had actual and imputed knowledge of counsel's intent to withdraw, as he was served with a copy of the motion to withdraw, served with the motion setting the motion to withdraw for hearing, and was served subsequent pleadings.¹⁷ They argue he had a duty to update the court and parties of his address after release from rehabilitation. *See Napier v. Napier*, No. M2019-00978-COA-R3-CV, 2020 WL 4299404, at *7 (Tenn. Ct. App. July 27, 2020).

Father's entire argument on this issue spans half of a page and contains no citation to legal authority, consisting entirely of a recitation of the facts, citations to the record, and the assertion that "[t]he failure to serve Father with the order was a violation of his due process right to notice." Father does not allege that his attorney should not have been permitted to withdraw. He does not allege that he did not know of his attorney's withdrawal, and the court credited counsel's statements in the motion for sanctions that counsel had contact with Father multiple times prior to the August 22 deposition notice but that he would not cooperate with scheduling the deposition. Father does not point to where in the record this issue was previously raised. Finally, he does not describe what harm he suffered as a result of the failure to serve the order on him. We conclude that this issue's development is skeletal at best, and it is accordingly waived. *Sneed*, 301 S.W.3d at 615 (an issue is waived if the litigant "merely constructs a skeletal argument."). It is likewise waived because it is being raised for the first time on appeal. *Fowler v. City of Memphis*, 514 S.W.3d 732, 743 (Tenn. Ct. App. 2016) ("Generally, arguments that are raised for the first time on appeal are waived."); *State Dep't of Child.'s Servs. v. A.M.H.*, 198 S.W.3d 757, 764 (Tenn. Ct. App. 2006) ("It is well settled, however, that issues not raised at trial will generally not be considered for the first time on appeal."). Accordingly, Father is not entitled to relief on this basis.

IV. Default

Father asserts that the default judgment against him should be set aside. He reasons

¹⁷ On June 9, 2023, Father was served with his attorney's notice setting the motion to withdraw for a hearing. The certificate of service on the order permitting withdrawal, however, indicates that Father's attorney, but not Father, was served with the order on June 28, 2023. On August 31, 2023, Father was served with the motion for sanctions, which the court found accurately represented that counsel had made multiple attempts to schedule a deposition with Father prior to August 22.

that he had insufficient notice of the deposition and that default is not an appropriate sanction for the remaining discovery violations. He argues that while he had notice of potential sanctions for the other discovery violations, he was not on notice he was subject to default. Father also argues his due process rights were violated in the hearing on the motion to set aside the default. The Petitioners respond that Father flaunted multiple orders from the court and did not object to any technical defect in the notice of deposition under Rule 32.04(1). The Petitioners note Father cites no caselaw that the court was required to warn him that default was a possible sanction for noncompliance with discovery. The Petitioners cite to the trial court's credibility finding against Father and its finding that Father was playing games with the court. They argue that Father acted willfully in not defending the motion for default. We conclude that Father waived any issue regarding notice, that the court did not err in entering default, and that the court did not err in denying the motion to set the default judgment aside.

We review both a trial court's decision to grant sanctions and its decision not to set aside a nonfinal order for an abuse of discretion. *Caldwell*, 674 S.W.3d at 908 (citing *Alexander v. Jackson Radiology Assocs., P.A.*, 156 S.W.3d 11, 14 (Tenn. Ct. App. 2004)); *Kelly v. Kelly*, No. M2023-00598-COA-R3-CV, 2025 WL 1178680, at *4 (Tenn. Ct. App. Apr. 23, 2025) (citing *Discover Bank v. Morgan*, 363 S.W.3d 479, 490 (Tenn. 2012)). "An abuse of discretion occurs when the trial court applies incorrect legal standards, reaches an illogical conclusion, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party." *West*, 460 S.W.3d at 120. In other words, discretionary decisions "are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Pegues v. Ill. Cent. R.R. Co.*, 288 S.W.3d 350, 353 (Tenn. Ct. App. 2008) (quoting *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007)); *Ehsani v. Ehsani*, No. M2022-01819-COA-R3-CV, 2024 WL 301903, at *2 (Tenn. Ct. App. Jan. 26, 2024). "A discretionary decision will not stand if the trial court fails to apply the relevant statutory, legal, or procedural framework intended to guide its determination." *Langlois v. Energy Automation Sys., Inc.*, 332 S.W.3d 353, 357 (Tenn. Ct. App. 2009) (citing *Pegues*, 288 S.W.3d at 353). The burden of proof rests with the party seeking to set aside the judgment. *Henry v. Goins*, 104 S.W.3d 475, 482 (Tenn. 2003); see *Discover Bank*, 363 S.W.3d at 491.

A. Notice

Father first objects that default was premised on the missed deposition and that he was not provided adequate notice of the deposition under Tennessee Rule of Civil Procedure 30.02. The Petitioners argue that Father has waived his Rule 30.02 argument by failing to file a prompt written objection under Rule 32.04(1) and by failing to raise the notice issue below. They note that Father's third attorney also sought to set aside the default and did not raise this issue.

Under Tennessee Rule of Civil Procedure 30.02, the Petitioners were required to

serve notice of the deposition:

A party desiring to take the deposition of any person upon oral examination shall give notice in writing to every other party to the action. The notice shall be served on the other parties at least five days beforehand when the deposition is to be taken in the county in which suit is pending. When the deposition is to be taken out of the county, at least seven days' notice shall be given. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

Tenn. R. Civ. P. 30.02(1). Father asserts that, under this provision, he was entitled to seven days' notice.¹⁸ He further points to Rule 6.05, which provides that, when an action must take place within a certain period of time after service of notice, if "the notice or paper is served upon such party by mail, three days shall be added to the prescribed period." He contends that, in conjunction with Rule 6.01, he was entitled to ten days excluding intermediate Saturdays, Sundays, and holidays. The certificate of service reflects that the notice for the August 29 deposition was served August 22.

The Petitioners respond that Father is raising this argument for the first time on appeal, and that it is accordingly waived. Furthermore, they note that, under Tennessee Rule of Civil Procedure 32.04, "[a]ll errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice." Tenn. R. Civ. P. 32.04(1).

We agree with the Petitioners. First, the Rule of Civil Procedure 32.04(1) demonstrates that any notice deficiency is waived unless a written objection is promptly served on the opposing party. Father does not purport to have objected, and the record reveals no objection. Second, "[i]t is axiomatic that parties will not be permitted to raise issues on appeal that they did not first raise in the trial court." *Powell*, 312 S.W.3d at 511. Father raises this issue for the first time on appeal, and it is waived. Accordingly, we conclude there was no reversible error in the notice of Father's deposition, which served as one basis for the grant of default judgment.

B. Entry of Default

Father next argues that he did participate in discovery and that this distinguishes his

¹⁸ The deposition was served on Father at two addresses, one within and one outside the county.

case from other cases granting default in a parental termination. In addition, he avers he did not have notice that the court could sanction him with a default judgment, and he asserts that the default was too harsh a punishment because both parties had deficient discovery. The Petitioners argue that the sanction was appropriate.¹⁹

Tennessee Rule of Civil Procedure 37.02 provides that, where a party, a deponent, or any other person designated by the Rule fails to comply with a court order regarding discovery, the court “may make such orders in regard to the failure as are just.” Tenn. R. Civ. P. 37.02. Rule 37.02 provides the following nonexclusive list of sanctions that may be imposed for noncompliance with discovery orders:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35.01 requiring the party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this rule, unless the party failing to comply shows that he or she is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising the party or both to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

¹⁹ The Petitioners note that Father’s statement of the issues addresses setting aside the default whereas his brief addresses both the imposition of default and failure to set it aside. They address both arguments.

Tenn. R. Civ. P. 37.02; *see Gordon v. Gordon*, No. M2024-00917-COA-R3-CV, 2026 WL 1079413, at *5 (Tenn. Ct. App. Apr. 21, 2026). “A default judgment, while a necessary part of a trial court’s repertoire, is a big stick that should not be wielded haphazardly.” *In re Connor B.*, 603 S.W.3d 773, 782 (Tenn. Ct. App. 2020) (quoting *First Union Nat’l Bank of Tenn. v. Abercrombie*, No. M2001-01379-COA-R3-CV, 2003 WL 22251347, at *3 (Tenn. Ct. App. Oct. 2, 2003)). Accordingly, default judgments should be reserved for situations when a defendant “(1) makes no appearance in the case, in spite of being properly served, (2) appears, but fails to respond to the complaint, or (3) disobeys a pretrial order directing defendant to comply with some procedural requirement.” *Id.*

Parental termination proceedings, however, also entitle the parent whose rights are being terminated to additional procedural safeguards. *Id.* at 783. Under Tennessee Code Annotated section 36-1-117(n),

(n) The court may enter a default judgment against any party to the adoption or termination proceeding upon a finding that service of process has been validly made against that party in accordance with the Tennessee Rules of Civil or Juvenile Procedure and the statutes concerning substituted service; however, in termination proceedings, proof must be presented as to legal grounds and best interest pursuant to § 36-1-113.

Tenn. Code Ann. § 36-1-117(n).

By requiring a showing of proof for termination grounds and best interest, a default judgment in a parental termination case differs from default judgment cases in other contexts, where the defaulting litigant is deemed to have admitted the material allegations of fact in the complaint. *In re Connor B.*, 603 S.W.3d at 783. In *Connor B.*, the mother did not follow the trial court’s instructions to cooperate with her attorney and sign the pleadings. *Id.* at 777. The trial court entered a default and held a hearing where, after the mother’s attorney announced her absence, only the petitioners’ attorney and guardian ad litem participated in the presentation of proof. *Id.* at 780. This court concluded that the mother “was clearly subject to a default judgment due to her failure to file a personally signed answer within the time allowed.” *Id.* at 784. Likewise, in *In re Christabell B.*, the trial court granted default judgment against the mother as a discovery sanction. No. M2021-01274-COA-R3-PT, 2023 WL 8112559, at *2 (Tenn. Ct. App. Nov. 22, 2023). This court upheld the default, noting that mother had failed to respond to discovery. *Id.* at *5.

Father argues that default was granted in error in the present case because he responded to discovery; however, the trial court found below that Father both failed to produce written discovery and failed to appear for a deposition after numerous delays. The court found after a hearing that Father refused to cooperate with discovery as outlined in

the motion for sanctions, which alleged that counsel made multiple attempts to schedule a deposition but that Father refused to cooperate and that Father had refused to disclose the discovery he intended to rely on at trial. The court also found that Father's discovery failures were a strategic attempt to "play[] games with the court" and that Father had intentionally failed to advise the parties of his whereabouts in order to gain an advantage. *See Napier*, 2020 WL 4299404, at *7 ("Tennessee law, however, makes it incumbent on pro se litigants to update their addresses with the court to ensure that they receive proper notice."). The court found that these acts were contemptuous and proper grounds for default.

Father also asserts that he was not on notice that a default judgment might be entered. However, the Petitioners, after the missed deposition, filed a motion for sanctions asking precisely for the sanction of a default judgment. Father asserts that the trial court could not impose this sanction for the failure to produce documents because the court had previously delineated that the sanction for failure to produce documents would be to limit him to whatever discovery he had produced at trial, and not default. *See Gordon*, 2026 WL 1079413, at *7 ("In determining whether a trial court acted properly in imposing sanctions under Rule 37, this court has repeatedly indicated that the absence of notice renders sanctions improper."). Father argues that he could not be sanctioned for the other objectionable conduct, failure to appear at the deposition, for the reasons addressed supra. However, we have rejected Father's argument that his failure to appear for the deposition was not sanctionable. The trial court specifically made a finding that it did not credit Father's claims that he did not know about the deposition or the default hearing. Furthermore, according to Father's own pleadings, the court had explicitly stated that if the parties "don't appear for a deposition, I may very well sanction them by striking pleadings." We conclude that the court did not abuse its discretion in imposing the default judgment.

C. Setting Aside Default

Finally, Father asserts that it was error to refuse to set the default aside. He asserts that his attorney was not permitted to argue during the motion to set the default aside and that this violated his due process rights. Mother contends that Father acted willfully and that there was no error in refusing to set the default aside. We conclude the court did not abuse its discretion.

Father's counsel filed a written motion to set the default aside, and a hearing was held. While Father is correct that the hearing consisted largely of the trial court's findings in response to the written argument, counsel never sought to present any further oral argument, presumably relying on the written motion which outlined the factual and legal bases for setting the default aside. The trial court refused to set the order aside, finding that Father "does play games with the court," that Father "knew what to do, how to do it," and that Father deliberately failed to inform the court of his incarceration "till it was

something he thought he could use to his advantage.”

“[P]rocedural due process may require the opportunity for an oral presentation to the decision maker if written submissions are inadequate to provide a party a fair hearing.” *In re Int’l Fid. Ins. Co.*, No. 03C01-9811-CR-00398, 1999 WL 619548, at *4 (Tenn. Crim. App. Aug. 17, 1999). However, in general, due process requires only “the provision of a hearing ‘at a meaningful time,’”; it does not necessarily require “in-person argument opposing a proposed action” or a “prior hearing.” *In re A-River City Bail Bond, Inc.*, No. W2015-01578-CCA-R3-CD, 2016 WL 7190909, at *9 (Tenn. Crim. App. Dec. 12, 2016) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547, 105 S. Ct. 1487, 1496, 84 L. Ed. 2d 494 (1985)); see *Manning v. City of Lebanon*, 124 S.W.3d 562, 566 (Tenn. Ct. App. 2003) (“The essence of procedural due process is notice and an opportunity to be heard at a meaningful time and in a meaningful manner.”). Here, Father makes no argument that the written arguments presented by his counsel were inadequate to comport with due process or that his counsel sought to present further oral argument to the court.

Turning to the court’s refusal to set the default aside, Father sought relief under Rule 55.02, but he did not specify the reason for relief beyond his purported lack of notice. Under Tennessee Rule of Civil Procedure 55.02, “[f]or good cause shown the court may set aside a judgment by default in accordance with Rule 60.02.” See also Tenn. R. Civ. P. 55.01 (regarding entry of default judgment). Rule 60.02, in turn, permits a court to relieve a party from a final judgment on the basis of:

(1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment.

Tenn. R. Civ. P. 60.02.

A court faced with a motion to set aside a default should consider “(1) whether the default was willful; (2) whether defendant has a meritorious defense; and (3) the level of prejudice that may occur to the non-defaulting party if relief is granted.” *In re Brady R.*, 2026 WL 937461, at *4 (quoting *Tenn. Dep’t of Hum. Servs. v. Barbee*, 689 S.W.2d 863, 866 (Tenn. 1985)). In such a consideration, “[w]illfulness is a threshold inquiry.” *Discover Bank*, 363 S.W.3d at 492. “If the court finds that the defaulting party has acted willfully, the judgment cannot be set aside on ‘excusable neglect’ grounds, and the court need not consider the other factors.” *Id.* at 494. “[C]ourts have attempted to define willful conduct as conduct based on deliberate choices or conduct which is flagrant and unexplained.” *JTM Enters. v. Oddello Indus., LLC*, No. E2022-00855-COA-R3-CV, 2023 WL 8281841, at *5

(Tenn. Ct. App. Nov. 30, 2023). In general, default judgments should be set aside if reasonable doubt exists as to the conduct of the defaulting party. *Orten*, 185 S.W.3d at 831.

In *Brady R.*, this court considered a default entered in a termination of parental rights case as a sanction for discovery violations. 2026 WL 937461, at *4. The father in that case suffered from substance abuse and claimed not to have received notice of the hearings or his counsel's representation. This court upheld the refusal to set the default aside, noting that the court found the father acted willfully. *Id.* at *5.

Here, too, the trial court found that Father's conduct was willful. In particular, the trial court found that Father intentionally neglected to inform the Petitioners or the court of his incarceration until he believed he could use the fact to his advantage. The court found that Father had been "play[ing] games" and that he was a sophisticated party who was aware of his responsibility to update the parties and the court regarding his contact information. In its final order, the court deemed this conduct "contemptuous." Furthermore, the court did not credit Father's assertion that he did not know about the scheduled deposition. We conclude that it was not an abuse of discretion to decline to set the default aside.

V. Right to Counsel

Father asserts that his statutory right to counsel was violated when he requested and was denied indigent representation at trial. He argues that, although he completed the affidavit of indigency to show an asset of a vehicle worth \$85,000, the trial court should have asked him how much money he owed on the car. He asserts the court should have reevaluated its finding when he filed the second affidavit. We conclude that the trial court did not err in finding that Father was not indigent.

An important component of a parent's due process rights in a termination proceeding is the statutory right to appointed counsel for indigent parents. *In re Bentley D.*, 537 S.W.3d 907, 913 (Tenn. 2017) (citing *In re Carrington H.*, 483 S.W.3d 507, 527-28 (Tenn. 2016); Tenn. Code Ann. § 37-1-126(a)(2)(B)(ii)). Upon request, the court must appoint an indigent parent counsel. Tenn. Code Ann. § 37-1-126(a)(2)(B)(ii), (a)(3). "Tennessee statutorily provides the right to appointed counsel for *indigent* parents in every parental termination proceeding." *In re Carrington H.*, 483 S.W.3d at 527. (emphasis added). However, the "right to appointed counsel in parental termination proceedings is not absolute," and may be conditional upon a proper completion of an affidavit reflecting indigency. *In re Joshua M.*, No. E2021-01527-COA-R3-PT, 2022 WL 4666232, at *5 (Tenn. Ct. App. Oct. 3, 2022) (failure to complete affidavit waived right to counsel). "Whether a person is indigent is a question of fact, and as such, the standard of review is de novo with a presumption of correctness of the trial court's findings, unless the evidence preponderates otherwise." *State, Dep't of Child. 's Servs. v. RDV*, No. E2004-01216-COA-

R3-PT, 2005 WL 623246, at *4 (Tenn. Ct. App. Mar. 17, 2005) (citing Tenn. R. App. P. 13(d)).

Here, Father's attorney moved to withdraw when Father began filing pro se motions while represented by counsel. Father then sent a letter terminating his attorney. Shortly before trial, the court considered whether to relieve Father's retained attorney of representation. During this hearing, Father confirmed that he wished to fire his retained counsel. See *Lovin v. State*, 286 S.W.3d 275, 285-86 (Tenn. 2009) (noting that while "a client may discharge a retained lawyer at any time, with or without cause," the trial court's "decision to permit a retained lawyer to withdraw from a case is a discretionary one"). The trial court permitted Father to discharge his attorney. Father then sought the appointment of counsel and submitted an affidavit of indigency. He gave sworn testimony that the contents of the affidavit were true. The affidavit reflected that Father's income was "\$250,000 on leave of absen[c]e 12 months" and that he owned an automobile worth \$85,000. He stated he had debt on the automobile, but he did not specify the amount of his debts. Asked how much money he had in his bank accounts, Father replied, "I think I've spent all of my money. I'm not even – zero. I have no money." The court found that Father, who had hired three previous lawyers and had just terminated his last attorney, was actually simply "trying to prolong this matter." The court did not credit Father's assertion that he was indigent.²⁰ Instead, it found that the affidavit established that Father had significant assets he could use to obtain an attorney, even if he did not have money in a bank account. The evidence does not preponderate against the court's factual finding that Father's sworn statements regarding his income and assets rendered him not indigent.

²⁰ The second day of trial was held two weeks later. On that day, Father filed several motions, including one styled "Motion Pursuant to Local Rules of the Court for the Middle District of Tennessee - Rule 60 Relief from Orders and I.C.W.A. 25 U.S.C. 1912 & 1914." The entire document was approximately 80 pages long and contained excerpts of exhibits introduced the first day of trial. Attached toward the end of this motion was a new affidavit of indigency, which differed markedly from the first in that it showed Father had no income, that the Porsche was worth \$20,000, and that he owed \$85,000 on the car and \$100,000 in credit card debt. The motion included a notice that it would be heard on a day approximately two weeks after the conclusion of the trial. Partway through trial, Father noted he wanted the motions he had filed to be heard. The court stated it did not have the motions and that none had been set to be heard. After the motions were located, the court concluded that they were not properly before the court. Opposing counsel and the GAL represented that they also had not received copies of the motions as of that morning. Father did not specifically raise, and the court did not specifically address, the second, inconsistent affidavit of indigency or the appointment of counsel. We cannot say, under the circumstances, that the court erred in failing to address this second affidavit. The court had found that Father was not indigent in the previous two weeks, when Father swore to the court he was earning \$250,000 and had a Porsche worth \$85,000. Neither the court nor the other attorneys had seen the new motions, Father did not orally raise the issue of indigency, and the affidavit was attached to a motion which addressed Rule 60 relief. The affidavit was located near the end of close to 80 pages of attachments. We conclude the trial court did not err in not addressing the second affidavit. Furthermore, given the discrepancies in the affidavits and the credibility determination of the trial judge against Father, the court did not in any case err in refusing to deem him indigent.

VI. Standard of Proof in ICWA Termination

Father next urges this court to adopt a raised standard of proof in ICWA cases. He contends that the State law grounds for termination, which require clear and convincing evidence under State law, must be proven beyond a reasonable doubt in ICWA cases. *See* Tenn. Code Ann. § 36-1-113(c). Father's argument acknowledges that the majority of courts use a dual standard of proof. Nevertheless, he exhorts this court to adopt the higher standard. The Petitioners respond that the higher standard of proof does not apply to the state grounds. This issue presents a question of law which is reviewed de novo. *Hyder v. Bd. of Prof'l Resp. of Sup. Ct.*, 696 S.W.3d 532, 537 (Tenn. 2024) ("The determination of the correct legal standard is a question of law."). We conclude that the state grounds of termination required by Tennessee law must be proven by clear and convincing evidence in cases involving the ICWA.

The ICWA sets out certain standards of proof:

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912.

Under the statute, proof beyond a reasonable doubt specifically applies to the finding that continuing custody is likely to result in serious emotional or physical damage

to the child in termination cases. 25 U.S.C. § 1912(f). For foster placement, the same fact must be proven by clear and convincing evidence. 25 U.S.C. § 1912(e). The ICWA is intended to establish “minimum Federal standards for the removal of Indian children from their families.” 25 U.S.C. § 1902. It further requires courts to apply the higher “standard of protection” when state and federal law differ. 25 U.S.C. § 1921.

Accordingly, courts have attempted to determine whether the higher standard of protection, proof beyond a reasonable doubt, applies to state termination grounds as well as the ICWA analysis. Faced with this issue, many courts have applied a dual standard of proof. Reflective of this approach, a Kansas court has described the dual standard as follows:

The federal standard has been interpreted by some state courts to require a dual burden of proof. First, the court must determine by clear and convincing evidence whether the state law provisions for termination are satisfied and then turn to the more stringent standard under the ICWA to determine whether the petitioner has proved beyond a reasonable doubt that custody by the natural Indian parent would likely result in damage to the child.

In Int. of H.A.M., 961 P.2d 716, 721 (Kan. Ct. App. 1998) (citing *In re Bluebird*, 411 S.E.2d 820, 823 (N.C. Ct. App. 1992)).

Ultimately, the vast majority of state courts have concluded that proof beyond a reasonable doubt applies to the requisite findings under the ICWA but not to the state grounds which must also be proven in order to effect termination. In fact, “nearly every . . . state court that has considered this issue has concluded that ICWA allows states to specify the standard of proof for state-law findings distinct from the findings required by ICWA.” *Valerie M. v. Ariz. Dep’t of Econ. Sec.*, 198 P.3d 1203, 1207 (Ariz. 2009) (“That Congress did not expressly address the burden of proof applicable to findings required by state law suggests that this was not an issue on which Congress thought a minimum federal standard was necessary.”); *see Matter of J.R.B.*, 715 P.2d 1170, 1172 (Alaska 1986) (applying dual standard because the grounds for termination are additional protection in termination cases); *Timmons v. Ark. Dep’t of Hum. Servs.*, 376 S.W.3d 466, 469 (Ark. Ct. App. 2010) (applying a dual burden of proof); *In Int. of H.A.M.*, 961 P.2d at 721 (“The federal standard has been interpreted by some state courts to require a dual burden of proof.”); *In re Denise F.*, 658 A.2d 1070, 1072 (Me. 1995) (“A dual burden of proof—one federal, one state—thus exists in cases involving the termination of parental rights to an Indian child.”); *In re Elliott*, 554 N.W.2d 32, 38 (Mich. Ct. App. 1996) (holding that, “in an Indian child custody proceeding, a dual burden of proof must be met”); *In re Bluebird*, 411 S.E.2d at 823 (“[A] dual burden of proof is created in which the state provisions and federal provisions must be satisfied separately. The state grounds for termination must be supported by clear and convincing evidence, while the federal law requires evidence which justifies termination beyond a reasonable doubt.”); *In re K.S.*, 448 S.W.3d 521, 536 (Tex.

App. 2014) (“Although the court’s charge imposed the beyond a reasonable doubt burden on the state grounds for termination, our review of the sufficiency of the evidence applies the state burden of proof—clear and convincing evidence—to termination of parental rights under the family code.”); *K.E. v. State*, 912 P.2d 1002, 1005 (Utah Ct. App. 1996) (“The requirements for termination under state law and the additional requirement under federal law must each be met; however, those requirements are met under separate burdens of proof.”); *In re Int. of D.S.P.*, 480 N.W.2d 234, 238 (Wis. 1992) (“The additional state law safeguards should be applied by the burden of proof mandated by the state law. A dual burden of proof, if mandated by the ICWA and state law, is therefore appropriate.”); *but see In re Okla. Unif. Jury Instructions for Juv. Cases*, 116 P.3d 119, 163 (Okla. 2005) (“Accordingly, the reasonable doubt standard is used in these instructions for both the state law requirements and the requirements in 25 U.S.C. § 1912(f).”).

We join the majority of states in concluding that a dual standard of proof is appropriate. The federal statute specifies a heightened standard of proof for the requirement “that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” 25 U.S.C. § 1912(f). This element must be proven beyond a reasonable doubt in proceedings in Tennessee under the ICWA. However, the state grounds of termination are subject to proof under the clear and convincing standard of evidence found in Tennessee Code Annotated section 36-1-113(c).

VII. State Grounds and Best Interest

Father also challenges the state grounds for terminating his parental rights and argues that the trial court erred in concluding that termination of his parental rights is in Knox’s best interest. We begin with the observation that parents have a fundamental constitutional interest in the care and custody of their own children. *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007). This fundamental interest is “far more precious than any property right.” *In re Carrington H.*, 483 S.W.3d at 522 (quoting *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982)). “[P]ublic policy strongly favors allowing parents to raise their biological or legal children as they see fit, free from unwarranted governmental interference.” *In re Bernard T.*, 319 S.W.3d 586, 597 (Tenn. 2010). However, a parent’s rights are not absolute and may be terminated on clear and convincing evidence that statutory grounds for termination exist and that termination is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c)(1)-(2); *In re Adoption of Angela E.*, 402 S.W.3d 636, 639 (Tenn. 2013).

In a termination of parental rights case, we review a trial court’s findings of fact de novo on the record with a presumption of correctness unless the evidence preponderates otherwise. *In re Bernard T.*, 319 S.W.3d at 596; *see* Tenn. R. App. P. 13(d). “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 Carrington H.*, 483 S.W.3d at 524 (citing *In re Bernard T.*, 319 S.W.3d at 596-97). The grounds for termination and the determination that termination is in the child’s best interest must be established by clear and convincing evidence, that is, evidence that “enables the fact-finder to form a firm belief or conviction regarding the truth of the facts” and that “eliminates any serious or substantial doubt about the correctness of these factual findings.” *In re Bernard T.*, 319 S.W.3d at 596; Tenn. Code Ann. § 36-1-113(c). “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 Carrington H.*, 483 S.W.3d at 524 (citing *In re M.L.P.*, 281 S.W.3d 387, 393 (Tenn. 2009)).

A. Grounds

The trial court found three grounds for termination of Father’s parental rights. These include abandonment by failure to visit, abandonment by failure to support, and failure to manifest an ability and willingness to assume custody. We address each in turn below.

1. Abandonment by Failure to Visit

Father argues that the trial court erred in finding the ground of abandonment by failure to visit. Parental rights are subject to termination when “[a]bandonment by the parent or guardian, as defined in § 36-1-102, has occurred.” Tenn. Code Ann. § 36-1-113(g)(1) (effective: April 22, 2021 to June 30, 2021).²¹ Here, Mother and Stepfather sought termination under two theories of abandonment: that Father abandoned Knox by failure to visit and that Father abandoned Knox by failure to support.

Abandonment occurs when,

²¹ See *In re J.S.*, No. M2022-00142-COA-R3-PT, 2023 WL 139424, at *6 (Tenn. Ct. App. Jan. 10, 2023) (“This court applies the versions of the parental termination statutes in effect on the date the petition was filed.”). We note that in this case, the parties, unsure if the operative date was the filing of the original or amended complaint, introduced proof of the abandonment grounds covering both periods. Generally, an amended petition that does not allege new grounds relates back to the original pleading. See *Autumn L. v. James C.*, No. M2024-01350-COA-R3-PT, 2025 WL 3641550, at *8 (Tenn. Ct. App. Dec. 16, 2025), *perm. app. denied* (Tenn. Mar. 2, 2026) (“Throughout this Opinion, we cite to the statutes that were in place at the time the initial petition was filed in January 2022, as the amended petition did not include substantive alterations.”). The amendment here alleged no new grounds. In any event, the proof was that Father neither visited nor supported Knox during the four months before either petition, and the provisions of the statutes regarding termination which are relevant to this appeal were not amended in the interval. See 2021 Tennessee Laws Pub. Ch. 235 (H.B. 1168); 2021 Tennessee Laws Pub. Ch. 311 (H.B. 237).

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

Tenn. Code Ann. § 36-1-102(1)(A)(i) (effective: March 6, 2020, to June 30, 2021).

Father argues that his failure to visit was not willful²² because he was prohibited from visiting by court order. Regarding willfulness, Tennessee law provides:

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

Tenn. Code Ann. § 36-1-102(1)(I).

“‘Willfulness’ does not require the same standard of culpability required by the penal code. Nor does it require malevolence or ill will.” *In re S.M.*, 149 S.W.3d 632, 642 (Tenn. Ct. App. 2004) (citations omitted). Instead,

Willful conduct consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent. . . . Conduct is “willful” if it is the product of free will rather than coercion. Thus, a person acts

²² Although Father’s pleadings asserting the defense of lack of willfulness were struck, the parties introduced evidence regarding willfulness, the Petitioners’ pretrial brief addressed willfulness, and the trial court made findings on willfulness. It appears that the issue of willfulness was tried by implied consent. *See* Tenn. R. Civ. P. 15.02 (“When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.”); *In re Brian W.*, No. M2020-00172-COA-R3-PT, 2020 WL 6390132, at *4 n.2 (Tenn. Ct. App. Oct. 30, 2020) (“A thorough examination of the record, however, shows that DCS did not object when Mother and Father introduced evidence regarding ‘willfulness’ at trial nor did they bring this issue to the juvenile court’s attention after the court entered the termination order which clearly considered the parents’ willfulness argument. Thus, the issue of ‘willfulness’ was tried by consent.”); *In re Braelyn S.*, No. E2020-00043-COA-R3-PT, 2020 WL 4200088, at *4 n.3 (Tenn. Ct. App. July 22, 2020); *McLemore v. Powell*, 968 S.W.2d 799, 803 (Tenn. Ct. App. 1997) (noting that “[i]mplied consent hinges on the issues that were actually litigated by the parties”).

“willfully” if he or she is a free agent, knows what he or she is doing, and intends to do what he or she is doing.

Failure to visit or support a child is “willful” when a person is aware of his or her duty to visit or support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so. . . . Failure to visit or to support is not excused by another person’s conduct unless the conduct actually prevents the person with the obligation from performing his or her duty . . . or amounts to a significant restraint of or interference with the parent’s efforts to support or develop a relationship with the child. . . .

In re Audrey S., 182 S.W.3d 838, 863-64 (Tenn. Ct. App. 2005) (citations and footnotes omitted) (incarcerated parent’s failure to visit was not willful).

“The willfulness of particular conduct depends upon the actor’s intent. Intent is seldom capable of direct proof, and triers-of-fact lack the ability to peer into a person’s mind to assess intentions or motivations. . . . Accordingly, triers-of-fact must infer intent from the circumstantial evidence, including a person’s actions or conduct.” *In re J.J.C.*, 148 S.W.3d 919, 926 (Tenn. Ct. App. 2004) (quoting *In re Adoption of Muir*, No. M2002-02963-COA-R3-CV, 2003 WL 22794524, at *5 (Tenn. Ct. App. Nov. 25, 2003)). “[I]n determining whether a parent’s conduct was ‘willful,’ it may become necessary in a given case to evaluate events occurring prior to the start of the four-month period.” *In re Brookelyn W.*, No. W2014-00850-COA-R3-PT, 2015 WL 1383755, at *9 (Tenn. Ct. App. Mar. 24, 2015).

The court found that Father willfully failed to visit Knox in the four months prior to the filing of both the petition and the amended petition. The court further found that the “suspension of his parenting time and communication was caused by his own actions and the risk of irreparable physical and psychological harm his actions posed to the child,” noting that Father had “sabotaged” the supervised visitation set up by the court. The court found that it had “afforded [Father] a pathway back to his son, and [Father] chose not to take the path,” instead choosing to abuse alcohol. In sum, the court found that Father’s “failure to successfully rehabilitate himself, or even make a credible effort to rehabilitate himself, resulted in that loss of parenting time continuing for the last three and a half years.”

Father contends that, contrary to the court’s finding, the order contained no method for him to reinstate visitation. “It is well-settled that a trial court’s order requiring that a parent complete some task or meet a condition before resuming visitation does not preclude a finding a willfulness.” *In re Jaylah W.*, 486 S.W.3d 537, 551-52 (Tenn. Ct. App. 2015). “When a parent’s contact with a child is limited by court order, the parent may abandon the child through failure to visit if ‘the parent has the ability to demonstrate a change in situation or behavior that would warrant reinstating visitation but fails to do so.’” *In re C.N.*, No. M2020-01021-COA-R3-PT, 2022 WL 94403, at *9 (Tenn. Ct. App. Jan. 10,

2022) (quoting *In re Kiara C.*, No. E2013-02066-COA-R3-PT, 2014 WL 2993845, at *6 (Tenn. Ct. App. June 30, 2014)).

This court has found failure to visit willful despite the existence of a no-contact order when the parent chose not to avail him or herself of avenues to reinstating visitation. *In re Adoption of Angela E.*, 402 S.W.3d at 642 (father was told to petition for a hearing on visitation, but he failed to take any action to advance his petition for two years); *In re Paisley B.*, No. M2024-01641-COA-R3-PT, 2025 WL 3186310, at *6 (Tenn. Ct. App. Nov. 14, 2025) (father was given the ability to cure the suspension of visitation by completing a domestic violence class but did not do so); *In re Ethan W.*, No. E2024-00318-COA-R3-PT, 2024 WL 4600451, at *5 (Tenn. Ct. App. Oct. 29, 2024) (mother failed to submit to drug screens necessary for visitation); *In re Jaylah W.*, 486 S.W.3d at 552 (mother failed to comply with the trial court's mechanism for reinstating visitation by not addressing her mental health and not locating supervisors for visitation); *In re Jason S.*, No. E2020-01479-COA-R3-PT, 2021 WL 1575469, at *6 (Tenn. Ct. App. Apr. 22, 2021) (mother could have sought visitation under the no-contact order by filing to reinstate and presenting herself to the court, but she did not do so).

On the other hand, failure to visit may not be willful if there is no clear method for reinstating visitation. In *In re C.N.*, the father filed a motion for visitation, and the trial court denied the motion, but “the order denying the motion does not explain what was required of Father to regain visitation.” 2022 WL 94403, at *10. This court concluded that, because there was nothing indicating what father should do in order to reinstate visitation, the failure to visit was not willful. *Id.*

Here, the trial court's initial suspension of parenting time in July 2020 provided an avenue to reinstate visitation by filing a motion and completing recommendations from an alcohol and drug assessment. Father completed these requirements. The December 15, 2020 order subsequently awarded supervised parenting time and informed Father that he should propose a treatment plan in order to seek expansion of his parenting time. While these prior orders informed Father of the actions necessary to regain or expand contact with Knox, the order from January 2021 suspending parenting time, which was put in place five months before the termination petition was filed, contained no such mechanism. This order summed up Father's erratic behavior, concluding that Father's mental health issues were a clear and present danger to the child. It then went on to state that “it is in the best interest of the minor child to suspend Father's contact with the child pending further orders of this Court.” There was, simply put, no “pathway” that was provided for renewing visitation between Knox and Father. It is not clear what Father could have done to enable him to visit Knox. Significantly, this order was also entered not long before the beginning of the statutory time period for assessment of non-visitacion.

We conclude that because the basis of the trial court's ruling created an absence of any clear mechanism to allow for visitation to begin again and the order ending visitation

was itself put in place approximately one month prior to the critical statutory time period for non-visitation, Father has demonstrated by a preponderance of the evidence that his failure to visit was not willful. This ground for termination is reversed.

2. Abandonment by Failure to Support

Father also argues that the trial court erred by finding abandonment by failure to support. Regarding failure to support, Father asserts that Mother's testimony regarding his relationship to the LLC was without foundation and should have been stricken. He acknowledges that he personally received pay in August and September. He insinuates that he suffered from a medical condition that prohibited employment and that his failure to support was not willful.

To reiterate, the statute requires the Petitioners to establish that, in the four months preceding the petition, "the parent or parents . . . either have failed to visit or have failed to support or have failed to make reasonable payments toward the support of the child." Tenn. Code Ann. § 36-1-102(1)(A)(i). Failure to support is defined by statute:

. . . "failed to support" or "failed to make reasonable payments toward such child's support" means the failure, for a period of four (4) consecutive months, to provide monetary support or the failure to provide more than token payments toward the support of the child. That the parent had only the means or ability to make small payments is not a defense to failure to support if no payments were made during the relevant four-month period

Tenn. Code Ann. § 36-1-102(1)(D). Token support "means that the support, under the circumstances of the individual case, is insignificant given the parent's means." Tenn. Code Ann. § 36-1-102(1)(B).

Regarding Mother's testimony, Father offers no legal authority for the proposition that her testimony was impermissible. The parties were co-parenting for a period of time, and Mother had been awarded child support. Mother testified that she had received child support through garnishment and that Father had created an LLC in order to avoid paying child support. The trial court credited this testimony. The Petitioners introduced evidence in the form of pay stubs that Father was earning significant amounts, including earning approximately \$22,000 individually, rather than as the LLC, from one of the two tech companies paying him, during the relevant time period. Nevertheless, Father paid nothing in child support.

Father quibbles with the proof of income introduced, asserting that "[i]t appears that Father was unemployed or on leave for at least a portion of the four month period prior to the filing of the second petition." Initially, as we noted above, the relevant time was the four months before the filing of the first petition. In any event, the statute clarifies the

correct analysis if the parent had limited income: “That the parent had only the means or ability to make small payments is not a defense to failure to support if no payments were made during the relevant four-month period.” Tenn. Code Ann. § 36-1-102(1)(D). Accordingly, even if Mother’s testimony regarding the structure of Father’s LLC were incorrect, and even if Father suffered a medical condition which limited his income, the record establishes that he earned income and failed to pay even a proverbial dime toward the child’s support during the statutory period. The trial court found that Father had the ability to pay child support but neglected to do so. The record supports the conclusion that this ground was established by clear and convincing evidence.

3. Failure to Manifest an Ability and Willingness to Assume Custody

A court can also terminate parental rights when “[a] parent or guardian has failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility of the child, and placing the child in the person’s 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).

The Tennessee Supreme Court has clarified that

[t]wo prongs must be proven by clear and convincing evidence to terminate parental rights under this statute: (1) the parent or legal guardian failed to manifest an ability and willingness to personally assume legal and physical custody or financial responsibility of the child; and (2) placing the child in the parent’s legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child.

In re Neveah M., 614 S.W.3d 659, 674 (Tenn. 2020).

The Tennessee Supreme Court has indicated that the 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.” *Id.* at 677. Failure of the parent to manifest either ability or willingness will satisfy the first prong. *Id.* at 677. “Ability focuses on the parent’s lifestyle and circumstances,” while willingness revolves around a parent’s attempts “to overcome . . . obstacles” preventing the parent from assuming custody. *In re Serenity W.*, No. E2018-00460-COA-R3-PT, 2019 WL 511387, at *6 (Tenn. Ct. App. Feb. 8, 2019). A parent’s express desire to reunite with the child is insufficient to establish a willingness to assume custody. *See In re Nicholas C.*, No. E2019-00165-COA-R3-PT, 2019 WL 3074070, at *17 (Tenn. Ct. App. July 15, 2019). To the contrary, “[w]hen evaluating willingness, we look for more than mere words.” *In re Jonathan M.*, No. E2018-00484-COA-R3-PT, 2018 WL 5310750, at *5 (Tenn. Ct. App. Oct. 26, 2018). This court considers a parent’s efforts to overcome any obstacles standing in the way of assuming custody or financial responsibility. *In re Jaxx M.*, No. E2018-

01041-COA-R3-PT, 2019 WL 1753054, at *9 (Tenn. Ct. App. Apr. 17, 2019) (citing *In re Cynthia P.*, No. E2018-01937-COA-R3-PT, 2019 WL 1313237, at *8 (Tenn. Ct. App. Mar. 22, 2019)). A failure to make efforts to overcome such obstacles “can undercut a claim of willingness.” *Id.* As for the second prong, a substantial risk of harm requires “a real hazard or danger that is not minor, trivial, or insignificant” and requires the harm to be more than a “theoretical possibility;” instead, the harm must be “sufficiently probable to prompt a reasonable person to believe that the harm will occur more likely than not.” *Ray v. Ray*, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001); see *In re Maya R.*, No. E2017-01634-COA-R3-PT, 2018 WL 1629930, at *8 (Tenn. Ct. App. Apr. 4, 2018).

Regarding this ground, the trial court found that Father had “a history of causing emotional trauma to Knox as a result of his behavior and has been court ordered more than once to correct the way he talks to Knox and the content of their conversation.” The court cited Father’s alcohol abuse and “threatening tendencies” when drinking. The court had “no confidence that [Father] can ever successfully rehabilitate himself such that he could demonstrate an ability and willingness to provide for the needs of this child” and found that the child would be put at risk of emotional and physical harm.

Father objects on evidentiary grounds to Mother’s testimony regarding his Williamson County Medical Center detox admissions. Mother was asked if she had reviewed the medical records, and she stated that, “after [she] reviewed those records,” Father was admitted nine times for detox at this facility between 2021 and 2023. Father objected, and Mother’s trial attorney was unable to introduce the records into evidence because she could not locate the affidavit of the custodian of records. Generally, “[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Tenn. R. Evid. 602; see *Affainie v. Heartland Express Maint. Servs., Inc.*, No. M2019-01277-COA-R3-CV, 2020 WL 1549600, at *5 (Tenn. Ct. App. Apr. 1, 2020) (testimony in reliance on a document that was not admitted into evidence and is not in the record constitutes inadmissible hearsay); *State v. Hurt*, No. W2017-02179-CCA-R3-CD, 2020 WL 1593774, at *12 (Tenn. Crim. App. Apr. 1, 2020) (“Because the victim merely was repeating what someone else said the cost of the repairs were, without having first-hand knowledge of the information, his testimony was inadmissible hearsay.”). However, even if the testimony regarding the nine admissions to the Williamson County Medical Center was admitted in error, the record contained ample other evidence of Father’s alcohol abuse. Father’s records showing three admissions to Recovery Unplugged in 2021 were admitted. Furthermore, Mother testified that Father was admitted to Brentwood Springs Detox three times between 2021 and 2023. Father and his attorney told Mother on two separate occasions in 2023 that Father was going into a detox treatment facility. This evidence, along with Dr. Montgomery’s diagnosis, demonstrates Father’s continuing struggles with substance abuse. Accordingly, any error was harmless. Tenn. R. App. P. 36(b) (“A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or

would result in prejudice to the judicial process.”).

Father also asserts his cross-examination of Mother regarding negative PEth tests was unreasonably limited. The trial court permitted Father to ask if he submitted the tests, Mother responded that he submitted some, but she did not know how many, and Father was not permitted to ask further questions. As noted above, this court has previously upheld termination in cases where cross-examination was limited. *In re Rhyder C.*, 2022 WL 2837923, at *8 (mother alleged her due process rights were violated when she was not permitted to confront witnesses through cross-examination, but this court concluded that mother’s rights were not violated by a grant of summary judgment based on admissions she made regarding undisputed facts); *In re Brady R.*, 2026 WL 937461, at *1 (default judgment was upheld even though the parent did not participate in the termination trial); *cf. Orten*, 185 S.W.3d at 828 (default judgment in a divorce was upheld when husband’s attorney was permitted to withdraw after husband did not appear and the case was decided on wife’s proof with no cross-examination).

Father did not make an offer of proof and does not present an argument regarding what testimony he could have elicited from Mother if he had been permitted to ask further questions. *See* Tenn. R. Evid. 103 (relief from exclusion of evidence is available when “the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context”); *Dickey*, 63 S.W.3d at 723 (concluding that there was no abuse of discretion in limiting cross-examination when the party failed to make an offer of proof). We conclude he is not entitled to relief.

Father also contends that, by the time of trial, he was subject to enforced sobriety while incarcerated. However, there was no evidence introduced at trial that Father was addressing his underlying alcohol problems. Furthermore, Father’s criminal charges and confinement do not evince an ability to assume custody of Knox. Accordingly, the evidence does not preponderate against the trial court’s finding that Father failed to manifest a willingness and ability to assume custody

Father also objects to the consideration of Dr. Montgomery’s evaluation, in which he opined that Father struggled with alcohol use and a personality disorder, on the basis that the evaluation was subject to a protective order. However, Father himself insisted on introducing the report at trial. When Father first proposed introducing the report, Mother’s counsel noted that the report was filed under a protective order. The court asked Father, “Do you want that report to be introduced, sir?” Father responded, “Yeah.” The court asked, “The entire report?” Father said, “Let’s introduce it.” He later confirmed, “Yeah, I want the whole thing admitted, correct, yes.”

Tennessee Rule of Appellate Procedure 36 provides, “Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of

an error.” Tenn. R. App. P. 36(a). If introduction of the report was error, Father not only invited it but insisted upon it. He is not entitled to relief.

We conclude that clear and convincing evidence supports the trial court’s conclusion that Father, who continued to struggle with substance abuse and was in jail facing multiple criminal charges, failed to manifest an ability and willingness to assume custody.

B. Best Interest

Having determined that at least one statutory ground for termination has been shown against Father by clear and convincing evidence, our focus now shifts to what outcome is in Knox’s best interest. See *In re Audrey S.*, 182 S.W.3d at 877-78. The Tennessee Supreme Court has summarized the law regarding the best interest analysis as follows:

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

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

In re Gabriella D., 531 S.W.3d 662, 681-82 (Tenn. 2017) (citations omitted).

The nonexclusive factors relevant to the best interest analysis are laid out in Tennessee Code Annotated section 36-1-113(i)(1):

(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.

Tenn. Code Ann. § 36-1-113(i).

In considering termination of parental rights, the determination of a child's best interest "may not be reduced to a simple tallying of the factors for and against termination." *In re Chayson D.*, 720 S.W.3d 123, 146 (Tenn. Ct. App. 2023). Rather, a court must determine, after completing a holistic assessment of the record, whether terminating a particular parent's rights would be in a particular child's best interest. *See id.*

The trial court made detailed findings regarding each statutory factor. The trial

court found as follows:

(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;

The Court finds by clear and convincing evidence that the child's critical need for stability and continuity throughout his childhood is best served by terminating [Father's] parental rights. Knox has not had contact with [Father] in approximately four years and does not have any expressed desire or need for contact. Knox has been in a stable and loving family with the Mother and the Stepfather and has strong relationships with both and his younger brother. Conversely, the termination of [Father's] parental rights will have very little impact on Knox's stability and continuity of placement. [Father] has never provided a home for Knox. [Father] has not demonstrated stability in providing for or caring for Knox, and he is currently incarcerated indefinitely.

Historically, [Father] has only put Knox at risk. Knox has lived exclusively with his mother and stepfather for the last four years and has a significant bond with both. Knox is doing well in school and sports and generally stable in all aspects of his life. Knox's best interests are not served by removing him from this environment where he has only known consistency and stability. This factor favors termination and carries significant weight in the best interest analysis.

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

The child is in a safe, loving, and caring home. Knox knows no other home, and although he knows his biological father, they do not have a relationship, and they do not have a parent-child bond. [Father] has no relationship with Knox, nor is there a secure and healthy parental attachment. Knox's experience with [Father] has had a negative emotional impact on him. By contrast, Knox has a significant bond with his mother, stepfather and brother. This is what he knows, and according to [Mother], it would be devastating to Knox to disrupt this what he knows and understands as his home. The Court agrees with [Mother] and finds that to remove Knox from his environment would significantly impact his emotional and psychological well-being. This factor favors termination and carries significant weight in the best interest analysis.

(C) Whether the parent has demonstrated continuity and stability in meeting

the child's basic material, educational, housing, and safety needs;

[Father] has never demonstrated continuity and stability in meeting the child's basic material, educational, housing, or safety needs. [Father] has never provided a safe, stable home for Knox. He has not provided support or care to meet any of Knox's needs since the parties divorced in 2018. There is no evidence to suggest [Father] may do so in the future. Indeed, [Father] is currently incarcerated indefinitely and cannot provide any home to Knox in the immediate future. The Court has detailed its findings on this issue throughout this order and finds this factor favors termination and carries significant weight in the best interest analysis.

(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;

[Father] does not have a relationship with Knox. [Father] does not communicate with Knox. [Father] has not communicated with Knox in over three years. [Father] has never enjoyed what this Court considers a healthy parent-child relationship with Knox. There is no parent-child attachment, no effort at such a relationship and no reasonable expectation that [Father] and Knox will create such an attachment in the future. This factor favors termination and carries significant weight in the best interest analysis.

(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;

As noted above, [Father] has not communicated with Knox since July 2020 and has not tried to do so as evident by his failure to get on any meaningful path to recovery. Although there is a Court order prohibiting [Father] from contact with the child, that order did not close the door on any relationship between father and son. The reality is that [Father] knows what he needs to do to be in his son's life, and he has not done it. He has resource after resource available to him, and he has not utilized those resources to keep his family intact. This was true before he was prohibited from contacting Knox and even then, his parenting time with Knox was erratic because of his instability and alcohol abuse. The Court finds this factor favors termination.

(F) Whether the child is fearful of living in the parent's home;

There was no proof that the child is currently fearful of living in [Father's] home, but the child certainly exhibited emotional distress as a

result of time spent with [Father] in years past. Knox was 5 years old the last time he saw [Father], and though there is a risk of triggering past trauma if [Father] were to resume parenting time, the Court finds that this factor does not carry as much weight as others considered.

(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;

There was no proof regarding [Father's] current home. As stated above, [Father] is currently incarcerated indefinitely in the Williamson County, Tennessee jail on several pending charges. [Mother] provided credible testimony that Knox's experience during [Father's] parenting time negatively impacted his emotions and behavior. The Court credits her testimony and finds it would be detrimental to Knox to disrupt his current family life and place him back in the home with [Father]. The Court also credits Ms. Mann's testimony that placing Knox in [Father's] home would have a detrimental impact on his psychological well-being. The Court finds that returning Knox to [Father's] care, especially without [Father's] rehabilitation, is likely to exacerbate old trauma from the child's past experiences and cause the child emotional distress. This factor carries great weight and the Court finds it favors termination of [Father's] parental rights.

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

Knox has a significant, healthy, parental attachment to [Stepfather]. Both Petitioners provided credible testimony about the bond Knox has with [Stepfather] and described various aspects of family life such as Knox's involvement in their engagement, his father/son haircuts with [Stepfather], and his close bond with his little brother and with [Stepfather's] extended family. The Court credits their testimony and finds that the pictures entered as exhibits support their claims regarding Knox's relationship with [Stepfather] and his family. The Court also credits the Petitioners' testimony that [Stepfather] loves Knox and vice-versa, and Knox thinks of [Stepfather] as his father. The father-son bond between Knox and [Stepfather] carries great weight in the Court's analysis, and the Court finds the relationship serves the child's best interest. The Court finds this factor favors termination.

(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;

Knox is closely bonded to his little brother, and the Court finds he loves his brother very much. The Court credits Petitioners' testimony as to Knox's relationship with [Stepfather's] family. The Court finds [Stepfather's] extended family has become Knox's family as if he were [Stepfather's] biological son, and Knox has significant bonds with those individuals. The proof showed they are a close-knit family with healthy, secure relationships and bonds to one another. By contrast, [Father's] behavior has jeopardized Knox's relationship with his extended family. Any relationship Knox has with [Father's] extended family is a result of [Mother's] efforts, and it's most likely she will facilitate that relationship in the future, not [Father]. This factor favors termination and carries significant weight in the Court's best interest analysis.

(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;

[Father] has never maintained a stable home or demonstrated an ability to provide the same for Knox. There is no evidence [Father] is maintaining a residence currently. [Father] is incarcerated on numerous criminal charges. He has a long history of alcohol abuse and abusive behavior toward women, all of which has prohibited him from being able to parent his child in a safe, stable manner. The Court finds [Father] has not been successful treating his alcohol problem, and there is little hope he will do so in the future. [Father] has not made lasting adjustments in his treatment of other people. He has not changed the way he behaves around and toward the minor child or shown any indication that he wants to do so to preserve his relationship with Knox. [Father's] incarceration is further evidence he has not made a lasting adjustment of circumstances to render it safe and beneficial for the child to be in his home. This factor favors termination and will be given great weight in the Court's analysis.

(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;

[Father] does not acknowledge that his circumstances need to be

adjusted. He has been wholly unwilling or unable to follow any prescribed course of action to treat his alcohol issues so that he can resume his relationship with the minor child. [Father] has already had numerous opportunities at treatment, he knows how to access treatment and has resources to pay for it, and he has family support. As Ms. Mann said, with all of this in his “pocket,” [Father] has never changed his conduct for Knox’s sake and the sake of their relationship. This factor favors termination and carries significant weight in the Court’s analysis.

(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;

This factor does not apply.

(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;

This factor does not apply.

(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;

The Court has previously discussed the emotional abuse [Father] inflicted on Knox, and the negative emotional impact his behavior had on Knox’s own behavior. There were several Court orders in which the Court admonished [Father] to stop speaking to the child about his parenting time and various other things. Despite these orders, the Court finds [Father] persisted in his behavior to Knox’s detriment. The Court credits [Mother’s] testimony that, despite therapy, Knox’s behavior did not improve until [Father’s] parenting time was suspended. The Court also credits [Mother’s] testimony that [Father] was emotionally abusive toward her during and after the marriage and toward other women. The Court finds there is a significant risk Knox would suffer future emotional abuse if returned to [Father’s] care. The Court gives significant weight to this factor in its best interest analysis.

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

[Father] has not provided safe, stable care for the minor child since

the parties' divorce in 2018, nor has he demonstrated the ability to provide a safe and stable environment for the child. To the contrary, [Father] has subjected Knox to emotional abuse and trauma; and, because [Father] has not made any changes to his behavior, the Court is highly concerned the same would happen again. There was no evidence regarding whether [Father] has provided such a home for another child, but given he is currently incarcerated, he is not presently doing so for any child. This factor favors termination and will be given significant weight in the best interest analysis.

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

[Father] does not know Knox and has not spent time with him in the last four years. [Father] has no knowledge and understanding of Knox's basic needs or what it requires for him to thrive and be successful in life because he has not been around to learn these things. [Father's] lack of effort at rehabilitation shows he does not have a desire to develop such an understanding. This factor favors termination and is given great weight.

(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;

[Father] has not demonstrated any commitment to creating and maintaining a home for Knox. As noted, [Father] does not have knowledge of Knox's specific needs or what Knox needs to thrive, and he has not demonstrated any desire to create and maintain a home for Knox to meet his needs. This factor favors termination and is given great weight in the best interest analysis.

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

Again, [Father] is incarcerated. That is the only information introduced regarding [Father's] current home environment. There was no evidence presented regarding the physical environment of any home [Father] maintains outside of his incarceration or whether he has a home at present. There is absolutely no evidence in the record to suggest [Father] has a healthy home environment or can provide one in the future. This factor favors termination and is given great weight in the Court's analysis.

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

The Court finds that [Father] has not consistently provided more than token financial support for the child. The proof showed that in the determinative four-month period preceding the filing of the original petition and the filing of the amended petition, [Father] did not pay any support for the child. The Court credits [Mother's] testimony that [Father] actively evaded paying child support by altering his payee information. While there was evidence that [Mother] received child support in 2023 for approximately 6 months, this is the only period that support was arguably "consistently provided," and resulted from a wage garnishment which ultimately ended after only six months. The Court does not find this is consistent support, particularly given the years with no support and [Father's] active evasion of payment. This factor favors termination and will be given significant weight in the best interest analysis.

(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.

[Father] has emotionally abused the Child, both in his conduct toward the mother in the presence of the child and in his treatment of the child directly. The record indicates [Father] has not taken accountability for his actions, and persists in negative, possibly criminal, behavior that suggests a strong likelihood of continued abuse if [Father] were allowed parenting time. [Father] has not successfully treated his alcohol abuse issues, which has interfered with his ability to appropriately and safely parent the minor child for the last five years, beginning as far back as 2019 when the Soberlink order was first entered. [Father's] continued alcohol abuse and alleged criminal activity are evidence that he does not possess the necessary mental and emotional fitness to provide safe care and supervision for the child. The Court finds that until [Father] addresses his issues, any contact between [Father] and the child would be detrimental to the child's well-being, and the Court finds Dr. Montgomery's report as recounted herein supports this finding. This factor overwhelmingly favors the termination of [Father's] parental rights.

On appeal, Father does not mount any particular challenge to the trial court's detailed findings on each of the best interest factors. Instead, Father asserts that the court erred in the best interest analysis because denying termination would not change Mother's custody, because the harm from Father's drinking to Knox is "speculative," and because it was not clear whether Father would relapse on release. While Father describes the harm as speculative, the record contains evidence that Knox has in fact been harmed by Father's drinking, even when custody rested primarily with Mother. Conversely, there is no

evidence regarding Father addressing his underlying sobriety problem while in prison so as to instill confidence that he would be able to remain sober upon release.

Overall, the court found that Knox was currently in a loving home where two parents provided him and his little brother stability and care. Knox has been with his family without seeing Father for four years, and he has no current relationship with Father. Father, on the other hand, is currently incarcerated. Father has a long history of alcohol abuse that he has not been successful in addressing. Despite numerous admissions to treatment programs, Father has not been able to maintain sobriety, and he has not been able to successfully maintain his personal relationships or address his personality disorder. Father consumed alcohol while Knox was in his custody, intimidated a witness who testified to his alcohol consumption, and caused Knox distress by discussing parenting time with him. Father moved frequently prior to his arrest, and he is incarcerated, with no safe or stable home to provide his child. Moreover, as the trial court found, Father's refusal to acknowledge his behaviors interferes with addressing them. Father is, in fact, unwilling to acknowledge that he needs to change, despite his access to resources to treat his alcohol abuse. Knox alternatively is currently in a safe and stable household. He excels in school and extra-curricular activities, and his daily physical and emotional needs are being met by Mother and Stepfather. Knox has a close bond with Mother, Stepfather, and his little brother. He does not ask about Father, has not had contact with Father since 2020, and has no parental attachment to Father. We conclude that clear and convincing evidence supports the trial court's determination that termination is in Knox's best interest.

VIII. Attorney's Fees

The Petitioners seek attorney's fees on appeal, citing cases involving divorce. *See* Tenn. Code Ann. § 36-5-103(c). The Petitioners present no authority that a party seeking termination of parental rights is entitled to attorney's fees; accordingly, we deny the request.

IX. Conclusion

For the foregoing reasons, we affirm the judgment of the Circuit Court for Davidson County. Costs of the appeal are taxed to the appellant, Robert Cole G., for which execution may issue if necessary.

s/ Jeffrey Usman
JEFFREY USMAN, JUDGE